STATE OF NORTH CAROLINA DURHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CVS001535-310
PATHOS ETHOS, INC., Plaintiff, v. BRAINTAP INC. d/b/a BRAINTAP TECHNOLOGIES, Defendant, and BRAINTAP INC. d/b/a BRAINTAP TECHNOLOGIES, Third-Party Plaintiff, v. NICHOLAS ZALDASTANI, Third-Party Defendant.	**ORDER AND OPINION ON MOTIONS TO DISMISS**

THIS MATTER is before the Court on Plaintiff Pathos Ethos, Inc.'s ("Pathos") Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) ("Pathos's Motion to Dismiss," ECF No. 22) and Third-Party Defendant Nicholas Zaldastani's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Zaldastani's Motion to Dismiss," ECF No. 24, and together with Pathos's Motion to Dismiss, "Motions to Dismiss"). Both Motions to Dismiss are directed to claims asserted by Defendant Braintap Inc. d/b/a Braintap Technologies ("Braintap") in its Counterclaims and Third-Party Complaint ("Countercls.," ECF No. 12).

THE COURT, having considered the Motions to Dismiss, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record,

CONCLUDES that Pathos's Motion to Dismiss should be **GRANTED** in part and **DENIED** in part and that Zaldastani's Motion to Dismiss should be **DENIED**.

J.C. White Law Group PLLC, by James C. White and Gregory P. McGuire, for Plaintiff Pathos Ethos, Inc.

Ward and Smith, P.A., by Christopher S. Edwards and Payton C. Bullard, for Defendant Braintap Inc. d/b/a Braintap Technologies.

Blue LLP, by Dhamian A. Blue, for Third-Party Defendant Nicholas Zaldastani.

Davis, Judge.

INTRODUCTION

1. Braintap, a company that provides subscription services through its mobile application, and Pathos, a software developer, had a business relationship for several years that ultimately went sour. Pathos initiated this lawsuit against Braintap based upon its contention that Braintap had failed to pay various sums due under the parties' contracts. Braintap, in turn, has asserted claims of its own against both Pathos and Braintap's former chief executive officer ("CEO"), Zaldastani, alleging, among other things, that Pathos and Zaldastani colluded to covertly confer upon themselves equity interests in Braintap. In the present Motions to Dismiss, Pathos and Zaldastani seek the dismissal of several of Braintap's claims.

FACTUAL AND PROCEDURAL BACKGROUND

2. The Court does not make findings of fact in connection with a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and instead recites those facts contained in the complaint (or, as here, the counterclaims) and in documents attached to, referred to, or incorporated by reference in the

complaint that are relevant to the Court's determination of the motion. *See, e.g., Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *11 (N.C. Super. Ct. July 12, 2017).

3. Pathos is a North Carolina corporation that maintains its principal place of business in Durham County, North Carolina. (Countercls. ¶ 2.) Pathos is in the business of brand strategy development, digital marketing, and software development. (Countercls. ¶ 14.)

4. Braintap is a Delaware corporation with its principal place of business in Craven County, North Carolina. (Countercls. ¶ 1.) Braintap is a "brain fitness startup," which provides subscription services through its mobile application to customers seeking to "improve [their] brain functions and neuroplasticity." (Countercls. ¶¶ 8–9.)

5. Zaldastani, a resident of Durham County, was hired by Braintap as its CEO in 2018. (Countercls. ¶¶ 3, 10, 12.)

6. In 2019, Zaldastani began working with Pathos's co-founders, Sam and Isaac Park (the "Parks"), and introduced them to Braintap's co-founders, Patrick and Cynthia Porter (the "Porters"). (Countercls. ¶¶ 13–14.)

7. In December 2019, Zaldastani retained Pathos to perform "fractional product management" relating to the development and maintenance of Braintap's mobile application, and on 12 December 2019, Braintap and Pathos entered into a "product management" agreement. (Countercls. ¶¶ 21–22.)

8. Under this agreement, Braintap delegated to Pathos all responsibility for developing and maintaining its mobile application, including analyzing customer insights, product development, and prioritizing and implementing new features that had been previously backlogged in development. (Countercls. ¶¶ 24–25.) In exchange, Braintap promised to pay Pathos a flat fee of $3,000 per month, plus $250 per hour for approved out-of-scope work that would be billed on an ad-hoc basis. (Countercls. ¶¶ 23, 26.)

9. On 25 October 2021, Zaldastani and the Parks represented to Braintap's executives and board members that Pathos intended to make a $100,000 capital investment into Braintap via a cash transfer. (Countercls. ¶¶ 27–28.) However, Pathos never made the promised cash transfer. (Countercls. ¶ 29.)

10. Instead, Pathos billed Braintap for $100,000 in service fees. (Countercls. ¶ 30.) By way of example, from October 2021 to January 2022, Pathos billed Braintap $5,000 per month, in addition to the amounts called for under the product management agreement, for work that it either failed to complete or for work that Braintap had not authorized. (Countercls. ¶ 31.)

11. On 25 October 2021, Zaldastani—without informing or obtaining approval from Braintap's board of directors—issued to Pathos 74,505 shares of series A preferred stock in Braintap as satisfaction of the $100,000 bill for services rendered. (Countercls. ¶¶ 32–34.)

12. Zaldastani and Pathos then allegedly undertook efforts to conceal the stock issuance from Braintap's board of directors. (Countercls. ¶ 35.) As a result,

Braintap continued to pay invoices sent by Pathos for work allegedly performed under the product management agreement. (Countercls. ¶ 36.)

13. On 20 April 2022, Braintap and Pathos entered into a Master Services Agreement ("MSA"). (Countercls. ¶ 56.) Under the terms of the MSA, Pathos would provide specific services to Braintap that would be outlined in separate, individual statements of work ("SOWs"). (Countercls. ¶¶ 57, 62, Ex. F.)

14. On 27 April 2022, Zaldastani and the Porters entered into SOW2 with Pathos, which stated that Pathos would provide to Braintap "strategy, design, and operation services[,]" including: strategic operations, "people management[,]" IT systems, accounting and financial reporting, marketing, marketing operations, sales and support, and "fulfillment" services. (Countercls. ¶¶ 62, 65, Ex. F.) In exchange, as a "Recurring Retainer," Braintap promised to pay Pathos $1,000,000 in four quarterly installments of $250,000. (Countercls. Ex. F.)

15. On 27 May 2022, Zaldastani and Isaac Park negotiated and executed a "simple agreement for future equity" ("SAFE"). (Countercls. ¶ 67, Ex. G.) Under the terms of the SAFE, Pathos represented itself as an "investor" of Braintap's and promised to pay $250,000 in exchange for, among other things, the future "right to certain shares of [Braintap] Capital Stock." (Countercls. ¶ 68, Ex. G.)[1]

[1] The execution of the SAFE had been previously contemplated by the parties when they agreed in SOW2 that "[i]n the event that the SAFE is not granted to Pathos on the Effective Date, then Brain[t]ap shall pay to Pathos a monthly fee of $83,333 for each month (or portion of a month) that Pathos provides the Services prior to the grant of the SAFE." (Countercls. Ex. F.)

16. However, Pathos never actually paid Braintap the $250,000 "payment amount" called for in the SAFE. (Countercls. ¶ 70, Ex. G.) Instead, Pathos accepted the SAFE as satisfaction for one of the SOW2's quarterly installment payments. (Countercls. ¶ 71.)

17. Zaldastani and Pathos undertook efforts to conceal the SAFE from Braintap's board of directors. (Countercls. ¶ 72.) As a result, Braintap continued to pay invoices sent by Pathos for work done under SOW2. (Countercls. ¶ 74.)

18. Zaldastani subsequently entered into various additional SOWs with Pathos, which stated that Pathos would provide Braintap with various support services, including: "director of engineering services[;]" "iOS software engineering services[;]" "Android software engineering services[;]" "cloud software engineering services[;]" and "product management services[.]" (Countercls. ¶¶ 85, 87, 92, 97, 102, 107, Ex. I.)

19. Although Pathos never actually performed the services provided for in those SOWs within the time periods specified therein, Pathos nevertheless billed for—and Braintap paid for—those unperformed services. (Countercls. ¶¶ 86, 88–90, 95, 100, 103–05, 106–07, 109–10.)

20. Zaldastani and Pathos's executives intentionally caused Braintap to be overbilled for duplicative services and for services under the MSA that Pathos never actually provided. (Countercls. ¶¶ 136–37.)

21. In August 2021, Zaldastani made a backdated entry in Braintap's accounting system for December 2020, reflecting that he had received a twenty

percent ownership interest in Braintap's predecessor entity, Excel Management, LLC ("Excel"). (Countercls. ¶¶ 43–44.) However, this entry was false in that Zaldastani had never provided consideration to Excel, served as a member of Excel, or actually owned an economic interest in Excel. (Countercls. ¶¶ 45–46.)

22. In March 2021, Zaldastani converted his purported ownership interest in Excel into common stock of Braintap and issued equivalent shares to himself without informing or obtaining approval from Braintap's board of directors. (Countercls. ¶¶ 48, 50.) Indeed, Zaldastani undertook efforts to conceal his actions from Braintap's board. (Countercls. ¶ 51.)

23. Zaldastani sought to redeem a convertible promissory note for 292,093 shares of series A preferred stock in Braintap in April 2021. (Countercls. ¶ 52.) Once again, he not only failed to inform or obtain approval from Braintap's board of directors, but also made efforts to conceal what he had done. (Countercls. ¶¶ 53–54.)

24. Braintap eventually learned of the above-referenced acts by Zaldastani, and in October 2022, it terminated Zaldastani from his position as CEO. (Countercls. ¶¶ 37, 75, 111, Ex. C.)

25. On 2 November 2022, Braintap terminated the MSA and all outstanding SOWs with Pathos, effective 1 December 2022. (Countercls. ¶ 112.)

26. Braintap and Pathos entered into an escrow agreement on 9 December 2022, whereby Braintap agreed to place a final $200,000 payment in escrow, transferrable to Pathos upon its providing Braintap with "certain assets associated

with Braintap's mobile application, infrastructure, and technology." (Countercls. ¶¶ 114–17, Ex. J.)

27. However, Pathos failed to provide Braintap with—among other things—the BrainTap-Server.pem file and the credentials required to modify and update version two of the "BrainTap Pro Application" ("V2 Application") as well as the Braintap-gitlab-runner.pem file for version three of the "BrainTap Pro Application" ("V3 Application"). (Countercls. ¶¶ 119–20, 132.)

28. On 4 January 2023, the V2 Application experienced catastrophic failures, and without the necessary files, Braintap was unable to modify the application's code or restore service to its customers. (Countercls. ¶¶ 122–23.) Therefore, Braintap "execute[d] an emergency and unplanned migration" to the V3 Application, which required "serious work to circumvent the challenges raised by not having access to the [V3 Application] files." (Countercls. ¶¶ 130, 134.)

29. To date, Braintap has been unable to access or recover important information, including customer data, associated with the V2 Application. (Countercls. ¶¶ 121, 124–25.)

30. On 25 March 2024, Pathos initiated this lawsuit by filing a Complaint in Durham County Superior Court naming Braintap and Ward & Smith, P.A. ("Ward & Smith"), a law firm, as Defendants. (ECF No. 3.) In the Complaint, Pathos asserted claims against Braintap for breach of the escrow agreement, breach of the MSA and SOW2, and for unfair and deceptive trade practices ("UDTP"). Pathos also

asserted a claim for injunctive relief against Ward & Smith in its capacity as the escrow agent.

31. This action was designated as a complex business case on 2 April 2024 and assigned to the undersigned. (ECF Nos. 1–2.)

32. On 16 April 2024, the Court entered an Order on Joint Motion to Interplead Funds authorizing Ward & Smith to deposit the disputed escrowed funds with the Durham County Clerk of Superior Court and dismissing the law firm as a party to this action. (ECF No. 7.)

33. Braintap filed an Answer, Counterclaims, and Third-Party Complaint on 28 May 2024 in which it asserted counterclaims against Pathos for declaratory judgment, UDTP, breach of the escrow agreement, breach of the MSA, and unjust enrichment. Braintap also brought third-party claims against Zaldastani for breach of fiduciary duty and declaratory judgment.[2]

34. On 29 July 2024, Pathos filed its Motion to Dismiss pursuant to Rules 12(b)(1) and (6). Zaldastani, in turn, filed his Motion to Dismiss based on Rule 12(b)(1) on 7 August 2024.

35. On 26 November 2024, the Court held a hearing on the Motions to Dismiss at which all parties were represented by counsel.

36. The Motions to Dismiss have been fully briefed and are now ripe for resolution.

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[2] The Third-Party Complaint contains two separate breach of fiduciary claims against Zaldastani.

LEGAL STANDARD

37. A motion brought under Rule 12(b)(1) challenges a court's jurisdiction over the subject matter of the claimant's claims. N.C. R. Civ. P. 12(b)(1). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest," *In re T.R.P.*, 360 N.C. 588, 590 (2006), and has been defined as "a court's legal authority to adjudicate the kind of claim alleged." *In re McClatchy Co., LLC*, 386 N.C. 77, 85 (2024) (cleaned up). "[T]he proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465 (1964) (cleaned up).

38. In determining the existence of subject matter jurisdiction, the Court may consider matters outside the pleadings. *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 491 (2004). However, "if the trial court confines its evaluation to the pleadings, the court must accept as true the [claimant]'s allegations and construe them in the light most favorable to the [claimant]." *Munger v. State*, 202 N.C. App. 404, 410 (2010) (quoting *Dep't of Transp. v. Blue*, 147 N.C. App. 596, 603 (2001)).

39. In ruling on a motion to dismiss under Rule 12(b)(6), the Court may only consider the complaint and "any exhibits attached to the complaint[,]" *Krawiec v. Manly*, 370 N.C. 602, 606 (2018), in order to determine whether "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory," *Forsyth Mem'l Hosp., Inc. v. Armstrong World Indus., Inc.*, 336 N.C. 438, 442 (1994) (cleaned up).

The Court must view the allegations in the complaint "in the light most favorable to the non-moving party." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017) (cleaned up).

40. "It is well established that dismissal pursuant to Rule 12(b)(6) is proper when (1) the complaint on its face reveals that no law supports the [claimant'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 [claimant's] claim." *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (cleaned up).

ANALYSIS

41. As a preliminary matter, the Court notes that the present Motions to Dismiss only relate to certain counterclaims and third-party claims asserted by Braintap.[3] Pathos's claims in the Complaint are unaffected.

42. As discussed in detail below, Pathos and Zaldastani contend that several of the claims asserted by Braintap should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). The Court will address their respective arguments on the jurisdictional issue together because they are identical. The Court will then discuss Pathos's Motion to Dismiss based on Rule 12(b)(6) in which it seeks dismissal of Braintap's counterclaim for UDTP for failure to state a valid claim for relief.

[3] For clarity, Zaldastani's Motion to Dismiss encompasses all of the third-party claims asserted against him by Braintap (that is, a claim for declaratory judgment and two claims for breach of fiduciary duty), and Pathos's Motion to Dismiss is directed toward Braintap's counterclaims against it for declaratory judgment and UDTP. The remainder of Braintap's counterclaims against Pathos (which consist of claims for breach of the escrow agreement, breach of the MSA, and unjust enrichment) are not affected by Pathos's Motion to Dismiss.

A. Subject Matter Jurisdiction

43. Collectively, Zaldastani and Pathos contend that this Court lacks subject matter jurisdiction as to (1) both of Braintap's claims for declaratory judgment (one of which is asserted against Pathos and the other against Zaldastani) and (2) Braintap's two claims for breach of fiduciary duty (both of which are asserted against Zaldastani).

44. This is so, they assert, because Delaware's Court of Chancery possesses exclusive jurisdiction over such claims pursuant to Del. Code Ann. tit. 8, § 205.

45. Del. Code Ann. tit. 8, § 205(a) provides that:

> [U]pon application by the corporation, any successor entity to the corporation, any member of the board of directors, any record or beneficial holder of valid stock or putative stock, any record or beneficial holder of valid or putative stock as of the time of a defective corporate act ratified pursuant to § 204 of this title, or any other person claiming to be substantially and adversely affected by a ratification pursuant to § 204 of this title, the [Delaware] Court of Chancery may:
>
> > (1) Determine the validity and effectiveness of any defective corporate act ratified pursuant to § 204 of this title;
> >
> > (2) Determine the validity and effectiveness of the ratification of any defective corporate act pursuant to § 204 of this title;
> >
> > (3) Determine the validity and effectiveness of any defective corporate act not ratified or not ratified effectively pursuant to § 204 of this title;
> >
> > (4) Determine the validity of any corporate act or transaction and any stock, rights or options to acquire stock; and
> >
> > (5) Modify or waive any of the procedures set forth in § 204 of this title to ratify a defective corporate act.

Del. Code Ann. tit. 8, § 205(a).

46. The portion of § 205 upon which the arguments of Pathos and Zaldastani are specifically based is subpart (e), which states that "[t]he [Delaware] Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions brought under this section." Del. Code Ann. tit. 8, § 205(e) (emphasis added).

47. Pathos and Zaldastani assert that each of the above-referenced claims pled by Braintap are subject to § 205(e) because they require a judicial determination as to the alleged invalidity of corporate acts by a Delaware corporation within the scope of § 205(a).

48. Specifically, Pathos contends that the declaratory judgment claim brought against it seeks a ruling as to whether it holds a valid ownership interest in Braintap based on Zaldastani's issuance of shares in the company to Pathos as well as the execution of the SAFE agreement. This issue, Pathos asserts, is the precise kind of claim described in § 205(a) over which Delaware's Court of Chancery would have exclusive jurisdiction based on § 205(e).

49. Similarly, Zaldastani argues that Braintap's declaratory judgment claim against him relates to the question of whether he actually owns any shares in the company as a result of (1) his attempt to convert a membership interest in Excel into ownership of Braintap's common stock; and (2) his effort to redeem a convertible promissory note into series A preferred stock in Braintap. Zaldastani further contends that the two breach of fiduciary duty claims against him arise from these same acts and—as a result—are likewise encompassed by § 205.

50. The Court rejects Zaldastani's and Pathos's argument for three reasons.

51. First, and most basically, subpart (e) of § 205—by its express language—makes clear that it applies only to "actions brought under this section." Del. Code Ann. tit. 8, § 205(e) (emphasis added). Here, none of Braintap's claims at issue give any indication that they have been brought under Delaware law at all—much less under § 205. As a result, on that ground alone, subpart (e) is inapplicable.

52. Second, their argument also fails as a matter of statutory interpretation. The logical meaning of § 205(e)'s "exclusive jurisdiction" provision is that if a claim invoking one of the subjects discussed in § 205(a) is brought *in the courts of Delaware*, then the Delaware Court of Chancery is the appropriate forum within that state's court system.

53. This interpretation has been adopted by this Court, by Delaware courts, and by courts in other jurisdictions in response to similar arguments made by litigants based on analogous provisions of Delaware statutes. *See, e.g., Futures Grp. v. Brosnan*, 2023 NCBC LEXIS 7, at *9 (N.C. Super. Ct. Jan. 19, 2023) (interpreting a similar Delaware statutory provision as simply meaning that "the Court of Chancery would be the proper court in which to pursue this claim *if the case were pending in Delaware*" (emphasis added)); *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 236 (Del. Ch. 2014) (noting that "a grant by the General Assembly of 'exclusive' jurisdiction to [the Court of Chancery] for claims arising under a particular statute does not preclude a party from asserting a claim arising under that statute in a different jurisdiction"); *In re Kloiber*, 98 A.3d 924, 939 (Del. Ch. 2014) (holding that "[w]hen a Delaware state statute assigns exclusive jurisdiction to a

particular Delaware court, the statute is allocating jurisdiction among the Delaware courts" and that "[t]he state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case"), *vacated on other grounds*, 2014 Del. Ch. LEXIS 190 (Sept. 3, 2014); *Owen v. Array US, Inc.*, 2023 N.Y. Misc. LEXIS 5329, at *1–2 (N.Y. Supr. Ct. Sept. 5, 2023) (denying a motion to dismiss for lack of subject matter jurisdiction and holding that Del. Code Ann. tit. 8, § 205(e) "does not divest New York of its interest in adjudicating th[e] matter" or "mandate that th[e] claim be tried in Delaware").

54. Third, even if it was, in fact, the intent of the Delaware legislature to deprive courts in all other states of jurisdiction to hear claims that could have been brought under § 205, it is hard to conceive of how such a mandate would pass constitutional muster.

55. In rejecting arguments similar to those being made by Pathos and Zaldastani here, a Delaware court has expressly noted the constitutional problems that would exist under that scenario. *See In re Kloiber*, 98 A.3d at 939 (stating that a state statute purporting to grant sole jurisdiction to a Delaware court over certain types of claims to the exclusion of courts in other states would violate the Full Faith and Credit Clause because "Delaware . . . cannot unilaterally preclude a sister state from hearing claims under its law" and that any attempt to do so would "not be giving constitutional respect to the judicial proceedings of [its] sister state[s]").

56. Therefore, Pathos's and Zaldastani's Motions to Dismiss based on lack of subject matter jurisdiction are **DENIED**.

B. UDTP

57. Braintap premises its UDTP claim on three specifically identified categories of acts attributable to Pathos: (1) "charging for services it did not provide;" (2) "overbilling or duplicative billing for services it did provide;" and (3) "making [] false representations concerning capital investments made in Braintap in order to induce issuance purported [sic] equity in Braintap." (Countercls. ¶ 155.)

58. "To prevail on a claim of unfair and deceptive trade practice a [claimant] must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the [claimant] or to his business." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460–61 (1991).

59. Pathos seeks dismissal of Braintap's UDTP claim on two grounds.

60. First, Pathos contends that the claim fails to the extent it is premised on "false representations regarding capital investments in Braintap" because such misrepresentations relate to securities transactions, which are not "in or affecting commerce" for purposes of a UDTP claim.

61. Under the Unfair and Deceptive Trade Practices Act ("UDTPA"), commerce generally "includes all business activities, however denominated[.]"[4] N.C.G.S. § 75-1.1(b). North Carolina courts have broadly defined "business activity" as the "regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it

[4] Although not relevant here, professional services rendered by a member of a learned profession are excluded from the definition of "commerce." N.C.G.S. § 75-1.1(b).

is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 579 (1991). Although the "in or affecting commerce" element of a UDTP claim is broad, it does not encompass "all wrongs" committed between businesses. *Sterner v. Penn*, 159 N.C. App. 626, 632–33 (2003). "Certain events . . . are deemed to be extraordinary events outside of the regular, day-to-day activities or affairs of a business. Such extraordinary events are, therefore, not deemed 'business activities' and are not 'in or affecting commerce.'" *DeGorter v. Capitol Bancorp Ltd.*, 2011 NCBC LEXIS 29, at *10 (N.C. Super. Ct. July 29, 2011) (cleaned up).

62. Our Supreme Court has held that transactions involving securities are "extraordinary event[s] . . . [u]nlike [the] regular purchase and sale of goods, or whatever else the enterprise was organized to do[,]" such that "they are not . . . 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying [the UDTPA]." *HAJMM Co.*, 328 N.C. at 594.

63. This Court has previously summarized the development of the so-called "Securities Exemption" to the UDTPA as follows:

> [The Securities Exemption to the UDTPA] ha[s] [its] genesis in the North Carolina Supreme Court's decision in *Skinner v. E. F. Hutton & Co., Inc.*, 314 N.C. 267 (1985). There, the Court held that "securities transactions are beyond the scope of N.C.G.S. § 75-1.1" in part because securities transactions are "'already subject to pervasive and intricate regulation'" under the North Carolina Securities Act and the federal securities laws. *Id.* at 275 (quoting *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 167–68 (4th Cir. 1985)).
>
> In *HAJMM*, the North Carolina Supreme Court expanded the securities exception to include "the trade, issuance and redemption of corporate securities or similar financial instruments . . . ." 328 N.C. at 594.
>
> In *Oberlin*, our Court of Appeals expanded the reach of the UDTPA securities exception. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52

> (2001). In that case, plaintiff Oberlin Capital, L.P. agreed to provide working capital for an automotive parts corporation. *Id.* at 54.
>
> . . .
>
> Our Court of Appeals held that "[b]ecause the loan agreement at issue here, which also granted Oberlin the right to purchase stock in [the debtor corporation] in the future, was primarily a capital raising device, it was not 'in or affecting commerce' for the purposes of Chapter 75." *Id.* at 62.

Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc., 2007 NCBC LEXIS 17, at *7–10 (N.C. Super. Ct. June 11, 2007).

64. Thus, given the expansive scope with which our appellate courts have interpreted the Securities Exemption to the UDTPA, "[t]he only relevant question is whether securities were involved in the transaction." *DeGorter*, 2011 NCBC LEXIS 29, at *15; *see Aym Techs., LLC v. Scopia Capital Mgmt. LP*, 2021 NCBC LEXIS 29, at *30 (N.C. Super Ct. Mar. 31, 2021) (dismissing a claim for UDTP based on misrepresentations made during the course of equity purchase negotiations "[b]ecause our courts have repeatedly held that the only question for the [c]ourt under [the Securities Exemption to the UDTPA] is whether the basis for the transaction involved securities" (cleaned up)); *see also White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 304 (2004) (noting that "the question is whether the transactions at issue involved securities or other financial instruments involved in raising capital").[5]

[5] Braintap cites our Supreme Court's 2021 decision in *Nobel v. Foxmoor Grp., LLC*, 380 N.C. 116 (2021), for the proposition that the Supreme Court has recently taken a more restrictive approach on the applicability of the Securities Exemption. Although it is true that the Supreme Court in *Nobel* addressed the applicability of the exemption in that case based on the reasoning originally articulated in *HAJMM*, it did not purport to overrule any of the cases from North Carolina's lower courts since *HAJMM* was decided. Nor did it contain language expressly cautioning against a more expansive interpretation of the Securities Exemption.

65. Here, it cannot be disputed that with regard to key occurrences forming the basis for Braintap's UDTP claim, "securities were involved in the transaction." Clearly, the issuance of 74,505 shares of series A preferred stock and the issuance of the SAFE relate to securities. Specifically, Braintap's counterclaims allege that:

> On or about October 25, 2021, Zaldastani and Pathos executives Sam and Isaac Parks represented to Braintap executives and board members that Pathos intended to make a $100,000 capital investment into Braintap.
>
> Zaldastani, Sam, and Isaac represented that Pathos' investment would be made through cash [sic] transfer to Braintap.
>
> . . .
>
> Upon information and belief, on October 25, 2021, Zaldastani purported to cause Braintap to issue 74,505 shares of series A preferred stock in Braintap to Pathos as satisfaction for the $100,000 of wrongfully billed charges.
>
> . . .
>
> Upon information and belief, after Zaldastani purported to cause Braintap to issue 74,505 shares of series A preferred stock to Pathos, Zaldastani and Pathos concealed the issuance of these shares from Braintap board members and executives.
>
> . . .
>
> In May 2022, Pathos purportedly acquired a simple agreement for equity ("SAFE") from Braintap.
>
> . . .
>
> The SAFE was negotiated among Zaldastani and Pathos. It purports to grant Pathos equity in Braintap's [sic] in exchange for a $250,000 payment from Pathos.
>
> . . .

Absent clear direction from the Supreme Court to the contrary, this Court must follow the cases decided since *HAJMM* that have expanded the scope of the exemption.

> Pathos never provided Braintap with the $250,000 payment called for in the SAFE.
>
> . . .
>
> Upon information and belief, Zaldastani and Pathos concealed the purported issuance of the SAFE from Braintap board members and executives.

(Countercls. ¶¶ 27–30, 32, 35, 67–68, 70–72, 74.)

66. Such transactions unquestionably involve securities and are at the heart of Braintap's UDTP allegation that Pathos made "false representations concerning capital investments made in Braintap in order to induce issuance purported [sic] equity in Braintap." (Countercls. ¶ 155.)

67. Indeed, the Court notes that Braintap's declaratory judgment claim against Pathos is expressly based on the issue of whether the securities allegedly issued to Pathos conferred upon it a legally valid ownership interest in Braintap. (*See* Countercls. ¶¶ 138–43.) Therefore it can hardly be said that the role played by securities in Braintap's counterclaims is a minor one.

68. Accordingly, the portions of Braintap's UDTP claim based upon the alleged issuance to Pathos of shares or equity in Braintap fail as a matter of law based on the Securities Exemption.

69. Second, Pathos contends that Braintap's remaining allegations in support of its UDTP claim—even when read in the light most favorable to Braintap—allege only intentional breaches of contract, which are insufficient to support a UDTP claim.

70. North Carolina courts have repeatedly held that "[a]ctions for [UDTP] are distinct from actions for breach of contract, and a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *McDonald v. Bank of N.Y. Mellon Tr. Co.*, 259 N.C. App. 582, 589 (2018) (cleaned up). "When a [claimant] alleges a UDTP violation based upon a breach of contract, the [claimant] must show substantial aggravating circumstances attending the breach[.]" *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 281 N.C. App. 312, 320 (2022) (cleaned up). "As a general proposition, unfairness or deception either in the formation of the contract or in the circumstances of its breach may establish the existence of substantial aggravating circumstances[.]" *SciGrip, Inc. v. Osae*, 373 N.C. 409, 426 (2020) (cleaned up). However, "[i]t is not enough to allege [the] aggravating or egregious *results* of a breach. If that were the case, then any contract dispute that results in serious losses could present a valid UDTPA claim, a result North Carolina courts have repeatedly rejected." *Edwards v. Genex Coop., Inc.*, 777 Fed. Appx. 613, 623 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 853 (2020) (cleaned up).

71. Deceptive representations made during contract formation and inducing a party to enter into a contract "while having no intention of keeping the promises made" are "classic example[s] of [] aggravating circumstance[s]." *Pee Dee Elec. Membership Corp. v. King*, 2018 NCBC LEXIS 22, at *18–19 (N.C. Super. Ct. Mar. 15, 2018) (cleaned up).

72. However, as this Court has observed:

> It is far more difficult to allege and prove egregious circumstances *after* the formation of the contract. One reason for this is that disputes concerning the circumstances of the breach are often bound up with one party's exercise of perceived rights and remedies under the contract. Even where the exercise of contractual rights is "allegedly contrary to the terms of the agreement," the legal question concerns the interpretation and application of the agreement—that is, whether the contract has been breached. *Taylor v. United States*, 89 F. Supp. 3d 766, 773 (E.D.N.C. 2014) (cleaned up). These claims are "best resolved by simply determining whether the parties properly fulfilled their contractual duties." *Heron Bary Acquisition, LLC v. United Metal Finishing, Inc.*, 245 N.C. App. 378, 383 (2016) (cleaned up).
>
> Thus, the North Carolina Court of Appeals has repeatedly stressed that a section 75-1.1 violation "is unlikely to occur during the course of contractual performance." *Id*.

Post v. Avita Drugs, LLC, 2017 NCBC LEXIS 95, at *5 (N.C. Super. Ct. Oct. 11, 2017).

73. Substantial aggravating circumstances after contract formation typically require: (1) the forgery or destruction of documents; (2) concealment of a breach coupled with conduct designed to deter investigation into the breach; or (3) intentional deception designed to allow the defendant to receive the benefits of the contract. *In re Randolph Hosp., Inc.*, 2024 Bankr. LEXIS 206, at *93 (Bankr. M.D.N.C. Jan. 29, 2024) (cleaned up); *see, e.g.*, *Garlock v. Henson*, 112 N.C. App. 243, 245–46 (1993) (finding substantial aggravating circumstances where the defendant "forged a bill of sale in an attempt to extinguish plaintiff's ownership interest"); *Foley v. L & L Int'l, Inc.*, 88 N.C. App. 710, 714 (1988) (sufficient aggravating circumstances existed where the defendant "ke[pt] a customer's down payment on a car for seven months without even attempting to get the car it had promised to obtain, while falsely claiming that the car had been obtained and would be delivered shortly").

74. The remainder of Braintap's allegations pled with any degree of specificity concern Pathos's performance of its various contracts with Braintap and essentially amount to claims of overbilling and intentional breaches of contract. However, claims for UDTP require more. *See W&W Partners, Inc. v. Ferrell Land Co., LLC*, 2019 NCBC LEXIS 104, at *15 (N.C. Super. Ct. Dec. 6, 2019) (cleaned up) (holding that "defendant's knowing and intentional overbilling of the plaintiff . . . during the performance of the contract [was] not substantial aggravating circumstances").

75. For these reasons, Pathos's Motion to Dismiss Braintap's UDTP claim is **GRANTED**, and that claim is **DISMISSED** with prejudice.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Zaldastani's Motion to Dismiss is **DENIED**.

2. Pathos's Motion to Dismiss is **GRANTED** as to Braintap's claim for UDTP, and that claim is **DISMISSED** with prejudice.

3. In all other respects, Pathos's Motion to Dismiss is **DENIED**.

SO ORDERED, this the 9th day of December, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases