STATE OF NORTH CAROLINA MECKLENBURG COUNTY ERNEST CUTTER III, Plaintiff, v. GREGORY VOJNOVIC; and HOT DOG SHOPPE HOLDINGS, LLC, Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 10487 **ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO STRIKE PARTS OF THE CUTTER AFFIDAVIT**

1. **THIS MATTER** is before the Court on Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"),[1] Defendants' Motion for Summary Judgment[2] ("Defendants' Motion"; together with Plaintiff's Motion, the "Cross-Motions"), and Defendants' Motion to Strike Parts of the Cutter Affidavit[3] (the "Motion to Strike"; together with the Cross-Motions, the "Motions"), all filed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)") in the above captioned case.

2. Having considered the Motions, the briefs filed in support of and in opposition to the Motions, the arguments of counsel at the hearing on the Motions, and other appropriate matters of record, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion to Strike, **GRANTS** Defendants' Motion, and **DENIES** Plaintiff's Motion as set forth below.

[1] (Pl.'s Mot. Summ. J., ECF No. 66.)

[2] (Defs.' Mot. Summ. J, ECF No. 69.)

[3] (Mot. Strike Parts the Cutter Aff., ECF No. 87.)

James, McElroy & Diehl, PA, by J. Alexander Heroy and Jennifer M. Houti, for Plaintiff Ernest Cutter III.

Nelson Mullins Riley & Scarborough LLP, by Thomas G. Hooper, for Defendants Gregory Vojnovic and Hot Dog Shoppe Holdings, LLC.

Bledsoe, Chief Judge.

I.

FACTUAL BACKGROUND

3. This action arises from Plaintiff Ernest Cutter, III's ("Cutter" or "Plaintiff") and Defendant Gregory Vojnovic's ("Vojnovic") effort to purchase three Ohio restaurants that were owned by three different companies collectively known as Jib Jab ("Jib Jab").[4] In 2019, Cutter sought to purchase and operate Jib Jab through his company ARC Industries, Inc. ("ARC"), which invests in small and mid-size companies in the light manufacturing, distribution, and warehousing industries.[5]

4. On 15 October 2019, Cutter, on behalf of ARC, sent a non-binding letter of intent to Jib Jab's broker outlining possible terms for ARC's acquisition of Jib Jab.[6]

---

[4] (Aff. Gregory Vojnovic, dated 13 August 2021, at ¶ 26 [hereinafter "Vojnovic Aff,"], ECF No. 5.)

[5] (Dep. Ernest Cutter, III, dated 20 October 2022, at 30:3–31:6, 48:17–49:20, 51:8–9 (ECF No. 70.11) [hereinafter "Cutter Dep."], ECF Nos. 67.1, 70.11, 80.1, 82.2, 85.1, 92—93; Aff. Ernest Cutter, III, dated 25 October 2023, at ¶ 2 [hereinafter "Cutter Aff."], ECF No. 81; 2d Aff. Gregory Vojnovic, dated 22 September 2023, at ¶ 9 [hereinafter "2d Vojnovic Aff."], ECF No. 71.) The transcript of Cutter's deposition has been filed under different docket entries. For clarity, the Court will cite to the specific electronic filing number in which the cited portion of Cutter's deposition may be found.

[6] (Cutter Dep. 47:17–48:16; Index Defs.' Mot. Summ J. Ex. C, Dep. Ex. 3 [hereinafter "15 October 2019 LOI"], ECF No. 70.3.) Cutter testified that he sent the letter "to get the numbers . . . in front of the other side and to start negotiating the numbers." (Cutter Dep. 61:8–10, ECF No. 70.11.)

The 15 October 2019 LOI suggested a $12,437,500 purchase price, with $7.5 million paid at closing—comprised of a $4.5 million loan guaranteed by the U.S. Small Business Administration (the "SBA"), a separate $2.5 million mortgage loan, and $500,000 in equity.[7] Another $4.5 million would be paid under a 10-year promissory note at 5% interest, with payments beginning a year later and interest totaling $337,500.[8] The sellers also would be paid $100,000 under a 12-month "transition services agreement" ("TSA").[9]

5. Since Cutter had no experience in the restaurant industry,[10] no experience buying, investing in, or operating restaurants,[11] and no interest in developing restaurant management expertise,[12] he sought to team up with a business associate with relevant experience so that, together, they could pursue the Jib Jab opportunity.[13] Ultimately, on 1 November 2019, Cutter reached out to Defendant

[7] (15 October 2019 LOI 5–6; Cutter Dep. 54:14–55:21, ECF No. 70.11.)

[8] (15 October 2019 LOI 5–6.)

[9] (15 October 2019 LOI 5–6.; Cutter Dep. 47:17–65:9, ECF No. 70.11.)

[10] (Cutter Dep. 46:20–21 ("I don't know anything about restaurants."), ECF Nos. 67.1, 70.11.)

[11] (Cutter Dep. 47:1–13 ("My typical deal is . . . not restaurants."), ECF No. 70.11.)

[12] (Cutter Dep. 37:22–38:8 ("I don't possess [a restaurant management] skill set, nor did I desire to try to attain it."), ECF Nos. 70.11, 80.1; 2d Vojnovic Aff. ¶ 9.)

[13] (Cutter Dep. 35:7–35:12 (ECF No. 67.1), 37:15–38:8 (ECF Nos. 70.11, 80.1).)

