

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

08 CVS 4182

WALTERS & ZIMMERMAN, PLLC and)
BAMBI FAIVRE WALTERS,)

Plaintiffs,)

v.)

SCOTT P. ZIMMERMAN,)

Defendant.)

**BRIEF IN SUPPORT OF
DEFENDANT’S MOTION
TO DISMISS**

NOW COMES DEFENDANT, Scott P. Zimmerman (“Mr. Zimmerman”) through counsel, pursuant to Business Court Rule 15.2, and submits this Brief in Support of Defendant’s Motion to Dismiss.

NATURE OF THE MATTER BEFORE THE COURT

In this lawsuit, lawyer Bambi Faivre Walters (“Plaintiff Walters”) purports to sue on her own behalf and on behalf of the now-dissolved law firm Walters & Zimmerman, PLLC. The lawsuit relates to internal disputes between the members of the PLLC, disputes that eventually led to the law firm’s dissolution. Walters & Zimmerman, PLLC was dissolved on 29 March 2007 by the filing of Articles of Dissolution with the Department of the Secretary of State of North Carolina.

Plaintiff Walters, however, was not a member of Walters & Zimmerman, PLLC, but instead was the principal of a corporate member, Bambi Faivre Walters, PC, which is not a party. The lawsuit names as its sole defendant attorney Scott P. Zimmerman who was also not a member of Walters & Zimmerman, PLLC.

For the reasons discussed below, Plaintiffs' Amended Complaint should be dismissed because Plaintiff Walters has no standing to bring a lawsuit on behalf of Walters & Zimmerman, PLLC. She has no standing to assert these claims as an individual because Plaintiff Walters was not a member of Walters & Zimmerman, PLLC, but the principal of the corporate member Bambi Faivre Walters, PC. Nor could Plaintiff Walters bring these claims even if she had been a member of the law firm because the claims she purports to assert on behalf of Walters & Zimmerman, PLLC can only be brought as a derivative action. The Amended Complaint does not satisfy the prerequisites of a derivative suit.

Plaintiff Walters alleges in the Amended Complaint that she has authority to sue on behalf of Walters & Zimmerman, PLLC because she was identified in the Articles of Organization as manager. Even if Plaintiff Walters were the manager, that status would not entitle her to take actions beyond the usual course of business for the law firm—that is the practice of law. Suing the principal of the only other member of the PLLC is not within the usual course of business of the practice of law. Therefore, Plaintiffs' Amended Complaint should be dismissed.

Further, the lawsuit should be dismissed because Mr. Zimmerman, the only defendant named in the lawsuit, has no individual liability. To the extent Plaintiffs bring cognizable claims at all, which is denied, Mr. Zimmerman is merely the principal of a member of Walters & Zimmerman, PLLC. The member is Scott P. Zimmerman, PLLC, not Mr. Zimmerman individually. Accordingly, Plaintiffs' Amended Complaint should be dismissed.

Additionally, although all the claims in the lawsuit should be dismissed on grounds of lack of standing or improper party, several of the claims, even if properly asserted, fail pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

STATEMENT OF FACTS

Plaintiff Walters & Zimmerman, PLLC was formed on or about 18 August 2006 (Am. Compl. ¶ 8) and dissolved on or about 29 March 2007 (Am. Compl. Ex. C). The Articles of Organization filed on 18 August 2006 identify two members of the PLLC: Bambi Faivre Walters, P.C. and Scott P. Zimmerman, PLLC. (Am. Compl. Ex. A). Plaintiff Walters is the principal of Bambi Faivre Walters, PC and Mr. Zimmerman is the principal of Scott P. Zimmerman, PLLC. (Answer & Countercl. ¶ 4).¹

Neither of the members of Walters & Zimmerman, PLLC identified in the Articles of Organization is a party to this lawsuit. Instead, the lawsuit is brought by Plaintiff Walters individually. She also purports to bring the lawsuit on behalf of the now-dissolved Walters & Zimmerman, PLLC. The Amended Complaint is silent as to the discrepancy between the Articles of Organization and the parties to the lawsuit.

Walters & Zimmerman, PLLC worked primarily for one client (the “Client”). (Am. Compl. ¶¶ 12 to 20). As time progressed the Client became dissatisfied with, and in some cases adamantly objected to, work by Plaintiff Walters. (Answer & Countercl. ¶¶ 14-21). As a result, the Client directed Mr. Zimmerman to manage all of its matters, including review and direct submission of all billings. (Answer & Countercl. ¶¶ 16-19). The Client further directed that Plaintiff Walters transfer all of the Client’s files to Mr. Zimmerman. (Id.) Following that transfer, problems surfaced relating to patent applications handled by Plaintiff Walters. These continued developments strained the relationship between Mr. Zimmerman and Plaintiff Walters as principals of the members of Walters & Zimmerman, PLLC. As a result, on 8 March 2007,

¹ Defendant Zimmerman disputes many of the allegations of the Amended Complaint as his Answer and Counterclaim make clear. Although allegations from the Answer and Counterclaim are provided for context only, for purposes of the Motion to Dismiss, Defendant Zimmerman relies solely on the allegations of the Amended Complaint, taken as true.

Plaintiff Walters and Mr. Zimmerman, as the principals of the members, discussed dissolution (Am. Compl. ¶ 44) and agreed to dissolve Walters & Zimmerman, PLLC (Answer & Countercl. ¶ 22). On 29 March 2007, Articles of Dissolution for Walters & Zimmerman, PLLC were filed after Mr. Zimmerman received email confirmation of an agreement to dissolve from Plaintiff Walters. (Answer & Countercl. ¶ 23). This lawsuit was filed after negotiations about the dissolution broke down.

ARGUMENT

“A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint.” Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (quoting Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970)). Dismissal of a complaint pursuant to Rule 12(b)(6) is proper “when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff’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 plaintiff’s claim.” Oates v. JAG, Inc., 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

I. PLAINTIFF BAMBI FAIVRE WALTERS LACKS STANDING TO BRING THIS ACTION IN THE NAME OF WALTERS & ZIMMERMAN, PLLC.

Walters & Zimmerman, PLLC was a law firm whose members were two corporate entities. Plaintiff Walters is not a member of the Walters & Zimmerman, PLLC, but if she were a member she would still lack standing to bring this action either on her own behalf or on behalf of Walters & Zimmerman, PLLC.

A professional limited liability company (“PLLC”) is treated under North Carolina statutes like any limited liability company. A limited liability company (“LLC”) is a “statutory form of business organization ... that combines characteristics of business corporations and

partnerships.’ ” Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (quoting Russell M. Robinson, II, Robinson on North Carolina Corporate Law § 34.01, at 34-2 (rev. 7th ed.2006) (hereinafter Robinson)). The LLC Act contains numerous “default” provisions that govern an LLC in the absence of the LLC’s articles of organization or written operating agreement. Robinson, § 34.01, at 34-2 to 34-3.

The Amended Complaint correctly does not allege that Bambi Favire Walters, P.C. and Scott P. Zimmerman, PLLC, ever entered into a written operating agreement as the members of Walters & Zimmerman, PLLC. Therefore, the default provisions of the LLC Act govern the present case.

The Articles of Organization list Plaintiff Walters as the “manager” of Walters & Zimmerman, PLLC. Pursuant to N.C. Gen. Stat. § 57C-3-23, a manager of a PLLC has the authority to act for and bind the PLLC but only in its usual course of business. Expressly, “[a]n act of a manager that is not apparently for carrying on the usual course of the business of the limited liability company does not bind the limited liability company unless authorized in fact or ratified by the limited liability company.” N.C. Gen. Stat. § 57C-3-23. The usual business of Walters & Zimmerman, PLLC was the provision of legal services to clients. (Am. Compl. ¶ 9). As such, the authority to file a legal action in the name of the PLLC to assert the claims stated in the Amended Complaint is beyond that vested in the manager.

