STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF CUMBERLAND | 00 CVS 4612

BILLY R. HINSON, Z. MICHAEL MARTIN and MID-SOUTH MARKETING, INC.,

Plaintiffs,

vs.

TRIGON HEALTHCARE, INC., TRIGON INSURANCE CO., MONTICELLO SERVICE AGENCY, INC., MID-SOUTH INSURANCE CO., NORWOOD DAVIS, JR., THOMAS SNEAD, JR., THOMAS BYRD, JOHN BERRY, PAUL NEZI, PHYLLIS H. COTHRAN, KATHY A. MERRY, WILLIAM P. BRACCIODIETA, RALPH T. BULLOCK, JAMES W. COPLEY, JR., RONALD M. NASH, TIMOTHY P. NOLAN, PETER L. PERKINS, DAVID P. WADE, J. CHRISTOPHER WILTSHIRE, and LINDA G. BAMBACUS,

Defendants.

ORDER and OPINION

{1} **THIS MATTER** is before the Court on 1) Individual Defendants Paul F. Nezi, Ralph T. Bullock, James W. Copley, Jr., Ronald M. Nash, Timothy P. Nolan, William P. Bracciodieta and David P. Wade's motions to dismiss for lack of jurisdiction and 2) Defendant Trigon Healthcare, Inc.'s ("Trigon HC") motion to dismiss for lack of jurisdiction. Each jurisdictional motion is filed pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Also before the Court are various motions to dismiss for failure to state a claim filed by all defendants pursuant to Rule 12 (b)(6) of the North Carolina Rules of Civil Procedure. The Court **GRANTS** in part and **DENIES** in part defendants' motions.

Ross Law Firm, by C. Thomas Ross, for plaintiffs.

McGuireWoods LLP, by Kurt E. Lindquist II, R. Leonard Rowe, Jr., Gilbert E. Schill, Jr. and J. Cary Tharrington IV, for defendants.

I.

{2} In connection with the pending motions to dismiss for failure to state a claim, the Court has taken the facts alleged in the Amended Complaint as true. For purposes of the jurisdictional motions, the Court has considered the affidavits filed on behalf of plaintiffs and defendants.

{3} Trigon HC, Trigon Insurance Co., ("Trigon Insurance") and Monticello Service Agency, Inc. ("Monticello") are all corporations organized under the laws of Virginia. Trigon HC is the parent corporation of both Trigon Insurance and Monticello. (Am. Compl. ¶ 4.)

{4} Mid-South Insurance Company ("MSIC") is currently a Nebraska corporation licensed to do business in North Carolina. MSIC previously had a place of business in Fayetteville, North Carolina. At all relevant times it was owned by either Trigon Insurance or Monticello. It was never directly owned by Trigon HC. It was first purchased by Trigon Insurance in 1996 for approximately $85 million.

{5} Plaintiffs allege in conclusory fashion that Trigon HC is the owner and alter ego of MSIC, and that Trigon

Insurance, Monticello and MSIC are mere instrumentalities of and subject to the total control and domination of Trigon HC. (Am. Compl. ¶ 4.)

{6} One of the problems with plaintiffs' pleadings and affidavits is that they frequently refer to Trigon HC, Trigon Insurance and Monticello collectively as "Trigon." It is often difficult to tell to which company plaintiffs are referring, particularly when allegations of alter ego are made. Sometimes plaintiffs refer to Trigon HC and its "affiliates." In support of plaintiffs' allegation that Trigon HC is the alter ego of MSIC, Trigon Insurance and Monticello, plaintiffs' affidavits claim, among other things, that:

1. the individuals with whom plaintiffs negotiated identified themselves, without distinguishing between its affiliates, as employees of "Trigon";
2. "Trigon" officers were responsible for the hiring policies of MSIC;
3. materials received in relation to the insurance products carried the "Trigon" name and logo;
4. plaintiffs were directed to communicate on a regular basis with employees of Trigon HC and its affiliates in reference to the insurance products plaintiffs offered on behalf of MSIC; and
5. "Trigon" officers attended meetings in Raleigh to deal with issues related to the problems plaintiffs were having with the MSIC insurance being sold.

