STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 10612
NANCY WRIGHT; GREG WRIGHT; and JODY STANSELL, individually and as members of LORUSSO VENTURES, LLC d/b/a CINCH.SKIRT, Plaintiffs, v. KRISTA LORUSSO, individually and as a member-manager of LORUSSO VENTURES, LLC d/b/a CINCH.SKIRT, Defendant, v. LORUSSO VENTURES, LLC d/b/a CINCH.SKIRT, Nominal Defendant.	**ORDER AND OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

1. This case arises from a dispute among the members of a company called Cinch.Skirt. Plaintiffs Nancy Wright, Greg Wright, and Jody Stansell are Cinch.Skirt's minority members. They accuse Defendant Krista LoRusso of abusing her position as the majority member and have asserted more than a dozen direct and derivative claims against her. LoRusso has moved for summary judgment on most of their claims. For the following reasons, the Court **GRANTS in part** and **DENIES in part** the motion.

Miller Law Firm, PLLC, by W. Stacy Miller, and the Law Office of Matthew I. Van Horn, PLLC, by Matthew Ivan Van Horn, for Plaintiffs Nancy Wright, Greg Wright, and Jody Stansell.

Leonard G. Kornberg, P.A., by Leonard Gary Kornberg, for Defendant Krista LoRusso.

Higgins & Owens, PLLC, by Sara W. Higgins, for Nominal Defendant LoRusso Ventures, LLC.

Conrad, Judge.

I.
BACKGROUND

2. The Court does not make findings of fact when ruling on a motion for summary judgment. The following background, drawn from the evidence submitted by the parties, provides context for the Court's analysis and ruling only.

3. Cinch.Skirt is a North Carolina limited liability company that makes and sells an easily removable bed skirt for use in hotels and similar businesses. LoRusso founded the company in early 2017 and was, at first, its only member and manager. Later that year, at LoRusso's invitation, the Wrights and Stansell signed a purchase agreement to acquire minority interests. From then until now, Cinch.Skirt has had four members, with LoRusso holding a seventy-six percent interest, the Wrights jointly holding a twenty percent interest, and Stansell holding the remaining four percent interest. (*See* LoRusso Aff. ¶ 2, ECF No. 169; Purchase Agrmt., ECF No. 67.)

4. An operating agreement governs Cinch.Skirt's internal affairs. Any action taken by members requires a supermajority vote, defined as "over eighty percent" of the ownership interests in the company. The agreement also names LoRusso as the sole "initial manager" but restricts her authority in various ways, including by requiring supermajority member approval to declare bankruptcy, dissolve the company, start a new line of business, make loans to any member or manager, and

more. Members have the right, again by a supermajority vote, to elect additional managers and to remove a manager. (*See* Op. Agrmt. §§ 2.4, 2.6, 2.7, 2.7*, Ex. A, ECF No. 67.)[1]

5. At an annual meeting in April 2019, Cinch.Skirt's members unanimously agreed to establish a series of new internal operating procedures, including how to handle order placement, hiring an outside accountant, and holding weekly member meetings about the financial status of the business. They also unanimously agreed to divide up "member roles" by specified "job descriptions": LoRusso became "Product Development, Supply Chain & Manufacturing Manager"; Stansell became "Sales Manager"; Greg Wright became "Financial Manager"; and Nancy Wright took an "Advisory" role. The parties now dispute the intent of these member roles. LoRusso, on one hand, contends that the members became service providers or employees. The Wrights and Stansell, on the other hand, contend that the members elected Stansell and Greg Wright to serve as managers of the LLC alongside LoRusso. (*See* Def.'s Ex. 8, ECF No. 168.1; Def.'s Ex. 11, ECF No. 214.1.)

6. In December 2019, the members held a second meeting to reaffirm the actions approved the previous April and to take further measures. They agreed, among other things, that expenditures of $1,000 or more would require supermajority approval, that Cinch.Skirt would provide insurance benefits to each member, and

[1] The operating agreement contains two sections numbered 2.7. The first is entitled "Restrictions on Authority of Managers." The second is entitled "Term of a Manager and Replacement." To distinguish these provisions, this opinion will cite the former as (Op. Agrmt. § 2.7) and the latter as (Op. Agrmt. § 2.7*).

that LoRusso and Stansell would coordinate their sales and manufacturing efforts. (*See* Def.'s Ex. 10, ECF No. 168.1.)