In a case with virtually identical facts, the North Carolina Court of Appeals recently held that the filing of an action by the manager of a PLLC to recover purported assets of the PLLC allegedly misappropriated by another member is not “carrying on in the usual way the business of the limited liability company.” Crouse v. Mineo, ___ N.C. App. ___, 658 S.E.2d 33, 37-38 (2008) (citing N.C. Gen. Stat. § 57C-3-23). As with Plaintiffs in this case, the individual

bringing the lawsuit in Crouse was one member of a two-attorney PLLC attempting to cause the PLLC to file a lawsuit on its own behalf. Id., 658 S.E.2d at 36. In affirming the trial court's dismissal of the plaintiff's claims, the Crouse court cited § 57C-3-23 and held that the manager did not have standing to cause the LLC to bring a lawsuit on its own behalf. Id., 658 S.E.2d at 38.

Here, Plaintiff Walters has not alleged, nor can she, that this lawsuit is in the usual course of business or that Scott P. Zimmerman, PLLC as the other member of Walters & Zimmerman, PLLC, authorized or ratified the filing of this lawsuit. Accordingly, Plaintiff Walters' action does not bind the limited liability company because it is "not authorized in fact or ratified by the limited liability company." N.C. Gen. Stat. § 57C-3-23. As such, Plaintiff Walters lacks the authority to cause Walters & Zimmerman, PLLC to institute the present action and the Amended Complaint as to Plaintiff Walters & Zimmerman, PLLC should be dismissed.

Even if Ms. Walters were a member, which she is not, the only course of action available to a LLC member seeking to bring an action on behalf of the LLC without the consent of a majority of the LLC's members would be to file a derivative suit. Crouse, 658 S.E.2d at 40-41. Plaintiff Walters has failed to meet the requirements for filing a derivative suit on behalf of an LLC. To properly pursue a derivative action, a member must meet the conditions set forth in N.C. Gen. Stat. § 57C-8-01. Pursuant to N.C. Gen. Stat. 57C-8-01(b), "the complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the managers, directors, or other applicable authority and the reasons for the plaintiff's failure to obtain the action, or for not making the effort."

Plaintiff Walters is not a member of Walters & Zimmerman, PLLC and thus is not a proper plaintiff to file a derivative lawsuit pursuant to N.C. Gen. Stat. § 57C-8-01(a)(2).

Notwithstanding that obstacle, the Amended Complaint on its face also fails to comply with the requirements of N.C. Gen. Stat. § 57C-8-01(b). The Amended Complaint is completely devoid of any discussion relating to the “efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the managers, directors, or other applicable authority and the reasons for the plaintiff’s failure to obtain the action, or for not making the effort.” *Id.* Therefore, even if Plaintiff Walters were a member of Walters & Zimmerman, PLLC and were able to bring a derivative lawsuit, the Amended Complaint still fails to state a claim upon which relief can be granted because the Amended Complaint fails to comply with the pleading requirements of N.C. Gen. Stat. § 57C-8-01(b). Therefore, Plaintiffs’ claims should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

II. PLAINTIFF WALTERS LACKS STANDING TO ASSERT A CLAIM FOR ACCOUNTING OR DISTRIBUTION.

Plaintiff Walters purports to assert a claim for accounting and a liquidating distribution against Mr. Zimmerman. This claim must fail. As discussed above, Plaintiff Walters, individually, is not a member of Walters & Zimmerman, PLLC. Even if she were manager, this suit may not be brought for the reasons set forth in Section I. Therefore she does not have the rights under the provisions of the North Carolina General Statutes upon which these claims rely.

III. MR. ZIMMERMAN DOES NOT HAVE INDIVIDUAL LIABILITY.

Plaintiffs’ claims against Mr. Zimmerman must also fail because he is not a member of Walters & Zimmerman, PLLC. Furthermore, even if Mr. Zimmerman were a member of Walters & Zimmerman, PLLC, he is shielded from individual liability pursuant to N.C. Gen. Stat. §57C-3-30(a).

The main purpose of forming an LLC is to shield individual members from personal liability for the debts and obligations of the LLC in accordance with the statutory protections

provided to members of the LLC. Thus, “limited liability of the [LLC’s] owners, often referred to as ‘members,’ is a crucial characteristic of the LLC form, giving members the same limited liability as corporate shareholders.” Hamby v. Profile Products, LLC, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007). “A person who is a member, manager, director, executive or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager, director, or executive and **does not become so by participating, in whatever capacity, in the management or control of the business.** N.C. Gen. Stat. §57C-3-30(a) (emphasis added).

The Court of Appeals has stated that “[t]his statutory provision expressly limits the liability of a member ‘for the obligations of a [LLC]’ and provides that ‘participating, in whatever capacity in the management or control of the business,’ does not impose liability on a member for the acts of the limited liability company...” Spaulding v. Honeywell Intern., Inc., ___ N.C. App. ___, 646 S.E.2d 645, 649 (2007). As such, mere participation in the business affairs of a limited liability company by a member is not enough to hold the member independently liable for any alleged harm caused by the LLC. Id., 646 S.E.2d at 649.

In another case landowners brought suit against a limited liability company and an individual member alleging that a proposed liquid propane distribution center constituted a nuisance. Page v. Roscoe, LLC, 128 N.C. App. 678, 679, 497 S.E.2d 422, 424 (1998). The Page court affirmed the trial court’s ruling that the plaintiff could not state a claim against a member of a limited liability company because the plaintiff had not “allege[d] any acts on the part of [the member] individually, which are not related to his status as a member of a North Carolina limited liability company[.]” Id. at 686-88, 497 S.E.2d at 428. See also RD & J Properties v. Lauralea-Dilton Enterprises, LLC, 165 N.C. App. 737, 738, 600 S.E.2d 492, 495 (2004) (holding

that an individual member of an LLC could not be held personally liable for breach of contract allegedly committed by the LLC because the member did not sign the contract in his individual capacity). Like the claims in Roscoe, any and all of Plaintiffs' claims in this case stem from Mr. Zimmerman's participation in the business affairs of Walters & Zimmerman, PLLC. Following the holding of the Page court, therefore, Plaintiffs have failed to state a claim against Mr. Zimmerman and Plaintiffs' Amended Complaint should be dismissed.

IV. THE NORTH CAROLINA UNFAIR AND DECEPTIVE TRADE PRACTICES ACT DOES NOT APPLY TO THIS ACTION.

Notwithstanding the bases for dismissal set forth above, and in addition to those grounds, Plaintiffs' claim for a violation of the North Carolina Unfair and Deceptive Trade Practices Act must fail.

A. Plaintiffs' Claims Are Not "In or Affecting Commerce"

To establish a *prima facie* claim pursuant to North Carolina's Unfair and Deceptive Trade Practices Act ("UTPA"), plaintiff must show that (1) defendant committed an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) plaintiff was injured as a result. N.C. Gen. Stat. § 75-1.1; Phelps-Dickson Builders, L.L.C. v. Amerimann Partners, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005). Under the UTPA "commerce," in its broadest sense, comprehends intercourse for the purposes of trade in any form. Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 (1999). The determination of whether a practice is "in or affecting commerce" is a question of law to be decided by the Court. See, e.g., J.M. Westall & Co. v. Windswept View of Asheville, Inc., 97 N.C. App. 71, 387 S.E.2d 67 (1990).

Internal corporate management decisions do not affect commerce as defined by Chapter 75 and North Carolina courts. Wilson v. Blue Ridge Elec. Membership Corp. 157 N.C. App. 355, 358, 578 S.E.2d 692, 694 (2003). In Wilson, a former employee filed a complaint against

his former employer, alleging unfair and deceptive trade practices following the denial of employee's application for seat on employer's board of directors after employee was discharged. Id. at 356, 578 S.E.2d at 693. The Wilson court affirmed the trial court's dismissal of the unfair trade practices claim for failure to state a claim upon which relief can be granted because the alleged action did not affect commerce. The court noted that "[m]atters of internal corporate management, such as the manner of selection and qualifications for directors, do not affect commerce as defined by Chapter 75 and our Supreme Court. Id. at 358, 578 S.E.2d at 694.

Like the unfair and deceptive trade practices claims in the Wilson case, all of Plaintiffs' claims for unfair and deceptive trade practices arise out of the internal management activities relating to Walters & Zimmerman, PLLC. Similar to the employer's decision regarding the selection of a board of directors in Wilson, all of Mr. Zimmerman's actions that are alleged to constitute unfair and deceptive trade practices are internal management actions he performed as a member of Walters & Zimmerman, PLLC and therefore "do not affect commerce as defined by Chapter 75 and our Supreme Court." Id. at 358, 578 S.E.2d at 694.

Similarly, in Durling v. King, 146 N.C. App. 483, 488-89, 554 S.E. 2d 1, 4 (2001), the Court of Appeals evaluated sales representatives' claims for commissions from their former employer. Noting that employer-employee claims are often excluded from the scope of Chapter 75, the court also recognized that the mere existence of an employer-employee relationship does not always defeat a Chapter 75 claim. In that case, however, the court ruled that Chapter 75 was inapplicable because there was no evidence that "the subject transactions had any impact beyond the parties' employment relationships." 46 N.C. App. at 489, 554 S.E. 2d at 5. Here, the Amended Complaint does not allege facts from which the Court can conclude that the internal law firm disputes had any impact beyond the law firm.

Following the reasoning of the Wilson and Darling courts, Plaintiffs' claims for unfair and deceptive trade practices should be dismissed for failure to state a claim upon which relief can be granted.

Nor do the allegations illustrate that the dispute within the former Walters & Zimmerman, PLLC has any impact or effect on the consuming public. The "primary purpose of N.C. Gen. Stat. § 75-1.1 is to provide a private cause of action for consumers. Although commerce is defined broadly under N.C. Gen. Stat. § 75-1.1(b) as all business activities, however denominated, the fundamental purpose of N.C. Gen. Stat. § 75-1.1 is to protect the consuming public. See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520 (4th Cir. 1999); Skinner v. E.F. Hutton & Co., Inc., 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985). Typically, claims under § 75-1.1 involve a buyer and seller. Durling v. King, 146 N.C. App. 483, 488-89, 554 S.E. 2d 1, 4 (2001) (internal citations and quotations omitted). Courts have also recognized actions based on other types of commercial relationships, including those arising out of contracts. J.M. Westall & Co., Inc. v. Windswept View of Asheville, Inc., 97 N.C. App. 71, 387 S.E.2d 67, disc. review denied, 327 N.C. 139, 394 S.E.2d 175 (1990). The proper inquiry is "whether the defendants' allegedly deceptive acts *affected* commerce." Id. at 75, 387 S.E.2d at 69. Therefore, in order for the UTPA to apply there must be a competitive or business relationship in that can be policed for the benefit of the consuming public. Food Lion, 194 F.3d at 520.

B. Learned Profession Exception Applies

Section 75-1.1(b) expressly excludes from the provisions of the UTPA "professional services rendered by a member of a learned profession." Thus, professional services rendered by an attorney in the course of his business are exempt under the statute and may not form the basis

of an unfair or deceptive trade practices claim. See e.g., Sharp v. Gailor, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). All of the claims that Plaintiffs allege against Mr. Zimmerman directly relate to the course and scope of his representation of the firm's Client as a practicing attorney as well as his actions as an attorney in the law firm of Walters & Zimmerman, PLLC. Thus, Plaintiffs claims are expressly excluded from the UTPA and should therefore be dismissed.

V. PLAINTIFFS' CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS FAILS TO STATE A CLAIM.

Notwithstanding the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs' claim for misappropriation of trade secrets must fail for the additional reason that the information that Mr. Zimmerman allegedly misappropriated was not the property of the Plaintiffs and furthermore, said information was readily ascertainable by others and therefore could not have been trade secrets.

