

STATE OF NORTH CAROLINA  
STANLY COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
23 CVS 363

JT RUSSELL AND SONS, INC.,

Plaintiff,

v.

ATLAS JAMES RUSSELL; THE  
TILLERY TRADITION, INC.; and  
MID-EASTERN ASPHALT, LLC,

Defendants.

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ATLAS JAMES RUSSELL,  
individually and derivatively on  
behalf of JT RUSSELL AND SONS,  
INC.,

Counterclaim  
Plaintiff,

v.

JT RUSSELL AND SONS, INC.;  
ROBERT E. RUSSELL; RAYMOND  
RUSSELL; and TONY W. RUSSELL,

Counterclaim  
Defendants.

**ORDER AND OPINION ON MOTIONS  
TO DISMISS ATLAS JAMES  
RUSSELL'S COUNTERCLAIMS**

1. JT Russell and Sons, Inc. (“JT Russell”) began this lawsuit by suing Atlas James Russell (“Jim”)—a shareholder, former officer, and former director—for self-dealing and other misconduct. Jim denies JT Russell’s allegations and has counterclaimed to dissolve the company. He has also asserted derivative counterclaims on the company’s behalf against Robert E. Russell (“Bob”), Raymond Russell, and Tony W. Russell, all of whom are current or former officers and, as their names suggest, members of Jim’s family.

2. This opinion addresses two motions to dismiss Jim’s counterclaims, one by JT Russell and another by Bob, Raymond, and Tony. For the following reasons, the Court **GRANTS in part** and **DENIES in part** JT Russell’s motion and **GRANTS** Bob, Raymond, and Tony’s motion.<sup>1</sup>

*Troutman Pepper Hamilton Sanders LLP, by William C. Mayberry, Daniel Prichard, William J. Farley, and Jacquelyn Arnold, for Plaintiff JT Russell and Sons, Inc.*

*Ellis & Winters LLP, by Pamela S. Duffy and Tyler Jameson, for Defendant Atlas James Russell.*

*Fox Rothschild LLP, by Ashley Barton Chandler and Neale T. Johnson, for Defendants The Tillery Tradition, Inc. and Mid-Eastern Asphalt, LLC.*

*Bell, Davis & Pitt, P.A., by Edward B. Davis, for Counterclaim Defendants Robert E. Russell, Raymond Russell, and Tony W. Russell.*

Conrad, Judge.

## I. BACKGROUND

3. The Court does not make findings of fact on a motion to dismiss. The following background assumes that the allegations of the amended counterclaims are true.

4. JT Russell’s shareholders hail from two branches of the Russell family. One branch comprises Jim and his four siblings; together, they own fifty percent of the company. The other branch comprises Jim’s uncle Bob and cousins Raymond and

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<sup>1</sup> Jim and his fellow defendants have also moved to dismiss some of JT Russell’s claims. A separate opinion addresses those motions.

Tony; they own the remaining fifty percent. (*See* Am. Countercls. ¶¶ 1, 17, 19, ECF No. 53.)

5. According to Jim, this equal division of ownership carries with it a shared expectation that both branches of the Russell family will have employment privileges and a say in management. So, for example, Jim served as secretary, treasurer, and director, and nearly all his siblings worked for JT Russell at one time or another. Likewise, Bob was JT Russell's president until Raymond succeeded him. (*See* Am. Countercls. ¶¶ 18, 20–23.)

6. But the balance of power shifted in 2018. That February, the board of directors dismissed Jim from his positions as secretary and treasurer and replaced him with Tony's daughter. Then, at a special meeting in March, the shareholders (excluding Jim) voted to amend the bylaws to increase the size of the board and to allow nonshareholders to serve on it. Later, at another shareholder meeting in December, Raymond successfully moved to expel Jim from the board and to fill the open seats with his own stepbrother and Tony's daughter, neither of whom are shareholders. Jim challenges the validity of these actions, citing inadequate notice and other procedural irregularities, and alleges that Raymond and Tony's takeover of the board has upset the family's settled power-sharing arrangement. (*See* Am. Countercls. ¶¶ 24, 25, 31–34, 40.)