7. According to the Wrights and Stansell, LoRusso reneged on the agreements reached in April and December 2019 and abused her position as majority member. They allege that LoRusso routinely misused company funds for personal purposes, withheld financial information, interfered with the other members' job duties, purported to terminate Stansell as "Sales Manager" unilaterally, and effectively excluded the minority members from the business. Based on these allegations, they have asserted a mix of direct and derivative claims against LoRusso for fraud, negligent misrepresentation, breach of contract, breach of fiduciary duty, unjust enrichment, and punitive damages. (*See, e.g.*, LoRusso Dep. 53:9–23, 95:9–25, ECF No. 189.1; *see also* 2d Am. Compl., ECF No. 65.)[2]

8. LoRusso has moved for summary judgment on some, but not all, of the claims asserted against her. (*See* ECF No. 186.) LoRusso's motion has been fully briefed, and the Court held a hearing on 11 September 2023. The motion is ripe for decision.

II.
LEGAL STANDARD

9. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is

[2] LoRusso has asserted counterclaims of her own for breach of contract, computer trespass, and similar causes of action. These counterclaims are not at issue in the pending motion.

entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must consider the evidence in the light most favorable to the nonmoving party, drawing all inferences in the nonmoving party's favor. *See, e.g.*, *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

10. The moving party "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The moving party meets its burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citations and quotation marks omitted). If the moving party makes that showing, "the burden shifts to the nonmoving party to 'produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial.' " *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (quoting *DeWitt*, 355 N.C. at 682). The nonmoving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e).

III.
ANALYSIS

11. The second amended complaint includes seventeen claims for relief, dubbed as "counts." LoRusso's motion for summary judgment purports to challenge counts

three through ten, thirteen, and sixteen.[3] Her brief in support, however, does not mention count thirteen (unjust enrichment) or count sixteen (punitive damages) at all. The Court therefore denies her motion as to those counts without further analysis. Having done so, the Court now turns to the parties' arguments concerning counts three through ten.

A. Fraud and Negligent Misrepresentation

12. Counts three through six include a pair of direct claims for fraud and negligent misrepresentation and an identical pair of derivative claims. These claims are based on allegations of self-dealing and misuse of company funds—for example, that LoRusso made personal charges on company credit cards, lent company funds to her boyfriend, and improperly paid herself a distribution of $89,000 and reclassified it as a loan for tax purposes.

13. Fraud has five "essential elements": (a) a false representation or concealment of a material fact, (b) calculated to deceive, (c) made with intent to deceive, (d) that did in fact deceive, and (e) that resulted in damage to the injured party. *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992). The claimant must show not only that he actually relied on the misrepresentation but also that his reliance was reasonable. *See Forbis v. Neal*, 361 N.C. 519, 527 (2007).

14. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363,

[3] She also challenged counts one and two, and the parties have since stipulated to the dismissal of those claims. (*See* ECF No. 219.)

369 (2014) (citations and quotation marks omitted). Just as fraud requires a showing of reasonable reliance, negligent misrepresentation requires an analogous showing of justifiable reliance. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224 (1999); *see also Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 2023 N.C. LEXIS 585, at *22 (Sept. 1, 2023).

15. LoRusso's opening brief challenges only the allegations concerning the $89,000 payment. She contends that the Wrights and Stansell now admit that she earned the payment legitimately as part of her salary. Nancy Wright testified, for example, "that was her salary, and she deserved it." (N. Wright Dep. 160:2–11, ECF No. 168.4.) Likewise, when asked whether the payment "was her income," Stansell testified, "[w]e all know that." (Stansell Dep. 128:15–17, ECF No. 168.3.)

16. In response, the Wrights and Stansell object on a procedural ground: that LoRusso failed to comply with Business Court Rule 7.5, which requires a party to provide pinpoint citations to supporting evidence when possible. But this is incorrect. LoRusso's brief cites specific passages from several deposition transcripts to support her argument. There is no violation of Rule 7.5.

