

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 17162

CONSERVATION STATION, INC.,

Plaintiff,

v.

MATTHEW BOLESKY and
CONSERVATION TECHNOLOGY &
SOLUTIONS, LLC,

Defendants.

FINAL JUDGMENT

1. **THIS MATTER** came on for trial without a jury before the undersigned commencing on 2 October 2023 and concluding on 3 October 2023. The matter is now ripe for final determination, in accordance with Rule 55(b)(2) of the North Carolina Rules of Civil Procedure (the “Rule(s)”), and the Court herein issues its Final Judgment.

Revolution Law Group, by C. Scott Meyers, for Plaintiff.

Defendant Matthew Bolesky, pro se.

Robinson, Judge.

I. PROCEDURAL POSTURE

2. The Court entered default against Defendants Matthew Bolesky (“Mr. Bolesky”) and Conservation Technology & Solutions, LLC (“CTS”) on 26 July 2022.¹ (ECF Nos. 53–54.) “Generally, there is first an interlocutory entry of default, and then a final judgment by default only after the requisites to its entry,

¹ Plaintiff later took voluntary dismissals of several other Defendants, leaving Mr. Bolesky and CTS as the sole remaining Defendants. (ECF Nos. 60, 71.)

including a jury trial on damages, have occurred.” *Duncan v. Duncan*, 102 N.C. App. 107, 111 (1991) (cleaned up).

3. Following entry of default, the Court entered its Pretrial Scheduling Order, (ECF No. 89), and held its final pretrial conference and hearing (“Pretrial Conference”) on 11 September 2023, (*see* ECF No. 95). At the Pretrial Conference, Plaintiff’s counsel waived its demand for a jury trial as to CTS. Following the Pretrial Conference, Plaintiff Conservation Station, Inc. (“CSI”) and Mr. Bolesky held their final pretrial conference, as required by the Pretrial Scheduling Order, on 25 September 2023. (*See* ECF No. 103.) Following the final pretrial conference, CSI, through its counsel, and Mr. Bolesky stipulated “to a bench trial in this matter, and both CSI and Mr. Bolesky waive[d] their right [to] a jury trial pursuant to Rule 38(d)[.]” (ECF No. 103.) The pair also stipulated that Defendant CTS has not made an appearance in this action. (ECF No. 103.)

4. “A demand for trial by jury . . . may not be withdrawn without the consent of the parties who have pleaded or otherwise appear[ed] in the action.” N.C.G.S. § 1A-1, Rule 38(d). “Thus, a plaintiff who has requested a jury trial may withdraw that request, without the consent of the defendant, at any time before an answer is filed or before [a] filed [appearance] is made by the defendant.” *Cabe v. Worley*, 140 N.C. App. 250, 253 (2000). “A defendant does not have to directly respond to the complaint in order to ‘appear’ in an action, but makes an ‘appearance’ when the defendant ‘takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff.’ ” *Id.* at 253 (quoting *Roland v. Motor Lines*, 32 N.C. App.

288, 289 (1977)). Filing a motion to set aside entry of default constitutes an appearance which prevents a plaintiff from unilaterally withdrawing the jury request. *Id.*

5. Given that Mr. Bolesky's consent was required for CSI to withdraw its request for a jury trial, and that CSI and Mr. Bolesky agreed to waive the demand for a jury trial, the Court concluded, and restates herein, that the jury trial was properly waived. Further, since CTS did not make an appearance in this action through counsel, the Court concluded and restates herein that CSI's unilateral waiver of the jury trial as to CTS was proper. *See LexisNexis v. Travishan Corp.*, 155 N.C. App. 205, 207–08 (2002) (holding that a corporation must be represented by a licensed attorney and cannot appear *pro se*).

6. Where default is established, defendants have no further standing to contest the merits of plaintiff's right to recover, and instead, the only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of recovery. *Bell v. Martin*, 299 N.C. 715, 721 (1980). “[T]he substantive allegations raised by plaintiff's complaint are no longer in issue, and for the purposes of . . . default judgment are deemed admitted.” *Id.*

7. A default “admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery.” *Hunter v. Spaulding*, 97 N.C. App. 372, 377 (1990).

8. “Although defendant may not then attack the factual allegations of the complaint, he does not admit the legal conclusions. Thus, despite occasional

statements to the contrary[,] a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover." *Weft, Inc. v. G.C. Inv. Assocs.*, 630 F. Supp. 1138, 1141 (E.D.N.C. 1986) (cleaned up). "The Court is bound . . . to consider whether plaintiff's allegations are sufficient to state a claim for relief." *Id.*

9. The Court conducted a two-day bench trial from 2–3 October 2023 ("Trial"). (See ECF Nos. 89, 105.) The Court thereafter provided each side the opportunity to submit proposed findings of fact and conclusions of law for use in this Final Judgment, based on the record before the Court at Trial, including the evidence properly admitted during Trial. CSI's counsel timely submitted such proposed findings and conclusions. Mr. Bolesky did not submit any proposed findings and conclusions.

10. It is through this lens that the Court enters this Final Judgment.

II. FINDINGS OF FACT²

11. "When default is entered due to a defendant's failure to answer, the substantive allegations contained in plaintiff's complaint are no longer in issue[.]" *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 751 (2009). In the present case, the allegations of the Complaint are deemed admitted and not in dispute, and while they are treated as true, the Court does not make a determination as to the veracity of the statements in the Complaint.

² Any determination later stated as a Conclusion of Law that should have been stated as a finding of fact is incorporated in these Findings of Fact.

A. The Parties

12. CSI is a North Carolina corporation with its principal office in Wake County, North Carolina. (Compl. ¶ 1.)

13. Mr. Bolesky is a resident of Orange County, North Carolina. (Compl. ¶ 2.)

14. CTS is a North Carolina limited liability company with its principal office in Orange County, North Carolina. (Compl. ¶ 8.)

B. CSI's Early Years and Its Relationships with Manufacturers

15. In 1994, CSI was incorporated by Doraine Michaud (“Ms. Michaud”) in the State of New Jersey. (Compl. ¶ 18.) It was formed to engage in the distribution and sale of energy-efficient commercial lighting products. (Compl. ¶ 18.) “Ms. Michaud was the sole shareholder at formation and has remained the sole shareholder throughout its corporate existence.” (Compl. ¶ 18.)

16. During CSI’s early years, Ms. Michaud was its only employee. (Compl. ¶ 19.) After forming CSI, Ms. Michaud married Mr. Bolesky in March 1994. (Compl. ¶ 31; Equitable Distribution J. ¶ 11, ECF No. 107.5 [“ED Final J.”].)

17. In 1996, Mr. Bolesky became a CSI employee. (Compl. ¶ 32.) Mr. Bolesky was primarily responsible for sales and account management while Ms. Michaud remained responsible for day-to-day management and operations, and she was CSI’s primary salesperson. (Compl. ¶ 32.)

18. Mr. Bolesky and Ms. Michaud were CSI’s sole employees throughout its corporate existence. (Compl. ¶ 33.)

19. Through the mid-2000s, CSI won vendor contracts with departments of transportation in Florida, Maryland, Massachusetts, New York, North Carolina, Pennsylvania, and Virginia, as well as with transportation companies, including Amtrak, CSX, the Metropolitan Transit Authority in New York, Norfolk Southern, and the Southeastern Pennsylvania Transit Authority. (Compl. ¶ 22.)

20. CSI maintained vendor/supplier relationships with GELcore, LLC (“GELcore”), a manufacturer of LED and transportation lighting products. (Compl. ¶ 23.) CSI credits this relationship with GELcore as “one of the keys to [its] success[.]” (Compl. ¶ 23.)

21. Current Solutions Lighting, LLC, also known as Current by GE (“Current”), was another long-time lighting products provider with a close relationship to CSI. (Compl. ¶ 23.) CSI was an exclusive distributor of Current’s products for the State of New York, meaning New York purchasers of transportation-related LED products made by Current, like traffic and rail signs, had to be purchased from CSI. (Compl. ¶ 26.)

22. In some years, as much as eighty percent of the products sold by CSI were procured from Current. (Compl. ¶ 27.) As a result of this relationship, CSI was able to buy Current products on credit rather than providing immediate payment. (Compl. ¶ 28.)

23. With these agreements, secured and sustained by Ms. Michaud, CSI grew a network of customers and routinely produced multi-million-dollar revenue years by the mid-2000s. (Compl. ¶ 29.)

C. Shift in Day-to-Day Leadership of CSI

24. Between 1996 and the mid-2000s, Mr. Bolesky became familiar with CSI's business and gained Ms. Michaud's trust and confidence with respect to business matters. (Compl. ¶ 34.) As a result, Mr. Bolesky was entrusted with additional responsibilities, including (1) access to and shared control of CSI's finances and customer lists, and (2) reporting CSI's annual tax filings and filing annual reports required by state law. (Compl. ¶ 34.) By 2008, Mr. Bolesky had access to Ms. Michaud's signature stamp to carry out these responsibilities. (Compl. ¶ 34.)

25. Ms. Michaud and Mr. Bolesky moved from New Jersey to North Carolina in 2005. (Compl. ¶ 36.) The pair had children, and as CSI became more established and profitable, the couple shifted their respective responsibilities. (Compl. ¶ 37.) In 2007, Mr. Bolesky assumed primary responsibility for the day-to-day operations of and sales for CSI, while Ms. Michaud assumed primary responsibility of the family's domestic life but remained CSI's sole owner and president. (Compl. ¶ 37.)

26. In 2009, CSI was reincorporated as a North Carolina corporation. (Compl. ¶ 39.)

27. Throughout 2005 to 2009, CSI's primary contact at Current was Patrick Rossetti ("Mr. Rossetti"). (Compl. ¶ 40.) Mr. Rossetti was Current's sales manager and he acted as the "gatekeeper" for CSI's access to Current lighting products. (Compl. ¶ 40.) Aside from their professional relationship, Mr. Rossetti and Mr. Bolesky developed a personal friendship and went on vacations and golfing trips together. (Compl. ¶ 42.)

28. In 2011, Ms. Michaud grew concerned when she discovered that Mr. Bolesky and Mr. Rossetti developed what she described as a “kickback scheme,” which she believed was likely to jeopardize CSI’s distributorship with Current. (Compl. ¶ 43.) The purported scheme operated through Mr. Rossetti’s receipt of free sample products from Current, which were used to fill regularly priced orders from CSI customers and resulted in Mr. Bolesky and Mr. Rossetti sharing the proceeds from the sales. (Compl. ¶ 43.)

29. Ms. Michaud, in her capacity as president of CSI, demanded that Mr. Bolesky end this practice. (Compl. ¶ 44.)

D. Mr. Bolesky’s Management of CSI and the Divorce Proceeding

30. In July 2013, CSI received notice of administrative dissolution from the North Carolina Secretary of State for its failure to provide annual reports as required by North Carolina law. (Compl. ¶ 45.)

31. Around this time, Ms. Michaud noticed irregularities in CSI’s accounting that suggested Mr. Bolesky was “funneling corporate funds” to and purchasing expensive items for Mr. Rossetti. (Compl. ¶ 46.) Upon noticing these irregularities, Ms. Michaud demanded that Mr. Bolesky “rectify” the problem. (Compl. ¶ 47.) Mr. Bolesky defended these actions, arguing they were necessary to keep Mr. Rossetti happy and protect CSI’s relationship with Current. (Compl. ¶ 47.)

32. In November 2014, Mr. Bolesky and Ms. Michaud began taking steps to end their marriage, (Compl. ¶ 49), and the pair entered into a separation agreement on 15 January 2015 (the “Separation Agreement”), (Compl. ¶¶ 50–51). The Separation

Agreement provided, in relevant part, that Ms. Michaud would transfer the entirety of her ownership interest in CSI to Mr. Bolesky on 15 September 2021, and in the interim, that Mr. Bolesky would continue to run CSI's daily operations with complete control of its operations and management of the company. (Compl. ¶ 50.) According to the terms of the Separation Agreement, Mr. Bolesky was entitled to reasonable compensation which he, in his sole discretion, could determine. (Compl. ¶ 50.) Ms. Michaud was entitled to a \$43,000 salary and 50% of CSI's annual profits until she transferred her ownership interest in CSI to Mr. Bolesky in 2021. (Compl. ¶ 50.)

33. Mr. Bolesky became CSI's sole officer in 2015, as is reflected in the 2016 and 2017 annual reports filed with the North Carolina Secretary of State. (Compl. ¶ 52.) Mr. Bolesky also obtained signature authority on CSI's bank accounts. (Compl. ¶ 54.)

34. In September 2016, Ms. Michaud took a sales position with Fintronix, a manufacturer of general illumination products. (Compl. ¶ 57.) Ms. Michaud sought "to broaden CSI's focus from transportation lighting into general illumination by establishing CSI as a distributor of Fintronix's products[.]" (Compl. ¶ 57.) Both Mr. Bolesky and Fintronix's principals knew of and agreed to this plan. (Compl. ¶ 57.)

35. Neither Mr. Bolesky nor Ms. Michaud followed the terms of the Separation Agreement. (Compl. ¶¶ 55, 58.) Ms. Michaud attempted to transfer the entirety of her shares in CSI to Mr. Bolesky prior to 15 September 2021, and Mr. Bolesky did not cooperate in effectuating the transfer. (Compl. ¶ 55.) For his part, Mr. Bolesky

failed to make the salary and profit payments to Ms. Michaud, as he contended that her employment with Fintronix was a violation of the Separation Agreement's non-competition clause. (Compl. ¶ 58.)

36. On 3 June 2016, Ms. Michaud filed a lawsuit in North Carolina District Court against Mr. Bolesky, seeking to enforce the terms of the Separation Agreement (the "Divorce Proceeding"). (Compl. ¶ 59; *see, e.g.*, ECF No. 107.5.) On 25 August 2016, in his response to the complaint in that suit, Mr. Bolesky asked the Court to invalidate the Separation Agreement. (Compl. ¶ 60.)

37. Through discovery in the Divorce Proceeding, Ms. Michaud learned that, on 12 April 2016, Mr. Bolesky formed CTS. (Compl. ¶¶ 63–64.) CTS was involved in substantially the same line of work as CSI. (Compl. ¶ 65.)

38. Ms. Michaud also learned that two businesses with names similar to CTS were formed in Florida between 17 February and 16 September 2014. (Compl. ¶ 66.) Ms. Michaud suspected that Mr. Bolesky and Mr. Rossetti were engaged in a new scheme, using the Florida companies to funnel products and funds. (Compl. ¶ 67.) This practice by the pair appeared to continue into February 2017. (Compl. ¶ 67.)

39. At some time between 2014 and 2017, Ms. Michaud discovered that Mr. Bolesky did not service CSI's credit account with Current. (Compl. ¶ 82.) This meant that CSI's account with Current accrued a large debt, and that CSI was not making timely payments. (Compl. ¶ 82.) As a result, in May 2017, Current emailed Mr. Bolesky to inform him that CSI's future orders were on hold until the issues with the credit account were resolved. (*See* Compl. ¶ 82.)

40. Mr. Bolesky also failed to timely file CSI's annual reports with the North Carolina Secretary of State for the years 2015, 2016, and 2017, and did not file an annual report for 2018. (Compl. ¶ 84.) Further, Mr. Bolesky did not file or cause to be filed corporate tax returns for CSI. (Compl. ¶ 85.)

41. In April 2017, Ms. Michaud authorized CSI to file suit against Mr. Bolesky and CTS, but later dismissed the lawsuit in June 2017. (Compl. ¶ 89; *see* Def.'s Ex. 256, ECF No. 107.4.)

E. The Progression of the Divorce Proceeding, Impact on CSI, and Mr. Bolesky's Taking of CSI Customers to CTS

42. On 31 January 2018, the district court judge overseeing the Divorce Proceeding invalidated the Separation Agreement. (Compl. ¶ 90.) Mr. Bolesky retained *de facto* control of CSI, (Compl. ¶ 91), and while Ms. Michaud attempted to re-involve herself in CSI, Mr. Bolesky prevented her access to CSI's email and phone numbers, (Compl. ¶ 93). Mr. Bolesky also obtained an order of the Court in the Divorce Proceeding which barred Ms. Michaud from any involvement in CSI. (Compl. ¶¶ 96, 117.)

43. On 13 April 2018, Mr. Bolesky emailed the New York State Department of Transportation an invoice, identifying CTS as the entity purporting to replace CSI. (Compl. ¶ 98.)

44. On 18 April 2018, Mr. Bolesky emailed Mary Marino, an agent of Traffic Systems, Inc., a CSI client, indicating that CSI was being dissolved and that the new company email information was included. (Compl. ¶ 99.) The email stated, "[w]e are

in the process of ‘dissolving’ Conservation Station, Inc. Below is the new company information – Mailing, etc.” (Compl. ¶ 99.)

45. On 24 April 2018, Mr. Bolesky emailed longtime CSI client CSX, requesting that it change the supplier name and federal tax ID from CSI to CTS. (Compl. ¶ 100.)

46. All three emails were sent from Mr. Bolesky’s CSI email address and were not authorized or known at the time by Ms. Michaud. (Compl. ¶¶ 101–02.)

47. Mr. Bolesky was not authorized to use CSI’s customer list for any purpose other than facilitating procurement, sales, and payments with CSI’s vendors and customers for CSI’s benefit. (Compl. ¶ 35.)

48. On 25 April 2018, Mr. Bolesky emailed Mr. Rossetti requesting that CTS be considered for a distributorship with General Electric’s Traffic and Rail Signaling products. (Compl. ¶ 104.) This distributorship was one of CSI’s core business assets. (Compl. ¶ 105.)

49. During an 8 May 2018 hearing in the Divorce Proceeding, Mr. Bolesky testified that he was “the only guy working” at CSI, “the only guy selling stuff,” and that he was not diminishing its value. (Compl. ¶ 112.) When questioned by Ms. Michaud’s counsel in that action and asked whether Mr. Bolesky’s plan was to “wind down CSI[,]” Mr. Bolesky responded, “Yes.” (Compl. ¶ 113.)

50. Thereafter, the district court judge ordered that Ms. Michaud was required to execute documents that designated Mr. Bolesky as president of CSI, and that Ms. Michaud was restrained from interfering with CSI, including refraining from any contact with its vendors and customers. (Compl. ¶ 117.)