7. Jim also alleges that Raymond and Tony—and their father, Bob—do not have JT Russell's best interests in mind. Raymond and Tony have supposedly mismanaged the company: slashing revenues, driving up expenses, and cancelling

lucrative deals that Jim had struck before his ouster. And they have allegedly used JT Russell's resources to build and heat their homes, to pave their driveways, and for other personal purposes, while Bob similarly used JT Russell's fuel, equipment, and employees to operate his personal farm. JT Russell's other shareholders and directors never approved these activities and weren't aware of their extent, partly because they were "falsely booked to customer jobs." By contrast, Jim alleges that he and his branch of the family fastidiously and transparently documented their own uses of JT Russell's resources for other business ventures. (Am. Countercls. ¶¶ 6, 41, 42, 45, 48–53, 56, 67, 71.)

8. These disputes came to a head in 2022, and the parties agreed to mediate their differences in the hopes of avoiding litigation. The mediation was unsuccessful. JT Russell then began this action by suing Jim (along with two companies in which he holds an interest) for breach of fiduciary duty, breach of contract, unjust enrichment, and more. (See ECF No. 3.) Jim has denied those allegations and asserted counterclaims against JT Russell for judicial dissolution, to remove Raymond and Tony as directors, and for an accounting of corporate assets that Bob, Raymond, and Tony have diverted for personal use. Jim has also asserted derivative claims on JT Russell's behalf against Bob, Raymond, and Tony for breach of fiduciary duty, constructive fraud, conversion, and unjust enrichment.

9. JT Russell and Bob, Raymond, and Tony have separately moved to dismiss most of these counterclaims. (See ECF Nos. 64, 68.) The motions have been fully

briefed, and the Court held a hearing on 17 January 2024. The motions are ripe for resolution.

## II. ANALYSIS

10. Taken together, the motions to dismiss challenge every counterclaim other than the one to remove Raymond and Tony as directors of JT Russell. The Court begins with the parties' arguments regarding the derivative counterclaims before turning to the direct counterclaims.

### A. Derivative Counterclaims

11. JT Russell and Bob, Raymond, and Tony challenge Jim's derivative counterclaims on several independent grounds. The Court need not address them all. Jim's failure to comply with the presuit demand requirement of N.C.G.S. § 55-7-42 is dispositive and necessitates dismissal of his derivative counterclaims.

12. "No shareholder may commence a derivative proceeding" without having first made a "written demand . . . upon the corporation to take suitable action." N.C.G.S. § 55-7-42. This demand requirement allows the corporation, as the real party in interest, "a chance to investigate the claim and, if it chooses, to vindicate its own rights before freeing its members to seek relief on its behalf." *Al-Hassan v. Salloum*, 2020 NCBC LEXIS 22, at \*5 (N.C. Super. Ct. Feb. 20, 2022) (discussing analogous demand requirement for derivative actions on behalf of LLCs). Compliance is "necessary to confer standing on shareholders in a derivative action." *Anderson v. Seascope at Holden Plantation, LLC*, 241 N.C. App. 191, 203 (2015). Thus, failure to make a proper presuit demand deprives the plaintiff of standing and the trial court

of jurisdiction. *See Town of Midland v. Harrell*, 385 N.C. 365, 371 (2023) (“If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject matter jurisdiction over the claim.”).

13. Jim alleges that he made a written demand upon JT Russell in October 2022 “as part of an agreed process on exchanging claims” to facilitate a voluntary mediation. (Am. Countercls. ¶ 73.) But that document, which is attached to his pleading,<sup>2</sup> isn’t styled as a demand and doesn’t demand any action by JT Russell. All it contains is a list of potential “Claims”—including both personal claims against JT Russell and “Derivative claims” on its behalf—that Jim might assert in a future lawsuit. (Am. Countercls. Ex. A, ECF No. 55.)

