

STATE OF NORTH CAROLINA  
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS 255

BIOMILQ, INC.,

Plaintiff and  
Counterclaim Defendant,

v.

SHAYNE GUILIANO and 108LABS,  
LLC,

Defendants and  
Counterclaim Plaintiffs,

v.

LEILA STRICKLAND; MICHELLE  
EGGER; BREAKTHROUGH  
ENERGY VENTURES, LLC; BEV  
JOHN DOES; BIOMILQ JOHN  
DOES; and GOODWIN PROCTER  
LLP,

Counterclaim Defendants.

**ORDER AND OPINION ON  
DEFENDANTS' JOINT PARTIAL  
MOTION TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT**

1. **THIS MATTER** is before the Court on the 24 May 2023 filing by Defendants 108Labs, LLC (“108Labs”) and Shayne Guiliano (“Guiliano,” and together, “Defendants”) of Defendants’ Joint Partial Motion to Dismiss Plaintiff’s Second Amended Complaint (the “Motion”). (ECF No. 145 [“Mot.”].) Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s)”), the Motion requests that the Court dismiss Plaintiff BIOMILQ, Inc.’s (“Plaintiff”) first claim for relief against Guiliano for trade secret misappropriation under the North Carolina Trade Secrets Protection Act, N.C.G.S. § 66-152 *et seq.*, and third claim for relief against Defendants for violations of the North Carolina Unfair and Deceptive

Trade Practices Act, N.C.G.S. § 75-1.1 *et seq.* (the “UDTPA”), to the extent that claim is based on the wrongdoing alleged in the first claim for relief.

2. For the reasons set forth herein, the Court **DENIES** the Motion.

*Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips and Stephen D. Feldman, and Goodwin Procter, LLP, by Rachel M. Walsh for Plaintiff BIOMILQ, Inc.*

*Bowens & Averhart, PLLC, by Stephon J. Bowens, and Carnes Warwick, PLLC, by Tara D. Warwick and Jonathan A. Carnes for Defendant 108Labs, LLC.*

*Carnes Warwick, PLLC, by Tara D. Warwick and Jonathan A. Carnes for Defendant Shayne Guiliano.*

Robinson, Judge.

## I. PROCEDURAL BACKGROUND

3. The factual and procedural background of this matter is set forth in detail in the Court’s 10 February 2023 Order and Opinion on Defendants’ Joint Motion to Dismiss or in the Alternative Hold Proceedings in Abeyance. *See BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 24 (N.C. Super. Ct. Feb. 10, 2023).

4. The Court sets forth herein only those portions of the procedural history relevant and necessary to its determination of the Motion.

5. Plaintiff initiated this action on 4 March 2022 with the filing of its Complaint and Motion for Temporary Restraining Order and Preliminary Injunction, naming only Guiliano as a defendant. (ECF Nos. 3–4.) This matter was designated by Plaintiff to the North Carolina Business Court on the same day, (ECF No. 7), and it was assigned to the undersigned on 7 March 2022, (ECF Nos. 1–2).

6. On 13 April 2022, Plaintiff filed its First Amended Complaint, adding 108Labs as a defendant. (ECF No. 42.) Thereafter, on 15 June 2022, Defendants filed their Joint Motion to Dismiss or in the Alternative Hold Proceedings in Abeyance. (ECF No. 73.) The Court granted Defendants' motion in part, dismissing without prejudice Plaintiff's claim for trade secret misappropriation and its claim for violations of the UDTPA, to the extent that claim was based on Guiliano's alleged trade secret misappropriation. *See BIOMILQ, Inc. v. Guiliano*, 2023 NCBC LEXIS 24, at \*\*18–19 (N.C. Super. Ct. Feb. 10, 2023). The Court also dismissed without prejudice Plaintiff's claim for trespass to chattels. *Id.* at \*\*30–32.

7. On 18 April 2023, Plaintiff filed its Consent Motion for Leave to File Second Amended Complaint. (ECF No. 135.) The Court granted Plaintiff's motion on 19 April 2023, (ECF No. 136), and Plaintiff filed its Second Amended Complaint on 21 April 2023, (ECF No. 137).

8. Thirty-two days later, on 23 May 2023 at 11:57:35 p.m., Defendants filed Defendants' Partial Answer to Plaintiff's Second Amended Complaint (the "Partial Answer"). (ECF No. 144.) Several minutes later, on 24 May 2023 at 12:00:03 a.m., Defendants filed the Motion, (ECF No. 145), and shortly thereafter filed the brief in support of the Motion at 12:02:40 a.m., (ECF No. 146).