51. Effective 1 January 2019, Mr. Bolesky and Mr. Rossetti finalized the replacement of CSI with CTS as Current's distributor in New York. (Compl. ¶ 120.)

52. Between March 2019 and July 2019, longtime CSI clients Genesee & Wyoming, Inc. and California Northern Railroad began purchasing products from CTS. (Compl. ¶¶ 122–23.)

53. On 15 March 2019, Mr. Bolesky contacted the Metropolitan Transit Authority Procurement Office about changing its vendor relationship from CSI to CTS, providing them with a change of company name and a new tax ID number. (Compl. ¶ 124.)

54. The final order on equitable distribution in Ms. Michaud and Mr. Bolesky's domestic dispute was issued on 12 June 2019. (Compl. ¶ 131; ED Final J. 1.) Ms. Michaud was vested sole control of CSI, and she immediately ousted Mr. Bolesky from the business and sought to retake control of the business. (Compl. ¶ 132; ED Final J. 22–23.)

55. Following the events occurring between 2015 and the Final Equitable Distribution Judgment/Order on 12 June 2019, CSI lost (1) its ability to procure products from Current, and (2) numerous valuable and longtime clients to CTS or other distributors. (Compl. ¶¶ 147–48.)

56. From the evidence presented and the admissions of record by CTS, the Court finds that much, if not all, of Mr. Bolesky's wrongful actions were taken as agent of, and in furtherance of a plan to benefit CTS at CSI's expense as a result of Mr. Bolesky's misconduct.

III. CONCLUSIONS OF LAW

57. This case was properly designated as a mandatory complex business case and assigned to the undersigned. The Court has authority to make its Findings of Fact following the completion of the trial and the submission of all disputed issues for resolution by the Court without a jury. Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law. Any Findings of Fact that are more appropriately deemed Conclusions of Law are incorporated by reference into the Court's Conclusions of Law.

58. While the Court has entered default, the Court is required to consider the sufficiency of the allegations contained in the Complaint prior to awarding damages, if any, to CSI. *See Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 844 (2012). The Complaint must be sufficient to state a claim, *id.*, because a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover[.]” *Weft, Inc.*, 630 F. Supp. at 1141.

59. Plaintiff CSI contends that: (1) Mr. Bolesky is liable to CSI for breach of fiduciary duty, fraud, and constructive fraud; (2) Defendants are liable to CSI for conversion and tortious interference; and (3) Defendants have admitted to the conduct that underlies Plaintiff's claim for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1. (ECF No. 109.)

A. Counts One and Two: Breach of Fiduciary Duty and Constructive Fraud

60. A breach of fiduciary duty claim requires (1) a fiduciary duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) the

defendant's conduct proximately causing injury to the plaintiff. *Chisum v. Campagna*, 376 N.C. 680, 706 (2021) (citation omitted).

61. “A successful claim for constructive fraud requires proof of facts and circumstances ‘(1) which created the relation of trust and confidence [between the parties], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’” *Id.* at 706–07 (citing *Terry v. Terry*, 302 N.C. 77, 83 (1981)).

62. CSI alleges that Mr. Bolesky is liable to CSI for breach of fiduciary duty and constructive fraud. (Compl. ¶¶ 151–72.)

63. It is admitted that Mr. Bolesky was an officer of CSI and therefore owed CSI a fiduciary duty as its officer from 2016 through 12 June 2019. (Compl. ¶¶ 152–53.) Mr. Bolesky breached that duty by: (1) neglecting CSI's relationship and credit account with Current, (Compl. ¶ 158); (2) having CTS apply for a distributorship with Current that directly competed with CSI, (Compl. ¶ 159); (3) converting CSI's business assets, which enabled Mr. Bolesky and CTS to enjoy economic advantages, (Compl. ¶ 160); and (4) failing to file CSI's annual tax returns, (Compl. ¶ 161). These breaches proximately caused injury to CSI.

64. Mr. Bolesky sought to benefit himself, and did in fact benefit, by profiting from all revenues generated by CTS, including revenues generated from CTS's distributorship with Current. (Compl. ¶¶ 168, 170.)

65. Based on the evidence presented, the Court concludes that Mr. Bolesky engaged in misconduct that badly damaged CSI and that proximately resulted in significant financial damage. The Court also concludes that Mr. Bolesky's misconduct, as alleged, was engaged in his capacity as agent of CTS and that CTS is jointly and severally liable for Mr. Bolesky's misconduct.

66. CSI requests actual damages in the amount of \$8,048,593.91, contending that its damages are the lost profits it would have earned but for the actions of Defendants, which included intentionally harming CSI's relationships with its supplier and customers.

67. Courts in North Carolina will not award damages for lost profits based only on "hypothetical or speculative forecasts of losses." *Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847 (1993). "[A]bsolute certainty is not required[,] but evidence of damages must be sufficiently specific and complete to permit the fact finder to arrive at a reasonable conclusion." *Van-Go Transp., Inc. v. Sampson City*, 254 N.C. App. 836, 845 (2017) (cleaned up).

68. "The risk of speculative lost profits calculations is greatest in situations where parties must estimate revenues that they likely would have earned in an uncertain industry with numerous variables." *Id.* at 847 (citing in relevant part *Iron Steamer*, 110 N.C. App. at 847).

69. At trial, CSI's evidence on lost profits included the facts deemed admitted in the Complaint, the testimony of Ms. Michaud concerning CSI's history of revenues,

and her testimony concerning the Company's historical profit margin. (*See* ECF No. 107.2.)

70. While the Court determines that the lost profit requested by CSI is too speculative, the Court concludes that Mr. Bolesky's conduct as an officer of CSI caused significant financial damage to CSI. However, the Court must balance that conclusion with evidence of record that between 2016 and 2019, the period where Mr. Bolesky was an officer of CSI, Mr. Bolesky and Ms. Michaud were engaged in the Divorce Proceedings, which may have also resulted in some of the decline in profitability.

71. As a result, CSI is entitled to recover Two Hundred Thousand Dollars (\$200,000.00) in damages from Mr. Bolesky and CTS for the breach of fiduciary duty and constructive fraud claims. Considering the evidence presented, CSI has failed to satisfy its burden of proving that its damages were more than the amount determined herein.

72. CSI also seeks punitive damages pursuant to N.C.G.S. § 1D-15 for Mr. Bolesky's breach of fiduciary duty. (*See* Compl. ¶ 165.) As a result, the Court next considers whether there is sufficient evidence to support an award of punitive damages.

73. The purpose of punitive damages is to "punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C.G.S. § 1D-1.

74. Where there has been an entry of default, such as here, our Court of Appeals has required that “to recover punitive damages, Plaintiff’s complaint must allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages. Those aggravating factors are (1) fraud; (2) malice; or (3) willful or wanton conduct.” *Wiley v. L3 Communs. Vertex Aero.*, 251 N.C. App. 354, 367 (2016) (cleaned up). The aggravating factors “shall be averred with particularity.” N.C.G.S. § 1A-1, Rule 9(k).

75. Here, CSI alleges that Mr. Bolesky’s breaches of fiduciary duty and other misconduct were “willful, wanton, malicious, and in reckless disregard of CSI’s rights[.]” (Compl. ¶ 165.)

76. “[I]t is well established that merely nominal damages may support a substantial award of punitive damages. Once a cause of action is established, a plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages.” *Chisum*, 376 N.C. at 704 (quoting *Mace v. Pyatt*, 203 N.C. App. 245, 255 (2010)).

77. When determining whether to award punitive damages, the Court may consider, in addition to the purposes of punitive damages set forth in N.C.G.S. § 1D-1, evidence relating to:

- a. The reprehensibility of the defendant’s motives and conduct.
- b. The likelihood, at the relevant time, of serious harm.
- c. The degree of the defendant’s awareness of the probable consequences of its conduct.
- d. The duration of the defendant’s conduct.
- e. The actual damages suffered by the claimant.
- f. Any concealment by the defendant of the facts or consequences of its conduct.

- g. The existence and frequency of any similar past conduct by the defendant.
- h. Whether the defendant profited from the conduct.
- i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

N.C.G.S. § 1D-35.

78. "Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater." N.C.G.S. § 1D-25(b).

79. The Court concludes that Mr. Bolesky is liable for punitive damages.

80. The Court, as finder of fact, is struck by the severity of the misconduct engaged in by Mr. Bolesky as agent of CTS. The breaches of fiduciary duty appear from the evidence to have been carefully calculated and intended to destroy CSI's ability to compete in an otherwise lucrative market built by Ms. Michaud, as its agent. Whether as a result of the animosity between the pair arising from their marital discord or otherwise, Mr. Bolesky's conduct, as proven by the admissions of record and documentary evidence before the Court, clearly justifies the imposition of substantial punitive damages.

81. Therefore, the Court concludes that it is appropriate, given the evidence at trial, to award CSI Six Hundred Thousand Dollars (\$600,000.00) in punitive damages.