In this case, the purported trade secrets Plaintiffs seek to protect are, in essence, client records, attorney notes, billing records and invoices, none of which are actually owned by Plaintiff. (Am. Compl. ¶ 119). As the Amended Complaint and other pleadings before the Court make clear Walters & Zimmerman, PLLC had but one client. As such, the files, records, billings, and attorney notes that Plaintiffs contends are trade secrets relate to the provision of services to the sole client of Walters & Zimmerman, PLLC. Client records belong to the Client and not Plaintiffs. See North Carolina Rules of Professional Conduct, 27 N.C.A.C. 1.16 (2007) (stating that client materials and paperwork should be returned to the client upon termination of the representation).

The North Carolina Trade Secrets Protection Act defines "misappropriation" of a trade secret as "acquisition, disclosure, or use of a trade secret **of another without express or implied**

authority or consent.” N.C. Gen. Stat. § 66-152(1) (emphasis added). An essential element to a misappropriation of trade secrets claim is that the party bringing the action actually own the “trade secret” in question. The information Plaintiffs allege that Mr. Zimmerman misappropriated were the files, records, bills and attorney notes that belonged to the Client of Walters & Zimmerman, PLLC and the Amended Complaint does not allege to the contrary.

It was the Client who controlled the files and the lawyers were ethically bound to transmit its records as directed by the Client pursuant to Rule 1.16 of the North Carolina Rules of Professional Conduct. See, 27 N.C.A.C. 1.16. Therefore, the materials allegedly constituting trade secrets were owned by the Client, and the Client had the ability to direct that they be transferred to other law firms. Although facts related to Mr. Zimmerman’s express authority to provide that information to the Client of Walters & Zimmerman, PLLC appear in the Answer and Counterclaim, Plaintiffs in the Amended Complaint have failed to allege that the materials were the sole property of the Plaintiffs, an essential element of their misappropriation of trade secrets claim. Therefore, the claim should be dismissed.

Additionally, trade secrets must first exist before a claim for misappropriation can exist. A trade secret is defined as business or technical information that “[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development ... and [is] the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” N.C. Gen. Stat. § 66-152(3)(a)-(b). Factors to consider when determining whether an item is a trade secret are:

- (1) the extent to which information is known outside the business;
- (2) the extent to which it is known to employees and others involved in the business;
- (3) the extent of measures taken to guard secrecy of the information;
- (4) the value of information to business and its competitors;
- (5) the amount of effort or money expended in developing the information; and
- (6) **the ease or difficulty with which the information could properly be acquired or duplicated by others.**

State ex rel. Utils. Comm'n v. MCI, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (emphasis added).

As previously discussed, the Client of Walters & Zimmerman, PLLC owned the materials that Plaintiffs contend were “trade secrets” and therefore had an absolute right to acquire, duplicate or transfer that information to other law firms or attorneys. Accordingly, there are no trade secrets and, more importantly, there can be no misappropriation because Mr. Zimmerman’s actions were in accord with the directions of the Client who was the owner of that information. As such, Plaintiffs’ claim must fail and should be dismissed.

VI. PLAINTIFFS’ CONSTRUCTIVE FRAUD/BREACH OF FIDUCIARY DUTY ALLEGATIONS REGARDING U.S. PATENT AND TRADEMARK OFFICE POWERS OF ATTORNEY FAIL TO STATE A CLAIM.

In addition to the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs’ claim for constructive fraud/breach of fiduciary duty regarding the U.S. Patent and Trademark Office Power of Attorney, must fail. Constructive fraud arises where a confidential or fiduciary relationship exists which has led to and surrounded the consummation of a transaction in which the defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Forbis v. Neal, 361 N.C. 519, 528, 649 S.E.2d 382, 388 (2007) (quotations omitted). To state a claim for breach of fiduciary duty, a plaintiff must allege that a fiduciary relationship existed and that the fiduciary failed to act in good faith and with due regard to plaintiff’s interests. Toomer v. Branch Banking and Trust Co., 171 N.C. App. 58, 614 S.E.2d 328 (2005).

In support of this claim in the Amended Complaint, Plaintiffs allege that the Client of Walters & Zimmerman, PLLC executed a power of attorney giving authority to, among others, Scott P. Zimmerman to act on its behalf. (Am. Compl. ¶ 110). Plaintiffs then allege that Mr.

Zimmerman has exercised the authority vested in him by the Client pursuant to that power of attorney. (Am. Compl. ¶ 113). Plaintiffs have not alleged, nor can they, that Mr. Zimmerman has acted contrary to the power of attorney granted by the Client or beyond its scope. Plaintiffs have not alleged, nor can they, that Mr. Zimmerman has acted contrary to the Client or its wishes as grantor of the authority to act pursuant to the Power of Attorney.

The essence of Plaintiffs' claim seems to be that Mr. Zimmerman "has not filed a change of Power of Attorney and/or otherwise revoked the January 29, 2007 Power of Attorney." (Am. Compl. ¶ 113). These allegations are silent as to the Client's instruction with regard to the Power of Attorney and silent on how Defendant owes a fiduciary duty or any duty with regard to revocation of powers of attorney to anyone but the Client. The Amended Complaint does not allege or demonstrate the consummation of a transaction in which the Defendant Zimmerman is alleged to have taken advantage of his position nor does it allege a failure to act in good faith and with due regard to Plaintiffs' interests. Quite simply, this does not state a claim for constructive fraud or breach of a fiduciary duty. As such, Plaintiffs' claim must fail and should be dismissed.

VII. PLAINTIFFS' CLAIM FOR CONVERSION FAILS TO STATE A CLAIM.

Notwithstanding the bases for dismissal set forth above, and in the alternative to those grounds, Plaintiffs' claim for conversion must fail. "Conversion" is defined as: (1) the unauthorized assumption and exercise of the right of ownership, (2) over the goods or personal property, (3) of another, (4) to the exclusion of the rights of the true owner. Day v. Rasmussen, 177 N.C. App. 759, 629 S.E.2d 912 (2006). Plaintiffs' Amended Complaint is not entirely clear as to what property was allegedly converted, but it does reference purported "confidential and proprietary data." (Am. Compl. ¶ 127). Presumably Plaintiffs are referring to the "trade secrets"

asserted in Claim Seven. Therefore, the alleged conversion pertains to Client records, attorney notes, billing records and invoices. (Am. Compl. ¶ 119).

As the Amended Complaint and other pleadings before the Court make clear, Walters & Zimmerman, PLLC had but one client. The Amended Complaint does not identify any separate property owned solely by the Plaintiffs that has been converted. As set forth above, the files, records, billings, and attorney notes belong to the Client and not the Plaintiffs.² As such, Plaintiffs' claim must fail and should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant Scott P. Zimmerman respectfully requests that the Court grant his Motion to Dismiss and dismiss Plaintiffs' Amended Complaint against him.

² As illustrated by Exhibits 1 – 3 of Mr. Zimmerman's Answer and Counterclaim filed under seal, the Client directed that all of this information be transferred to and handled by Mr. Zimmerman.

This the 12th day of May 2008.

/s/ Denise Smith Cline

N.C. State Bar No. 10837

SMITH MOORE LLP

2800 Two Hannover Square

Post Office Box 27525

Raleigh, NC 27611

Telephone: (919) 755-8700

Facsimile: (919) 755-8800

E-mail: denise.cline@smithmoorelaw.com

/s/ Travis A. Crump

N.C. Bar No. 32643

SMITH MOORE LLP

300 North Greene Street, Suite 1400

Post Office Box 21927

Greensboro, North Carolina 27420

Telephone: (336) 378-5200

Facsimile: (336) 378-5400

E-mail: travis.crump@smithmoorelaw.com

Attorneys for Scott P. Zimmerman

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief in Support of Defendant's Motion to Dismiss was served electronically and by depositing a copy of same in the United States mail, first-class, postage prepaid, addressed as follows:

Bambi Faivre Walters
Bambi Faivre Walters, PC
P.O. Box 5743
Williamsburg, VA 23188
Attorney for Plaintiffs

This the 12th day of May, 2008.

/s/ Denise Smith Cline _____
Denise Smith Cline