

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

RFACTR, INC.; RICHARD BRASSER;
and GREG GENTNER,

Plaintiffs/Counterclaim
Defendants,

v.

18 CVS 12299

CHRIS MCDOWELL and CAROLINE
MCDOWELL,

Defendants/Counterclaim
Plaintiffs.

KEITH LEE and YOUNG KWON
(individually and derivatively on behalf
of rFactr, Inc.),

Plaintiffs,

v.

CHRIS MCDOWELL; CHRIS LAU; and
ROBERT DUNN,

Defendants,

and

RFACTR, INC.,

Nominal Defendant.

19 CVS 17741

CHRIS MCDOWELL,

Third-Party Plaintiff,

v.

RICHARD BRASSER and GREG
GENTNER,

Third-Party
Defendants.

CHRIS LAU and ROBERT DUNN,

Third-Party Plaintiffs,

v.

RICHARD BRASSER and GREG
GENTNER,

Third-Party
Defendants.

**ORDER ON CHRIS MCDOWELL'S RENEWED MOTION TO
CONSOLIDATE AND MOTION TO STAY PRETRIAL DEADLINES AND
CONTINUE TRIAL**

1. **THIS MATTER** is before the Court upon
 - a. Chris McDowell's ("McDowell") Renewed Motion to Consolidate the above-captioned cases (the "Renewed Motion") pursuant to Rule 42(a) of the North Carolina Rules of Civil Procedure ("Rule(s)"), filed on 25 April 2022 in *Lee v. McDowell* (19 CVS 17741) ("*Lee*"), (*Lee* ECF No. 133); and
 - b. McDowell's Motion to Stay Pretrial Deadlines and Continue Trial ("Motion to Stay"), filed on 3 May 2022 in *rFactr v. McDowell* (18 CVS 12299) ("*rFactr*"), (*rFactr* ECF No. 141), (together, the "Motions").¹

¹ McDowell is a Defendant/Third-Party Plaintiff in *Lee* and a Defendant/Counterclaim Plaintiff in *rFactr*.

2. The Motions have been fully briefed, and a hearing was held on the Motions on 2 June 2022 (the “Hearing”), at which all parties were represented by counsel. Having considered the Motions, the related briefing and supporting materials, and the arguments of counsel at the Hearing on the Motions, the Court hereby memorializes its oral ruling at the Hearing and **DENIES** the Motions as set forth below.

3. Under Rule 42(a), the trial court has the authority to consolidate “actions involving a common question of law or fact[.]” “This power is vested in the trial judge so as to avoid multiplicity of suits, unnecessary costs, delays, and to afford protection from oppression and abuse.” *Kanoy v. Hinshaw*, 273 N.C. 418, 423 (1968). “Whether or not consolidation of cases for trial, where permissible, will be ordered is in the discretion of the court.” *Phelps v. McCotter*, 252 N.C. 66, 66 (1960). “A trial court’s ruling on a Rule 42 motion will not be reversed on appeal absent a manifest abuse of discretion.” *Crescent Univ. City Venture, LLC v. Trussway Mfg.*, 2018 NCBC LEXIS 74, at *12 (N.C. Super. Ct. July 16, 2018) (quoting *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 448 (1997)).

4. On 21 February 2020, McDowell filed a Motion to Consolidate in the *Lee* action (the “First Motion”), seeking to consolidate *Lee* with *rFactr*.² The Court denied the First Motion without prejudice on 23 June 2020, concluding that, in light of the

² (Def./Third-Party Pl. Chris McDowell’s Mot. Consolidate, *Lee* ECF No. 35.)

summary judgment motions pending in the *rFactr* action at that time, consolidation was “at best, premature.”³

5. The Court subsequently ruled on all of the summary judgment motions filed in the two actions—in *rFactr* on 8 December 2020⁴ and in *Lee* on 26 May 2022.⁵ A jury trial in the *rFactr* case is scheduled to commence on 11 July 2022,⁶ and the parties in that case have made numerous pretrial disclosures, filed motions *in limine*, and submitted their proposed pre-trial order. *Lee* has not yet been scheduled for trial and pretrial disclosures have not yet commenced.

6. McDowell renews his motion to consolidate the two actions, contending that (i) the cases have overlapping parties (McDowell, Richard Brassler (“Brassler”), Greg Gentner (“Gentner”), and rFactr, Inc. (“rFactr” or the “Company”)); (ii) the parties who are in only one case (Keith Lee (“Lee”), Young Kwon (“Kwon”), and Robert Dunn (“Dunn”)) are investors and/or members of rFactr’s board of directors and will be necessary fact witnesses in both cases; and (iii) the cases involve identical or similar claims with identical or similar allegations and thus involve significant overlapping

³ (Order on Chris McDowell’s Mot. Consolidate 4–5, *Lee* ECF No. 52.)

⁴ (Order & Op. on Pls.’ and Defs.’ Mots. Summ. J. and Defs.’ Am. Mot. Strike and/or Preclude Reliance on Aff. Luis Gomez, *rFactr* ECF No. 124.)