The affidavits are specific about the names of people the plaintiffs dealt with and do not include Nezi, Bullock, Copley, Nash, Nolan or Wade.

{7} MSIC, then organized under the laws of North Carolina, was owned by Trigon Insurance from February 1996 to July 1997 and owned by Monticello from July 1997 through June 2000. (Am. Compl. ¶ 5.) It was subsequently sold to another company not a party to this litigation. Under the contract with that third party, Trigon HC remains liable for any damages awarded in this lawsuit.

{8} Defendants William P. Bracciodieta, Paul F. Nezi, Ralph T. Bullock, James W. Copley, Jr., Ronald M. Nash, Timothy P. Nolan and David P. Wade were all officers of Trigon Insurance or other Trigon affiliates and are residents of Virginia. (*See* individual affidavits.) They were never officers of MSIC. None ever spoke directly with plaintiffs. Only Bracciodieta attended the July 1999 meeting in Raleigh. The other individual defendants named in the complaint have not moved to dismiss on jurisdictional grounds. The moving defendants were named solely because they are officers of Trigon HC or an affiliate other than MSIC and, according to plaintiffs, must have participated in decisions made by the corporate defendants relative to the business of MSIC.

{9} At the time of the acquisition of MSIC, Plaintiffs Billy R. Hinson and Z. Michael Martin were licensed, independent insurance agents in North Carolina. (Am. Compl. ¶ 1-2.) Each entered into agency contracts with MSIC which provided that any dispute arising out of the agency contracts would be litigated in Cumberland County, North Carolina. Plaintiffs have no contracts with any other corporate defendant.

{10} Plaintiffs Hinson and Martin formed Mid-South Marketing ("MSM"), which was incorporated in September of 1996, for the exclusive purpose of establishing a network of sub-agents who would market and sell the health insurance products of MSIC to individuals in North Carolina, South Carolina, Georgia and Tennessee. (Am. Compl. ¶ 23.) They assigned their agency contracts to MSM.

{11} Plaintiffs leased and opened an office, hired and trained employees, recruited sub-agents, developed leads to potential insureds, and established a telemarketing and direct mail campaign to market MSIC insurance products. (Am. Compl. ¶ 24.)

{12} As the leading producer of new business for MSIC, MSM was paid commissions both for itself and for its sub-agents, to whom MSM was responsible for paying commissions. (Am. Compl. ¶ 25.)

{13} According to the Amended Complaint, after MSIC was acquired and plaintiffs began generating increased business for it, the company was mismanaged in several respects. First, MSIC made several changes in its underwriting of policies. According to plaintiffs, these changes had a negative effect on MSIC's ability to service its insurance contracts and process new applications and consequently led to policy cancellations, deteriorating relationships between plaintiffs and their sub-agents, improper charges to insureds, unintended policy lapses, and continuing complaints. (Am. Compl. ¶ 25-29.) Plaintiffs allege that these actions by MSIC constitute anticipatory breaches of both the insurance policies and the contract with plaintiffs and also constitute tortious interference with plaintiffs' contracts with their sub-agents. (Am. Compl. ¶ 29.)

{14} Plaintiffs allege that mismanagement at MSIC caused over 1,800 policies to lapse in April 1999 and led many policyholders and agents to replace the lapsed policies with policies from other insurance companies. All replaced policies caused a direct loss of commissions to plaintiffs and their sub-agents under the terms of their respective contracts with MSIC. (Am. Compl. ¶ 29.)

{15} When plaintiffs complained about these problems, MSIC indicated that the problems were being resolved and plans were being made to expand the insurance business in plaintiffs' market area. Based on these representations, plaintiffs continued to devote their business exclusively to MSIC insurance products. Plaintiffs' allegations about the statements defendants made are artfully ambiguous or devoid of any precise attribution. It is clear, however, that the contracts of insurance and the agency agreements were with MSIC and not any other defendant.

{16} In July 1999 a meeting was held in Raleigh, North Carolina to discuss how to improve MSIC's handling of the insurance business generated by plaintiffs. At the meeting Defendant Berry stated that progress was being made in reducing the backlog of claims, that the underwriting cycle had been shortened and that underwriting guidelines had been softened. He stated that on October 1, 1999, the systems conversions would be operating normally and all service problems would be resolved. Plaintiff alleges that Defendant Byrd stated that "Trigon" was committed to the North Carolina market, that he appreciated plaintiffs and their sub-agents' loyalty to "Trigon" in staying with "Trigon" during the difficult times and that "Trigon" was committed to solving the problems that had led to the meeting. The defendants' tone at this meeting was optimistic that problems were being resolved and that future operations would be more efficient and profitable. (Am. Compl. ¶ 34.) Berry and Byrd worked for Trigon Insurance. Byrd also was a officer of Trigon HC. At this time MSIC was owned by Monticello.

{17} In August 1999 a "Field Communication Bulletin-#4" was sent to "All Mid-South Insurance Appointed Representatives." This bulletin outlined actions taken to improve service to brokers, policyholders and providers. (Am. Compl. ¶ 35.)

{18} In September 1999 a "Field Communication Bulletin-#5-NC" was sent to "All Mid-South Insurance Company North Carolina Appointed Representatives." This bulletin announced an extension in the MedCost program and provided an option for the period of August 1, 1999 to December 31, 1999, of placing preferred provider business with either MedCost or the new North Carolina PPO network Healthstar. (Am. Compl. ¶ 36.)

{19} In October 1999 a news release was issued announcing that MSIC planned to exit the health insurance market. In conjunction with the news release, MSIC sent letters to its policyholders and agent/brokers notifying them of its intention to leave the insurance market and advising the policyholders of their need to replace the existing or pending policy with another through their agent or broker. Plaintiffs contend that these letters constitute tortious interference with contract.

{20} On October 5, 1999, MSIC had a contract with plaintiffs to produce business for MSIC and there were approximately 1,200 to 1,300 pending applications produced by plaintiffs. (Am. Compl. ¶ 38.)

{21} In October 1999 MSIC terminated plaintiffs' agents' contracts. (Am. Compl. ¶ 39.)

II.

{22} To subject individual defendants and Trigon HC to personal jurisdiction, plaintiffs must allege facts sufficient to satisfy North Carolina's long-arm statute, i.e., N.C. Gen Stat. § 1-75.4 (2000), and the Due Process Clause of the

United States Constitution. *See Dillon v. Numismatic Funding Corp.,* 291 N.C. 674, 231 S.E. 2d 629 (1977).

The long-arm statute provides for personal jurisdiction in any action claiming injury to person or property within this state arising out of an act or omission in this state, N.C.G.S. § 1-75.4(3) (1996); an act or omission outside this state by the defendant, provided in addition that at or about the time of the injury either:

> a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or
>
> b. Products, materials, or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.
>
> Personal jurisdiction is also proper in any action which:
>
> a. Arises out of a promise . . . by the defendant to perform services . . . or to pay for services . . . in this State . . .; or
>
> b. Arises out of services . . . performed for the plaintiff by the defendant within this State . . .; or
>
> c. Arises out of a promise, made anywhere . . . by the defendant to deliver or receive within this State . . . things of value . . . .

Replacements, Ltd., v. Midwesterling, 133 N.C. App. 139, 142-143, 515 S.E.2d 46, 49 (1999); N.C.G.S. § 1-75.4. If the long-arm statute is alleged to confer jurisdiction over the defendants, plaintiff must still allege that defendant has the minimum contacts with North Carolina to meet the requirements of due process so as "not to offend 'traditional notions of fair play and substantial justice.'" *Murphy v. Glafenhein,* 110 N.C. App 830, 835, 431 S.E.2d 214, 244, *disc. rev. denied,* 335 N.C. 176, 436 S.E.2d 382 (1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)). "The factors used in determining the existence of minimum contacts include '(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.'" *Id.* (quoting *Cherry Bekaert & Holland v. Brown,* 99 N.C. App. 626, 632, 394 S.E.2d 651, 655-56 (1990)).

{23} Long-arm jurisdiction may either be general or specific: "specific jurisdiction [exists] where the controversy arises out of the defendant's contacts with the forum state, and general jurisdiction [exists] where the controversy is unrelated to the defendant's activities within the forum, but there are 'sufficient contacts' between the forum and the defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, 80 L. Ed. 2d 404, 410, 104 S. Ct. 1868, 1871 (1984). The controversy in the instant case arose from contracts between MSIC and plaintiffs and defendants' alleged representations to plaintiffs.

A.

{24} Trigon HC seeks to dismiss for lack of jurisdiction because it claims that plaintiffs failed to allege facts sufficient to hold Trigon HC under an alter ego theory. Plaintiff alleges that Trigon HC owned Trigon Insurance and Monticello and subsequently acquired MSIC in 1996, and that Trigon Insurance, Monticello and MSIC were the mere instrumentalities of and subject to the total control and domination of Trigon HC. The North Carolina Supreme Court has stated that

> a corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded.

[T]hree elements support an attack on separate corporate entity under the instrumentality rule:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn v. Wagner, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1982) (quoting *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E. 2d 570, 575 (1966)). "Non-compliance with corporate formalities" and "complete domination and control of the corporation so that it has no independent identity" are just two factors that courts have used to justify piercing the corporate veil. *See id.*

{25} Only Trigon HC, not Trigon Insurance or Monticello, is contesting jurisdiction. Without allegations of alter ego, plaintiffs' assertion of personal jurisdiction over Trigon HC would be tenuous at best. If Trigon HC has dominated and controlled MSIC, a second tier subsidiary doing business in North Carolina, to the extent that the corporate veil may be pierced, such action would justify assertion of jurisdiction over the parent.

{26} Trigon HC asserts that plaintiffs have not adequately pled an alter ego relationship which would warrant piercing the corporate veil. While the Court is concerned about the lack of specificity and the presence of ambiguity in the allegations of the Amended Complaint, it believes there are sufficient allegations to withstand a Rule 12(b)(6) motion and thus it would be better to determine the Rule 12(b)(2) issue of jurisdiction over Trigon HC after completion of discovery on the alter ego issues. If it is clear at that time that plaintiffs cannot pierce the corporate veil with respect to Trigon HC, a renewed motion to dismiss on jurisdictional grounds may be appropriate, as would a motion for summary judgment.

{27} In holding that the allegations in the Amended Complaint with respect to alter ego are sufficient at this stage of the proceedings, the Court is not holding that mere conclusory allegations of domination and control of a subsidiary by a parent are sufficient. There are allegations of meetings with Trigon HC employees and direction of MSIC activities by Trigon HC employees. There are also allegations that Trigon HC employees made promises with respect to the conduct of MSIC's business. There are also allegations of direct communication from Trigon HC with respect to MSIC's business. Whether those allegations can be supported will be determined by discovery. It will not be sufficient for plaintiffs to establish only a parent-subsidiary relationship and some involvement in the subsidiary's business by the parent. The burden will be much heavier. A more complete record is necessary at this stage of the case.

B.

{28} Defendants William P. Bracciodieta, Paul F. Nezi, Ralph T. Bullock, James W. Copley, Jr., Ronald M. Nash, Timothy P. Nolan and David P. Wade seek to dismiss for lack of jurisdiction. For the reasons set out below, and with the exception of the motion of Mr. Bracciodieta, the Court grants these defendants' motions to dismiss. The Court denies Mr. Bracciodieta's motion to dismiss for lack of personal jurisdiction with leave for him to refile that motion after discovery with respect to his statements in Raleigh is complete.

{29} As agents of Trigon Insurance, plaintiffs must overcome an additional jurisdictional hurdle before haling these agents before a foreign tribunal.

> While a corporate entity is liable for any wrongful act or omission of an agent acting with proper authority, *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 596, 394 S.E.2d 643, 648 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991) (citation omitted), it does not follow an agent may be held liable under the jurisdiction of our courts for acts or omissions allegedly committed by the corporation. A corporation can only act through its agents, *Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 375, 354 S.E.2d 455, 457 (1987) (citation omitted); therefore, plaintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual official capacity. *See Moore v. American Barmag Corp.*, 710 F. Supp. 1050, 1057 (W.D.N.C. 1989), *aff'd*, 902 F.2d 44 (4th Cir. 1990) (senior official of corporation not liable for alleged patent infringement by corporation without showing defendant acted as alter ego of

corporation or acted outside his official capacity).

Godwin v. Walls, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479 (1995); *see also Rich Foods Svcs. Inc, v. Rich Plan Corp.* (Lawyers Weekly No. 1-02-0754, 21 pp.) (Britt, Sr., J. – Order). The only allegation plaintiffs make with respect to Messrs. Nezi, Bullock, Copley, Nash, Nolan and Wade is that they were officers of Trigon Insurance. Plaintiffs do not allege any individual conduct on any of these defendants outside of this employment position. This fact alone is insufficient to confer jurisdiction. There are no grounds to support either specific or general jurisdiction over these defendants.

{30} As to Mr. Bracciodieta, plaintiffs allege that he attended the meeting on July 15, 1999, and that at that meeting representations were made to plaintiffs upon which they relied and were damaged by their reliance. Facts alleging that Mr. Bracciodieta may have had a role in the alleged misrepresentations to plaintiffs and that these misrepresentations were made in North Carolina are sufficient to confer personal jurisdiction over Mr. Bracciodieta. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 596, 394 S.E.2d 643, 648 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). If discovery were to reveal that Mr. Bracciodieta's statements were not actionable in any way, there would be no ground for specific jurisdiction over him and the record would be devoid of any basis for general jurisdiction. Thus, Mr. Bracciodieta's motion to dismiss is denied with leave to renew the motion with respect to the allegations against him after discovery has been completed.

III.

{31} When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. *See Hyde v. Abbott Lab., Inc.*, 123 N.C. App. 572, 473 S.E.2d 680, 682 (1996). The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See id.* When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. *Sutter v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6). *See Hudson Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999). When applying this standard, it must be kept in mind that when fraud is alleged, the circumstances constituting fraud must be pled with particularity. N.C. R. Civ. P. 9(b). *See also Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981).

{32} Defendants have not moved to dismiss the Second Claim for Relief based upon breach of contract. The Court will address each of the other causes of action separately.

A.

{33} Plaintiffs complain that defendants were negligent in managing MSIC, which negligence in turn caused damage to MSM and plaintiffs. Plaintiffs allege that defendants had a duty to "operate in good faith and to use ordinary care not to cause injury in defendants' undertaking to operate MSIC." However, plaintiffs do not specify from where, besides the contracts between MSM and MSIC, this duty arises. The only duties owed to MSM by defendants are those arising from the contract. Thus, plaintiffs could only allege that MSIC negligently breached its contract with plaintiffs. Even if true, North Carolina only recognizes negligent breach of contract in four situations:

> (1) the injury was to the person or property of someone other than the promisee;
>
> (2) the injury was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee;
>
> (3) the injury was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm; and

> (4) the injury was a wilful [sic] injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 82, 240 S.E.2d 345, 349 (1978). Plaintiffs do not allege facts under any of those four categories.

{34} While the Supreme Court found in *Lloyd A. Fry Roofing* that this may not be an exhaustive list of the categories in which a promisor is held liable for negligent performance of a contract, this Court can find no authority for expanding this list to include the plaintiffs. Such inclusion of plaintiffs would open this particular tort to all parties to a contract not listed above. Such an outcome was not intended; otherwise the North Carolina Supreme Court would not have made the distinctions above. Thus, defendants' motion to dismiss the negligence claim is granted.

B.

{35} MSM alleges that defendants tortiously interfered with its contracts with its agents when MSIC directly contacted the agents, brokers and policyholders before canceling the contract with MSM. According to plaintiffs, the letters sent by MSIC compelled the recipients of the letters to find replacement coverage for the MSIC policies, thereby breaching the sub-agent and MSM contracts.

{36} To sustain a claim for tortious interference of contract, plaintiffs must allege facts showing:

(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

> *Embree Constr. Group, Inc. v. Rafcor, Inc.,* 330 NC 487, 498, 411 S.E.2d 916, 924 (1992). "In determining whether an actor's conduct is justified, consideration is given to the following: the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor and the contractual interests of the other party." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988). A legitimate business purpose is sufficient justification for interference. *See id.*

{37} First, it is unclear whether or not defendants were actually outsiders to the contract between MSM and its agents. All agents contracted to sell insurance for MSM, which contracts MSM was to service. Without the insurance product, the contracts between MSM and its agents would not exist. However, the Court need not decide on this basis.

{38} The purpose for defendants' letter to sub-agents, agents and policyholders was to notify those persons of MSIC's intent to discontinue the insurance business. Plaintiffs do not allege that defendants' discontinuing its insurance business was in bad faith or not for legitimate business reasons. Conversely, it is clear from plaintiffs' amended complaint that plaintiffs believe that defendants were not competent in supporting the insurance business MSM supplied. Additionally, it was in the best interests of all parties receiving the notice that MSIC notify them immediately of its intention to discontinue its insurance business so that gaps in insurance coverage could be prevented. Thus, MSIC had a legitimate business purpose in sending the letters to sub-agents and agents of MSM and to policyholders, and any interference in the contracts between MSM and agents was privileged.

C.

{39} Plaintiffs also allege restraint of trade and unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1 (2000).

{40} Without sufficient aggravating circumstances, a breach of contract is not sufficient to support a claim for unfair and deceptive trade practices under N.C.G.S. § 75-1.1. *Branch Banking & Trust Co. v. Thompson,* 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992), *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (citing *Bartolomeo v. S.B. Thomas, Inc.,* 889 F.2d 530, 535 (1989)).

{41} While no North Carolina cases specifically define what constitutes aggravating circumstances, the court in *Bartolomeo*, cited with approval by the North Carolina Court of Appeals in *Branch Banking & Trust*, suggests that aggravating circumstances include “deception in the formation of the contract or in the circumstances of its breach.” 889 F.2d 530, 535 (1989). Plaintiffs do not allege fraud. Plaintiffs allege that defendants made representations to them on which they relied to their detriment. Even if true, these allegations are insufficient to constitute aggravating circumstances. The breach of contract by defendants, as alleged by plaintiffs, appeared to be motivated by the economic realities of the failed business venture with plaintiffs; as such, the determining factors are not sufficient aggravating circumstances. *See Boyd v. Drum,* 129 N.C. App. 586, 594, 501 S.E.2d 91 (1998) *aff’d,* 350 N.C. 90, 511 S.E.2d 304 (1999) (A business deal that goes sour because it did not make enough money is not sufficient grounds to find aggravating circumstances.).

D.

{42} The Court also dismisses plaintiffs’ claim for indemnity because such claim has not yet accrued. *See Hager v. Brewer Equip. Co.*, 17 N.C. App. 489, 491, 195 S.E.2d 54, 56 (1973) (“The right to sue for indemnity for damages resulting from the negligence, misfeasance or malfeasance of another does not accrue until legal payment has been made.”). Plaintiffs do not allege that they have made legal payments to parties impacted by defendants’ alleged breach or misrepresentations.

E.

{43} With respect to plaintiffs’ claims for negligent misrepresentation, the allegations are sufficiently broad to support both a misrepresentation of fact as opposed to opinion or belief and to raise an issue with respect to the duty owed by the person making the statement or the entity on behalf of which the statement was made. Accordingly, the motions to dismiss the Fourth Claim for Relief for negligent misrepresentation is denied. Discovery will permit clarification of the statements made and the duty, if any, of the persons making the statements to plaintiffs.

It is therefore ORDERED, ADJUDGED and DECREED that:

1. The motions to dismiss for lack of jurisdiction of Defendants Paul F. Nezi, Ralph T. Bullock, James W. Copley, Jr., Ronald M. Nash, Timothy P. Nolan and David P. Wade are granted;

2. Defendants William P. Bracciodieta and Trigon HC’s motions to dismiss for lack of personal jurisdiction are denied with leave to renew at a later date;

3. Defendants’ motion to dismiss plaintiffs’ claims for negligence, tortious interference with contract, restraint of trade, violations of UDTPA and indemnity is granted; and

4. Defendants’ motion to dismiss the negligent misrepresentation claims is denied.

This is the 23rd day of August 2001.

____

Ben F. Tennille

Special Superior Court Judge

for Complex Business Cases