

STATE OF NORTH CAROLINA
COUNTY OF CRAVEN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 11-CVS-00154

JOHN ANDREW SNYDER, M.D. and)
JAMES KENNEDY TARVER, M.D.,)
Individually and Derivatively for)
COASTAL RADIOLOGY)
ASSOCIATES, PLLC, CRA)
HOLDINGS, LLC, and CORAD)
INVESTMENTS, LLC,)
Plaintiffs,)

v.)

ALFRED JAMES BEYER, III, M.D.,)
ELIZABETH GILBERT D'ANGELO,)
M.D., CHRISTOPHER WARREN)
FLYE, M.D., CATHERINE JOYCE)
EVERETT, M.D., STEPHEN NELSON)
SIDES, II, M.D., TIMOTHY COUNCIL)
SLOAN, M.D., SAMUEL JOSEPH)
BUFF, M.D., and JAMES CLIFFORD)
LORENTZEN, M.D.,)
Defendants,)

ORDER ON MOTION TO DISMISS

And)

COASTAL RADIOLOGY)
ASSOCIATES, PLLC, CRA)
HOLDINGS, LLC, and CORAD)
INVESTMENTS, LLC,)
Nominal)
Defendants.)

This matter is before the Court on Defendants' Motion to Dismiss. After considering the record, briefs, oral argument held May 6, 2011, and supplemental materials submitted after argument, the Court determines that the significant legal issues raised by the motion would be better considered with the benefit of a more specific complaint based on a more developed record, and accordingly, the motion is DENIED, but without prejudice to the later presentation of the legal arguments by way of motion for summary judgment.

The individual parties are all physicians who now practice or formerly practiced with the nominal corporate defendant, Coastal Radiology Associates, PLLC (“Coastal Radiology”) in New Bern, North Carolina, which had some affiliation with nominal corporate defendants CRA Holdings, LLC (“Holdings”) and/or CORAD Investments, LLC (“CORAD”).¹ Plaintiffs initiated this action on January 31, 2011 by a Verified Complaint (“Complaint”) which consists of 156 numbered paragraphs and asserts ten causes of action. The Complaint states that claims are presented both individually and derivatively.

Initially, each of the ten physicians practicing with Coastal Radiology was both a member manager and an employee. Plaintiffs were initially removed as managers through a reduction in the number of managers. Later, their employment was terminated, allegedly in retaliation for their taking action to correct what they asserted to be improper management and diversion or intermingling of corporate funds. The individual Defendants are categorized into two groups: a group of “Instigating Defendants,” alleged to be the primary actors; and the “Acquiescing Defendants” who are alleged to have acted “either passively, or under coercion or duress.” *See* Complaint ¶ 5. In addition to monetary claims, Plaintiffs seek to invalidate restrictive covenants in their employment agreements.

Defendants answered the complaint. They also filed a motion to dismiss that seeks: 1. to narrow the third claim which asserts breaches of fiduciary duty, in order to eliminate asserted fiduciary duties which Defendants contend are not supported by North Carolina law; and 2. to dismiss the fifth claim which accuses the individual Defendants with tortious interference with Plaintiffs’ employment contracts on the grounds that Defendants are “non-outsiders” having legitimate interests in those contracts. The motion to dismiss attacks the breadth of the fiduciary duty claim’s allegation which states: “As a manager, employee, and member, each Defendant owed and owes a fiduciary duty to each Plaintiff and/or to the Companies.” Complaint ¶114.²

¹ The Complaint asserts that the operating agreements for the three companies are essentially the same, and quotes various provisions of these agreements, primarily related to the timing and procedure for reducing the number of managers.

² The Case Management Report previews that there will likely be more extensive motion practice, as Defendants contend that the overall corporate action which ultimately led to Plaintiffs’ termination was appropriate and within the authority granted by the operating agreements. Plaintiffs’ counsel also acknowledges the breadth of the allegations, asserts that discovery is necessary to refine the claims or to guard against waiving potential claims, and urges that the issues are ones of mixed fact and law that should not be addressed through a motion to dismiss. Defendants’ counsel was admirably frank in admitting that the scope of discovery will not likely be affected, one

The allegations of the Complaint were drawn in a broad manner intended to reach the outer perimeters of North Carolina precedent. The motion to dismiss seeks to draw a dividing line between those legal or factual relationships that will support a fiduciary duty and those that will not. That line drawing is particularly difficult when such relationships arise in the context of a limited liability company. The law has not yet well advanced to determine when the duties attendant to such relationships are better informed by general corporate principles or by partnership principles. The Court must further be very careful if drawing such bright lines for North Carolina appellate precedent favors particularized fact inquiries conducted under a purposefully broad fiduciary duty net. Defendants' motion is presented with enticing simplicity to withdraw certain relationships from the protection of that net, such as employee to employee or member to member. Plaintiffs caution, however, that the breadth of their factual allegations, which must at this stage be presumed to be true, preclude such a simple approach, particularly at the stage of a Rule 12(b)(6) motion.

Certainly, North Carolina courts continue to adhere to a standard for ruling on motions to dismiss that affords a plaintiff substantial leeway than does the standard for summary judgment. *See Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161 (1970), quoting *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Plaintiffs take full advantage of the liberality this pleading standard affords.

The broad sweep of the allegations of paragraph 114 of the Complaint seeks to hold Defendants liable for any fiduciary duty which on the broadly alleged pattern of alleged wrongful mismanagement and wrongful conduct may be fashioned from the various relationships between plaintiffs and defendants in any of their roles as either manager, employee, or member. Defendants seek to limit Plaintiffs' ability to pursue fiduciary duties alleged to be owed by: 1. managers to members individually, as opposed to the company; 2. employees to fellow employees; 3. employees to the company absent an additional relationship such as

way or the other, based on the Court's ruling on the present motion to dismiss. The Court much appreciates the candor that both counsel displayed at oral argument and the professionalism with which they have worked with each other to date. They both recognize the significance of the issues at play beyond the immediate case. The Court's confidence that they can continue their cooperative effort to fashion discovery in a cost efficient manner and to well present the legal issues is essential to the Court's ruling.

director or officer; or 4. members to fellow members.³ Defendants assert that the law is clear that a manager of a limited liability company owes a duty to the company but not to its members. *See Kaplan v. O.K. Techs, LLC*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137, *disc. review denied*, 353 N.C. 805, 690 S.E.2d 699 (2010) (*aff'g* June 27, 2008 decision by Judge Tennille of this Court). Defendants further read *Kaplan* as authority for the proposition that an employee owes no fiduciary duty to the employer absent a separate status as corporate officer or director, which relationships impose fiduciary duties as a matter of law, and even then, such duties run to the company and not to fellow employees.

Plaintiffs in turn contend that Defendants improperly attempt to rely on general rules without at the same time acknowledging exceptions to those rules. They contend the factual allegations properly invoke the exceptions to the general rules. As to fiduciary duties arising from a status as member owner of a limited liability company, Plaintiffs argue that while *Kaplan* may stand for the general proposition that a manager's fiduciary duties run to the company as does that of a corporation's director, it also recognizes the exception that, at least in the corporate context, a majority or controlling shareholder may owe fiduciary duties to minority holders.⁴ Plaintiffs further note that North Carolina precedent allows for the aggregation of different ownership interests to constitute a majority subject to this fiduciary duty. *Loy v. Lorm*, 52 N.C. App. 428, 432-433, 278 S.Ed.2d 897, 901 (1981); *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951).⁵ Here, Plaintiffs allege that the remaining members have undertaken concerted action against them and that this wrongful concerted action draws from each of the various relationships among the parties.

³ In summarizing the issues raised by the motion to dismiss, the Court does not attempt to address exhaustively the underlying legal principles and how Plaintiffs now seek to apply or extend precedent.

⁴ North Carolina courts have not yet had to define clearly in various contexts when a limited liability company is more appropriately viewed as a corporation or as a partnership. *See generally* Russell M. Robinson, II, Robinson on North Carolina Corporation Law, §§ 11.04, 34.03 (7th ed. 2010). In addition to *Kaplan*, this Court has recognized in the corporate context that powers exercised by majority shareholders in a closely held corporation must be modulated by a correlative fiduciary duty to the minority. *Oakeson v. TBM Consulting Group, Inc.*, 2009 NCBC 23 ¶44 (N.C. Super. Ct. Aug. 21, 2009). The parties acknowledge that the general question of duties owed by members to members in limited liability companies is an unsettled area.

⁵ The allegations throughout the Complaint assert that defendants acted in concert, particularly the "Instigating Defendants."

As noted, North Carolina courts have been particularly hesitant to establish bright lines that define when fiduciary obligations may arise, leaving such matters to individualized fact inquiries. *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001); *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931). While *Dalton v. Camp* found no fiduciary duty in the specific employment relationship before the court, it would be too broad a reading of its holding to argue that it forecloses imposing a fiduciary duty in any employment relationship. Plaintiffs note the prior opinion of this Court which denied summary judgment in *Sunbelt Rentals, Inc. v. Head & Enquist Equipment, L.L.C.*, 2002 NCBC 4 (N.C. Super. Ct. July 10, 2002) as evidence that no flat rule can be applied to restrict the application of fiduciary duties to employee conduct. In *Sunbelt Rentals*, this Court noted that the determination of a fiduciary duty must be a fact-specific inquiry, and such a duty by an employee may be imposed but “more must be shown than the ordinary characteristics of the employer-employee relationship.” [*Id.* ¶ 27]. There, the Court found a genuine issue of material fact whether certain of the employees exercised sufficient domination and influence to rise to the level of a fiduciary duty owed to the corporate employer. [*Id.* ¶ 28].⁶

In sum, the Court does not believe that it should undertake to define the scope of any potential fiduciary duty based on general categories of relationships pursuant to the current Rule 12(b)(6) motion. But, it believes that when it later addresses these significant issues, it will be appropriate to have a more specific delineation of what duties are being asserted and the basis for asserting them.

The Court also believes that the further development of the factual record or a more specific factual presentation will assist in resolving claims of tortious interference. Defendants contend that any claim under the employment contract is limited to a claim against the corporation for wrongful termination, and that the individuals are protected by the liability shield afforded “non-outsiders” by *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976).⁷

⁶ *Sunbelt Rentals* did not have to address the question of whether such fiduciary duties can run between employees as well as from the employee to the employer. The Court is suspicious whether in this case Plaintiffs can or will need to develop persuasive evidence that any defendant who was an employee but not a manager exercised the domination or control of the type Judge Tennille considered in *Sunbelt Rentals*. The Court is particularly dubious whether such a duty should be imposed on the “Acquiescing Defendants” by reason of their status as employees under the allegation that they acted passively or under coercion.

⁷ The term “non-outsider” distinguishes between strangers to the contract and individuals who are not named parties to a contract but have a legitimate business interest in the subject matter of the contract. *Smith v. Ford Motor*

Defendants further contend that Plaintiffs have not met and cannot on these facts meet their burden to allege legal malice necessary to impose liability on a “non-outsider,” which requires more than actual malice and demands proof that the individual exceeded his or her legal right or authority. *See Varner v. Bryan*, 113 N.C. App. 697, 702, 440 S.E.2d 295, 298 (1994)(citations omitted). Defendants assert that one can be guilty of actual malice without having at the same time acted with legal malice. *See Childress v. Abeles*, 240 N.C. 667, 675, 84 S.Ed.2d 182 (1954).

Again, Plaintiffs assert that the broadly alleged Complaint effectively invokes exceptions to those general rules. Plaintiffs assert that the facts show wrongdoing not sheltered by the privilege sometimes afforded non-outsiders, and that the actions taken were for illegitimate purposes rather than to promote legitimate business interests. Defendants are alleged both to have converted corporate funds to their own personal use and further to have discharged Plaintiffs from employment in retaliation for exercising legal rights. They further argue that Defendants’ failure to follow procedural rules required by the operating agreements. This pattern of unauthorized conduct defeats any argument that actions were taken for legitimate business reasons and precludes the immunities Defendants seek, thereby satisfying any requirement to plead legal malice.

At present, it is difficult to unweave the overall Complaint claim into the threads of its separate claims. The Court concludes that the issues raised by the motion to dismiss invite both a factual and legal analysis that is not best resolved under the Rule 12(b)(6) standard. At the same time, both the Court and the Defendants are entitled to a greater precision in the claims at some point. The Court will then allow Plaintiffs to utilize initial discovery to better determine their claims.⁸ But the Court will further require those claims to be more specifically stated after such initial discovery. It is appropriate to divide the discovery periods to allow first a greater

Co., 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976) (other provisions of case overturned by statute; *see Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209-210, 388 S.E.2d 134, 137 (1990).

⁸ Ultimately, the need for further specificity may extend beyond just those issues addressed in the present motion to dismiss. For example, the Complaint includes a fraud claim, including an individual committing fraud and then others taking concerted action to adopt the fraud. Rule 9 would contemplate greater specificity in the allegations. The Complaint seeks punitive damages, which by statute demands proof by clear and convincing evidence. The Complaint interweaves contract and tort claims from the same fact pattern, an effort that demands particularized facts. *See, e.g. N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81-2, 240 S.Ed.2d 345, 350-51 (1978).

definition of the claims and then a period to develop a full factual record on the claims that survive that refining process.

Accordingly, the Court orders:

1. Defendants' motion to dismiss is DENIED;
2. Defendants' shall not be foreclosed in subsequently challenging the third claim (fiduciary duty) and fifth claim (tortious interference) by summary judgment based on the legal grounds asserted in support of their motion to dismiss;
3. The parties shall cooperate in fashioning early discovery which shall allow Plaintiffs to refine the claims to those for which Plaintiffs contend they have or will have a good faith evidentiary basis to withstand a motion for summary judgment;
4. Based on such early discovery, Plaintiffs shall file an amended complaint on or before August 1, 2011, which amendment shall be allowed without further motion, and which amended complaint shall, at a minimum:
 - a. delineate fiduciary claims with specificity adequate to determine the legal and factual basis upon which any Defendant is alleged to owe a fiduciary duty, (that is, whether each duty arises from a legal relationship, such as manager to company, majority member to minority, etc., or a particularized factual relationship, such as employee exercising dominion and control, etc.) and for any such asserted duty, whether it is alleged to be owed to the company or to Plaintiffs individually;
 - b. specify which claims are being brought individually and which are being brought derivatively, and if derivatively, on behalf of which company;
 - c. specify what action any Defendant took or failed to take that is alleged to constitute legal malice;
 - d. specify what act or failure to act by any Defendant that is alleged to constitute actionable fraud;
 - e. specify what act or failure to act by any Defendant is alleged to justify the recovery of punitive damages.

It is SO ORDERED this 19th day of May, 2011.

/s/ James L. Gale
James L. Gale
Special Superior Court Judge
for Complex Business Cases