17. On the merits, the Wrights and Stansell offer no argument or evidence. They do not dispute the legitimacy of the $89,000 payment or LoRusso's characterization of their testimony. Nor do they point to any evidence that LoRusso misrepresented the nature of the payment, that they were deceived by her, or that they reasonably or justifiably relied on any statements about the payment or how it was classified. The Wrights and Stansell needed "to come forth with evidence to

controvert" LoRusso's argument "or otherwise suffer entry of summary judgment against" them. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 205 (1980). They did not, and as a result, there is no genuine issue of material fact regarding the $89,000 payment.

18. The rest of LoRusso's arguments are untimely, having been raised for the first time in her reply brief or at the hearing. The Court declines to address them. *See* BCR 7.2 ("A party should therefore brief each issue and argument that the party desires the Court to rule upon and that the party intends to raise at a hearing."); 7.7 ("[T]he Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief.").

19. Accordingly, LoRusso is entitled to summary judgment to the extent that the claims for fraud and negligent misrepresentation are based on the $89,000 payment. The Court denies her motion as to these claims in all other respects.[4]

B. Breach of Contract

20. Counts seven and eight are direct and derivative claims for breach of contract. Together, the claims allege as many as twenty breaches of the purchase agreement, the operating agreement, and other agreements reached during member meetings in 2019. LoRusso moves for summary judgment across the board.

21. **Purchase Agreement.** The Wrights and Stansell allege that LoRusso breached the purchase agreement by failing to obtain patent protection for the

[4] It is perhaps worth noting that a misuse of company funds alone does not necessarily entail fraud or negligent misrepresentation. At trial, the Wrights and Stansell will need to show not only that LoRusso misused funds but also that she made misrepresentations about her actions and that they reasonably or justifiably relied on those misrepresentations.

company's lead product. As LoRusso correctly observes, though, she is not a party to that agreement, having signed it only as a representative of Cinch.Skirt. (*See* Purchase Agrmt. 1.) Given that she is "not a party to the contract, as a matter of law [she] cannot be held liable for any breach that may have occurred." *Canady v. Mann*, 107 N.C. App. 252, 259 (1992); *see also Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 438 (1977) ("It is a fundamental principle of contract law that parties to a contract may bind only themselves and that the parties to the contract may not bind a third person who is not a party to the contract in absence of his consent to be bound."). The Court therefore grants LoRusso's motion as to the alleged breaches of the purchase agreement.

22. **Operating Agreement.** Although not a party to the purchase agreement, LoRusso is a party to Cinch.Skirt's operating agreement. *See* N.C.G.S. § 57D-2-31(b) (stating that an interest holder is "deemed to be a party to[] the operating agreement"). The second amended complaint alleges at least ten breaches of that agreement, which LoRusso denies.

23. Little needs to be said about LoRusso's argument that "there is no evidence in the record to survive Summary Judgement [sic] regarding" the breaches alleged in "¶ 176(a), (c), (d), (e), (f), (g), (i), (j), (k)" of the second amended complaint. (LoRusso Br. in Supp. 15, ECF No. 187.) That single sentence—with no reference to the record and no legal argument—is facially insufficient to meet her "initial burden" as the moving party to show "the absence of a genuine issue of material fact." *Liberty Mut. Ins.*, 356 N.C. at 579.

24. LoRusso argues in more depth that she did not breach the operating agreement when she terminated Stansell from his position within Cinch.Skirt without consulting the other members (which is alleged in paragraph 176(h) of the second amended complaint). Her position is that Stansell was a "Member-Service Provider" as defined in section 2.11 and that she had authority as manager to terminate him at any time. (*See* Op. Agrmt. § 2.11 ("In the absence of a separate written agreement to the contrary, the Manager may terminate such service agreement at any time upon notice to such Member-Service Provider.").) Stansell disagrees. He contends that the members unanimously elected him to serve as a manager in April 2019 and that a supermajority vote was required to remove him from that position. (*See* Op. Agrmt. § 2.7* ("The Members shall have the power by the action or vote of a SuperMajority in Interest Members to remove a Manager . . . .").)[5]

25. Whether Stansell was a manager or a Member-Service Provider is a question for the finder of fact. The minutes from the April 2019 meeting are ambiguous, stating that members "agreed upon" certain "member roles" and that Stansell would serve as "Sales Manager." (Def.'s Ex. 8.) The phrase "member roles" could suggest that Stansell became a Member-Service Provider, as LoRusso contends. But the title

[5] The Wrights and Stansell also argue that they were managers of Cinch.Skirt under the statutory default rule that "[a]ll members by virtue of their status as members are managers of the LLC." N.C.G.S. § 57D-3-20(d). This is plainly incorrect. The statute makes clear that an operating agreement may depart from the default rule and that "those persons designated as managers in, or in the manner provided in, the operating agreement will be managers." *Id.* Here, the operating agreement provides that LoRusso is "the initial manager[]" and allows the members to elect additional managers. (Op. Agrmt. §§ 2.6, 2.7*.)