⁵ (Order & Op. on Def./Third-Party Pl. Chris McDowell’s and Defs./Third-Party Pls. Chris Lau and Robert Dunn’s Mots. Summ. J., *Lee* ECF No. 141.)

⁶ (Notice Jury Trial, *rFactr* ECF No. 127.)

evidence.⁷ McDowell argues that consolidating the two actions will avoid unnecessary expense and the possibility of inconsistent verdicts.⁸

7. Brassler, Gentner, and rFactr, who are parties in both *rFactr* and *Lee*, and Lee, Kwon, and Dunn, who are parties only in the *Lee* case, oppose the Renewed Motion. Although these parties acknowledge that factual issues related to Brassler's and Gentner's conduct and the impact of that conduct on rFactr will be at issue in both cases, they contend that this overlap between the two cases is minimal, that the vast majority of the issues to be litigated are unique to each case, and that consolidation of the two cases will cause substantial inefficiency and jury confusion.⁹ Caroline McDowell, a party in the *rFactr* case, has not stated a position on the Renewed Motion.

8. Upon careful consideration of the parties' competing arguments and the relevant facts and circumstances, the Court concludes, in the exercise of its discretion, that consolidation of the above-captioned cases does not serve the purposes of Rule 42(a) and is not appropriate in the circumstances.

9. First, the cases do not include common legal claims, and the only common factual issue between the cases is related to Brassler's and Gentner's conduct as executive officers of rFactr. That said, in *rFactr*, Brassler's and Gentner's conduct is

⁷ (Def./Third-Party Pl. Chris McDowell's Br. Supp. Renewed Mot. Consolidate 9, 12, 13 [hereinafter "McDowell's Supp."], *Lee* ECF No. 134.)

⁸ (McDowell's Supp. 15.)

⁹ (*See* Pls.' Resp. Opp'n Renewed Mot. Consolidate, *Lee* ECF No. 137; Third-Party Defs. Richard Brassler and Greg Gentner and Nominal Def. rFactr Inc.'s Mem. Opp'n Chris McDowell's Renewed Mot. Consolidate, *Lee* ECF No. 138.)

at issue on McDowell's direct claims against Brassier and Gentner for breach of fiduciary duty and constructive fraud. In *Lee*, this same conduct is at issue on the derivative claims against McDowell and Dunn for breach of fiduciary duty and potentially on McDowell's and Dunn's claims seeking indemnity from Brassier and Gentner if McDowell and Dunn are found liable on those claims. Thus, while the facts surrounding Brassier's and Gentner's conduct are the same, the legal claims to which they relate are different, weighing against consolidation. See *Markham*, 125 N.C. App. at 448 (affirming the trial court's refusal to consolidate two actions where there was "a common nucleus of basic facts" but there were "few, if any, common legal issues").

10. Moreover, the relief sought for Brassier's and Gentner's alleged conduct is also distinct in the two cases—McDowell seeks the return of his investment in *rFactr* and McDowell and Dunn seek an offset on behalf of *rFactr* against the amount of *rFactr*'s loss McDowell and Dunn are found to have caused in *Lee*—another factor weighing against consolidation.

11. Finally, conducting a single trial of both actions would be inefficient and would prejudice Lee, Kwon, and Dunn, who are parties only in the *Lee* action. In particular, a single trial would (i) create logistical challenges in the conduct of the trial, (ii) require Lee, Kwon, and Dunn to incur significant expense in sitting through the large portions of the trial unrelated to their claims, (iii) substantially increase the number of limiting instructions and jury issues and the length of jury instructions, all increasing the risk of jury confusion, see *Levin v. Jacobson*, 2016 NCBC LEXIS

191, at *2–3 (N.C. Super. Ct. Mar. 7, 2016) (denying a motion to consolidate where a consolidated trial would become “overly complicated” by limiting instructions “to help segregate and clarify the matters in the mind of the jury”), (iv) lengthen the currently scheduled trial by one or two weeks, likely resulting in a longer jury selection process and increasing the risk of juror illness during a longer trial and thus the risk of mistrial, and (v) necessitate a further delay of the trial of the *rFactr* case—a four-year-old case that has been set for trial since March 2021—resulting in unfairness to the *rFactr* parties who oppose the Renewed Motion.

12. Taken together, the Court concludes, in the exercise of its discretion, that the foregoing considerations outweigh any gain that might otherwise be obtained from consolidating the two cases. Accordingly, the Court concludes, in the exercise of its discretion, that consolidation of the above-captioned cases is inappropriate in the circumstances and that the Renewed Motion should therefore be denied. Because the Motion to Stay is dependent upon the success of the Renewed Motion, the Court further concludes, in the exercise of its discretion, that the Motion to Stay should also be denied.

13. **WHEREFORE**, for the reasons set forth above, the Court, in the exercise of its discretion, hereby **DENIES** the Motions.

SO ORDERED, this the 3rd day of June, 2022.

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