B. Counts Three and Four: Fraud

82. CSI alleges that Mr. Bolesky is liable to it for fraud. (Compl. ¶¶ 175–79.)

83. CSI must allege the five essential elements of a fraud claim: “(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, [and] (5) resulting in damage to the injured party.” *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974) (citations omitted). A plaintiff’s reliance on the fraudulent misrepresentation “must be reasonable.” *Forbis v. Neal*, 361 N.C. 519, 527 (2007) (citing *Johnson v. Owens*, 263 N.C. 754, 757 (1965)). Reliance is not reasonable if a plaintiff exercising reasonable diligence fails to make any independent investigation as to the truth of the allegedly fraudulent assertion. *Calloway v. Wyatt*, 246 N.C. 129, 130 (1957).

84. There is an additional requirement. Rule 9 requires that fraud be pleaded with particularity. N.C.G.S. § 1A-1, Rule 9(b). “A pleader meets the requirements of [Rule 9] when its fraud claim alleges the ‘time, place, and content of the fraudulent representation, identity of the person making the representation, and what was obtained as a result of the fraudulent acts or representations.’” *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at **6 (N.C. Super. Ct. June 18, 2007) (quoting *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39 (2006)).

1. Count Three

85. Based on the allegations of the Complaint, it is deemed admitted that Mr. Bolesky testified at an 8 May 2018 hearing in the Divorce Proceeding as follows:

Ms. Peek: So your plan is to wind down CSI to zero?

Mr. Bolesky: CSI is winded - - your client wound CSI down [by] taking the mail and the checks.

Ms. Peek: Well, let me rephrase that. Is it your plan to wind down CSI to zero?

Mr. Bolesky: Yes.

Ms. Peek: And then you're going to start working in CTS?

Mr. Bolesky: I don't know what I'm going to do. I'm going to get through this divorce and figure it out.

(Compl. ¶¶ 110, 113 (alteration in original).)

86. CSI alleges at Count Three of the Complaint that Mr. Bolesky's testimony that he did not know whether he would use CTS to engage in the same type of business as CSI was a material misrepresentation. (Compl. ¶ 175.) This testimony was false at the time he gave it, and Mr. Bolesky knew it was false. (Compl. ¶¶ 114, 177.)

87. Based on the Court's careful review of the operative allegations in the Complaint, it concludes that CSI has failed to adequately state a cause of action for fraud at Count Three. The Complaint does not include allegations of *how* this statement was reasonably calculated to deceive. (See Compl. ¶¶ 116, 175–76.)

88. "A complaint which fails to state a cause of action is not sufficient to support a . . . judgment for plaintiff." *Brown v. Cavit Scis., Inc.*, 230 N.C. App. 460, 467 (2013). Therefore, the Court concludes that CSI is not entitled to recover on its claim for fraud against Mr. Bolesky because the allegations at Count Three are deficient.

2. Count Four

89. CSI also alleges a cause of action for fraud at Count Four, alleging that Mr. Bolesky made "material misrepresentations to CSI's customers regarding the

relationship between CSI and CTS and the reasons to shift their business to CTS from CSI.” (Compl. ¶ 183.)

90. The Complaint does not allege the time, place, and content of the fraudulent representation by Mr. Bolesky. There are numerous statements by Mr. Bolesky deemed admitted, but the Complaint fails to set forth which of those statements provides the basis for this cause of action for fraud.

91. Therefore, the Court concludes that CSI is not entitled to recover on its claim for fraud contained in Count Four because the allegations are deficient.

C. Count Seven: Conversion

92. In Count Seven of its Complaint, CSI alleges a claim for conversion against Defendants. (Compl. ¶¶ 214–24.)

93. Conversion is the “unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner’s rights.” *Peed v. Burlerson’s, Inc.*, 244 N.C. 437, 439 (1956) (citation and quotation marks omitted). “There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant.” *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012). “North Carolina does not recognize a claim for conversion of ‘intangible interests such as business opportunities and expectancy interests.’” *McFee v. Presley*, 2022 NCBC LEXIS 142, at *9 (N.C. Super. Ct. Nov. 29, 2022) (quoting *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 414 (2000)).

94. The Complaint alleges that “Defendants Bolesky and CTS willfully, knowingly, and fraudulently converted CSI’s Business Assets for the use and benefit of all Defendants.” (Compl. ¶ 215.) “CSI’s Business Assets” was defined in the Complaint to include “funds, accounts receivable, distributorship with Current, business relationship with customers, and good will.” (Compl. ¶ 192.)

95. Since intangible interests cannot properly be the subject of a conversion claim, Defendants could not have converted CSI’s distributorship rights with Current, CSI’s business relationships, or goodwill. *See Willard v. Barger*, 2020 NCBC LEXIS 117, at **23 (N.C. Super. Ct. Oct. 9, 2020) (determining that goodwill is an intangible asset and thus the conversion claim failed); *Norman*, 140 N.C. App. at 414 (business opportunities and expectancy interests cannot be the subject of a conversion claim).