"Sales Manager" could suggest that the members elected Stansell to serve as a manager. Indeed, Nancy Wright testified that the members voted to create "a triumvirate of managers with roles" matching "their expertise" and with "each of them being a manager of the LLC." (N. Wright Dep. 50:7–19.) The Court cannot weigh the credibility of this testimony in deciding a motion for summary judgment; that is the role of the jury.

26. The Court therefore denies LoRusso's motion as to the alleged breaches of the operating agreement.

27. **Oral Agreements.** The second amended complaint refers to two alleged oral agreements among the members of Cinch.Skirt in April 2019 and December 2019. As alleged, LoRusso breached these agreements by, among other things, failing to share profits, failing to provide health insurance, and interfering with the other members' performance of their company duties.

28. LoRusso argues that these agreements are invalid because section 9.10 of the operating agreement states that Cinch.Skirt "shall have no oral operating agreements." (Op. Agrmt. § 9.10.) This is unpersuasive for two reasons. First, LoRusso does not explain why unanimous agreements reached during a properly noticed member meeting are prohibited "oral operating agreements" under section 9.10 as opposed to permissible member actions under section 2.4. (*Compare* Op. Agrmt. § 9.10, *with* Op. Agrmt. § 2.4.) Second, some evidence suggests that the members memorialized their oral agreements in writing, arguably satisfying section 9.10 assuming it applies. (*See* Def.'s Exs. 8, 10; *see also* Def.'s Ex. 9, ECF No. 168.1.)

LoRusso is therefore not entitled to summary judgment with respect to the April 2019 and December 2019 agreements.

C. Breach of Fiduciary Duty

29. Counts nine and ten are claims for breach of fiduciary duty. Count nine is a direct claim based on allegations that LoRusso, as Cinch.Skirt's majority member, owes a fiduciary duty to the other members. Count ten is a derivative claim based on allegations that LoRusso, as Cinch.Skirt's manager, owes a fiduciary duty to the company.

30. Again, although LoRusso's motion challenges counts nine and ten in their entirety, her brief is more limited. She ignores count ten, other than to concede that she owes a fiduciary duty to Cinch.Skirt in her role as manager. Accordingly, the Court denies her motion as to count ten.

31. As to count nine, LoRusso argues that she does not owe a fiduciary duty individually to the Wrights and Stansell. The Court agrees.

32. "The law does not favor claims by one LLC member against another for breach of fiduciary duty." *Strategic Mgmt. Decisions, LLC v. Sales Performance Int'l, LLC*, 2017 NCBC LEXIS 69, at *10 (N.C. Super. Ct. Aug. 7, 2017). That is because members of an LLC "are like shareholders in a corporation in that members do not owe a fiduciary duty to each other or to the company." *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473 (2009).

33. True, "in some circumstances, a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members." *Vanguard*

Pai Lung, LLC v. Moody, 2019 NCBC LEXIS 39, at *17 (N.C. Super. Ct. June 19, 2019) (citations and quotation marks omitted). But control does not necessarily go "hand in hand with a majority interest in an LLC." *Strategic Mgmt. Decisions*, 2017 NCBC LEXIS 69, at *12. Because an LLC is a creature of contract, members have the freedom to allocate rights and responsibilities as they wish. And minority members may negotiate to add key protections in the operating agreement: special voting rights, access to information, limits on transfers of interests, and more. "Especially where the members have bargained for comprehensive terms to govern their relationship, the imprudent imposition of fiduciary duties could 'undermine the contractual nature of an Operating Agreement.' " *Id.* at *11 (quoting *HCW Ret. & Fin. Servs., LLC v. HCW Emp. Benefit Servs., LLC*, 2015 NCBC LEXIS 73, at *47 n.102 (N.C. Super. Ct. July 14, 2015)).

34. LoRusso's seventy-six percent interest in Cinch.Skirt gives her a numerical majority but not a controlling majority. The operating agreement makes clear that "[a]ny action to be taken by the Members" must "be made by the Members holding a SuperMajority In Interest," which is defined as more than eighty percent. (Op. Agrmt. § 2.4, Ex. A.) In some cases, even a supermajority is not enough: unanimity is needed to amend the operating agreement and to call for a loan or capital contribution from a member. (*See* Op. Agrmt. §§ 3.2, 3.4, 9.3.) Together, these provisions prevent LoRusso from taking *any* member action unilaterally. *See Claudio v. Sellers*, 2019 N.C. App. LEXIS 288, at *8 (N.C. Ct. App. Mar. 26, 2019) (unpublished) ("Defendant Wilson—although numerically a majority [member]—by

definition of the operating agreement was not a majority [member] and did not owe a fiduciary duty based on the operating agreement.").

35. The Wrights and Stansell insist that LoRusso is Cinch.Skirt's controlling member because she is also its manager. In some cases, managerial authority demonstrates control. *See, e.g.*, *Vanguard Pai Lung*, 2019 NCBC LEXIS 39, at *19 (citing comprehensive "managerial control" as "one of the clearest attributes of a controlling member of an LLC"). Not here, though. The operating agreement carefully circumscribes LoRusso's powers as manager. Although she has authority over many aspects of Cinch.Skirt's day-to-day business, (Op. Agrmt. § 2.6), she cannot unilaterally decide to start a new line of business, sell material assets of the company, or pay a salary or lend company funds to any member or manager (including herself), (Op. Agrmt. § 2.7(b), (d), (g), (h)). These actions require the approval of a supermajority of the members. Similarly, a supermajority must approve extraordinary actions like amending the articles of organization, declaring bankruptcy, dissolving the company, and issuing new ownership units and admitting new members. (*See* Op. Agrmt. § 2.7(a), (c), (e), (f).)

36. A number of other provisions give added protection to minority members. The rules for when and how to make distributions of company cash are well defined, and no member has "priority over any other" when it comes to obtaining a return of capital and related economic rights. (Op Agrmt. §§ 3.3, 5.1–5.4.) In addition, each member may, at his or her own expense, inspect company records and demand an audit by independent accountants. (*See* Op. Agrmt. § 9.1.)

37. Given the wide-ranging protections for minority members in the operating agreement, no reasonable jury could conclude that LoRusso has the sort of controlling authority needed to create a fiduciary relationship among Cinch.Skirt's members. The Wrights and Stansell have effective veto power over any action requiring a member vote as well as a significant check on many powers of the manager. They also have economic and informational rights that promise transparency and maintain balance between minority and majority interests. Imposing fiduciary duties on LoRusso above and beyond her contractual duties "would be inconsistent with the parties' bargain and with this State's policy of 'giv[ing] the maximum effect to the principle of freedom of contract and the enforceability of operating agreements.' " *Strategic Mgmt. Decisions*, 2017 NCBC LEXIS 69, at *14 (quoting N.C.G.S. § 57D-10-01(c)).

38. Finally, some of the misconduct alleged in count nine took place before the Wrights and Stansell became members of Cinch.Skirt. (*See, e.g.*, 2d Am. Compl. ¶ 191(b).) At that point, the parties were simply in an arm's-length relationship, which is not fiduciary in nature. *See, e.g.*, *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368 (2014).

39. Absent a fiduciary relationship, there can be no breach of fiduciary duty. *See, e.g.*, *Dalton v. Camp*, 353 N.C. 647, 651 (2001). The Court therefore grants LoRusso's motion for summary judgment as to count nine.

IV.
CONCLUSION

40. For all these reasons, the Court **GRANTS in part** and **DENIES in part** LoRusso's motion for summary judgment.

a. The Court **GRANTS** the motion as to counts three through six to the extent based on the alleged $89,000 payment but **DENIES** the motion as to those counts in all other respects.

b. The Court **GRANTS** the motion as to counts seven and eight to the extent based on the purchase agreement but **DENIES** the motion as to those counts in all other respects.

c. The Court **GRANTS** the motion as to count nine but **DENIES** the motion as to count ten.

d. The Court **DENIES** the motion as to counts thirteen and sixteen.

SO ORDERED, this the 19th day of September, 2023.

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