14. Our courts have held with crystal clarity that a list of claims, without more, is not a proper demand. “[T]he statute contemplates a demand upon the company to take appropriate and tangible action,” not a mere “list of legal claims for relief to be asserted by the [shareholder] in a forthcoming lawsuit.” *Cumberland Cnty. Hosp. Sys. v. Woodcock*, 2023 NCBC LEXIS 43, at \*18 (N.C. Super. Ct. Mar. 21, 2023) (discussing analogous LLC statute); *see also Bourgeois v. LaPelusa*, 2022 NCBC LEXIS 111, at \*28 (N.C. Super. Ct. Sept. 23, 2022) (“Despite listing these grievances, nowhere does the letter specify what action Bourgeois is seeking.”); *Miller v. Burlington Chem. Co.*, 2017 NCBC LEXIS 6, at \*30 (N.C. Super. Ct. Jan. 27, 2017) (“Such complaints and allegations of injury, however, are not demands to take

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<sup>2</sup> A trial “court may consider matters outside of the pleadings” when deciding whether subject matter jurisdiction exists. *Keith v. Wallerich*, 201 N.C. App. 550, 554 (2009). There is no need to do so here, however, because the document that Jim holds out as his written demand is attached to his pleading and deemed to be part of it. *See* N.C. R. Civ. P. 10(c).

suitable action.”); *Garlock v. Hilliard*, 2000 NCBC LEXIS 6, at \*10 (N.C. Super. Ct. Aug. 22, 2000) (“That letter made no specific demand and did not request that the Board of Directors take any action or bring any lawsuit.”).

15. Jim argues that a shareholder can satisfy the demand requirement without expressly asking the corporation to sue the purported wrongdoer. That’s true: a demand to take suitable action is not limited to a demand to commence a lawsuit. But the defect here is not that Jim failed to demand that JT Russell sue Bob, Raymond, and Tony. Rather, it is that he failed to demand that JT Russell take any action at all.

16. He goes on to argue that his list of claims put JT Russell on notice of the misconduct by Bob, Raymond, and Tony and gave the company a chance to redress that misconduct during their presuit mediation. Again, though, the statute requires a written demand for suitable action, not an implied demand. *See Cumberland Cnty. Hosp. Sys.*, 2023 NCBC LEXIS 43, at \*17–18 (concluding that sending a draft complaint was not “a valid substitute for making a proper demand for suitable action”). And in any event, Jim’s threat to assert both personal and derivative claims did not fairly put JT Russell on notice of the action that he wanted it to take. The implication, if any, is that Jim was looking out for his own interests as much as or more than JT Russell’s. *See id.* at \*16–17 (holding that a shareholder’s demand to protect “*its own* financial interests” was “not a proper demand”); *Bourgeois*, 2022 NCBC LEXIS 111, at \*28 (“Compounding the problem, the demand letter includes

personal claims that Bourgeois might have brought directly and that cannot be the basis for a derivative action.”).

17. Absent a clear and specific demand for suitable action to right wrongs to the corporation, Jim has not satisfied section 55-7-42 and lacks standing to pursue a derivative action on JT Russell’s behalf. For this reason, the Court dismisses his derivative counterclaims without prejudice for lack of subject matter jurisdiction.

#### B. Direct Counterclaims

18. JT Russell moves to dismiss two of Jim’s direct counterclaims for failure to state a claim. See N.C. R. Civ. P. 12(b)(6). Dismissal is proper when “(1) the complaint on its face reveals that no law supports the . . . claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the . . . claim.” *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (citation and quotation marks omitted). In deciding the motion, the Court must treat all well-pleaded allegations as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. See, e.g., *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019).

19. **Dissolution.** Jim alleges that he reasonably expected to work for and participate in the management of JT Russell’s family business and that those expectations have been frustrated. He also alleges that Bob, Raymond, and Tony have mismanaged JT Russell and misused its assets for personal gain. Based on these allegations, he seeks to dissolve JT Russell. See N.C.G.S. § 55-14-30(2) (authorizing a court to dissolve a corporation when “(ii) liquidation is reasonably



necessary for the protection of the rights or interests of the complaining shareholder” or “(iv) the corporate assets are being misapplied or wasted”).

20. At the hearing, JT Russell’s counsel conceded that Jim has adequately stated a claim for relief. Even so, JT Russell moves for partial dismissal on the ground that some of the actions that Jim cites to support his claim occurred during his tenure as an officer and director, that he failed to object to them at that time, and that he cannot seek dissolution based on them now.

21. At best, this appears to be an argument to dismiss a handful of paragraphs in Jim’s pleading, rather than to dismiss the claim for dissolution. That is not how Rule 12(b)(6) operates. As federal courts have noted, “a court dismisses claims, not allegations.” *Surgical Instrument Serv. Co. v. Intuitive Surgical, Inc.*, 571 F. Supp. 3d 1133, 1140 (N.D. Cal. 2021); *see also United States ex rel. Cooley v. ERMI, LLC*, 2023 U.S. Dist. LEXIS 196605, at \*9 n.3 (N.D. Ga. Nov. 2, 2023) (“If the allegations that ERMI makes are sufficient to state a claim as a whole, the fact that some of its allegations may not contribute to a breach of fiduciary duty does not doom an otherwise sufficiently pled claim.” (cleaned up)); *Mitchell v. Muncie Cmty. Schs.*, 2016 U.S. Dist. LEXIS 92043, at \*14 (S.D. Ind. July 15, 2016) (“In ruling on a motion to dismiss, the Court dismisses parties or claims, but not allegations.”).

22. Moreover, what Jim knew and did when he was JT Russell’s secretary and treasurer are issues for discovery. For now, the Court must take Jim’s allegations as true, including his allegation that “he was not aware of all instances or the full extent

of” misconduct by Bob, Raymond, and Tony while he was serving as an officer and director. (Am. Countercls. ¶ 70; *see also* Am. Countercls. ¶¶ 52, 59.)

23. The Court therefore denies JT Russell’s motion to dismiss Jim’s dissolution counterclaim.

24. **Accounting.** “[A]n equitable accounting may be available when a plaintiff has asserted a valid claim for relief in equity and an accounting is necessary to compel discovery of information regarding accounts held exclusively by the defendant.” *Gottfried v. Covington*, 2014 NCBC LEXIS 26, at \*16 (N.C. Super. Ct. June 25, 2014) (quoting *Mkt. Choice, Inc. v. New Eng. Coffee Co.*, 2009 U.S. Dist. LEXIS 73627, at \*35–36 (W.D.N.C. Aug. 18, 2009)). “It is a remedy, not an independent cause of action, and is available only if the plaintiff first shows that he lacks an adequate remedy at law and alleges facts in the complaint to that effect.” *Elhulu v. Alshalabi*, 2021 NCBC LEXIS 44, at \*20 (N.C. Super. Ct. Apr. 29, 2021). The Court therefore grants the motion to dismiss Jim’s accounting counterclaim to the extent it is pleaded as an independent cause of action but does so without prejudice to his right to seek an accounting as a remedy, if appropriate, at a later stage.

### III. CONCLUSION

25. For all these reasons, the Court **GRANTS** Bob, Raymond, and Tony’s motion to dismiss and **GRANTS in part** and **DENIES in part** JT Russell’s motion to dismiss as follows:

- a. The Court **DISMISSES** Jim’s derivative counterclaims without prejudice for lack of jurisdiction.

- b. The Court **DISMISSES** Jim's accounting counterclaim without prejudice to his right to seek an accounting as a remedy.
- c. The Court **DENIES** the motion to dismiss Jim's dissolution counterclaim.

**SO ORDERED**, this the 28th day of February, 2024.

/s/ Adam M. Conrad  
Adam M. Conrad  
Special Superior Court Judge  
for Complex Business Cases