96. Regarding the allegation that Defendants converted CSI’s “funds [and] accounts receivable,” our Supreme Court requires “evidence of the specific source, specific amount, and specific destination of the funds in question.” *Variety Wholesalers*, 365 N.C. at 529. A claimant “cannot maintain a claim for conversion of money unless the funds in question can be specifically traced and identified.” *Id.* at 528. CSI has provided neither sufficiently specific allegations nor adequate evidence at trial to allow the Court to trace the funds as required by controlling law.

97. Therefore, the Court concludes that CSI is not entitled to recover on its claim for conversion against Defendants.

D. Count Twelve: Tortious Interference

98. CSI alleges a claim for tortious interference with prospective economic advantage against Defendants. (Compl. ¶¶ 251–62.)

99. “To state a claim for tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff and which would have been entered into absent the defendant’s interference.” *Silverdeer, LLC v. Berton*, 2013 NCBC LEXIS 21, at **31 (N.C. Super. Ct. Apr. 24, 2013). “Our Supreme Court has held that a plaintiff must identify a *specific* contractual opportunity that was lost as a result of the defendant’s allegedly tortious conduct in order to sustain a claim for interference with prospective economic advantage.” *MarketPlace 4 Ins., LLC v. Vaughn*, 2023 NCBC LEXIS 31, at **37 (N.C. Super. Ct. Feb. 24, 2023) (citing *Beverage Sys. of the Carolinas v. Associated Bev. Repair, LLC*, 368 N.C. 693, 701 (2016); *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, 2016 NCBC LEXIS 79, at *29 (N.C. Super. Ct. Oct. 21, 2016)).

100. The Complaint is devoid of any reference to *specific* contracts that would have resulted but for Defendants’ alleged tortious interference. Therefore, CSI is not entitled to recover on its claim for tortious interference with prospective economic advantage.

E. Count Thirteen: Violation of N.C.G.S. § 75-1.1

101. CSI alleges a claim against Defendants for violations of the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75.1.1 *et seq.* (“UDTPA”). (Compl. ¶¶ 264–77.)

102. To recover under the UDTPA, a plaintiff must establish that: “(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” *Dalton v. Camp*, 353 N.C. 647, 656 (2001); *Nobel v. Foxmoor Group*, 380 N.C. 116, 120 (2022).

103. CSI alleges that “[t]he wrongful acts of Defendants . . . constitutes [sic] unfair and deceptive trade practices.” (Compl. ¶ 264.)

104. Claims for breach of fiduciary duty and constructive fraud may in appropriate circumstances support a claim for violations of the UDTPA. *See White v. Thompson*, 196 N.C. App. 568, 574 (2009), *aff’d*, 364 N.C. 47 (2010).

105. However, on the facts presented in this case, Mr. Bolesky’s self-dealing is not conduct “in or affecting commerce” under the UDTPA. This case is factually analogous to the Court’s recent decision in *Langley v. Autocraft, Inc.*, where the Court held Plaintiff’s claim for violations of the UDTPA failed because Defendant’s wrongs “allegedly committed are alleged to have harmed [plaintiff business], not external market participants.” 2023 NCBC LEXIS 95, at **21 (N.C. Super. Ct. Aug. 7, 2023). There, even where defendant formed a competing entity and used that entity to usurp corporate opportunities, it did not “transform the misconduct into an unfair or deceptive trade practice that affected commerce.” *Id.* at **22.

106. Here, Mr. Bolesky's formation of CTS and usurpation of CSI's corporate opportunities was not in or affecting commerce for purposes of the UDTPA. Rather, CTS was "used merely as an instrument . . . to facilitate harm" within CSI. *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *31 (N.C. Super. Ct. Dec. 22, 2021).

107. Therefore, CSI is not entitled to recover on its claim for violations of the UDTPA.

IV. CONCLUSION

108. **THEREFORE**, for the reasons set forth herein, the Court hereby **ENTERS FINAL JUDGMENT** against Matthew Bolesky and Conservation Technology & Solutions, LLC jointly and severally as follows:

a. In the amount of \$200,000.00, plus pre- and post-judgment interest at the legal rate of 8% from 30 December 2021 until satisfied. *See* N.C.G.S. §§ 24-1, 24-5(b).

b. In the amount of \$600,000.00, plus post-judgment interest at the legal rate of 8% from the date of the filing of this Final Judgment until satisfied. *Id.*

109. To the extent any claims not addressed herein may remain in this action, those claims are now **DISMISSED** with prejudice.

110. Each side shall bear their own costs and attorney's fees.

IT IS SO ORDERED, this the 12th day of December, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases