

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THE INTERCOLLEGIATE WOMEN'S )  
LACROSSE COACHES ASSOCIATION, )  
 )  
Plaintiff, )  
 )  
v. ) 1:20-cv-00425  
 )  
CORRIGAN SPORTS ENTERPRISES, )  
INC. and RICHARD LEE CORRIGAN, )  
JR. in his individual and )  
corporate capacities, )  
 )  
Defendants. )

**MEMORANDUM OPINION AND ORDER**

THOMAS D. SCHROEDER, Chief District Judge.

This case involves claims arising out of the failed business relationship between a sponsor of national high school lacrosse tournaments and the company it partnered with to host them in the fallout of the ongoing COVID-19 pandemic. Before the court is the motion of Defendants Corrigan Sports Enterprises, Inc. ("CSE") and Richard Lee Corrigan, Jr. to dismiss all claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> (Doc. 23.) Plaintiff Intercollegiate Women's Lacrosse Coaches Association ("IWLCA") filed a response in opposition (Doc. 59), to which Defendants replied (Doc. 62). For the reasons set forth below, the motion will be granted in part and denied in part.

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<sup>1</sup> Defendants' motion to strike certain documents IWLCA submitted in response to Defendants' previous motion to dismiss for lack of personal jurisdiction (Doc. 35) is deemed denied for the reasons noted herein.

**I. BACKGROUND**

**A. Factual background**

IWLCA's amended complaint contains the following factual allegations, which are taken as true for the purposes of the present motion:

IWLCA is a non-profit corporation whose membership is comprised of coaches of the National Collegiate Athletic Association ("NCAA") women's lacrosse programs. (Doc. 15 ¶ 1.) Since 2006, IWLCA has hosted annual tournaments for female student-athletes who are currently or will soon be eligible for recruitment by college lacrosse programs. (Id. ¶ 7.) Over time, IWLCA added tournaments, such that it currently hosts the IWLCA Champions Cup, the IWLCA New England Cup, the IWLCA Midwest Cup, the IWLCA Capital Cup, the IWLCA Presidents Cup, and the IWLCA Debut (collectively "the Recruiting Tournament Series"). (Id.) The Recruiting Tournament Series, attended by IWLCA's member coaches, is popular among high school lacrosse teams across the country. (See id. ¶ 1.) The 2020 Recruiting Tournament Series was expected to cause a total of approximately 37,000 people to travel from all over the country to compete in five central tournament locations. (Id.) Each of these tournaments is associated with a specific alleged trademark. (Id. ¶ 7.)

The Recruiting Tournament Series is typically managed, or "hosted," by a third-party event management company selected by

IWLCA. (See id.) The third-party event management company has multiple responsibilities in running the tournaments, including securing a venue, setting up and maintaining the website for registering teams, collecting registration fees, and acquiring necessary event insurance. (See Doc. 15-1.) Since 2009, IWLCA selected CSE to host its tournaments. (See id.) Through 2017, IWLCA and CSE operated pursuant to some form of periodic contract. (See id. ¶ 7.)

On February 6, 2017, IWLCA published a "Request for Proposals" ("RFP") seeking bids from event management companies to host the 2018-2020 Recruiting Tournament Series. (Doc. 15 ¶ 8; Doc. 15-1.) Defendant CSE submitted a proposal in response to the RFP (Doc. 15-2), and on May 10, 2017, the IWLCA Board of Directors accepted CSE's proposal (Doc. 15 ¶¶ 9, 10). CSE was selected to host these tournaments as part of its ongoing business relationship with IWLCA. (See id. ¶ 7.) No separate contract to formalize their agreement was entered into. (See id. ¶ 11.) Pursuant to the RFP and CSE's proposal, CSE successfully hosted the Recruiting Tournament Series throughout 2018 and 2019. (Id. ¶ 13.)

Near the end of 2019, cognizant of concerns relating to COVID-19, the IWLCA Board of Directors decided to evaluate IWLCA's potential exposure should any of the 2020 tournaments need to be cancelled. (Id. ¶ 17.) To facilitate that evaluation, between December 2019 and April 2020, the IWLCA Executive Director

requested that CSE produce information and documents relating to the 2020 Recruiting Tournament Series. (Id.) The requested documents included copies of all insurance policies that CSE was required to obtain for each of the 2020 tournaments, copies of all agreements relating to the 2020 tournaments, a listing of the teams registered for each of the 2020 tournaments and an accounting of the fees paid by them, and an accounting of all expenses incurred up to that point in connection with the 2020 tournaments. (Id.) CSE refused to produce this information. (Id. ¶ 18.)

On March 11, 2020, the COVID-19 outbreak was declared a pandemic. (Id. ¶ 23.) In light of that and related restrictions on large events, on April 13, 2020, the IWLCA Board of Directors voted to cancel the 2020 Recruiting Tournament Series and informed CSE of its decision. (Id. ¶¶ 42, 43.) IWLCA directed CSE to issue registered teams a full refund of the registration fees and deposits, less any documented unrecoverable costs incurred prior to the cancellation decision, that CSE had collected as part of its management responsibilities.<sup>2</sup> (Id. ¶¶ 28, 44, 54.) IWLCA then notified its membership of the cancellation decision and released a public statement to inform the lacrosse community and registrants of the cancellation. (Id. ¶ 48.) IWLCA was unable to inform

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<sup>2</sup> Although IWLCA has made multiple requests for information relating to Defendants' costs, Defendants have not claimed any costs. (Id. ¶ 29.) However, IWLCA estimates that the unrecoverable expenses incurred prior to the cancellation decision would not have exceeded \$100 per team, yielding a refund of \$1,700 to each team. (Id. ¶ 46.)

registrants directly because CSE refused to release the list of registered teams acquired through its management responsibilities, despite IWLCA's request. (Id. ¶ 50.)

Though IWLCA directed CSE to issue refunds, Defendants refused to refund registrants' fees to the extent IWLCA requested. (Id. ¶¶ 36, 40, 49, 52-56.) Further, Defendants refused to cancel the tournaments. (Id. ¶ 51.) Following IWLCA's announcement of the cancellation, CSE released multiple communications publicly indicating that the 2020 Recruiting Tournament Series was not cancelled. (Id.) On April 18, 2020, CSE released a statement stating, "Contrary to IWLCA's announcement earlier today, [CSE] plans to host the scheduled 2020 [Recruiting Tournament Series]. We regret that the IWLCA Board of Directors has decided to step away from its 'official involvement' with the tournaments this year." (Id.) That same day, CSE posted an announcement to Twitter stating, "DESPITE THE RUMORS, GIRLS LAX TOURNAMENTS ARE STILL ON!" (Id.) This announcement prominently displayed IWLCA's alleged trademarks, modified by removing "IWLCA" from each tournament's trademark name and logo. (Id.) On April 20, 2020, CSE again announced that the tournaments were still scheduled but renamed each of the tournaments to include CSE rather than IWLCA. (Id.) For example, the "IWLCA Presidents Cup" became the "CSE Presidents Cup." (Id.) The announcement stated that the tournaments "will look and feel the exact same as they always have." (Id.)

Although CSE refused to cancel the Recruiting Tournament Series, it soon decided to postpone individual tournaments. On April 23, 2020, CSE announced that the "CSE" Champions Cup, originally scheduled for June 19-21, 2020, was cancelled and rescheduled for August 7-9, 2020. (Id. ¶ 52.) Although these August dates fell within an NCAA "dead period" during which coaches were prohibited from watching prospective student athletes compete in person, CSE did not issue refunds. (Id.) On April 30, 2020, CSE announced that the "CSE" New England Cup, originally scheduled to take place in Amherst, Massachusetts on June 26-28, 2020, was cancelled and rescheduled for July 24-26, 2020, even though Massachusetts had barred all events like it. (Id. ¶ 53.) Despite this state ban, CSE did not issue refunds. (Id.)

IWLCA claims that its tournaments and related trademarks, although unregistered, were created and are owned by it. (Id. ¶ 7.) However, sometime between December 2019 and April 2020, CSE filed trademark applications seeking to register and convert ownership of the trademarks for the Recruiting Tournament Series to itself. (Id. ¶ 21.) On June 12, 2020, IWLCA filed trademark applications for the word marks of the names for the tournaments within the Recruiting Tournament Series, as well as the mark for IWLCA itself, based on its first use of these marks in commerce. (Docs. 15-6, 15-7, 15-8, 15-9, 15-10, 15-11, 15-12.) All trademark applications submitted by both IWLCA and CSE remain pending with

the U.S. Patent and Trademark Office.

**B. Procedural history**

On May 6, 2020, IWLCA filed this action in North Carolina state court seeking declaratory, monetary, and injunctive relief. (Doc. 1-1.) On May 13, 2020, Defendants removed the action to this court (Doc. 1), and on June 18, 2020, IWLCA filed an amended complaint (Doc. 15). On June 24, 2020, IWLCA moved for temporary injunctive relief (Doc. 18), which this court denied without prejudice on July 23, 2020 (Doc. 43). On September 2, 2020, the parties presented, and this court granted, a consent motion for entry of a permanent injunction whereby Defendants are permanently enjoined from any future use of the trademarks/service marks at issue in this litigation. (Doc. 54.)

Defendants filed the present motion to dismiss on July 2, 2020. (Doc. 23.) The motion is fully briefed (Docs. 59, 62) and is ready for resolution.

**II. ANALYSIS**

**A. Standard of review**

Federal Rule of Civil Procedure 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. (8)(a)(2). Under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v.

Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. A motion to dismiss under Rule 12(b)(6) is meant only to “test[] the sufficiency of a complaint” and not to “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). Thus, in considering a Rule 12(b)(6) motion, a court “must accept as true all of the factual allegations contained in the complaint,” Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), and all reasonable inferences must be drawn in the plaintiff’s favor. Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997). “Rule 12(b)(6) protects against meritless litigation by requiring sufficient factual allegation ‘to raise a right to relief above the speculative level’ so as to ‘nudge[] the[] claims across the line from conceivable to plausible.’” Sauers v. Winston-Salem/Forsyth Cty. Bd. Of Educ., 179 F. Supp. 3d 544, 550 (M.D.N.C. 2016) (alteration in original) (quoting Twombly, 550 U.S. at 555). “[T]he complaint must ‘state[] a plausible claim for relief’ that ‘permit[s] the court to infer more than the mere possibility of misconduct’ based upon ‘its judicial experience and common sense.’” Coleman v. Md. Ct. App., 626 F.3d 187, 190 (4th Cir.



2010) (alterations in original) (quoting Iqbal, 556 U.S. at 679). As such, mere legal conclusions are not accepted as true, and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678.

In ruling on a Rule 12(b)(6) motion, “a court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint.” E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011). The court may also consider documents “attached to the motion to dismiss, so long as they are integral to the complaint and authentic.” Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). Generally, a “court cannot go beyond these documents” without “convert[ing] the motion into one for summary judgment,” an action from which courts should refrain “where the parties have not had an opportunity for reasonable discovery.” E.I. du Pont, 637 F.3d at 448.

**B. Defendant Corrigan’s personal liability**

Corrigan moves to dismiss claims against him on the ground that the amended complaint does not state facts setting out a claim as to him specifically. (Doc. 24 at 2-3.) He points to the amended complaint’s multiple invocations of “the Defendants” collectively as insufficient. IWLCA responds largely by relying on evidence it submitted at the temporary injunction stage tending

to show that Corrigan was personally involved in the use of the alleged trademarks and the decisions to proceed with the tournaments in spite of IWLCA's directives to cancel them and to issue refunds. (Doc. 59 at 23-25.)

In an action against multiple defendants, a complaint must state facts that support a cause of action against each individual defendant. "Blanket conclusory allegations as to multiple defendants are insufficient." Vision Motor Cars, Inc. v. Valor Motor Co., 981 F. Supp. 2d 464, 468 (M.D.N.C. 2013). "[A] plaintiff cannot rely on bare allegations relating to the conduct of 'all defendants' to hold [a defendant] liable, but must identify specific acts or conduct taken by each defendant to state a claim." Boykin Anchor Co. v. AT&T Corp., No. 5:10-CV-591-FL, 2011 WL 1456388, at \*4 (E.D.N.C. Apr. 14, 2011); see also Robbins v. Oklahoma, 519 F.3d 1242, 1250 (10th Cir. 2008) ("[Due to] the complaint's use of . . . the collective term 'Defendants' . . . with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed."). In this regard, Corrigan's arguments are largely correct.

This case is in an unusual posture, however. Following the evidentiary hearing on IWLCA's motion for temporary restraining order as well as Defendants' motion to dismiss on personal

jurisdiction grounds, IWLCA submitted evidence that tended to show Corrigan's personal involvement in decision-making on key issues. The court subsequently denied both motions. (Doc. 42.) In so doing, the court noted that IWLCA provided an email Corrigan sent to various high school lacrosse coaches, including those in North Carolina, that featured the allegedly infringing trademarks at issue and noted CSE's decision to hold the tournaments despite IWLCA's decision to "step away from its 'official involvement' with [the] tournaments." (Doc. 33-1.) Though Corrigan moved to strike this filing (Doc. 35), the court obviously found the argument unpersuasive in denying Corrigan's motion to dismiss on jurisdictional grounds. Nevertheless, any doubt over the court's denial of the motion to strike is now laid to rest.

Ultimately, the court need not consider whether Corrigan's motion to dismiss turns on this extrinsic evidence, which ordinarily would not be considered on a motion to dismiss. That is because attached to the complaint is a copy of an April 18, 2020 CSE press release, which contains alleged trademark violations and prominently features a photograph and the name of Lee Corrigan along with a partial quote from him announcing the continuation of the tournaments. (Doc. 15-14 at 5-9.) Though the text of the amended complaint itself contains no factual allegation regarding specific acts or omissions attributable to Corrigan, this attachment to the complaint can be considered. Fed. R. Civ.

P. 10(c); Pitt Cty., 572 F.3d at 180 (permitting court to consider documents attached to the complaint so long as they are integral to the complaint and authentic).

This is sufficient to make at least a trademark claim and trade practice claim under North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. §§ 75-1.1, et seq., against Corrigan plausible. IWLCA's trademark infringement and state trade practice claims sound in tort. Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.com, 128 F. Supp. 2d 340, 348 (E.D. Va. 2001) (Lanham Act claims are tortious in nature); Richardson v. Bank of Am., N.A., 643 S.E.2d 410, 429 (N.C. Ct. App. 2007) (unfair and deceptive trade practices are neither wholly tortious nor wholly contractual in nature); Henderson v. United States Fid. & Guar. Co., 476 S.E.2d 459, 463 (N.C. Ct. App. 1996) (unfair competition is common law tort). A corporate officer who actively participates in a tort may be liable even if he or she was acting in a corporate capacity. Blue Mako, Inc. v. Minidis, 472 F. Supp. 2d 690, 701-02 (M.D.N.C. 2007) (finding jurisdiction over non-resident corporate officer who allegedly sent false and misleading or inaccurate information to North Carolina to induce plaintiff to sign contract forming the basis of the action). In trademark infringement cases, a non-resident employee-defendant may be held jointly and severally liable "with that corporation if the individual defendant has direct

involvement in the infringing activities of the corporation.” Musselwhite v. Int'l Learning Works, Inc., No. 2:97CV460, 1997 WL 34588522, at \*2, 1997 U.S. Dist. LEXIS 21427, at \*7 (M.D.N.C. Oct. 17, 1997); accord Flexible Benefits Council v. Feltman, No. 1:08CV371, 2008 WL 2465457, at \*7 (E.D. Va. June 16, 2008) (holding corporate officers and directors personally liable for trademark infringement, particularly where the individuals authorized and approved the acts of infringement); Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Robinson, 123 F. Supp. 2d 965, 975 (W.D.N.C. 2000) (finding trademark infringement akin to tort cases for jurisdictional purposes); see Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 149 (4th Cir. 1987) (reversing district court's exoneration of individual defendants from liability because they participated in corporation's willful infringement and, thus, may be held personally liable); Rhee Bros., Inc. v. Han Ah Reum Corp., 178 F. Supp. 2d 525, 532 (D. Md. 2001) (allowing trademark claim to proceed against non-resident owner, operator, and president of a non-resident corporation pending determination of whether the individual defendant was “culpably involved in the commission of a ‘trademark tort’” in the forum state); AARP v. Am. Family Prepaid Legal Corp., 604 F. Supp. 2d 785, 799–800 (M.D.N.C. 2009) (denying motion to dismiss individual corporate officers and employees as to trademark and other claims).

IWLCA concedes in its brief that it does not name Corrigan personally in its contractual claims. (Doc. 59 at 23 n.7.) As the attachment relates to IWLCA's trademark and UDTPA claims, the court will deny the motion to dismiss as to those claims, but will otherwise grant the motion. The remaining claims against Corrigan will therefore be dismissed without prejudice.

**C. Causes of action against CSE**

IWLCA brings nine causes of action against CSE: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) conversion; (4) unjust enrichment; (5) violations of the Lanham Act, 15 U.S.C. §§ 1051, et seq.; (6) violations of the UDTPA; (7) breach of fiduciary duty; (8) constructive fraud; and (9) constructive trust. (Doc. 15 ¶¶ 62-138.) IWLCA also makes an independent claim for punitive damages pursuant to its other causes of action. (Id. ¶¶ 139-42.) Each claim will be addressed in turn.

**1. Breach of contract (claim eight)**

The court first addresses IWLCA's claim that CSE breached the parties' contractual agreement. Under North Carolina law, the essential elements for a breach of contract claim are the existence of a valid contract and a breach of the terms of that contract.<sup>3</sup> Eli Rsch., Inc. v. United Commc'ns Grp., LLC, 312 F. Supp. 2d 748,

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<sup>3</sup> The court accepts the parties' agreement that North Carolina law governs this claim. (See Docs. 15, 23, 59, 62 (citing North Carolina law); but see Doc. 23 at 18 fn.2 (suggesting Maryland law may apply).)

755 (M.D.N.C. 2004) (citing Poor v. Hill, 530 S.E.2d 838, 843 (N.C. Ct. App. 2000)). As such, in order to state a claim for breach of contract, IWLCA must first show that the parties had an enforceable contractual agreement.

A valid contract requires an agreement based on a meeting of the minds and sufficient consideration. Creech ex rel. Creech v. Melnik, 556 S.E.2d 587, 591 (N.C. Ct. App. 2001). Further, to be enforceable, a contract must be sufficiently definite. McClellan v. Duke Univ., 376 F. Supp. 3d 585, 606 (M.D.N.C. 2019) (citing Brooks v. Hackney, 404 S.E.2d 854, 857 (N.C. 1991)). However, a contract “need not definitely and specifically contain in detail every fact to which the parties are agreeing.” Sides v. Tidwell, 5 S.E.2d 316, 318 (N.C. 1939). In an agreement for services, a contract must be “certain and definite as to the nature and extent of the service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced.” Rider v. Hodges, 804 S.E.2d 242, 246 (N.C. Ct. App. 2017) (quoting Croom v. Goldsboro Lumber Co., 108 S.E. 735, 737 (N.C. 1921)).

Here, IWLCA alleges that a contractual agreement exists between itself and CSE, the material terms of which are outlined in the RFP and CSE’s proposal. (Doc. 15 ¶ 122.) CSE argues in turn that, due to their preliminary and indefinite nature, the RFP

and proposal together constitute only an unenforceable offer to contract. (Doc. 23 at 18.)

Reviewing the RFP and proposal together with the pleadings, IWLCA has plausibly alleged that the terms of the agreement are sufficiently definite to constitute a binding, enforceable contract. The RFP outlines in detail the nature and extent of services that must be provided by the winning bidder. (See Doc. 15-1.) The RFP also includes suggested event locations and dates, and the proposal offers more specific event locations. (See id.; Doc. 15-2.) The proposal also outlines the compensation for each party, explaining that IWLCA and CSE will evenly split the net proceeds of the events. (Doc. 15-2 at 7-8.) Although these documents do not specify all of the terms of the agreement, the terms provided indicate that the alleged agreement is sufficiently definite to be enforceable. As such, the court finds IWLCA has plausibly alleged that an enforceable contract existed between these parties.

The next question is whether IWLCA has sufficiently alleged a breach of that agreement. IWLCA argues CSE breached the contract in several ways: refusing to produce information, contracts, policies, permits, and registration information upon IWLCA's request; refusing to comply with IWLCA's direction to process refunds; infringing upon IWLCA's trademarks to mislead registrants into believing the tournaments were not cancelled; and failing to



procure insurance against losses from cancellation of the tournaments.<sup>4</sup> (Doc. 15 ¶ 123.) Although not all of these allegations find support in the RFP and proposal, the allegations are neither contradicted by the terms of those documents. Further, at least one of IWLCA's allegations is fully supported by the contract, namely CSE's failure to procure cancellation insurance. Per the RFP, CSE was "required to acquire event insurance in order to cover all expenses incurred prior to the tournament in case the tournament is cancelled due to inclement weather, national emergency, or other circumstances." (Doc. 15-1 at 8.) IWLCA has alleged that CSE failed to do so, and CSE has not contested this. As such, IWLCA has stated a breach of the agreement sufficient to survive the motion to dismiss.<sup>5</sup>

**2. Breach of the covenant of good faith and fair dealing (claim nine)**

IWLCA's related claim is that CSE breached the covenant of good faith and fair dealing in connection with its collection of the deposits and registration fees for the 2020 Recruiting Tournament Series. IWLCA alleges CSE breached this duty based on

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<sup>4</sup> IWLCA also bases this claim on CSE's alleged breach of fiduciary duty and conversion of IWLCA's funds. Those bases are discussed separately infra.

<sup>5</sup> Whether IWLCA's other allegations are found to support additional breaches will ultimately hinge on the overall construction of the contract, if any. At this pleading stage, however, IWLCA need not make out a prima facie case. See Iodice v. United States, 289 F.3d 270, 281 (4th Cir. 2002).

its violations of the UDTPA, its failure to issue refunds, its false assertion that the IWLCA tournaments were not cancelled, and its attempt to register IWLCA's trademarks to mislead registrants.<sup>6</sup> (Doc. 15 ¶ 137.) Defendants argue that this claim cannot survive independently because it is founded on the very allegations forming the breach of contract claim and otherwise fails to allege one of the special relationships recognized as an exception to this rule. (Doc. 24 at 20-21.)

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." Bicycle Transit Auth., Inc. v. Bell, 333 S.E.2d 299, 305 (N.C. 1985) (internal citations and quotation marks omitted). The central purpose of the implied duty of good faith is to allow enforcement of a vague or incomplete agreement that the ratifying parties intended to be binding but lacks certain terms essential to proper contract formation. BioSignia, Inc. v. Life Line Screening of Am., Ltd., No. 1:12CV1129, 2014 WL 2968139, at \*4 (M.D.N.C. July 1, 2014) (citing Ultra Innovations, Inc. v. Food Lion, Inc., 502 S.E.2d 685, 687 (N.C. Ct. App. 1998)). However, where the claim for breach of good faith is "part and parcel" of

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<sup>6</sup> As with IWLCA's breach of contract claim, IWLCA also bases this claim on CSE's breach of fiduciary duty and conversion of IWLCA's funds. These bases are discussed separately infra.

a similar claim for breach of contract, the good faith claim is not to be pursued independently from the breach of contract claim. Id. (quoting Shalford v. Shelley's Jewelry, Inc., 127 F.Supp.2d 779, 787 (W.D.N.C. 2000)); see also Exact Scis. Corp. v. Blue Cross & Blue Shield of N.C., No. 1:16CV125, 2017 WL 1155807, at \*13 (M.D.N.C. Mar. 27, 2017).

Here, each of the allegations underpinning IWLCA's claim for breach of the covenant of good faith and fair dealing serves as the bases for its breach of contract claim. (Compare Doc. 15 ¶ 137 with ¶ 123 ("CSE breached the contract . . . by . . . refusing to . . . process refunds[;] . . . [c]onverting IWLCA's trademarks to its own use . . . to mislead . . . consumers into believing that the IWLCA's Tournaments are not cancelled.") As the underlying facts and alleged breaches are identical, the claim is "part and parcel" of the breach of contract claim. Therefore, IWLCA's separate cause of action for breach of the covenant of good faith and fair dealing will be dismissed as duplicative of its breach of contract claim. IWLCA may still assert theories of breach of good faith in support of its breach of contract claim. See Performance Sales & Mktg., LLC v. Lowes Cos., No. 5:07CV140, 2010 WL 2294323, at \*11 (W.D.N.C. June 4, 2010).

### **3. Conversion (claim one)**

The court next considers IWLCA's claim that CSE wrongfully converted the registration fees and deposits paid by participants

of the 2020 Recruiting Series Tournament. (Id. ¶¶ 62-72.) Under North Carolina law, conversion is “an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.” Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 723 S.E.2d 744, 747 (N.C. 2012) (internal citations omitted). The two essential elements of this claim are (1) ownership in the plaintiff and (2) wrongful possession or conversion by the defendant. Id. A party claiming conversion must show both that it retained lawful ownership of the chattel and a right to immediate possession of the chattel. See id.; Patterson v. Allen, 197 S.E. 168 (N.C. 1938). “A successful claim of conversion requires that the plaintiff maintain a right of possession of the property superior to that of the alleged converter from the time of the disputed action though the time of suit.” Interstate Narrow Fabrics, Inc. v. Century USA, Inc., 218 F.R.D. 455, 467 (M.D.N.C. 2003) (citing United States v. Currituck Grain, Inc., 6 F.3d 200, 205 (4th Cir. 1993)).

Here, IWLCA alleges that CSE wrongfully converted the registration fees and deposits for the 2020 Recruiting Series Tournaments. IWLCA contends that its contract with CSE confers upon IWLCA “exclusive control” over the fees and deposits and, as such, CSE was obligated to comply when IWLCA directed it to issue

refunds and its failure to do so constitutes conversion.<sup>7</sup> (Doc. 15 ¶¶ 62-72.) But IWLCA's claim of exclusive control is without merit. As discussed above, the material elements of the alleged contract between IWLCA and CSE are found in IWLCA's RFP and CSE's proposal. The RFP is silent as to ownership of the registration fees and deposits. (See Doc. 15-1.) CSE's proposal, however, clearly states that IWLCA and CSE are to "split the 'net' profit [of the 2020 Recruiting Tournament Series] on a 50/50 basis" and defines "net profit" as "gross revenues less hard costs." (Doc. 15-2 at 7.) The proposal further indicates that "[r]evenue streams include . . . Team Entry Fees." (Id. at 8.) A plain reading of this provision indicates that IWLCA does not have exclusive control or ownership over the registration fees and deposits, but rather a right to share evenly in the net profits of those fees with CSE.

Even if the court were to accept that IWLCA has ownership over some of the registration fees and deposits, IWLCA has not demonstrated a right to immediate possession. According to IWLCA's RFP, "after the conclusion of the tournament . . . [a]ll money

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<sup>7</sup> To the extent IWLCA alleges CSE collected the disputed funds as IWLCA's agent, such contentions lack merit. "[A] principal must have the right to control both the means and the details of the process by which the agent is to accomplish his task in order for an agency relationship to exist." Diggs v. Novant Health, Inc., 628 S.E.2d 851, 857 (N.C. Ct. App. 2006) (internal citations omitted). IWLCA alleges no facts in its amended complaint that would support the existence of an agency relationship. Without factual support, IWLCA's assertion of agency is a conclusory statement that cannot be accepted as true for the purposes of a Rule 12(b)(6) motion.

payable to the IWLCA shall be paid within 120 days.” (Doc. 15-1 at 8.) This provision clearly indicates that IWLCA does not have a right of immediate possession over fees collected before the tournaments take place. Further, IWLCA makes no argument regarding its right to immediate possession in light of this provision. As IWLCA has not sufficiently alleged its right to immediate possession, IWLCA has failed to state a claim for conversion, and Defendants’ motion to dismiss this claim will be granted.

#### **4. Unjust enrichment (claim seven)**

The court next considers IWLCA’s unjust enrichment claim. The elements of such a claim under North Carolina law are: “(1) plaintiff conferred a measurable benefit to defendant, (2) defendant knowingly and voluntarily accepted the benefit, and (3) the benefit was not given gratuitously.” TSC Rsch. LLC v. Bayer Chems. Corp., 552 F. Supp. 2d 534, 540 (M.D.N.C. 2008). The doctrine of unjust enrichment applies in “circumstances where it would be unfair for the recipient to retain [benefits] without the contributor being repaid or compensated.” Homeq v. Watkins, 572 S.E.2d 871, 873 (N.C. Ct. App. 2002) (quoting Collins v. Davis, 315 S.E.2d 759, 761 (N.C. Ct. App. 1984)). “In order to properly set out a claim for unjust enrichment, a plaintiff must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received.”

Id. (quoting Norman v. Nash Johnson & Sons' Farms, Inc., 537 S.E.2d 248, 266 (N.C. Ct. App. 2000)). A successful unjust enrichment claim must show that, at the time a benefit was given, both parties understood that the benefit was given with an expectation of some service or payment in return. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., 243 F. Supp. 2d 386, 412 (M.D.N.C. 2003) (citing Scott v. United Carolina Bank, 503 S.E.2d 149, 152 (N.C. Ct. App. 1998)). Further, a claim for unjust enrichment cannot survive where an express contract governs a party's claim. Booe v. Shadrick, 369 S.E.2d 554, 570 (N.C. 1988).

Here, IWLCA pleads unjust enrichment as an alternative to its breach of contract claim. (Doc. 59 at 16.) See also Bandy v. Gibson, No. 16 CVS 456, 2017 WL 3207068, at \*4 (N.C. Super. July 26, 2017) (business court) (declining to dismiss unjust enrichment claim merely because the complaint failed to specify that the claim was pleaded in the alternative); PDF Elec. & Supply Co., LLC v. Jacobsen, No. 20 CVS 4609, 2020 WL 5415220, at \*11 (N.C. Super. Sept. 9, 2020) (business court) (same). IWLCA argues that CSE was unjustly enriched when it retained the registration fees and deposits after IWLCA directed it to issue refunds. (Doc. 15 ¶ 117.) CSE, however, contends that the registrants – not IWLCA – conferred the benefit of the fees and deposits upon it and, as such, IWLCA cannot state a claim for unjust enrichment. The court declines to accept this argument at this stage. Although IWLCA

did not directly confer the fees and deposits onto CSE, IWLCA did grant CSE the benefit of managing the IWLCA 2020 Recruiting Tournament Series. Based on that benefit and the use of IWLCA's name and alleged trademarks, CSE was enabled to collect the registration fees and deposits as the official host of the IWLCA Recruiting Tournament Series. The allegations support the strong inference that IWLCA's sponsorship was a valuable drawing card for the registration of teams and players. IWLCA has therefore plausibly alleged it conferred a measurable benefit onto CSE in making it the official host. Further, as the contemporaneous documents show, both parties understood at the time of the conferral that this benefit was given with the expectation of some benefit in return. (See, e.g., Doc. 15-2 at 7-8 (detailing expected profit-sharing arrangement).) Because IWCLA has stated a viable claim for unjust enrichment as an alternative to its breach of contract claim, Defendants' motion to dismiss this claim will be denied.

#### **5. Violations of the Lanham Act (claim five)**

The court next addresses IWLCA's claim that CSE violated Section 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a), through the use of IWLCA's trademarks.<sup>8</sup> (Doc. 15 ¶¶ 97-110.)

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<sup>8</sup> As noted, the court previously entered a consent permanent injunction that prevents Defendants from using the subject marks in the future. (Doc. 54.) IWLCA presently seeks monetary damages and other remedies arising from Defendants' prior unauthorized use of their marks.



Specifically, IWLCA alleges that CSE's use of IWLCA's trademarks and deceptively similar marks constitutes dilution by blurring and tarnishment as well as infringement of IWLCA's trademarks. (Id. ¶ 104.) Each of these bases will be addressed in turn.<sup>9</sup>

**a. Trademark dilution**

To state a dilution claim, a plaintiff must show (1) that the plaintiff owns a famous mark that is distinctive, (2) that the defendant has commenced using a mark in commerce that is allegedly diluting the famous mark, (3) that a similarity between the defendant's mark and the famous mark gives rise to an association between the marks, and (4) that the association is likely to impair the distinctiveness of the famous mark or to harm the reputation of the famous mark. Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 264-65 (4th Cir. 2007). A necessary element is that the plaintiff's mark is "famous." Id. This is a high bar. A mark is considered famous if "it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c) (2) (A) (2020). "[A] mark must be truly prominent and renowned" to be considered famous under this standard. Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144, 171

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<sup>9</sup> The court disregards IWLCA's attempt to incorporate by reference into its briefing its prior briefing on the trademark claims (Doc. 59 at 12) as an attempt to circumvent Local Rules 7.2 and 7.3.

(4th Cir. 2012). As this designation provides strong protection to a mark, “the [Lanham Act] extends dilution protection only to those whose mark is a ‘household name.’” Id. (quoting Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1011 (9th Cir. 2004)).

Here, IWLCA has failed to plead any facts that would indicate that its trademarks are sufficiently “famous” among the general consuming public to qualify for dilution protection. As such, the court need not consider the remaining elements of the trademark dilution claim. Defendants’ motion to dismiss IWLCA’s claim for violations of the Lanham Act on the basis of trademark dilution will be granted.

**b. Trademark infringement**

Where, as here, the subject marks are unregistered, Section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (2020), provides protection for the marks where a plaintiff shows (1) it has a valid and protectable<sup>10</sup> mark, MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 340 (4th Cir. 2001), and (2) the defendant's use of an identical or similar mark is likely to cause confusion among consumers, U.S. Search, LLC v. U.S. Search.com Inc., 300 F.3d 517, 523 (4th Cir. 2002). Common law determines who enjoys the

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<sup>10</sup> In their motion to dismiss, Defendants do not contest the protectability of the subject marks. The extent of protection afforded a mark is determined by the mark’s distinctiveness. See U.S. Search, LLC v. U.S. Search.com Inc., 300 F.3d 517, 523 (4th Cir. 2002). As this issue has not been raised on the present motion, the court does not consider it here.

exclusive right to use an unregistered trademark and the extent of that right. See Spartan Food Sys., Inc. v. HFS Corp., 813 F.2d 1279, 1282 (4th Cir. 1987). At common law, trademark ownership is acquired by actual use of a mark in a given market, rather than by creation or registration of the mark. See United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97-98 (1918); Emergency One, Inc. v. Am. Fire Eagle Engine Co., 332 F.3d 264, 267-68 (4th Cir. 2003). The owner of a mark has an exclusive right to use the mark, which includes the right to prevent others from using the same or a confusingly similar mark. Emergency One, 332 F.3d at 267 (citing Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1106 (6th Cir. 1991)). When more than one user claims the exclusive right to use an unregistered trademark, priority is determined by "the first actual use of [the] mark in a genuine commercial transaction." Id. at 267-68 (quoting Allard Enters. v. Advanced Programming Res., Inc., 146 F.3d 350, 358 (6th Cir. 1998)).

Here, IWLCA has plausibly alleged that, at common law, it has the exclusive rights to the trademarks at issue. The amended complaint alleges that "the trademarks . . . were created by the IWLCA" and incorporates by reference each of IWLCA's relevant trademark applications, which are attached to the complaint. (Doc. 15 ¶ 7; see Docs. 15-6-15-12.) Importantly, these applications indicate that IWLCA was the first party to use these trademarks in

commerce and each specifies a date of first use for the relevant marks. The applications also include evidence of their use in commerce by IWLCA. Although CSE emphasizes that IWLCA hired event management companies to host the tournaments, this fact alone does not contradict IWLCA's pleading. There is no indication in the amended complaint that the event management companies, rather than IWLCA, were the first parties to use the marks simply by virtue of hosting the events. IWLCA alleges facts plausibly indicating that it was the first party to use the marks in commerce and enjoyed the exclusive right to do so.

IWLCA has also pleaded facts sufficient to indicate a likelihood of confusion arising from CSE's unauthorized use of identical or similar marks. IWLCA has alleged that CSE arrogated to itself the names of the IWLCA Recruiting Tournament Series and simply replaced "IWLCA" with "CSE." CSE contends that the placement of CSE alongside the tournament names eliminates any likelihood of confusion. This argument is unavailing at this stage. "Although pairings may decrease or eliminate the likelihood of confusion in some cases, simply pairing a registered trademark with another mark cannot alone avoid a finding of a likelihood of confusion." Rebel Debutante LLC v. Forsythe Cosmetic Grp., Ltd., 799 F. Supp. 2d 558, 573 (M.D.N.C. 2011). Here, it is plausible that CSE's use of IWLCA's trademarks would increase confusion, particularly given CSE's position as the official historical host

of the events and its statement that the tournaments would “look and feel the exact same as they always have.” (Doc. 15 ¶ 51.f.) The “likelihood of confusion is an inherently factual issue.” Petro Stopping Ctrs., L.P. v. James River Petroleum, Inc., 130 F.3d 88, 92 (4th Cir. 1997). At this early stage, IWLCA has pleaded facts sufficient to indicate a likelihood of confusion. Because IWLCA has pleaded both that it has a valid, protectable mark and there is a likelihood of confusion due to CSE’s unauthorized use of that mark, Defendants’ motion to dismiss IWLCA’s Lanham Act claim based on trademark infringement will be denied.

#### **6. Violations of the UDTPA (claim six)**

IWLCA next alleges violation of the North Carolina’s unfair and deceptive trade practices statute. Under the UDPTA, “unfair or deceptive acts or practices in or affecting commerce” are unlawful. N.C. Gen. Stat. § 75-1.1(a). “In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) the defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” Bumpers v. Cmty. Bank of N. Va., 747 S.E.2d 220, 226 (N.C. 2013) (brackets and internal citations omitted). An act or practice is considered unfair if it “is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers” and

deceptive if it "has the capacity or tendency to deceive." Bob Timberlake Collection, Inc. v. Edwards, 626 S.E.2d 315, 322-23 (N.C. Ct. App. 2006) (quoting Marshall v. Miller, 276 S.E.2d 397, 403 (N.C. 1981)).

The amended complaint alleges broadly that "the conduct of [CSE] described herein constitutes unfair or deceptive acts or practices in or affecting commerce." (Doc. 15 ¶ 112.) In its opposition, IWLCA indicates that it "is predicating its UDTPA claim upon Defendants' infringement of [] IWLCA's marks." (Doc. 59 at 15.) "North Carolina's UDTPA prohibits the same type of activity that the Lanham Act prohibits because trademark infringement and false designation undercut the mark holder's goodwill and the consumers' ability to distinguish among products." Camco Mfg., Inc. v. Jones Stephens Corp., 391 F. Supp. 3d 515, 528 (M.D.N.C. 2019) (internal citations and quotation marks omitted). Because the court has already found that IWLCA has sufficiently alleged a Lanham Act trade infringement claim, it similarly finds that IWLCA has sufficiently alleged a claim under the UDTPA. See id.; Universal Furniture Int'l, Inc. v. Collezione Europe USA, Inc., No. 1:04CV00977, 2007 WL 2712926, at \*15 (M.D.N.C. Sept. 14, 2007). Defendants' motion to dismiss this claim will therefore be denied.

**7. Breach of fiduciary duty (claim two) and constructive fraud (claim three)**

The court next considers IWLCA's claim that CSE breached its

fiduciary duty to IWLCA. (Doc. 15 ¶¶ 73-79.) To establish a breach of fiduciary duty, a party must show that (1) there was a fiduciary relationship, (2) which thereby created a fiduciary duty, and (3) the fiduciary breached that duty. Dalton v. Camp, 548 S.E.2d 704, 709 (N.C. 2001). Although North Carolina courts "have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified," Smith v. GMAC Mortg. Corp., No. CIV 5:06CV125-V, 2007 WL 2593148, at \*5 (W.D.N.C. Sept. 5, 2007) (citing HAJMM Co. v. House of Raeford Farms, Inc., 403 S.E.2d 483, 489 (N.C. 1991)), it is well-established that, absent special circumstances, "no fiduciary relationship exists between mutually interdependent businesses with equal bargaining positions who dealt at arms-length." Rhone-Poulenc Agro S.A. v. Monsanto Co., 73 F. Supp. 2d 540, 546 (M.D.N.C. 1999); see also Sara Lee Corp. v. Quality Mfg., 201 F. Supp. 2d 608, 616 (M.D.N.C. 2002) ("[P]arties to a contract . . . do not become each others' fiduciaries."). Special circumstances may arise where one party sufficiently dominates and influences the other. See S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese, 284 F.3d 518, 533 (4th Cir. 2002) (citing Tin Originals, Inc. v. Colonial Tin Works, Inc., 391 S.E.2d 831, 833 (N.C. Ct. App. 1990)). Therefore, "even when parties to an arms-length transaction have reposed confidence in each other, no fiduciary duty arises unless one party thoroughly dominates the

other.” Id.; see also Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 348 (4th Cir. 1998) (“Only when one party figuratively holds all the cards – all the financial power or technical information, for example – have North Carolina courts found that the ‘special circumstance’ of a fiduciary relationship has arisen.”). “A fiduciary bears the extraordinary obligation . . . never to place his personal interest over that of the persons for whom he is obliged to act . . . . [T]hese obligations are out of place in a relationship involving two business entities pursuing their own business interests.” Broussard, 155 F.3d at 348 (internal quotation marks omitted).

Here, IWLCA alleges that CSE owed it a fiduciary duty because CSE broadly “held all the cards.” (Doc. 15 ¶ 75.) IWLCA alleges that as CSE collected and held all of the registration fees, maintained a list of the registrants, held all of the information relating to contracts for cancellation insurance, and held all of the information concerning each tournament venue, CSE owed it a fiduciary duty. Defendants contend that these obligations fail to plausibly establish a fiduciary duty on the part of CSE. Defendants are correct.

CSE undertook these alleged responsibilities pursuant to the alleged contractual agreement between the parties, and many of these responsibilities arose under the provisions specifically provided by IWLCA in the RFP. (See Doc. 15-1.) If IWLCA wished



to impose a fiduciary duty upon CSE in light of the extent of CSE's responsibilities, it was free to bargain for that protection. However, IWLCA cannot craft an agreement that outlines specific responsibilities and later allege that the responsibilities it elected to impose on the other demonstrate the other party's dominance, transforming that party into a fiduciary. IWLCA's claim of CSE's dominance is unsupported. IWLCA and CSE are sophisticated businesses that negotiated some type of an arrangement – allegedly a contractual one – at arms-length, and no special circumstances have been shown. Even if there were some form of dominion, it does not plausibly rise to the high bar of “thorough[] dominat[ion].” S. Atl. Ltd., 284 F.3d at 533. Defendants' motion to dismiss IWLCA's breach of fiduciary duty claim will therefore be granted.

In connection with the fiduciary duty claim, IWLCA also asserts a claim for constructive fraud. Constructive fraud arises when one party to a confidential or fiduciary relationship abuses its position to the detriment of the other party. See Watts v. Cumberland Cty. Hosp. Sys., 343 S.E.2d 879, 884 (N.C. 1986); see also Irwin v. Fed. Exp. Corp., No. 1:14CV557, 2014 WL 5605743, at \*6 (M.D.N.C. Nov. 4, 2014) (“A relationship of trust and confidence [is] also known as a fiduciary relationship.”). IWLCA predicates this claim on its argument that it has shown that a confidential or fiduciary relationship existed. (See Doc. 59 at 7 (“IWLCA has

adequately described the facts and circumstances establishing a relationship of trust and confidence for the same reasons [ ] IWLCA adequately alleged a fiduciary duty.”.) Defendants contend that because there is no fiduciary relationship, this claim necessarily fails. Defendants are correct, and their motion to dismiss IWLCA’s constructive fraud claim will therefore be granted.

**8. Constructive trust (claim four)**

Finally, the court addresses IWCLA’s claim that CSE’s actions warrant the imposition of a constructive trust. “A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.” Wilson v. Crab Orchard Dev. Co., 171 S.E.2d 873, 882 (N.C. 1970). Although a fiduciary relationship is often the basis of a constructive trust claim, a fiduciary relationship is not strictly necessary. Variety Wholesalers, 723 S.E.2d at 751-52. A trial court “may impose a constructive trust, even in the absence of fraud or a breach of fiduciary duty, upon the showing of either (1) some other circumstance making it inequitable for the defendant to retain the funds . . . or (2) that the defendant acquired the funds in an unconscientious manner.” Houston v. Tillman, 760 S.E.2d 18, 21 (N.C. Ct. App. 2014).

"[A]ctual wrongdoing . . . is not necessary for imposition of a constructive trust." Id.

IWLCA asks that the court impose a constructive trust over all of the registration fees and deposits collected by CSE for the 2020 Recruiting Tournament Series. (Doc. 15 ¶ 96.) As discussed above, IWLCA has failed to show that CSE owed it a fiduciary duty. As such, IWLCA must ultimately rise to the "difficult task" of showing other circumstances that make CSE's holding of the registration fees and deposits inequitable. Variety Wholesalers, 723 S.E.2d at 752. On the face of the amended complaint, however, IWLCA has plausibly alleged that such circumstances may exist. For example, IWLCA has successfully alleged violations of the Lanham Act and UTDPA. IWLCA has also sufficiently pleaded a claim for unjust enrichment. The pleadings further allege that IWLCA had discretion to cancel the tournament and CSE disregarded that discretion. (Doc. 15 ¶ 130.) Indeed, the amended complaint charges that CSE infringed on IWLCA's trademarks and failed to cancel the tournament at IWLCA's direction because it had not acquired the necessary event cancellation insurance. (Id. ¶¶ 30, 40.) Moreover, IWLCA charges that even though its sponsorship of the Recruiting Tournament Series was the drawing card for participation, once it canceled the events for public health reasons associated with COVID-19, CSE exerted improper influence over the registrants to coerce them into foregoing their right to

a proper refund of their fees. (Id. ¶ 40.)

It is early in this litigation, and this claim is not fully fleshed out. Considered together, however, these facts plausibly suggest that it may be inequitable for CSE to retain the disputed funds to the degree CSE retained them, such that a constructive trust should be imposed.<sup>11</sup> Therefore, Defendants' motion to dismiss this claim will be denied.

### **9. Economic loss rule**

Defendants contend that, to the extent a contract governs the relationship between the parties, the economic loss rule bars several of IWLCA's remaining tort claims.

In North Carolina, the economic loss rule "generally bars recovery in tort for damages arising out of a breach of contract." Rountree v. Chowan Cty., 796 S.E.2d 827, 830 (N.C. Ct. App. 2017). The rationale for the economic loss rule is that parties contracting for services are free to include, or exclude, provisions as to the parties' respective rights and remedies, should either party fail to meet their obligations, which tort law should not supplement. See Moore v. Coachmen Indus., 499 S.E.2d 772, 780 (N.C. Ct. App. 1998). "To give a party a remedy in tort . . . would permit the party to ignore and avoid the rights and

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<sup>11</sup> It is unclear what interest IWLCA has in the fees collected apart from its claim that CSE should have refunded them to the registrants (less any appropriate sunk costs that could not be recovered) but by refusing to do so CSE improperly traded on, and thus benefitted from its infringement of, IWLCA's trademarks.

remedies granted or imposed by the parties' contract." Id. A "tort action must be grounded on a violation of a duty imposed by operation of law," not a violation of a duty arising purely from "the contractual relationship of the parties." Rountree, 796 S.E.2d at 831 (internal quotation marks and citation omitted). "Accordingly, North Carolina law requires courts to limit plaintiffs' tort claims to only those claims which are 'identifiable' and distinct from the primary breach of contract claim." Legacy Data Access, Inc. v. Cadrillion, LLC, 889 F.3d 158, 164 (4th Cir. 2018) (quoting Broussard, 155 F.3d at 346).

Here, as IWLCA argues, Defendants' invocation of the economic loss rule is premature. "The economic loss rule does not bar a claim when there is a dispute over the validity of the contract, the existence of a contractual duty, or the expiration of a contractual duty." USConnect, LLC v. Sprout Retail, Inc., No. 17 CVS 2554, 2017 WL 1450593, at \*5 (N.C. Super. Ct. Apr. 21, 2017) (Business Court); see also Precision Hydraulic Cylinders, Inc. v. Mfg. Tech., Inc., No. 7:18-CV-203-FL, 2019 WL 4409710, at \*7 n.6 (E.D.N.C. Sept. 13, 2019) (distinguishing between cases in which parties dispute the scope of a contract and cases in which parties dispute the existence of a contract). Although IWLCA has plausibly alleged that the parties had a contractual agreement, CSE still contests the ultimate existence of a contractual agreement. At this early stage and based only on IWLCA's pleadings, the court

declines to resolve whether a contract existed. For that reason, the court cannot presently determine whether any of IWLCA's claims will be subject to the economic loss rule, and Defendants' motion to dismiss IWLCA's remaining non-contractual claims on the basis of the economic loss rule will be denied.

#### **10. Punitive damages (claim ten)**

IWLCA's amended complaint alleges a separate claim for punitive damages on the grounds that its other claims support a punitive damages award. (Doc. 15 ¶¶ 139-42.) Defendants are correct that claims for punitive damages do not exist as separate causes of action under North Carolina law. See, e.g., Eli Rsch., 312 F. Supp. 2d at 764; Shugar v. Guill, 283 S.E.2d 507, 509 (N.C. 1981). However, this does not bar plaintiffs from making a specific request for punitive damages in a complaint. In fact, in North Carolina courts, a specific demand for punitive damages is required and must be supported with aggravating factors. Eli Rsch., 312 F. Supp. 2d at 764 n.11. Punitive damages are available in cases where at least nominal damages are recoverable and a plaintiff has alleged malicious, wanton, and reckless injury. Hawkins v. Hawkins, 400 S.E.2d 472, 474-75 (N.C. Ct. App. 1991). IWLCA has alleged as much here. While there is technically no separate cause of action for punitive damages, because IWLCA's request for punitive damages is contained in its prayer for relief (Doc. 15 ¶ 143.e.), the court will treat the allegations of the

tenth claim for relief as support for IWLCA's prayer for punitive damages. Defendant's motion is therefore granted to the limited extent that the tenth claim does not set out a separate claim, but the allegations pleaded will be considered in support of any request for punitive damages made elsewhere in the amended complaint.

### **III. CONCLUSION**

For the reasons stated,

IT IS THEREFORE ORDERED that Defendants' motion to dismiss (Doc. 23) is GRANTED IN PART and DENIED IN PART as follows:

1. The motion to dismiss all claims against Corrigan in his individual capacity is DENIED as to claims five (violations of the Lanham Act) and six (violations of the UDTPA), but is otherwise GRANTED;<sup>12</sup>

2. The motion to dismiss claims four (constructive trust), six (violations of the UDPTA), seven (unjust enrichment), and eight (breach of contract) against CSE is DENIED;

3. The motion to dismiss claim ten (punitive damages) against CSE is GRANTED to the limited extent noted above, but IWLCA may pursue its punitive damages prayer for relief;

4. The motion to dismiss claims one (conversion), two (breach of fiduciary duty), three (constructive fraud), and nine

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<sup>12</sup> This includes dismissal of any claims against Corrigan in any alleged "corporate capacity."

(breach of the covenant of good faith and fair dealing) against CSE is GRANTED; and

5. The motion to dismiss claim five (violations of the Lanham Act) against CSE is DENIED in relation to Plaintiff's trademark infringement claim and GRANTED in relation to Plaintiff's trademark dilution claim.

IT IS FURTHER ORDERED that Defendants' motion to strike (Doc. 35) is DENIED.

/s/ Thomas D. Schroeder  
United States District Judge

December 4, 2020