Vojnovic, the chief executive officer of a Georgia company that provides consulting services to restaurants,[14] and they agreed to work together to purchase Jib Jab.[15]

6. The pair never entered into a written contract concerning the acquisition of Jib Jab, nor did they execute a formal partnership agreement.[16] Nonetheless, it is undisputed that Cutter and Vojnovic broadly agreed that Cutter would structure the terms of the acquisition, handle the negotiations with Jib Jab's broker, procure funding for the acquisition, close the deal, and handle any future financing and acquisitions, and that Vojnovic would be responsible for handling the post-acquisition operation of the Jib Jab restaurants.[17]

7. On 19 February 2020, Cutter, again indicating that he was acting on behalf of ARC, sent another non-binding letter of intent to Jib Jab's broker, this time proposing a slightly higher purchase price ($12,487,500), with $7.5 million paid at closing from a sale-leaseback transaction with Essential Properties, LLC.[18] The balance would be paid under a $100,000 TSA and a 10-year promissory note at 5%

---

[14] (Dep. Gregory Vojnovic, dated 2 November 2022, at 97:7–18 [hereinafter "Vojnovic Dep."], ECF Nos. 67.5, 80.2, 85.2; Cutter Dep. 38:9–18 (ECF Nos. 70.11, 80.1), 70:1–18 (ECF No. 70.11); Vojnovic Aff. ¶ 2.) The transcript of Vojnovic's deposition has been filed under different docket entries. For clarity, the Court will cite to the specific electronic filing number in which the cited portion of Vojnovic's deposition may be found.

[15] (2d Vojnovic Aff. ¶ 13.)

[16] (Cutter Dep. 73:17–24 (ECF No. 67.1), 222:20–23:12 (ECF No. 70.11); Vojnovic Aff. ¶ 27.)

[17] (Cutter Dep. 75:7–17 (ECF Nos. 67.1, 70.11), 77:19–79:25 (ECF No. 70.11), 81:1–84:25 (ECF No. 70.11), 85:1–3 (ECF No. 67.1); Vojnovic Dep. 97:19–98:21, ECF Nos. 67.5, 80.2; 2d Vojnovic Aff. ¶¶ 12–13.)

[18] (Index Defs.' Mot. Summ J. Ex. D, Dep. Ex. 8 4–5 [hereinafter "19 February 2020 LOI"], ECF No. 70.4.)

interest.[19] Interest payments (totaling $387,500) and principal payments would begin in one and two years, respectively.[20]

8. In March 2020, and in anticipation of the contemplated Jib Jab purchase, Vojnovic created three separate entities: Defendant Hot Dog Shoppe Holdings, LLC ("Holdings"), former defendant Hot Dog Shoppe Operating, Inc. ("Operating"), and former defendant Hot Dog Shoppe Franchising, LLC ("Franchising").[21] Vojnovic is the registered agent for Holdings, Operating, and Franchising.[22] Cutter and Vojnovic intended for Holdings to be the legal owner of Jib Jab after the purchase transaction closed.[23] The COVID-19 pandemic, however, intervened, and the restaurants were forced to close, which then dried up the financing, so Cutter and Vojnovic were unable to press forward with the proposed acquisition.[24]

9. On 11 May 2020, with the pandemic well underway, Cutter, again on behalf of ARC, submitted another non-binding letter of intent to Jib Jab's broker, but this time with a smaller initial investment. This letter proposed a purchase price of $13,712,500, with only $6 million—all from Essential Properties, LLC—paid at

---

[19] (19 February 2020 LOI 4–5.)

[20] (19 February 2020 LOI 4–5.; Cutter Dep. 95:2–104:4, ECF No. 70.11.)

[21] (Vojnovic Aff. ¶¶ 7, 13, 18; Cutter Dep. 119:2–21:25, ECF Nos. 67.1, 70.11.)

[22] (Cutter Dep. 119:18–20:4, ECF Nos. 67.1, 70.11; Vojnovic Aff. ¶¶ 34, 36.)

[23] (Cutter Dep. 120:9–18, ECF Nos. 67.1, 70.11; Vojnovic Dep. 140:2–14 (ECF No. 80.2), 160:7–15 (ECF No. 67.5).)

[24] (Cutter Dep. 104:9–15, ECF No. 70.11; 2nd Vojnovic Aff. ¶ 21.)

closing.[25] The rest of the balance would be paid through a $100,000 TSA and a six-year, $6 million promissory note with a 5% interest rate requiring interest payments (now totaling $1,612,500) and principal payments to begin in a year.[26] Jib Jab rejected these proposed terms.[27]

10. On 11 June 2020, Vojnovic, acting on behalf of Holdings,[28] sent a new non-binding letter of intent to Jib Jab's broker proposing a purchase price of $8.85 million without including any details about financing.[29] As it did with Cutter's proposed terms, Jib Jab rejected Vojnovic's proposal.[30]

11. Vojnovic next engaged an investment banker to canvas over 30 potential lenders, including traditional, unitranche, and hard-money lenders, in an attempt to secure financing for the purchase.[31] None of the lenders were interested in financing the transaction.[32] After exhaustive effort, the only financing option Cutter and Vojnovic were able to arrange was an SBA-guaranteed loan from HomeTrust Bank.[33]

---

[25] (Index Defs.' Mot. Summ J. Ex. E, Dep. Ex. 10 5–6 [hereinafter "11 May 2020 LOI"], ECF No. 70.5.)

[26] (11 May 2020 LOI 5–6; Cutter Dep. 110:17–13:23, ECF No. 70.11.)

[27] (Cutter Dep. 113:24–14:19, ECF No. 70.11.)

[28] (Index Defs.' Mot. Summ J. Ex. F, Dep. Ex. 12, ECF No. 70.6)

[29] (Cutter Dep. 116:17–17:24, ECF No. 70.11.)

[30] (Cutter Dep. 122:7–25, ECF No. 70.11.)

[31] (2nd Vojnovic Aff. ¶ 25; Cutter Dep. 178:19–25, ECF No. 70.11.)

[32] (Cutter Dep. 135:1–37:12, 178:19–79:2, ECF No. 70.11.)