9. Following full briefing, the Court held a hearing on the Motion on 7 November 2023 at which all parties were present and represented through counsel. (See ECF No. 210.)

## II. LEGAL STANDARD

10. A motion to dismiss for failure to state a claim “tests the legal sufficiency of the complaint.” *Isenhour v. Hutto*, 350 N.C. 601, 604 (1999) (cleaned up). Dismissal is proper when “(1) the complaint on its face reveals that no law supports the plaintiff’s 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 plaintiff’s claim.” *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (cleaned up). 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). The Court may also consider documents that are the subject of the complaint. *See, e.g., McDonald v. Bank of N.Y. Mellon Tr. Co.*, 259 N.C. App. 582, 586 (2018).

## III. ANALYSIS

11. Rule 12(b) clearly provides that a motion to dismiss for failure to state a claim upon which relief may be granted “shall be made *before pleading* if a further pleading is permitted.” N.C.G.S. § 1A-1, Rule 12(b) (emphasis added). This Court’s interpretation of Rule 12 is clear and is consistently applied. *See New Friendship Used Clothing Collection, LLC v. Katz*, 2017 NCBC LEXIS 72, at \*24–25 (N.C. Super. Ct. Aug. 18, 2017); *Johnston v. Johnston Props., Inc.*, 2018 NCBC LEXIS 119, at \*\*13–14 (N.C. Super. Ct. Nov. 15, 2018); *Handi-Clean Prods. v. Momar, Inc.*, 2021 NCBC LEXIS 35, at \*2 (N.C. Super. Ct. Apr. 6, 2021) (denying a motion to dismiss

pursuant to Rule 12(b)(6) where the answer and motion bore the same time stamp of filing).

12. “This Court has held that in the absence of case law from appellate courts interpreting such language to mean otherwise, a Rule 12(b) motion to dismiss for failure to state a claim must be filed *prior* to [the filing of] an answer, not contemporaneously with or minutes after.” *Johnston*, 2018 NCBC LEXIS 119, at \*\*14 (emphasis in original) (citing *New Friendship*, 2017 NCBC LEXIS 72, at \*24).

13. As evidenced by the time stamps on the filings, Defendants filed their Partial Answer first. (See ECF No. 154.) Then, several minutes later, Defendants filed the Motion. (See Mot.) Accordingly, under well-settled case law from this Court and our State’s appellate courts, the Motion is untimely. See *Jackson v. Duke Univ. Health Sys.*, 2021 N.C. App. LEXIS 436, at \*\*10 (2021) (unpublished) (citing *Robertson v. Boyd*, 88 N.C. App. 437, 440 (1988)). Although it is the unusual circumstance that a defendant files an answer which does not fully respond to all allegations in the operative complaint, the Partial Answer constitutes an answer—a permitted further pleading—under Rule 12(b). See N.C.G.S. § 1A-1, Rules 7(a), 12(b).

14. Additionally, the Court is unable to treat the Motion as one for judgment on the pleadings under Rule 12(c). In *New Friendship*, this Court determined that by reading Rule 12(b)(6) and Rule 12(h) together, a post-answer Rule 12(b)(6) motion may be properly considered as a Rule 12(c) motion for judgment on the pleadings if the pleadings are closed. 2017 NCBC LEXIS 72, at \*25–26.

15. Here, Defendants requested dismissal of Plaintiff's claims only pursuant to Rule 12(b)(6), and Defendants did not raise a 12(b)(6) defense in the Partial Answer.<sup>1</sup> Accordingly, given the procedural posture of this case and absent a request from Defendants, the Court declines to consider the Motion as one for judgment on the pleadings pursuant to Rule 12(c). *See Encompass Servs., PLLC v. Maser Consulting P.A.*, 2019 NCBC LEXIS 67, at \*3 (N.C. Super. Ct. Nov. 5, 2019) (declining to treat an untimely Rule 12(b)(6) motion as a Rule 12(c) motion when the movant did not request that the Rule 12(b)(6) motion be considered under Rule 12(c)). Furthermore, the pleadings in this matter are not closed, as "a reply to a counterclaim" is a permitted pleading under Rule 7(a). Thus, even if the Court were inclined to consider the Motion under Rule 12(c), it would be improper to do so at this time.

16. **THEREFORE**, the Court hereby **DENIES** the Motion because it was not timely filed.

**IT IS SO ORDERED**, this the 13th day of November, 2023.

/s/ Michael L. Robinson

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

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<sup>1</sup> Neither Plaintiff nor Defendants raised the procedural issues outlined in this Order and Opinion in their briefing on the Motion. However, the Court, in its discretion, concludes that the untimeliness of the Motion is an appropriate ground on which to base its ruling herein.