[33] (Cutter Dep. 179:21–80:22, ECF No. 67.1; 2nd Vojnovic Aff. ¶¶ 26–27.)

12. On 29 June 2020, Cutter, again on behalf of ARC, submitted one last non-binding letter to Jib Jab, this time proposing a purchase price of $11 million, with $10 million paid at closing, funded by a proposed $4.5 million SBA-guaranteed loan from HomeTrust Bank plus $5.5 million from Essential Properties, LLC, and approximately $500,000 in equity.[34] The proposal contemplated that the balance would be paid on the maturity date of a 10-year, $1 million, interest-free "standby" promissory note.[35]

13. The SBA-guaranteed loan, however, required personal guarantees from Cutter and Vojnovic, and neither was willing to personally guarantee the loan—Cutter because he had already personally guaranteed another outstanding SBA-guaranteed loan to purchase an unrelated company through ARC,[36] and Vojnovic because he did not have sufficient funds to retire two outstanding SBA-guaranteed loans made to him many years earlier that the SBA required to be paid off as a condition of the new loan.[37] To solve this problem, Vojnovic asked Cutter to pay off his outstanding loans, which Vojnovic argued would be recorded as a partnership expense. Cutter advised Vojnovic in a telephone call in November 2020 that he would

---

[34] (Index Defs.' Mot. Summ J. Ex. H, Dep. Ex. 16 4–5 [hereinafter "29 June 2020 LOI"], ECF No. 70.8.)

[35] (29 June 2020 LOI 4–5; Cutter Dep. 133:7–34:20, ECF No. 70.11.)

[36] (Cutter Dep. 141:4–16, ECF No. 70.11; 2d Vojnovic Aff. ¶ 28.)

[37] (Vojnovic Dep. 261:9–13, 273:10–15, ECF No. 67.5; 2d Vojnovic Aff. ¶¶ 29–33; Aff. J. Alexander Heroy, dated 25 September 2023 Ex. Q, ECF No. 67.17.)

not pay Vojnovic's debts.[38] He also indicated that he would agree to accept a finder's fee in lieu of an interest in any eventual purchase of Jib Jab. Vojnovic responded that he would take the Jib Jab opportunity to another equity source.[39]

14. By this time, it had become clear to Vojnovic, through Cutter's words and actions, that Cutter would not personally invest in, guarantee financing for, or participate in the management of Jib Jab. Vojnovic therefore decided to move forward with the deal on his own and performed many of the tasks originally assigned to Cutter.[40] Vojnovic thereafter satisfied his outstanding SBA loans,[41] personally guaranteed the HomeTrust Bank loan to Holdings, and obtained from his brother the equity needed to purchase Jib Jab.[42] Holdings ultimately purchased Jib Jab in March 2021 through an SBA-guaranteed loan from HomeTrust Bank and a sale-leaseback transaction with Essential Properties.[43] Cutter did not provide any equity, obtain

---

[38] (Cutter Dep. 174:1–175:22, ECF No. 67.1; Vojnovic Dep. 276:15–19, ECF No. 67.5; 2d Vojnovic Aff. ¶¶ 6, 36, 45.) According to Cutter, he and Vojnovic did not have an agreement about how the loan balances were going to be satisfied. (Cutter Dep. 175:11–76:25, ECF No. 70.11.)

[39] (Vojnovic Dep. 308:15–24. ECF No. 80.2.) Cutter also refused to pay a required $10,000 nonrefundable loan commitment fee. (2nd Vojnovic Aff. ¶ 37.)

[40] (Vojnovic Dep. 196:3–11 (ECF No. 80.2), 334:7–22 (ECF No. 67.5); 2d Vojnovic Aff. ¶¶ 41–44, 49.)

[41] (2d Vojnovic Aff. Ex. D, ECF No. 72.4.)

[42] (Vojnovic Dep. 301:15–17, ECF No. 67.5; 2d Vojnovic Aff. ¶¶ 50–53.)

[43] (2d Vojnovic Aff. ¶ 53.)

any financing, or guarantee any loans to fund the purchase of Jib Jab, and he did not participate at any time in the management or operation of Holdings or Jib Jab.[44]

II.

PROCEDURAL BACKGROUND

15. Cutter filed the above-captioned action on 1 July 2021, alleging that he and Vojnovic had entered into a common law partnership which Vojnovic had breached by closing the Jib Jab purchase without Cutter's participation.[45] Cutter also asserted claims against Vojnovic, directly and derivatively on behalf of the alleged common law partnership, for breach of fiduciary duty,[46] tortious interference with prospective economic advantage,[47] and misappropriation.[48] Cutter asserted additional claims against Holdings, Operating, and Franchising for tortious interference with prospective economic advantage and for a constructive trust.[49] Cutter also sought judicial dissolution and an accounting of the alleged common law partnership.[50]

---

[44] (2d Vojnovic Aff. ¶ 58.)

[45] (Compl. ¶¶ 38–44, ECF No. 3.)

[46] (Compl. ¶¶ 46–48.)

[47] (Compl. ¶¶ 50–53.)

[48] (Compl. ¶¶ 55–59.)

[49] (Compl. ¶¶ 50–53, 66–70.)

[50] (Compl. ¶¶ 61–64.)

Vojnovic filed his Answer and Counterclaims on 28 October 2021[51] and later dismissed his counterclaims on 21 September 2023.[52]

16. Cutter voluntarily dismissed his claims against Operating and Franchising on 1 November 2021.[53] On 24 January 2023, the Court dismissed all of Cutter's derivative claims, the tortious interference claim against Holdings, and the misappropriation claim against Vojnovic.[54] The Court also dismissed Cutter's constructive trust claim but without prejudice to Cutter's right to seek a constructive trust as a remedy should he prevail on any claims entitling him to such relief.

17. The claims now pending before the Court, and that are the subject of the Cross-Motions, are Cutter's claim against the alleged common law partnership for judicial dissolution and an accounting and his claims against Vojnovic for breach of the alleged partnership agreement, breach of fiduciary duty, and tortious interference with prospective economic advantage.

18. The parties filed the Cross-Motions on 25 September 2023,[55] and Defendants filed the Motion to Strike on 6 November 2023. After full briefing, the Court held a hearing on the Motions on 7 December 2023 (the "Hearing"), at which all parties were represented by counsel. The Motions are now ripe for resolution.

---

[51] (Answer and Countercls., ECF No. 14.)

[52] (Notice Voluntary Dismissal Countercls. Without Prejudice, ECF No. 65.)

[53] (Partial Voluntary Dismissal Without Prejudice, ECF No. 18.)

[54] (Order and Op. Defs.' Mot. Partial J. Pleadings, ¶ 32, ECF No. 53.)

[55] (Pl.'s Mot. Summ. J.; Defs.' Mot Summ. J..)

III.

LEGAL STANDARD

19. Under Rule 56(c), "[s]ummary judgment is appropriate 'if 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 [the movant] is entitled to a judgment as a matter of law.' " *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C.R. Civ. P. 56(c)). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up). "An issue is material if, as alleged, facts 'would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Bartley v. City of High Point*, 381 N.C. 287, 292 (2022) (quoting *Kootnz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

20. "The party seeking summary judgment 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 movant may meet this burden either (1) "by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense," or (2) "by showing through discovery that the opposing party cannot produce evidence to support an essential element of [its] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up). If the movant meets its burden, "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) (cleaned up); *see also* N.C.R. Civ. P. 56(e).

IV.

ANALYSIS

A. Defendants' Motion to Strike

21. The Court first turns to Defendants' Motion to Strike since it seeks to restrict the evidence the Court may consider on the Cross-Motions. The Motion to Strike asks the Court to strike certain portions of the Affidavit of Ernest Cutter III (the "Cutter Affidavit"),[56] specifically (i) the assertion in paragraph 1 that Cutter based the affidavit "upon personal knowledge," (ii) Cutter's use of "partnership" to the extent that term asserts a legal conclusion in paragraphs 4 through 7, (iii) Cutter's use of the legal terms "misappropriated" and "misappropriation" in

[56] (Cutter Aff.)

paragraphs 9 and 14, and (iv) all of the allegations in paragraph 3 and paragraphs 10 through 14.[57]

22. Rule 56(e) requires that affidavits supporting or opposing motions for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.R. Civ. P. 56(e). A party opposing summary judgment "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." *Id.* An affidavit must provide "specific facts" and not rely on "indefinite generalities." *Beasley v. Banks*, 90 N.C. App. 458, 460–61 (1988). Affidavits "which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment." *Rankin v. Food Lion*, 210 N.C. App. 213, 218 (2011). To that end, "[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect[.]" *Lemon v. Combs*, 164 N.C. App. 615, 622 (2004).

23. After a careful review of the Cutter Affidavit, the Court concludes that the Motion to Strike should be granted in part and denied in part.

24. First, the allegations in paragraph 3 and paragraphs 10 through 14 offer Cutter's opinions concerning available financing and investor interest in Jib Jab and lack any factual support. Cutter does not describe or identify the funding sources he claims are available to him or the identity of the investors he claims would invest in

[57] (Mot. Strike Parts Cutter Aff. 1.)

Jib Jab, nor did he disclose these alleged funding sources or investors in discovery.[58] Without such supporting factual allegations, Cutter's averments are conclusory and speculative and may not be considered on summary judgment. *See, e.g.*, *S.C. Telecomms. Grp. Holdings v. Miller Pipeline, LLC*, 248 N.C. App. 243, 248 (2016) (striking an affidavit with only conclusory statements as violating Rule 56(e)'s personal knowledge requirement); *see also, e.g.*, *Anton v. Anton*, 278 N.C. App. 150, 161 (2021) (concluding that affidavit reflecting "[p]laintiff's bare assertion of a belief" was "not based on any specific facts within [p]laintiff's personal knowledge, and [was] insufficient to overcome the specific factual evidence forecast by [d]efendants."); *Hylton v. Koontz*, 138 N.C. App. 629, 634 (2000) ("Our courts have held affirmations based on personal awareness, information and belief, and what the affiant thinks, do not comply with the 'personal knowledge' requirement of Rule 56(e).").

25. Next, paragraphs 4 through 7 refer to Cutter and Vojnovic's association as a "partnership" and paragraphs 9 and 14 allege that Vojnovic "misappropriated" the Jib Jab opportunity. Both terms, as used in these paragraphs, reflect an inadmissible legal conclusion that the Court may not consider on summary judgment. *See, e.g.*, *Singleton v. Stewart*, 280 N.C. 460, 467 (1972) (rejecting affidavit stating a legal conclusion under Rule 56 and noting that an "affiant's legal conclusion [is] not a fact 'as would be admissible in evidence' ") (quoting N.C.R. Civ. P. 56(e)); *Lemon*, 164 N.C. App. at 622 ("Statements in affidavits as to opinion, belief, or conclusions of law are of no effect."). Thus, the Court will strike Cutter's use of "partnership,"

[58] (Cutter Dep. 38:15–39:14 (ECF No. 80.1), 46:22–25 (ECF No. 70.11), 71:11–19 (ECF No. 70.11); Vojnovic Dep. 280:11–24, ECF No. 85.2.)

"misappropriated," and "misappropriation" in paragraphs 4, 5, 6, 7, 9, and 14 for asserting legal conclusions that Cutter and Vojnovic entered into a legally cognizable partnership and that Vojnovic illegally misappropriated the Jib Jab opportunity from Cutter.

26. The Court, however, will deny the Motion to Strike as to paragraph 1, which states that the affidavit is based on Cutter's personal knowledge, because Vojnovic's challenge is to the veracity of Cutter's assertion, not its admissibility.[59]

27. For the foregoing reasons, the Court will grant Defendants' Motion to Strike as to paragraphs 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, and 14 of the Cutter Affidavit (the "Stricken Statements") but will deny Defendants' Motion as to paragraph 1. Accordingly, the Court will not consider the Stricken Statements in resolving the Cross-Motions.

28. Although not presented by separate motion, the Court also notes that Defendants timely objected at the Hearing to Cutter's submission of the Expert Report of Thomas J. Molony (the "Molony Report").[60] The Molony Report was prepared by a well-regarded lawyer who is currently a professor at Elon University School of Law. The Molony Report opines on partnership law and its application to this case. North Carolina law is clear, however, that "while [a] legal expert may testify regarding the factual issues facing the jury, he is not allowed to either interpret the law or to testify as to the legal effect of particular facts." *Smith v.*

---

[59] (Mem. Law Supp. Mot. Strike Parts the Cutter Aff. 5, ECF No. 88.)

[60] (Pl.'s Reply Further Supp. Mot. Summ. J. Ex. 3, Expert Report Thomas J. Molony, ECF No. 85.3.)

Childs, 112 N.C. App. 672, 680 (1993). The Court agrees with Defendants that the Molony Report purports to offer expert opinion on the legal effect of particular facts as applied to this case and also to serve as an additional brief in support of Cutter's position that causes Cutter's briefs on the Motion to far exceed the word limits of Rule 7 of the Business Court Rules. Accordingly, the Court will disregard the Molony Report in considering the Cross-Motions.

B. The Cross-Motions

29. Both Cutter and Defendants seek summary judgment on Cutter's remaining claims. The parties' dueling contentions can be divided into two categories: (i) Cutter's claims that depend on the existence of a common law partnership between Cutter and Vojnovic—i.e., the claims for breach of the alleged partnership agreement, breach of Vojnovic's fiduciary duty as a member of the alleged partnership, and judicial dissolution of and an accounting of the alleged partnership—and (ii) Cutter's claim for tortious interference with prospective economic advantage claim, which is based on Vojnovic's alleged interference with Cutter's alleged contract with Jib Jab and does not depend on the existence of a partnership between Vojnovic and Cutter. The Court will examine the partnership-dependent claims first.

1. The Partnership-Dependent Claims[61]

30. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." N.C.G.S. § 59-36. "A contract, express or implied, is essential to the formation of a partnership," *Eggleston v. Eggleston*, 228 N.C. 668, 674

[61] The parties agree that North Carolina law governs Cutter's partnership-dependent claims. Based on the summary judgment record, the Court agrees.

(1948) (cleaned up), and "[a] partnership may be formed by an oral agreement." *Campbell v. Miller*, 274 N.C. 143, 149 (1968). "Even without proof of an express agreement to form a partnership, a voluntary association of partners may be shown by their conduct." *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 577 (1992). In particular, "[a] partnership may be inferred from all the circumstances, so long as the circumstances demonstrate a meeting of the minds with respect to the material terms of the partnership agreement." *Compton v. Kirby*, 157 N.C. App. 1, 11 (2003). Thus, a partnership may be implied "based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such." *Id.* (quoting *Eggleston*, 228 N.C. at 674). "[C]o-ownership and sharing of any actual profits are indispensable requisites for a partnership." *Wilder v. Hobson*, 101 N.C. App. 199, 202 (1990).

31. N.C.G.S. § 59-37 provides rules to determine whether a partnership exists. Of particular relevance here, section 59-37(3)–(4) specifically provides as follows:

> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> a. As a debt by installments or otherwise,
> b. As wages of an employee or rent to a landlord,
> c. As an annuity to a widow or representative of a deceased partner,
> d. As interest on a loan, though the amount of payment vary with the profits of the business,
> e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.[62]

[62] N.C.G.S. § 59-37.

32. Cutter contends that he and Vojnovic entered into a partnership to purchase Jib Jab because they agreed to split profits 50/50 and to a division of labor and responsibility for the pursuit of the Jib Jab opportunity.[63] Cutter also offers evidence that he and Vojnovic occasionally referred to each other as "partners."[64] Cutter argues that this evidence entitles him to a judgment as a matter of law that he and Vojnovic were partners in the Jib Jab opportunity or, alternatively, at a minimum, precludes summary judgment for Defendants.

33. Defendants reject Cutter's contentions and argue that there was no meeting of the minds concerning the essential terms of any alleged partnership agreement between them. In particular, Defendants argue that the undisputed evidence shows that Cutter and Vojnovic never agreed to all the essential terms of a partnership, including, in particular, to share losses jointly or to the terms and sources for the financing of the Jib Jab purchase.[65] Defendants contend that without agreement to these terms, no partnership existed as a matter of law, and Cutter's claims must be dismissed.

34. The Court agrees with Defendants.

---

[63] (Pl.'s. Mem. Law Supp. Mot. Summ. J. 8, ECF No. 68.)

[64] (*See, e.g.*, Aff. J. Alexander Heroy, dated 25 September 2023 Ex. C, ECF No. 67.3; Aff. J. Alexander Heroy, dated 25 September 2023 Ex. J, ECF No. 67.10.)

[65] (Mem. Law Supp. Defs.' Mot. Summ. J. 13–18 [hereinafter "Defs.' Br. Supp."], ECF No. 73.)

35. First, our courts have held that for a partnership to exist, the parties must agree to share profits *and losses* in equal or specified portions. *See, e.g.*, *Johnson v. Gill*, 235 N.C. 40, 44–45 (1952) ("To make a partnership, two or more persons should combine their property, effects, labor, or skill in a common business or venture, and share the profits *and losses* in equal or specified proportions[.]" (emphasis added)); *see also, e.g.*, *Reason v. Barfield*, 2023 NCBC LEXIS 46, *12 (N.C. Super. Ct. Mar. 24, 2023) ("[A partnership] agreement is most often expressed optimistically as one to share profits; however, the reverse is true as well. Partners or co-adventurers must also agree to bear responsibility for any losses the business incurs."); *La Familia Cosmovision, Inc. v. Inspiration Networks*, 2014 NCBC LEXIS 52, *16–22 (N.C. Super. Ct. Oct. 20, 2014) (relying, in part, on parties' lack of agreement to share losses to conclude that no partnership existed between them and concluding that "[t]he general rule under the Uniform Partnership Act, and other law, is that an agreement to share losses as well as profits is essential to the existence of a partnership." (citation omitted)).[66]

[66] Other jurisdictions also recognize this rule. *See, e.g.*, *Eagan v. Gory*, 374 Fed. Appx. 335, 339 (3d Cir. 2010) ("The obligation to share losses 'is one of the most important indicia of a partnership' ") (quoting *Yonadi v. Comm'r*, 21 F.3d 1292, 1297 (3d Cir. 1994)); *Van Hoose v. Smith*, 355 Mo. 799, 804 (1946) (Under Missouri law, "it is not sufficient to create a partnership that the parties were to share the profits of a given enterprise or transaction. They must also have agreed, that is, intended to share the losses and to become partners."); *True v. Hi-Plains Elevator Mach., Inc.*, 577 P.2d 991 (Wyo. 1978) (Under Wyoming law, absence of a "mutual interest" to share "in the profits derived from the venture and the losses sustained in its operation" is "conclusive evidence that a partnership . . . does not exist[.]"); *Grunstein v. Silva*, 2014 Del. Ch. LEXIS 167, at *53, (Del. Ch. Sept. 5, 2014) (Under Delaware law, "the hallmark of a partnership is the common obligation to share losses as well as profits[.]" (cleaned up)).

36. While Cutter and Vojnovic agree that they agreed to share profits, it is undisputed that neither party has offered evidence that they agreed to share any losses that the alleged partnership might suffer. To the contrary, Cutter's testimony establishes that he and Vojnovic did not reach such an agreement:

> Q. Was there any understanding about what would happen if like – to the losses? Who would – would incur the losses?
>
> A. No.
>
> Q. There was no understanding about that?
>
> A. No.[67]

37. The Court thus finds that Cutter and Vojnovic's failure to reach an agreement concerning the sharing of losses is fatal to Cutter's contention that he and Vojnovic entered into an enforceable partnership agreement to purchase Jib Jab. *See, e.g.*, *Reason*, 2023 NCBC LEXIS 46, at *14 (recognizing that a plaintiff must "present evidence that the parties' agreement was not limited to sharing only the upside of their venture").

38. Nevertheless, even if the absence of an agreement to share losses was not determinative, that fact, when combined with other undisputed evidence discussed below, further compels the conclusion that Cutter and Vojnovic did not enter into an enforceable partnership agreement as a matter of law.

39. For example, it is undisputed that Cutter never agreed to put his personal assets at risk at any time and that he consistently refused to guarantee or assume

[67] (Cutter Dep. 77:6–12, ECF No. 70.11.)

personal liability on any financing for the alleged partnership–a requirement consistently demanded by every lender.[68] Indeed, Vojnovic was the only party to assume personal liability.[69] The North Carolina courts have found that a partnership did not exist where, as here, one of the alleged partners did not bear any risk of loss. *See, e.g.*, *Rothrock v. Naylor*, 223 N.C. 782, 787–88 (1944) (finding existence of owner-independent contractor relationship rather than partnership, noting that one party bore no risk of any possible loss); *La Familia Cosmovision, Inc.*, 2014 NCBC LEXIS 52, *20–21 (finding no partnership in part because plaintiff did not share in any risk of loss).

40. The evidence is also undisputed that Cutter and Vojnovic never reached an agreement concerning the financing for the proposed purchase. Financing was critical to Cutter and Vojnovic's ability to purchase Jib Jab[70] and clearly was a material term of their purported partnership agreement, yet the evidence shows that Cutter and Vojnovic could never agree to the same financing terms, with the same lender, at the same time. Although Cutter and Vojnovic hoped to purchase Jib Jab together, their inability to agree to this essential term of their contemplated transaction prevented them from ever becoming co-owners and sharing profits in the

[68] (Cutter Dep. 141:4–16, ECF No. 70.11; 2d Vojnovic Aff. ¶ 28.)

[69] (Vojnovic Dep. 196:3–11 (ECF No. 80.2), 301:15–17 (ECF No. 67.5), 334:7–22 (ECF No. 67.5); 2d Vojnovic Aff. ¶¶ 41–44, 49, 50–53, Ex. D.)

[70] (Aff. J. Alexander Heroy, dated 25 September 2023 Ex. G, ECF No. 67.7; 2d Aff. J. Alexander Heroy, dated 25 October 2023 Ex. V, ECF No. 80.3; *see also* Cutter Dep. 126:15–27:7 ("Unless you get the money, you don't have a deal."), ECF No. 70.11; Vojnovic Dep. 119:21–25, ECF No. 80.2).

purported common law partnership and is fatal to Cutter's claim that a partnership existed between them. *See, e.g.*, *Miller v. Rose*, 138 N.C. App. 582, 590 (2000) (concluding that no partnership existed between alleged partners who did not agree to financing for their contemplated transaction because financing was "essential" to the purported partnership); *Compton*, 157 N.C. App. at 11 (requiring "a meeting of the minds with respect to the material terms of the partnership agreement").[71]

41. The undisputed evidence also establishes that the relationship between Cutter and Vojnovic lacked many indicia of an enforceable partnership. For example, they did not register a partnership name, make capital contributions to a partnership entity, set up bank accounts for a purported partnership, or file partnership tax returns. *See, e.g.*, *La Familia Cosmovision, Inc.*, 2014 NCBC LEXIS 52, at *22 (identifying "a variety of traditional indicia supporting the existence of a partnership"). They also never shared profits since they never got their purported partnership off the ground.

---

[71] Plaintiff places great weight on an unpublished opinion of the Court of Appeals, *Grub, Inc. v. Sammy's Seafood House & Oyster Bar, LLC*, No. COA14-861, 2015 N.C. App. LEXIS 330 (Apr. 21, 2015), as support for its contention that a partnership existed between Cutter and Vojnovic. Unlike here, however, *Grub, Inc.* did not involve an issue about financing the acquisition of property. Moreover, Rule 30(e) of the North Carolina Rules of Appellate Procedure expressly provides both that "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority" and further that "citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case." N.C.R. App. P. 30(e). Given that *Miller*, *Compton*, *La Familia Cosmovision, Inc*. and the other published decisions cited above adequately supply the rule of decision here, the Court finds little reason to find an exception to Rule 30(e) and to consider *Grub*, *Inc.* in connection with the Cross-Motions.

42. It is also undisputed that, to purchase Jib Jab, Cutter and Vojnovic established Holdings as a Georgia limited liability company—not as a North Carolina general partnership—indicating that both men sought to pursue their business relationship together with limited liability protections that would have been unavailable to them had they proceeded as partners in a general partnership. Also, the undisputed evidence shows that, at all times, Vojnovic was Holdings' only registered owner, so the two men never "co-owned" any purported partnership property.[72] *See Wilder*, 101 N.C. App. at 202 (noting that "co-ownership" is an "indispensable requisite[ ] for a partnership.").

43. Further, while Cutter argues that he and Vojnovic agreed to a division of labor for the alleged partnership, the testimony from both Cutter and Vojnovic indicates that this agreement remained at a high level—Cutter would obtain financing and close the deal and Vojnovic would handle operations—without a more detailed division of responsibility.[73] Since a partnership agreement will not be enforced unless it reflects agreement as to all material terms, *see*, *e.g.*, *Compton*, 157 N.C. App. at 11, Cutter and Vojnovic's failure to agree to specific, material terms of the division of labor within their purported partnership is further undisputed evidence that a partnership did not exist between them.

---

[72] (*See* Cutter Dep. 119:18–20:4, ECF Nos. 67.1, 70.11; Vojnovic Aff. ¶¶ 34, 36.)

[73] (Vojnovic Dep. 97:21–98:1 (ECF Nos. 67.5, 80.2), 99:23–100:4 (ECF No. 80.2); Cutter Dep. 78:8–19, ECF No. 70.11.)

44. Finally, the fact that Cutter and Vojnovic may have referred to themselves as partners from time to time is without determinative legal effect. As our Supreme Court has made clear, "[i]t is appropriate to regard the substance, not the form, of a transaction as controlling, and [a court is] not bound by the labels which have been appended to the episode by the parties." *Branch Banking & Tr. Co. v. Creasy*, 301 N.C. 44, 53 (1980); *see, e.g.*, *MAS Assocs., LLC v. Korotki*, 465 Md. 457, 484 (2019) ("Nor does the use of words like 'partner' or 'owner' magically transform a given association into a partnership."); *Murphy v. McDermott, Inc.*, 807 S.W.2d 606, 613 (Tex. Ct. App. 1991) (holding that the fact that one party referred to another as a partner was a legal conclusion that "does not give rise to an issue of a disputed fact[.]").

45. Accordingly, based on the above, the Court concludes as a matter of law on the undisputed evidence of record that a partnership did not exist between Cutter and Vojnovic in connection with the Jib Jab opportunity. As a result, the Court will deny Plaintiff's Motion and grant Defendants' Motion as to Cutter's claims for breach of the alleged partnership agreement, breach of Vojnovic's fiduciary duty as a member of the alleged partnership, and judicial dissolution of and an accounting of the alleged partnership. Those claims shall therefore be dismissed with prejudice.

2. <u>The Tortious Interference with Prospective Economic Advantage Claim</u>

46. The parties also seek summary judgment on Cutter's claim against Vojnovic for tortious interference with prospective economic advantage, arguing that, but for Vojnovic's interference and usurpation of the Jib Jab opportunity, Cutter would have

been able to purchase Jib Jab. Defendants argue that Cutter has not offered evidence showing that he could have purchased Jib Jab without Vojnovic's participation.

47. Tortious interference with prospective economic advantage "arises when a party interferes with a business relationship 'by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, [ ] if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights.' " *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 701 (2016) (quoting *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559 (1965)). "A plaintiff's mere expectation of a continuing business relationship is insufficient to establish such a claim. Instead, a plaintiff must produce evidence that a contract would have resulted but for the defendant's malicious intervention." *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 701 (internal citation omitted).[74]

[74] Defendants contend that under North Carolina's choice of law rules, Cutter's tortious interference claim may be governed by the laws of North Carolina (Cutter's residence), Georgia (Vojnovic's residence), or Ohio (the restaurants' location). (Defs.' Br. Supp. 21.) Plaintiff argues that North Carolina law applies to this claim. (Pl.'s Mem. Law Opp'n Defs. Mot. Summ. J. 16, ECF No. 79.) All parties agree, however, as does the Court, that the dispute is academic because the law concerning tortious interference with prospective economic advantage is substantially the same in each of these States. *Compare Beverage Sys. of the Carolinas, LLC,* 368 N.C. at 701, *with Chrvala v. Borden, Inc.*, 14 F.Supp.2d 1013, 1023 (S.D. Ohio) ("Under Ohio law, to prevail on a claim for tortious interference with a prospective business opportunity, a plaintiff must demonstrate: 1) the existence of the prospect of a business relationship; 2) that defendant knew of the plaintiff's prospective relationship; 3) that defendant intentionally and materially interfered with the plaintiff's prospective relationship; 4) without justification; and 5) caused plaintiff to suffer damages."), *and OnBrand Media v. Codex Consulting, Inc.*, 301 Ga. App. 141, 150 (2009) ("To prevail on a claim of tortious interference with business relations, a plaintiff must prove the following elements: (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of a contractual obligation or caused a party or a third party to discontinue

48. Cutter's contention that he could have purchased the restaurant but for Vojnovic's interference is supported only by speculation and conjecture, not admissible evidence. Indeed, while Cutter suggests that he knew individuals he could have either enlisted to operate the business or contacted to help him find an operator,[75] he has not offered evidence identifying any of these individuals and their qualifications and experience, indicating these individuals' willingness to assist Cutter in operating the Jib Jab business, or providing that Cutter even reached out to any of these individuals to gauge their interest in operating Jib Jab. Instead, he posits only his conjecture that he could have found these individuals if he had tried to locate them. Such speculation is insufficient to create an issue of fact under Rule 56. *See, e.g.*, *Henson v. Green Tree Servicing LLC*, 197 N.C. App. 185, 189 (2009) (noting that, under Rule 56, "[t]he plaintiff must offer evidence, beyond mere speculation or conjecture, sufficient for a jury to find every essential element of [its] claim.") (cleaned up); *Ramey Kemp & Assocs. v. Richmond Hills Residential Partners, LLC*, 225 N.C. App. 397, 404 (2013) (requiring party opposing summary judgment to present "admissible evidence, as compared to mere speculation or conclusory assertions, demonstrating the existence of a genuine issue of material fact" once movant provided evidence tending to show a lack of genuine issue of material fact).

---

or fail to enter into an anticipated relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.").

[75] (Cutter Dep. 38:15–39:21, ECF No. 80.1.)

49. Cutter's speculation is also completely at odds with the undisputed evidence establishing that Cutter had no experience or expertise in the restaurant industry, that he had never before bought or invested in a restaurant,[76] that he was not aware of anyone other than Vojnovic who could qualify as Jib Jab's operator,[77] and his testimony that "if [Vojnovic] did not want to partner this deal at this point [November 2019], [Cutter] was not going to go through the effort of trying to find another partner to get the deal done."[78]

50. Similarly, Cutter's contention that he could have obtained funding from other sources, including other equity investors, to purchase Jib Jab is likewise supported only by Cutter's speculation. Cutter has not offered evidence identifying these alleged sources, their willingness and wherewithal to invest in or provide financing for a Jib Jab purchase, the terms of any such investment or available financing, or that Cutter ever contacted any of these sources to gauge their interest in investing in or providing financing for the Jib Jab purchase, much less to obtain their commitment.[79] Indeed, Cutter admits that he "did not go out and try to find other sources of capital" after he refused to discharge Vojnovic's prior SBA loans.[80]

---

[76] (Cutter Dep. 37:15–38:8 (ECF No. 80.1), 46:1–7 (ECF No. 70.11), 68:22–69:1 (ECF No. 93).)

[77] (Cutter Dep. 38:15–18, ECF No. 80.1.)

[78] (Cutter Dep. 71:11–19, ECF Nos. 67.5, 70.11.)

[79] Vojnovic also testified that Cutter claimed to have other available financing options but never identified them with particularity. (Vojnovic Dep. 280:11–24, ECF No. 85.2.)

[80] (Cutter Dep. 176:18–23, ECF No. 70.11.)

51. The undisputed evidence also shows that Cutter's and Vojnovic's attempts to find financing for the Jib Jab purchase were unsuccessful, except for the SBA loan through HomeTrust Bank, and Cutter testified that he could not provide the required personal guarantee for that loan because of his previous SBA loan through ARC.[81] Thus, Cutter's contention that he could have funded the Jib Jab purchase is based solely on speculation, not evidence, and therefore cannot create a disputed material fact under Rule 56. *See, e.g.*, *Henson*, 197 N.C. App. at 189; *Ramey Kemp & Assocs.,* 225 N.C. App. at 404.

52. Accordingly, because Cutter has failed to offer any competent "evidence that a contract would have resulted but for the defendant's malicious intervention," *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 701, Defendants are entitled to summary judgment dismissing Cutter's claim for tortious interference with prospective economic advantage with prejudice. *See also, e.g.*, *Weiler v. DLR Grp.*, 2023 Ohio App. LEXIS 1177, *10–11 (2023) ("In order to substantiate a claim for tortious interference with a prospective business relationship or contract, a plaintiff must include allegations of fact demonstrating the existence of 'an actual prospective contractual relation' that but for the interference, would have been consummated."); *Camp v. Eichelkraut*, 246 Ga. App. 275, 283 (2000) ("An award for tortious interference with prospective business relations cannot be based on speculation that a relationship would develop.").

[81] (Cutter Dep. 135:13–37:12, 141:4–16, ECF No. 70.11.)

V.

CONCLUSION

53. **WHEREFORE**, the Court hereby:

a. **GRANTS** Defendants' Motion to Strike as to paragraphs 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, and 14 of the Cutter Affidavit;

b. **DENIES** Defendants' Motion to Strike as to paragraph 1 of the Cutter Affidavit;

c. **DENIES** Plaintiff's Motion;

d. **GRANTS** Defendants' Motion; and therefore

e. **DISMISSES** Plaintiff's remaining claims **with prejudice**.

SO ORDERED, this the 16th day of February, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge