Sirsi Corporation v. Craven-Pamlico-Carteret Regional Library System Doc. 15 Att. 2

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This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, E.D. North Carolina,
Western Division.
Charles Michael CASSELL, III, Plaintiff,
v.
Officer MONROE, et al., Defendants.
Charles Michael Cassell, III, Plaintiff,
v.
Officer Monroe, et al., Defendants.

Nos. 5:10-CT-3023-BO, 5:10-CT-3094-BO.
Dec. 7, 2010.

Charles M. Cassell, III, Taylorsville, NC, pro se.

ORDER

TERRENCE W. BOYLE, District Judge.

***1** On March 1, 2010, Charles Michael Cassell, III ("plaintiff") filed a civil rights suit in this district, *Cassell v. Monroe, et al.,* No. 5:10-CT-3023-BO (hereinafter "Cassell # 1"). On June 10, 2010, the clerk's office received a filing, docketed it as a separate civil rights suit, and opened a second case, *Cassell v. Monroe,* 5:10-CT-3094-BO (hereinafter "Cassell # 2"). Cassell # 2 did not included an Application to Proceed without Prepayment of Fees and Affidavit. Therefore, on June 15, 2010, an order of deficiency was entered in the matter. (Cassell # 2, D.E. # 2) On June 24, 2010, the Clerk of Court entered an order directing remittance of the $350.00 filing fee as set out and required under 28 U.S.C. § 1915(b)(1). (Cassell # 2, D.E. # 4) Prior to that, on March 9, 2010, the Clerk had entered the same order directing remittance of the $350.00 filing fee in Cassell # 1. (Cassell # 1, D .E. 5)

To begin, it appears that a clerical mistake was made in filing two separate suits. Both cases involve the same defendants, the same dates, and the same allegations. Filings in Cassell # 2 appear to have been made to clarify filings made in Cassell # 1, not to open a second case. Supportive of this conclusion, is the fact Cassell did not file a second Application to Proceed without Prepayment of Fees and Affidavit along with the filing construed as a separate complaint until instructed by the court to do so. Furthermore, Cassell wrote letters indicating his confusion about what was pending before this court. Under Rule 60(a) clerical mistakes in any part of the record may be corrected by the court sua sponte so long as no appeal is pending. Fed.R.Civ.P. 60(a). As of the date of this order, no dispositive motions have been filed in either case, no dispositive orders have been entered in either case, and no appeal has been docketed in the United States Court of Appeals for the Fourth Circuit in either case, and the district court may correct the mistake. *Id.* The Clerk is DIRECTED to void and vacate Cassell # 2 in its entirety and incorporate the filings in Cassell # 2 into Cassell # 1 in chronological order. Thereafter, one case shall remain. *Cassell v. Monroe,* No. 5:10-CT-3023-BO.

Given this posture, the court now reviews the matter for a frivolity determination and ruling on the pending motions.[FN1] 28 U.S.C. § 1915(e)(2). In reviewing this complaint, a court "shall dismiss" any case that is "frivolous or malicious," that "fails to state a claim on which relief can be granted," or that "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). A case is frivolous if it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

FN1. Prior to conducting this frivolity review, plaintiff made a filing docketed as a Motion to Amend (Cassell # 2, D.E. # 5). A party may amend his pleading once as a matter of course within 21 days after serving it. Fed.R.Civ.P. 15(a)(1)(A). The

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court shall allow the July 1, 2010, Motion to Amend (Cassell # 2, D.E. # 5). Therefore, the court conducts the frivolity review as to both the original complaint and the Motion to Amend.

The action, while difficult to understand, arises out of the alleged beating of plaintiff by defendant Officer Monroe on January 22, 2008, and February 22, 2008. Plaintiff further alleges deliberate indifference to his medical care and intentional interference with his mail. It appears that the named defendants are Officer Monroe, Dr. Owens, P.A. Williams, P.A. Leggett, Officer Gragainis, Officer Conner, Officer Hinson, Officer Blow, Sergeant Sutton, J. Winebarger, and P. Jackson.[FN2] The court shall allow these claims to proceed against these defendants. However, before proceeding, plaintiff must provide the addresses of defendants. Without addresses the Marshal will be unable to effect service upon defendants due to the insufficient address information. Therefore, plaintiff is allowed 14 days to comply with this order.

FN2. There are additional defendants appearing on the docket (Cassell # 1) identified only as “Doctor,” “All Officers,” and “Disciplinary Hearing Officer,” however, these parties are DISMISSED as they appear to be named in other filings.

***2** There are also two motions for discovery before the court filed by Cassell (Cassell # 1, D.E. # 7 and # 8). The motions fail to comply with Local Rule 7.1(c) of the Local Rules of Practice and Procedure, which states that “[c]ounsel must ... certify that there has been a good faith effort to resolve discovery disputes prior to the filing of any discovery motions.” Cassell's motions also fail to comply with Local Civil Rule 7.1(d), E.D.N.C, which requires that his motion be accompanied by a supporting memorandum. Further, it is likely defendants will serve him with the relevant prison and medical records when they serve their dispositive motions. If, after pursuing the proper avenues to obtain the information as well as receiving the records within defendants filings, Cassell seeks additional relevant information, he may properly resubmit his motion to compel for the court's consideration. Cassell's motions for discovery are denied.

Accordingly, the Clerk is DIRECTED to correct the clerical mistake. Thus, the Clerk is DIRECTED to VOID and VACATE *Cassell v. Monroe,* 5:10-CT-3094-BO, in its entirety. In doing so the June 24, 2010, order (Cassell # 2, D.E. # 4) is VACATED and the monies collected must be returned to Cassell's trust fund account. The Clerk is DIRECTED to notify the Department of Corrections to cease drafting funds from Cassell's trust account for case number 5:10-CT-3094-BO. Further, the Clerk is DIRECTED to incorporate all filings made in *Cassell v. Monroe,* 5:10-CT3094-BO in chronological order into *Cassell v. Monroe,* 5:10-CT-3023-BO which remains open and active. The matter is ALLOWED to proceed against Officer Monroe, Dr. Owens, P.A. Williams, P.A. Leggett, Officer Gragainis, Officer Conner, Officer Hinson, Officer Blow, Sergeant Sutton, J. Winebarger, and P. Jackson. All other defendants appearing in the docket are DISMISSED. However, the matter cannot proceed until Cassell provides the court with addresses for the 11 remaining named defendants. He is given 14 days to provide the addresses, of the 11 defendants. The motions for discovery are DENIED (Cassell # 1, D.E. # 7 and # 8) and the motion to amend is ALLOWED (Cassell # 2, D.E. # 5).

Cassell is NOTIFIED that he has one active case pending in this district. The case is *Cassell v. Monroe,* No. 5:10-CT-3023-BO. All filings made in the case referenced as *Cassell v. Monroe,* No. 5:10-CT-3094-BO have been placed into *Cassell v. Monroe,* No. 5:10-CT-3023-BO. Cassell is DIRECTED to include the correct case name and number, *Cassell v. Monroe,* 5:10-CT-3023-BO, on all future filings he wishes to make in this specific case. He is notified that 5:10-CT-3094-BO has been vacated as a separate case. When making filings Cassell MUST include the proper case number. Cassell is

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also ORDERED to provide the addresses of the 11 remaining named defendants above. He is WARNED that his failure to comply with this order may result in the dismissal of the case.

***3** SO ORDERED.

E.D.N.C.,2010.
Cassell v. Monroe
Slip Copy, 2010 WL 5125339 (E.D.N.C.)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, E.D. North Carolina,
Western Division.
Daniel L. SAGER, Plaintiff,
v.
STANDARD INSURANCE COMPANY, Defendant.

No. 5:08-CV-628-D.
July 12, 2010.

David A. Bryant, Daley, Debofsky & Bryant, Chicago, IL, Norris A. Adams, II, Essex Richards, PA, Charlotte, NC, for Plaintiff.

Andrew A. Vanore, III, Brown, Crump, Vanore & Tierney, LLP, Raleigh, NC, W. Sebastian Von Schleicher, Jacqueline J. Herring, Smith, Von Schleicher & Associates, Chicago, IL, for Defendant.

ORDER

DAVID W. DANIEL, United States Magistrate Judge.

***1** This matter is before the Court on Plaintiff's Motion to Compel Discovery and Motion for Hearing. [DE-22 & 27.] Defendant has responded [DE-25], and this matter is ripe for review.

After careful consideration, the Court concludes that Plaintiff's motion is fatally defective and that these deficiencies are not merely technical: (1) Plaintiff failed to file a supporting memorandum of law, as required by Local Civil Rule 7.1(d); (2) The motion is not signed by local counsel, as required by Local Civil Rule 83.1(d); and (3) The motion was filed after the close of fact discovery and no motion to extend the fact discovery deadline has been filed. *See* April 13, 2010 Order (establishing fact discovery deadline of March 31, 2010) [DE-21].

Plaintiff claims Defendant breached its contract with Plaintiff by failing to pay him disability benefits. Plaintiff seeks documents related to the "bonus, performance and compensation" of Defendant's employees, which Plaintiff asserts is relevant to show bias and incentive to deny claims. Pl.'s Mot. ¶ 9. Defendant contests Plaintiff's assertion that the type of information sought is relevant and has cited case law contrary to Plaintiff's position, while Plaintiff has failed to file a memorandum of law or to cite any case law in support of its position that the documents sought are relevant. One party's failure to file a memorandum of law hinders the opposing party's ability to adequately respond and prevents the court from properly adjudicating the motion.

It is also significant that the motion appears to be untimely, as it was filed after the close of fact discovery. *See PCS Phosphate Co., Inc. v. Norfolk Southern Corp.,* 238 F.R.D. 555, 558 (E.D.N.C.2006) ("Generally, absent a specific directive in the scheduling order, motions to compel discovery filed prior to the discovery deadline have been held timely.") By letter of February 25, 2010, Defendant's counsel informed Plaintiff's counsel that Defendant did not believe further supplementation of its discovery responses was necessary. Def.'s Resp. Ex. A [DE-26]. After some further discussion between counsel for the parties, Plaintiff's counsel, via email letter on March 22, 2010, asked Defendant to produce certain documents in response to its previous discovery requests. Pl.'s Mot. Ex. D. Despite Defendant's failure to respond, Plaintiff did not promptly file his motion to compel or ask the Court to extend fact discovery. Instead, Plaintiff waited three weeks after the close of fact discovery to file the instant motion. Plaintiff has provided no reason for his delay in the filing of this motion and has failed to show good cause for the Court to essentially amend its

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Scheduling Order to reopen fact discovery. *See* Fed.R.Civ.P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent.").

Based on Plaintiff's failure to comply with the Local Rules of this Court and with the Court's Scheduling Order, the motion to compel [DE-22] is **DENIED.** Plaintiff's motion for hearing [DE-27] is **DENIED,** as the Court finds, in its discretion pursuant to Local Civil Rule 7.1(i), that a hearing would not aid the Court in the determination of this motion.

E.D.N.C.,2010.
Sager v. Standard Ins. Co.
Slip Copy, 2010 WL 2772433 (E.D.N.C.)

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Only the Westlaw citation is currently available.

United States District Court, E.D. North Carolina,
Western Division.
Larry JOHN, Plaintiff,
v.
Donnie HARRISON, Defendant.

No. 5:09–CV–315–FL.
Jan. 5, 2010.

West KeySummary**Constitutional Law 92 967**

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k967 k. Particular claims. Most Cited Cases
(Formerly 78k1395(5))

Resident failed to allege any violation of his constitutional rights by the county sheriff. Thus, the sheriff was entitled to summary judgment on the resident's claims. The resident alleged the sheriff, who was responsible for serving and executing either personally or through deputy sheriffs, civil process under the laws of the state, made false claims against him and "made a nuisance or threatening presentment" to the resident. The resident failed to allege with any specificity that the sheriff's actions in the course serving civil process resulted in a violation of his rights.

Larry John, Raleigh, NC, pro se.

John A. Maxfield, Raleigh, NC, for Defendant.

ORDER
LOUISE W. FLANAGAN, Chief Judge.

***1** This matter is before the court on the Memorandum and Recommendation ("M & R") of United States Magistrate Judge William A. Webb (DE # 17), regarding plaintiff's motion for default judgment (DE # 11) and defendant's motion for summary judgment (DE # 12). No objections to the M & R have been filed, and the time within which to make any objection has expired.FN1 This matter is ripe for ruling.

FN1. Plaintiff returned the M & R to the magistrate judge with "Refusal for Cause" written across the face of each page, and filed copy of the same with the clerk. This response does not conform with the requirement to file "specific, written objections to the proposed findings and recommendations." *See* Fed.R.Civ.P. 72(b)(2).

In his complaint filed July 9, 2009, plaintiff appears to allege that he is his own sovereign nation. Invoking international law and the Bible, he contends that he may not be served with civil process by defendant, "an agent of a foreign principal." Plaintiff seeks "immediate exclusive original cognizance of the United States" as well as "injunctive relief from any future presentments and theft or kidnap actions from any foreign agents or principals." (Compl.7 .) Finding it difficult to determine the precise nature of the cause of action, the magistrate judge construed this prayer for relief as seeking to prevent service of civil process upon him.

Defendant answered on August 3, 2009, raising a number of defenses under the Federal Rules of Civil Procedure. Specifically, defendant argued that the complaint failed to state a claim for which relief could be granted; was not well grounded in fact, was not supported by existing law, was interposed to improperly harass and delay defendant's performance of his lawful duty, and was signed in violation of Rule 11; and was barred by sovereign, governmental, and individual qualified immunity. Defendant admitted attempting to serve civil pro-

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cess on plaintiff and denied violating any clearly established rights of plaintiff under the United States Constitution.

On September 25, 2009, plaintiff filed a motion for default judgment. As the magistrate judge noted, the motion was little more than a proposed order. Additionally, the court notes that plaintiff's assertion that defendant "failed to serve timely any claim, or answer, or defense" is not supported by the record in this case.[FN2] The magistrate judge recommended denying any requested relief for failure to comply with Local Civil Rules 7.1 and 10.1.

FN2. Defendant's answer contains a certificate of service upon plaintiff. Defendant advises that plaintiff returned the answer to defendant with the same "Refusal for Cause" notation. (Mem.Supp.Summ. J. 2.)

On October 23, 2009, defendant moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. In supporting affidavit filed contemporaneously therewith, defendant stated that, as elected Sheriff for Wake County, he is charged with a duty under state law to duly serve and execute all civil process directed to his office by the North Carolina Court of Justice. In furtherance of that office and in accordance with state law, defendant states that he served a civil summons and complaint upon plaintiff by and through Deputy Sheriff Kim Garey. Defendant argues that summary judgment is appropriate on the basis of these undisputed facts.

In his M & R, entered December 11, 2009, the magistrate judge recommends granting the summary judgment motion on a number of grounds. First, the magistrate judge notes that plaintiff did not file response to the motion, which is therefore uncontested. Second, the magistrate judge notes that the complaint was not properly signed as required by Local Civil Rule 10.1. Finally, the magistrate judge stated that the complaint fails to present any claim for relief which could be granted by the court. To the extent plaintiff has named defendant in his official capacity, plaintiff fails to allege an injury, or that such injury resulted from an official policy or custom of defendant's office. *See Belcher v. Oliver,* 898 F.2d 32, 36 (4th Cir.1990) ("Because it is clear that there was no constitutional violation we need not reach the question of whether a municipal policy was responsible for the officers' actions ."). To the extent defendant is named in an individual capacity, he is entitled to qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (holding that government officials are entitled to immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

***2** After careful review, the court agrees with the magistrate judge. The conclusions reached in the M & R are supported by controlling case law as applied to the facts of this case. Consequently, the court hereby ADOPTS the recommendation of the magistrate judge. For the reasons stated therein, plaintiff's motion is DENIED and defendant's motion is GRANTED. The clerk of court is DIRECTED to close the case.

SO ORDERED,

MEMORANDUM & RECOMMENDATION

WILLIAM A. WEBB, United States Magistrate Judge.

This cause comes before the Court upon Defendant's Motion for Summary Judgment (DE–12). Plaintiff has failed to respond to this motion and the time for doing so has expired. Accordingly, the motion is now ripe for adjudication. Pursuant to 28 U.S.C. 636(b)(1) this matter is before the undersigned for the entry of a Memorandum and Recommendation. For the following reasons, it is HEREBY RECOMMENDED that Defendant's Motion for Summary Judgment (DE–12) be GRANTED.

As an initial matter, Plaintiff's "motion for default judgment" (DE–11) has also been referred to the undersigned. Although it has been docketed as a

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motion, the filing is little more than a proposed order. No motion in accordance with Local Civil Rules 7.1 and 10.1 has been attached to the proposed order. Nor has a memorandum in support of the requested relief been filed. *See,* Local Civil Rule 7.1(d). For these reasons, it is HEREBY RECOMMENDED that any relief requested in Plaintiff's September 25, 2009 filing (DE–11) be DENIED.

I. Background

Defendant Donnie Harrison is the Sheriff for Wake County (DE–13, pg.2). In this capacity, he is charged under the laws of the State of North Carolina to serve and execute, either personally or through deputy sheriffs, civil process. (DE–13, pg.2).

On or about July 24, 2009, a Civil Summons and Complaint issued by the North Carolina General Court of Justice to the Sheriff of Wake County for service was personally served upon the Plaintiff (the Defendant in Wake County Superior Court case number 08 CVS 22477) by Deputy Sheriff Kim Garey (DE–13, pg.2).

Plaintiff filed the Complaint in this matter on July 9, 2009 (DE–1). The Complaint is entitled "Libel of Review–Common Law Claim in Admiralty—Notice Lis Pendens and—Verified Statement of Right—Re False Claim in Assumpsit to Rights in the Original Estate—Article III; Constitution" (DE–1, pg.1). In his Complaint, Plaintiff appears to claim that he is his own sovereign nation and cannot be served with civil process issued by the North Carolina General Court of Justice and seeks to prevent service of civil process upon him by the Sheriff of Wake County.

Specifically, Plaintiff asserts that "[m]unicipal agent Donnie Harrison has been making false claims and this counterclaim and notice lis pendens are now in the 'original exclusive cognizance' of the United States through the district court (DE–1, pg.1). Plaintiff also contends that "[i]n international law and according to the law of the land, agents of a foreign principal are required to file any pretended claim in the appropriate district court prior to exercising rights to that claim" (DE–1, pg.1). Likewise, Plaintiff indicates that "Donnie Harrison, acting as 'City Metro officer agent of the United Nation's International Monetary Fund and reserve banker', City of Washington, District of Columbia has made a nuisance or threatening presentment to Larry John. Donnie HARRISON is an agent of a foreign principal, a 'foreign state' " (DE–1, pg.2). Finally, Plaintiff argues that "Donnie Harrison, reserve bank agent, has served Larry John with nuisance court papers in an effort to execute inland seizure of Larry John's property" (DE–1, pg.5).

***3** Beyond this, it is difficult to ascertain the precise nature of Plaintiff's claims or the relief he seeks.

II. Analysis

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted:

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.
>
> *Celotex Corporation v. Catrett,* 477 U.S. 317, 322–323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

"[S]ummary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 317; *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir.1985). Specifically, the moving party bears the burden of identifying those portions

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of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits” that the moving party believes demonstrate an absence of any genuine issues of material fact. *Celotex,* 477 U.S. at 323. Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue which requires trial. *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As a general rule, the non-movant must respond to a motion for summary judgment with affidavits, or other verified evidence, rather than relying on his complaint or other pleadings. *Celotex,* 477 U.S. at 324. See also, *Williams v. Griffin,* 952 F.2d 820, 823 (4th Cir.1991).

Defendant's motion for summary judgment should be granted for a number of reasons. First, as noted above, because Plaintiff has not responded to the instant motion, summary judgment could be granted on that basis alone.

Furthermore, Plaintiff's complaint has not been properly signed. *See* Local Civil Rule 10.1. Specifically, in lieu of a signature, a fingerprint appears above the signature line of Plaintiff's Complaint (DE–1, pg.10).

In addition, Plaintiff's Complaint on its face fails to present any claim for relief which could be granted by this Court. *See generally,* F.R. Civ. P. 8. Generally, Plaintiff must present sufficient evidence for a reasonable fact finder to conclude that his injury, if any, resulted from an official policy or custom of the Sheriff's Office in order to survive summary judgment. See *Collins v. City of Harker Heights,* 503 U.S. 115, 120–121, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Plaintiff has failed to allege with any specificity that Defendant's actions in the course serving civil process resulted in a violation of his rights. Thus, Plaintiff has failed in the first instance to even allege an injury. Assuming *arguendo,* Plaintiff had sufficiently alleged a violation of his rights, he has further failed to properly allege that his injury resulted from an official policy or custom of the Sheriff's Office. *See Hinkle v. City of Clarksburg,* 81 F.3d 416, 420 (4th Cir.1996)(explaining that before a governmental entity can be held liable under § 1983 in its official capacity, there must be a deprivation of a federal right).

***4** Finally, while it is difficult to precisely ascertain Plaintiff's claim, it is appears that that Defendant is being sued in his official capacity as the Wake County Sheriff. Regardless, to the extent Defendant is being sued in his individual capacity he is entitled to qualified immunity. Qualified immunity shields public officials from liability for civil damages to the extent their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). This determination is based on the information actually known or reasonably available to the officer at the time, and is subject to any “exigencies of time and circumstance that reasonably may have affected the officer's perceptions.” *Pritchett v. Alford,* 973 F.2d 307, 312–313 (4th Cir.1992)(stating that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”). Even if officers “of reasonable competence” could disagree, qualified immunity will apply. *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Moreover, this entitlement “is an immunity from suit rather than a mere defense to liability” *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Given that Plaintiff has failed to clearly articulate that Defendant has violated any of his rights, Defendant is also entitled to the defense of qualified immunity.

III. Conclusion

For the foregoing reasons, it is HEREBY RECOMMENDED that Defendant's Motion for Summary Judgment (DE–12) be GRANTED.

SO RECOMMENDED in Chambers at

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Raleigh, North Carolina this 11th day of December, 2009.

E.D.N.C.,2010.
John v. Harrison
Not Reported in F.Supp.2d, 2010 WL 28657 (E.D.N.C.)

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United States District Court, E.D. North Carolina,
Western Division.
Dawn J. HIGGINS, Plaintiff,
v.
SPENCE & SPENCE, PA., et al., Defendants.

No. 5:07-CV-33-D(1).
March 3, 2009.

Belinda Keller Sukeena, Sukeena Law Firm, P.C., Holly Springs, NC, for Plaintiff.

Richard Keith Shackleford, Sheryl T. Friedrichs, Warren Perry Narron Shackleford & Mackay, PLLC, Wake Forest, NC, Alan Bryant Hewett, Hewett & Wood, PA, Selma, NC, for Defendants.

Annetha Dunn, Knightdale, NC, pro se.

ORDER

JAMES C. DEVER III, District Judge.

***1** Defendants Gregory A. Johnson, Elizabeth L. Johnson, Homes by Greg Johnson, Inc. (“HBGJ”), and Carol Grice Daniels (collectively, “defendants”) filed a motion to renew their motions to dismiss for failure to state a claim [D.E. 124]. Plaintiff responded with a motion to convert the motion to dismiss into a motion for summary judgment [D.E. 134]. As explained below, defendants failed to comply with Local Civil Rule 7.1(d) when they initially moved for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. As such, when defendants sought to renew their motions, they had nothing to renew. Construing their renewed motion as an initial motion to dismiss under Rule 12(b)(6)-given the motion's compliance with Local Civil Rule 7.1(d)-the motion is not timely filed. *See* Fed.R.Civ.P. 12(a)(1)(A)(i), (b). Accordingly, as explained below, the court denies defendants' motion to dismiss. Further, plaintiff's motion to convert defendants' motion to dismiss to a motion for summary judgment is denied as moot.

I.

Dawn J. Higgins (“plaintiff”) filed a complaint in this court on January 30, 2007, against several individuals and corporations allegedly involved in a real estate scheme involving ten closings with plaintiff in Johnson County, North Carolina [D.E. 1]. Plaintiff amended her complaint on March 9, 2007 [D.E. 17]. Plaintiff alleges that in 2003 several named defendants solicited her to purchase real property in Johnston County. Am. Compl. ¶¶ 3, 4, 20. The solicitors allegedly made numerous false representations to plaintiff concerning the investment properties, which induced her to provide personal financial information to the solicitors. *Id.* ¶¶ 22-25. The solicitors then wrongfully used plaintiff's personal information and forged powers of attorney to purchase ten homes in plaintiff's name-five without plaintiff's knowledge. *Id.* ¶¶ 26-27.

According to the amended complaint, defendants Gregory A. Johnson, Elizabeth L. Johnson, HBGJ, and Carol Grice Daniels were the sellers of six of the ten properties listed in the complaint. *See id.* ¶¶ 27, 30, 31.[FN1] Plaintiff's amended complaint contains twelve causes of action against defendants: (1) negligence per se; (2) negligence; (3) fraud; (4) breach of fiduciary duty; (5) civil conspiracy; (6) negligent misrepresentation; (7) constructive fraud; (8) legal malpractice/breach of standard of care; (9) violation of the North Carolina Unfair and Deceptive Trade Practices Act (“UDTPA”), N.C. Gen.Stat. § 75-1.1 *et seq.;* (10) violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c); (11) violation of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2607, for receipt of illegal kickbacks; and (12) violation of RESPA, 12 U.S.C. § 2603, for execution of false settlement statements. In conjunction with the eight non-statutory claims, plaintiff seeks punitive damages. *See* Am. Compl. ¶¶ 71, 77, 83, 91, 97, 111, 122, 137. Each claim incorporates

by reference all other allegations in the amended complaint. *See id.* ¶ 64, 72, 78, 84, 92, 98, 112, 123, 138, 150, 160, 166.

FN1. Defendants state that they were the sellers of seven properties (1, 2, 3, 6, 7, 8, and 9), but the amended complaint only alleges that they collectively sold six (1, 2, 3, 6, 7, and 8). *Compare* Defs.' Mem. in Supp. of Mot. to Dismiss 2 [hereinafter "Defs.' Mem."], *with* Am. Compl. ¶¶ 30-31.

***2** On April 24, 2007, Daniels, HBGJ, and the Johnsons each filed an answer to the amended complaint [D.E. 49, 50, 51]. They did not include separate motions or supporting memoranda with these answers. Other defendants in this litigation did file separate motions to dismiss [D.E. 52, 62, 74], including memoranda in support of their motions [D.E. 53, 63, 75]. Plaintiff responded to each of these motions and memoranda [D.E. 87, 88, 89], and these other defendants replied to plaintiff's responses [D.E. 93, 94, 95, 96]. The court referred these motions to Magistrate Judge James E. Gates. Plaintiff did not respond to Daniels, HBGJ, and the Johnsons' answers. Additionally, the court did not refer Daniels, HBGJ, and the Johnsons' answers with their purportedly embedded motions to dismiss to Judge Gates.

On January 7, 2008, Judge Gates recommended that the other defendants' motions be granted in part and denied in part [D.E. 103]. The court entertained objections from the other defendants [D.E. 107] and, on February 21, 2008, issued an order granting in part and denying in part the other defendants' motion to dismiss [D.E. 114]. Specifically, the court overruled the other defendants' objections regarding the statute of limitations and Rule 9(b) of the Federal Rules of Civil Procedure, sustained in part the other defendants' objection regarding plaintiff's request for punitive damages as to the negligent misrepresentation and civil conspiracy claims, and overruled the objection as to the remaining claims. Then, the court affirmed the M & R's recommendation that the other defendants' motion to dismiss the amended complaint be granted in part and denied in part.[FN2]

FN2. On February 5, 2008, plaintiff voluntarily dismissed (without prejudice) the following claims against the other defendants: negligence per se, fraud, violation of UDTPA, violation of RICO, and violation of the kickback and settlement statement provisions of RESPA. Plaintiff also voluntarily dismissed the civil conspiracy claim against attorney Spence. Consequently, the court vacated as moot the M & R's analysis of these claims [D.E. 114].

On May 5, 2008, HBGJ, Daniels, and the Johnsons jointly filed a renewal of their motions to dismiss [D.E. 124]. On June 17, 2008, plaintiff responded and moved to convert defendants' motion to one for summary judgment [D.E. 134].

II.

Local Civil Rule 7.1(d) of the Eastern District of North Carolina states:

> Except for motions which the clerk may grant as specified in Local Civil Rule 77.2, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Civil Rule 7.2(a). Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

Local Civil Rule 7.1(d), EDNC. When a party fails to comply with Local Civil Rule 7.1, a court may deny its motion. *See, e.g., Williams v. Black,* No. 5:07-CT-3170-D, at *2 (E.D.N.C. Oct. 10, 2008) (unpublished); *Thomas v. Smith,* No. 5:07-CT-3159-FL, at *1 (E.D.N.C. July 22, 2008) (unpublished); *Masinick v. Am. Craftsmen, Inc.,* No. 5:07-CV-461-BR, 2008 WL 483456, at *2 (E.D.N.C. Feb. 19, 2008) (unpublished); *ESA, Inc. v. Walton Constr. Co.,* No. 7:04-CV-75-F(3), at *1-2 (E.D.N.C. June 8, 2005) (unpublished); *Na-*

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tionwide Mut. Ins. Co. v. McMahon, 365 F.Supp.2d 671, 673 (E .D.N.C.2005); *cf. Fayetteville, Cumberland County Black Democratic Caucus v. Cumberland County,* No. 90-2029, 1991 WL 23590, at *2-3 (4th Cir. Feb. 28, 1991) (per curiam) (unpublished) (affirming district court's denial of motion based on party's violation of predecessor to Local Civil Rule 7.1).

***3** When defendants filed their answers to the amended complaint on April 24, 2007, they moved to dismiss plaintiff's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, they did not file separate motions or supporting memoranda. Defendants assume that because they filed a supporting memorandum with their renewed motion that they have complied with Local Civil Rule 7.1. *See* Renewal of Defs.' Mots. to Dismiss 1. FN3 Rule 7.1, however, clearly states that a motion "shall be filed *with* an accompanying supporting memorandum." Local Civil Rule 7.1(d), EDNC (emphasis added). Filing a supporting memorandum over a year after their original answers does not meet this contemporaneous requirement. Consequently, defendants failed to comply with Local Civil Rule 7.1(d), and the court denies defendants' original motions contained within their answers. Moreover, when defendants sought to renew their motions, they had nothing to renew. Construing their renewal as an initial motion to dismiss under Rule 12(b)(6)-given the motion's compliance with Rule 7.1(d)-their motion is not timely filed. *See* Fed.R.Civ.P. 12(a)(1)(A)(i), (b). Accordingly, the court denies defendants' renewed motion to dismiss [D.E. 124].

> FN3. Defendants' motion incorrectly cites Local Civil Rule 7.2, instead of Rule 7.1. Rule 7.2 sets forth the formatting and citation requirements for supporting memoranda. Rule 7.1(d) actually requires memoranda in support of motions.

Plaintiff's response includes a motion to convert defendant's renewed motion to dismiss to one for summary judgment [D.E. 134]. Because the court denies defendants' motion to dismiss as untimely, the court denies plaintiff's motion to convert as moot.

III.

As explained above, the court DENIES defendants' renewed motion to dismiss [D.E. 124] and DENIES plaintiff's motion to convert [D.E. 134] as moot.

SO ORDERED.

E.D.N.C.,2009.
Higgins v. Spence & Spence, PA
Slip Copy, 2009 WL 536069 (E.D.N.C.)

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C
Only the Westlaw citation is currently available.

United States District Court, E.D. North Carolina,
Western Division.
Luke MASINICK, Plaintiff,
v.
AMERICAN CRAFTSMEN, INC., ACI Super-walls, Inc., and Edward Rubio, Defendants.

No. 5:07-CV-461-BR.
Feb. 19, 2008.

Adam Mitchell Neijna, The Law Offices of Adam Neijna, PLLC, Raleigh, NC, for Plaintiff.

James P. Laurie, III, The Law Office of James P. Laurie III, PLLC, Raleigh, NC, for Defendants.

ORDER
W. EARL BRITT, Senior District Judge.

***1** This matter is before the court on defendants' motion to dismiss plaintiff's fifth claim for relief and plaintiff's motion for a more definite statement. Plaintiff did not file a response to defendants' motion, and defendants responded in opposition to plaintiff's motion.

Defendants contend that plaintiff has failed to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) as to his claim seeking declaratory judgment. This claim concerns provisions in the employment agreement between plaintiff and defendants which address non-competition, non-solicitation, confidential information, and future patents. (Compl.¶¶ 105-108.) Plaintiff alleges:

> The parties have an actual, justiciable controversy as to the rights and obligations of each in accordance with the respective Agreements and desire that the court declare the rights and obligations as to the following issue:
>
> a. What, if any, obligation(s) does Plaintiff have with regard to the non-compete and/or “Protection of Employer's Business” provision(s) contained in the Employment Agreement?
>
> b. What, if any, obligation(s) does Plaintiff have with regard to the confidentiality and/or “Confidential Information” provision(s) contained in the Employment Agreement?
>
> c. What, if any, obligation(s) does Plaintiff have with regard to the patent/trademark and/or “Ideas and Concepts” provision(s) contained in the Employment Agreement?
>
> d. What, if any, obligation(s) does Plaintiff have with regard to the Non-Disclosure Agreement?
>
> (*Id.* ¶ 111.)

Plaintiff asserts this claim pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen.Stat. § 1-253, which provides

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

As the North Carolina Court of Appeals has recognized,

> Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement. [T]he existence of an actual controversy is necessary to the court's subject matter jurisdiction. For there to be

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> an "actual controversy," there must be more than a mere disagreement between the parties and litigation must "appear unavoidable."

Bueltel v. Lumber Mut. Ins. Co., 134 N.C.App. 626, 628, 518 S.E.2d 205 (quotations and citations omitted) (alteration in original), *review denied,* 351 N.C. 186, 541 S.E.2d 709 (1999).

Defendants argue that no controversy exists because plaintiff has not "allege [d] facts showing any controversy beyond the mere existence of the post employment covenants." (Defs.' Br. at 2.) The court agrees. The court also notes that plaintiff has only alleged defendants intend to enforce the provisions at issue. (Compl.¶ 110.) Defendants have not counterclaimed against him for breach of those provisions nor do they seek injunctive relief to enforce those provisions. *Cf. Bueltel,* 134 N.C.App. at 629, 518 S.E.2d 205 (finding an actual controversy existed because former employer had communicated to former employee that employee was violating his employment agreement and that legal action may be taken against him, and because employee sought judgment as to whether his past and present conduct violated the agreement; "the parties were not asking the court to interpret the document in anticipation of future acts"). The motion to dismiss is ALLOWED, and plaintiff's fifth claim is DISMISSED.

***2** In his answer to defendants' counterclaims, plaintiff brings a motion for a more definite statement of some of defendants' affirmative defenses. Aside from not being proper on the merits for the reasons set forth in defendants' response, the motion also violates the court's local rules in that it is not accompanied by a supporting memorandum nor it is double-spaced, *see* Local Civil Rules 7.1(d), 10.1(a), EDNC. The motion for a more definite statement is DENIED.

E.D.N.C.,2008.
Masinick v. American Craftsmen, Inc.
Not Reported in F.Supp.2d, 2008 WL 483456 (E.D.N.C.)

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H

United States District Court, E.D. North Carolina, Western Division.
PACIFIC AG GROUP and Alliance Farm Group, Inc., Plaintiffs,
v.
H. GHESQUIERE FARMS, INC., Ghesquiere Plant Farms Limited, and Strawberry Hill, Inc., Defendants.

No. 5:05-CV-809-FL.
Aug. 21, 2007.

Paige Chandler Kurtz, Sprouse & Kurtz, PLLC, Raleigh, NC, for Plaintiffs.

John Rudy Wallace, Joseph A. Newsome, Wallace Nordan & Sarda, LLP, Raleigh, NC, for Defendants.

MEMORANDUM AND RECOMMENDATION

JAMES E. GATES, United States Magistrate Judge.

***1** This case comes before the court on the motions for summary judgment filed by defendants H. Ghesquiere Farms, Inc. ("Ghesquiere Farms"), Ghesquiere Plant Farms Limited, and Strawberry Hill, Inc. ("Strawberry Hill") (collectively "defendants") (DE # 37) and by plaintiffs Pacific AG Group and Alliance Farm Group, Inc. (collectively "plaintiffs") (DE # 39).[FN1] The motions were referred to the undersigned Magistrate Judge for review and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that both defendants' and plaintiffs' motions for summary judgment be denied.

> FN1. Plaintiffs re-filed their motion for summary judgment and memorandum in support of their motion for summary judgment with corrected signatures at docket entry # 43 and # 42, respectively.

BACKGROUND

Parties

Plaintiffs, both California corporations, are engaged in the business of propagating infant strawberry plants, termed strawberry runner tips, for resale to customers in the strawberry market. (Compl. (DE # 1), ¶¶ 1, 2, 8). Ghesquiere Farms, a Canadian corporation, is engaged in the business of growing, maintaining, and selling strawberry plants, which are purportedly distributed by Ghesquiere Plant Farms Limited, a Canadian corporation, and Strawberry Hill, an administratively dissolved North Carolina corporation.[FN2] (*Id.,* ¶¶ 3-5, 9).

> FN2. The administrative dissolution of Strawberry Hill does not prevent it from asserting counterclaims or being sued in this action. N.C.G.S. § 55-14-05(b)(5) (dissolution does not "prevent commencement of a proceeding by or against the corporation in its corporate name"); N.C.G.S. § 55-14-21 (making N.C.G.S. § 55-14-05(b)(5) applicable to administratively dissolved corporations).

2003 Shipments and Resulting July 2004 Settlement Agreement.

In 2003, plaintiffs purchased strawberry runner tips from Ghesquiere Farms and Strawberry Hill. (*Id.,* ¶ 10). Plaintiffs contend that these plants were infected with a disease, resulting in damages to plaintiffs. (*Id.,* ¶¶ 13-16). On 29 September 2003, as result of disputes over these plants, Ghesquiere Farms and Strawberry Hill sued plaintiffs and one other party in Wake County Superior Court. (*Id.,* ¶ 17). The action ("2003 action") was removed to this court [FN3] and in July 2004 a settlement was reached between plaintiffs and defendants. (*Id.,* ¶ 22). The handwritten settlement agreement ("agreement" or "settlement agreement") was negotiated and signed by Frank Sances ("Sances"), on behalf of plaintiffs, and Carl Ghesquiere ("Ghesquiere"), on behalf of defendants. (*Id.,* Ex. A, p. 3).[FN4] Under the agreement, defendants were

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required to provide a certain amount of strawberry runner tips to plaintiffs in 2004 without charge and to sell additional strawberry runner tips to plaintiffs at specified discounts 2004, 2005, and 2006. (*Id.,* ¶ 25, Ex. A). The agreement also provided for defendants to pay the specified discounts in cash to plaintiffs in lieu of the plants under certain circumstances. (*Id.,* ¶ 26, Ex. A, ¶ 8). The 2003 action was to be dismissed after the 2004 shipments provided for in the agreement had been made. (*Id.,* ¶ 24, Ex. A, ¶ 6).

FN3. *Strawberry Hill, Inc., et al. v. Alliance Farm Group, Inc., et al.,* No. 5:03-CV-795-FL (E.D.N.C).

FN4. The citations in this Memorandum and Recommendation are to the copy of the handwritten agreement attached as an exhibit to the complaint. A typed version of the agreement, although not fully signed, is attached as exhibit A to the answer and counterclaims (DE # 6-2).

2004 Shipments and Resulting November 2004 Addendum

Defendants shipped plants to plaintiffs in late July and early August 2004. (6 Aug 2004 Letter (DE # 38-7, 41-5), p. 1). Plaintiffs claimed that the plants did not meet the quality standards in the agreement. (*Id.,* p. 1 ¶¶ 1-4). To resolve the issue, in November 2004 the parties, again through Sances and Ghesquiere, entered into an addendum to the agreement. (Addendum (DE # 38-5, 41-3), p. ¶ 2). FN5 It provided for defendants to ship additional plants to plaintiffs free of charge in 2005. (*Id.,* p. 1 ¶ 3). The addendum also provided for the immediate dismissal of the 2003 action, which occurred. (*Id.,* ¶ 6).

FN5. Although all the parties to this action entered into the agreement, it appears that Ghesquiere Plant Farms Limited, was left out of the addendum. However, because the addendum incorporated the agreement by reference, the court concludes that all plaintiffs and all defendant to this action were parties to both the agreement and addendum.

Dispute Over Purchases to be Made in 2005

***2** A dispute subsequently arose between plaintiffs and defendants over the terms of the plant shipments to be made in 2005 under the agreement as amended by the addendum and the payment of cash discounts by defendants in lieu of the plants. (Sances' Depo. (DE # 38-13), p. 59). As a result, on 30 November 2005, plaintiffs brought this action alleging that defendants had breached the agreement. Defendants have filed an answer and counterclaims (DE # 6), in which they deny liability to plaintiffs and allege that plaintiffs breached the agreement. Defendants did not ship plaintiffs any plants in 2005 or 2006. (*See* Ghes.'s Aff. (DE # 37-2), ¶ 28).

Parties' Claims and Summary Judgment Motions

Plaintiffs assert claims for several breaches by defendants of their obligations under the agreement and the addendum, including: failure to provide conforming plants in the 2004 shipments, for which plaintiffs seek consequential damages; anticipatory repudiation by defendants of their obligation to provide plaintiffs plants in 2005; and failure to pay plaintiffs cash discounts in lieu of plants in 2005 and 2006. Defendants assert a counterclaim for plaintiffs' breach of their purported obligation to buy plants in 2005.

In their motion for summary judgment, plaintiffs seek entry of judgment in their favor on each of their foregoing claims. Defendants seek summary judgment denying plaintiffs' claim for consequential damages for the 2004 shipments and upholding their own claim for breach by plaintiffs regarding purchases in 2005.

DISCUSSION

I. STANDARD ON MOTION FOR SUMMARY JUDGMENT AND CHOICE OF LAW

Before turning to an analysis of each of the

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claims at issue, the court will review the standard for determination of summary judgment motions and the substantive law applicable to the parties' claims.

A. Summary Judgment Standard

It is well established that a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). In analyzing whether there is a genuine issue of material fact, all facts and inferences drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Evans v. Techs. Applications & Serv. Co.,* 80 F .3d 954, 958 (4th Cir.1996).

The burden is on the moving party to establish the absence of genuine issues of material fact and "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.,* 477 U.S. at 323; *Teamsters Joint Council No. 83 v. Centra, Inc.,* 947 F.2d 115, 119 (4th Cir.1991) ("[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate."). If the movant meets its burden, then the non-moving party must provide the court with specific facts demonstrating a genuine issue for trial in order to survive summary judgment. *Celotex,* 477 U.S. at 323. The non-moving party is not permitted to rest on conclusory allegations or denials and a "mere scintilla of evidence" will not be considered sufficient to defeat a summary judgment motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

B. Choice of Law

***3** This case is before the court pursuant to its diversity jurisdiction, 28 U.S.C. § 1332. In the addendum, the parties state that North Carolina law will govern the addendum and agreement. (Addendum, p. 1 ¶ 5). In the memoranda in support of their respective motions for summary judgment, the parties reaffirm their agreement to this choice of law provision. (Plfs.' Mem. in Supp. (DE # 40-1), p. 10; Defs.' Mem. in Supp. (DE # 38-1), p. 12). The court shall accordingly apply the substantive law of North Carolina in deciding the instant motions.

II. PLAINTIFFS' CLAIM FOR CONSEQUENTIAL DAMAGES FOR THE 2004 SHIPMENTS

As indicated, plaintiffs seek summary judgment on their claim for consequential damages purportedly caused by defendants' shipment of substandard plants to them in 2004. The consequential damages claimed are primarily for additional labor costs associated with disposal of purportedly unhealthy plants. Defendants seek summary judgment denying the claim on the grounds that all disputes arising from the 2004 shipments were resolved by the parties' entry into the addendum to the agreement. Defendants contend that plaintiffs' claim is also barred by the dismissal of the 2003 action.

The court will analyze this aspect of the parties' summary judgment motions by first reviewing additional facts relevant to plaintiffs' claim regarding the 2004 shipments. The court will then address the pertinent provisions of the addendum and the effect of dismissal of the 2003 action on plaintiffs' claim.

A. Additional Factual Background

Plaintiffs received the shipments at issue from defendants between late July and early August 2004. (6 Aug. 2004 Letter (DE # 38-7, 41-5), p. 1). After inspection, plaintiffs estimated that approximately 200,000 of the 2 million strawberry plants received were unable to be planted due to disease and other health issues. (*Id.,* p. 2 ¶ 9). Sances, acting on behalf of plaintiffs, notified Ghesquiere, acting on behalf of defendants, of these problems (*see* 6 Aug. 2004 Letter), and on 17 November 2004 the parties entered into the addendum. The addendum provided that defendants would ship an additional 200,000 plants to plaintiffs free of charge during the 2005

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growing season. (Addendum, p. 1 ¶ 3). The addendum also provided that the parties would file a stipulation of dismissal in the then-pending 2003 action and that the dismissal would be with prejudice. (*Id.,* ¶ 6). The parties filed the stipulation of dismissal on 24 November 2004, terminating the 2003 action. (*See* Stipulation (DE # 38-6)).

B. Interpretation of the Addendum

A settlement agreement is recognized in North Carolina as "a valid contract between the settling parties which is 'governed by general principles of contract law.' " *McClure Lumber Co. v. Helmsman Construction, Inc.,* 585 S.E.2d 234, 238, 160 N.C.App. 190, 197 (2003) (quoting *Chappell v. Roth,* 548 S.E.2d 499, 500, 353 N.C. 690, 692 (2001)). In analyzing the agreement, the court must first determine the intention of the parties. *Int'l Paper Co. v. Corporex Constructors, Inc.,* 385 S.E.2d 553, 556, 96 N.C.App. 312, 317 (1989). The language in the agreement will be given its plain and ordinary meaning. *Internet East, Inc. v. Duro Commc'ns, Inc.,* 553 S.E.2d 84, 87, 146 N.C.App. 401, 405 (2001); *see also Crawford v. Potter,* No. 1:04CV00303, 2005 U.S. Dist. LEXIS 23423, at *12 (M.D.N.C.2005) (in a breach of contract action applying North Carolina law, the court stated that "a settlement agreement, like all contracts must be interpreted according to its plain meaning"). If the contract is unambiguous on its face, the court is permitted to interpret the contract as a question of law; however, if any part of the contract is ambiguous or the intent of the parties is unclear, ambiguities must be resolved and the contract interpreted by the fact finder. *Int'l Paper Co.,* 385 S.E.2d at 556, 96 N.C.App. at 317.

***4** Here, the pertinent language of the addendum unambiguously indicates that it was entered into as a consequence of plaintiffs' complaints about the plants in 2004 shipments. It states in relevant part:

> [C]ertain plants which have been shipped to Alliance and Pacific AG [in 2004], have in the view of Alliance and Pacific AG, not met the appropriate standards. For that reason, the parties agree to amend and modify the Settlement Agreement.

(Addendum, p. 1 ¶ 2). In addition, there appears to be no dispute that defendants were to provide plaintiffs the 200,000 free plants as substitutes for the 200,000 plants about which plaintiffs complained. (Plfs.' Mem. in Supp., p. 5; Defs.' Mem. in Opp. (DE # 45), p. 5). Indeed, the limitation of plaintiffs' claim to consequential damages for the 2004 shipments reflects their view that the consideration they received under the addendum compensated them for the plants themselves. (*See* Plfs.' Mem. in Supp., p. 6, 13).

However, the addendum is ambiguous as to whether it was intended to resolve claims by plaintiffs for any other damages they potentially incurred as a result of the 2004 shipments, including any claims for consequential damages. There is no express provision in the addendum whether consequential damages or any other particular type of damages are included. In addition, the person who negotiated the addendum on behalf of plaintiffs, Sances, states in an affidavit that consequential damages were not discussed. (Sances' 1 Mar. 2007 Aff. (DE # 39-2), ¶¶ 58, 59). These facts tend to show that consequential damages are not covered by the addendum.

At the same time, the addendum does not contain an integration clause. [FN6] Without an integration clause, there is no presumption that the parties intended the documents to be their complete agreement.[FN7] *See Melvin v. Principi,* No. 5:03-CV-968-FL, 2004 U.S. Dist. LEXIS 28464, at *18 (E.D.N.C. 2 Dec. 2004) (under North Carolina law, an integration or merger clause "creates a rebuttable presumption that the writing is a complete and exclusive statement of the contract terms.") (quoting *Smith v. Central Soya of Athens, Inc.,* 604 F.Supp. 518, 525 (E.D.N.C.1985)). The record does not establish definitively that the addendum (including the agreement which was incorporated by reference into it) was intended to be the complete agreement of the parties regarding the 2004

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shipments. The court therefore cannot rule out the possibility that, although not stated in the addendum, parol evidence at trial would establish that the addendum was intended to apply to consequential damages, as defendants contend.

FN6. The court notes that in the agreement the parties included a provision, unusual for a commercial contract, that upon the death of either Sances or Ghesquiere all obligations under the agreement would cease. (Compl., Ex. A, ¶ 7). The parties do not address the purpose of this provision and the court makes no finding on its purpose. Nevertheless, the provision could indicate that only these two persons had a full understanding of the agreement and that there were unwritten terms personally known only to them. If that is so, the provision would tend to establish that the agreement was not fully integrated.

FN7. If the agreement is determined to be fully integrated but ambiguous, then the court can look to parol evidence only to determine the parties' intent. *Rowe v. Rowe,* 287 S.E.2d 840, 845, 305 N.C. 177, 185 (1982). In the absence of a fully integrated agreement, the court would be permitted to look to parol evidence not only to determine the parties' intent, but also to supplement or add provisions to the agreement. *Id.*

Also seemingly supportive of defendants' position is the overall structure of the addendum, which is suggestive of an intent to resolve all claims by plaintiffs arising from the 2004 shipments. It would not appear to have been in defendants' interest to replace the complained-of plants free of charge but leave themselves exposed to a future claim for consequential damages arising from the same allegedly defective shipment. This consideration is not dispositive of the parties' intent, however, because, among other reasons, it is conceivable that businesses in the position of defendants would deem the risk of a future claim worth taking.

***5** If the addendum did not resolve plaintiffs' claim for consequential damages, the degree to which the 2004 shipments conformed to the requirements established in the agreement would become an issue. Plaintiffs have presented both argument and evidence in support of their position that the shipments were nonconforming. (Plfs.' Mem. in Supp., p. 4-5; Compl., ¶¶ 40-42; FN8 Sances' 1 Mar. 2007 Aff., ¶¶ 36-56). While defendants deny in argument and their answer that the shipments were nonconforming, it is less clear that they have forecasted evidence supporting this denial. (Defs.' Mem. in Opp., p. 5; Ans. (DE # 6), ¶¶ 40-42). The court need not resolve that issue, however, given the uncertainty over whether the addendum encompasses consequential damages. The presence of this and the other disputes regarding facts material to plaintiffs' claim regarding the 2004 shipments precludes summary judgment for any party with respect to it.

FN8. The complaint is verified and therefore serves as evidence and not simply as a pleading.

C. Effect of Dismissal of the 2003 Action

Defendants are correct that the stipulation of dismissal with prejudice is an absolute bar to relitigation of any of the dismissed claims. *Harrison v. Edison Bros. Apparel Stores, Inc.,* 924 F.2d 530, 534 (4th Cir.1991). However, the dismissed claims dealt solely with the disputes between the parties in 2003. (*See* Compl., pp. 7-27, *Strawberry Hill, Inc.,* No. 5:03-CV-795-FL). Accordingly, the stipulation of dismissal bars only recovery for damages resulting from the 2003 shipments. The dismissal therefore does not apply to plaintiffs' claim arising from the 2004 shipment. Its inapplicability is an additional reason for denial of summary judgment for defendants on this claim by plaintiffs.

III. PARTIES' CLAIMS REGARDING 2005 SHIPMENTS PROVIDED FOR IN THE AGREEMENT

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As indicated, both plaintiffs and defendants assert claims with respect to the shipment of plants in 2005 that are provided for in the agreement but never occurred. Plaintiffs claim anticipatory repudiation by defendants and, alternatively, failure by defendants to pay discounts in cash. Defendants claim breach by plaintiffs based on their failure to make purchases as purportedly required. Each of these claims is discussed below, following a more detailed factual background pertaining to the 2005 shipments.

A. Additional Factual Background

On 9 March 2005, Sances telephoned Ghesquiere and expressed a desire to purchase strawberry plants that year. (Plfs.' Mem. in Supp., p. 7; Defs.' Mem. in Supp., p. 9; Sances' 1 Mar. 2007 Aff., ¶ 67; Ghes.'s Depo. (DE # 41-18), pp. 134-35). Subsequent to this conversation, Sances sent an email letter to Ghesquiere on 17 March 2005 ("17 March letter") setting out the terms for purchase of strawberry plants. (17 Mar. 2005 Letter (DE # 38-9, 41-6); Ghes. Depo, p. 136). The email began with a note from Sances' assistant, stating: "Following is our Strawberry agreement for the 2005 growing season. Please sign and return two copies with original signatures. We will sign and return a signed copy for your records." (17 Mar. 2005 Letter). In the body of the letter, Sances requested 2.5 million Ventana tips at a price of $78 per thousand, with a $40 per thousand discount, as set forth in the agreement. (*Id.,* p. 1 ¶¶ 2, 3, 5). Sances also requested 200,000 strawberry runner tips free of charge as reimbursement for the unhealthy tips shipped in 2004 and in accordance with the addendum. (*Id.,* ¶ 1). Quoting language from the agreement, Sances requested that Ghesquiere ship the plants to California, where Sances would inspect them and, if accepted, send Ghesquiere a check for payment. (*Id.,* ¶ 6). Ghesquiere did not print out and sign the 17 March letter or return it to Sances. (Plfs.' Mem. in Supp., p. 15, 16; Defs.' Resp. to Adm. (DE # 41-10), ¶ 12; Ghes.'s Depo., p. 137)).

***6** Following receipt of the 17 March letter, on 23 March 2005, Ghesquiere flew to California and met with Sances. (Plfs.' Mem. in Supp., p. 7-8; Defs.' Mem. in Supp., p. 9; Ghes.'s Depo. p. 137). The parties had dinner at a hotel restaurant in Solvang, California and discussed the terms of Sances' 17 March letter. (Plfs.' Mem. in Supp., p. 7-8; Defs.' Mem. in Supp., p. 9). During the discussion, the parties argued about the terms presented in the letter. (*Id.;* Sances' 1 Mar. 2007 Aff, ¶¶ 83, 84). Specifically, Ghesquiere wanted Sances to inspect and pay for the plants in Canada prior to shipment but Sances refused to accept these terms. (Plfs.' Mem. in Supp., p. 8; Defs.' Resp. to Adm., ¶ 11; Ghes.'s Depo., p. 143; Sances' 1 Mar. 2007 Aff, ¶ 88). Plaintiffs allege that Sances and Ghesquiere parted company that evening without resolving the dispute and without coming to an agreement. (Plfs.' Mem. in Supp ., p. 8; Sances' 1 Mar. 2007 Aff., ¶ 91). Defendants admit that the parties disagree about what was said during the discussion. (Defs.' Mem. in Supp., p. 9). Specifically, Ghesquiere states the issues of pricing, inspection, and payment were not serious disputes (Ghes.'s Depo., p. 143) and he understood their conversation to mean that Sances still intended to place an order with him. (Ghes.'s Aff., ¶ 22).

On 24 March 2005, Ghesquiere purchased $15,950 in Ventana plants in an effort to fulfill Sances' alleged order in his 17 March letter .[FN9] (Defs.' Mem. in Supp., p. 9; Ghes.'s Aff., ¶ 23). Subsequently, on 28 March 2005, Sances emailed Ghesquiere again setting out the terms of his alleged order, which were identical to the terms described in the 17 March letter. (28 Mar. 2005 Letter (DE # 38-10, 41-8)). Sances also again requested that Ghesquiere print out the letter, sign where indicated, and return the signed document to Sances. (*Id.*). There is no evidence that Ghesquiere printed out and signed the letter or returned it to Sances, as requested. (Plfs.' Mem. in Supp., p. 20; Sances' 1 Mar. 2007 Aff., ¶ 94).

FN9. Plaintiffs allege that Ghesquiere did

> not fly to California solely to meet with Sances, but that he already had the trip planned to facilitate purchase of the Ventana plants. (Plfs.' Mem. in Opp. (DE # 47-1), p. 14). Accordingly, plaintiffs contend that Ghesquiere did not purchase the plants in sole reliance on what transpired during the parties' 23 March 2005 meeting. (*Id.*).

Subsequently, on 19 April 2005, Sances telephoned Ghesquiere and cancelled his order for plants, including the 200,000 free plants. (Sances' 22 Mar. 2007 Aff. (DE # 47-3), ¶ 12). The next day, 20 April 2005, Sances spoke with Ghesquiere again and reiterated his cancellation. (Plfs.' Mem. in Supp., p. 21; Defs.' Mem. in Supp., p. 10; Ghes.'s Aff., ¶ 24). On 1 June 2005, Sances memorialized this cancellation in a letter and demanded payment of the discount amounts in lieu of plants. (1 Jun. 2005 Letter (DE # 38-11, 41-9)). However, by the time Ghesquiere received the telephone call on 20 April, defendants allege that they had already purchased the plant material for plaintiffs' order and begun planting. (Defs.' Mem. in Supp., p. 10-11; Ghes.'s Aff., ¶ 24). Plaintiffs allege that, as of 20 April, Ghesquiere told Sances that he had not yet begun planting. (Sances' 22 Mar. 2007 Aff., ¶ 13).

***7** Plaintiffs also allege that defendants have refused to pay the discounts as demanded (Compl., ¶ 59). Although defendants deny this allegation in their answer (Ans., ¶ 60), it appears from their memorandum that they have not paid plaintiffs the discounts (*see* Defs.' Mem. in Supp., pp. 17-19).

B. Plaintiffs' Claim for Anticipatory Repudiation

Plaintiffs argue that Ghesquiere's alleged insistence on altering the terms of the agreement to require inspection and payment prior to shipment constitutes anticipatory repudiation and therefore a breach of the agreement. North Carolina case law defines an anticipatory breach as a "positive, distinct, unequivocal, and absolute refusal to perform the contract." *Messer v. Laurel Hill Assoc,* 378 S.E.2d 220, 223, 93 N.C.App. 439, 443 (1989). The question of anticipatory repudiation is clearly fact-specific. Central to the determination are the discussions that took place between the parties on 23 March in Solvang, California. Whether Ghesquiere was merely requesting different terms, or insisting on different terms such that he was refusing to perform on the contract, is subject to dispute and therefore must be determined by the fact finder. Accordingly, plaintiffs' motion should be denied with respect to this issue.

C. Plaintiffs' Claim for Cash Discounts

As indicated, plaintiffs claim that defendants' failure to pay the discounts after plaintiffs' demand for them constitutes a breach of the agreement. Defendants contend that because they did not cease growing strawberry runner tips for plaintiffs and were ready, willing, and able to provide such plants to plaintiffs, they were not required to pay the discounts.

The pertinent provision of the agreement reads: "If Ghesquiere Plant Farms ceases growing strawberry runner tips for Alliance Farm Group, the full amount of promised discounts will be paid by Ghesquiere to Alliance Farm Group" ("discount provision") (Compl., Ex. A, ¶ 8). When interpreting this language, the court, as noted, must give the words their plain meaning. *Internet East, Inc.,* 553 S.E.2d at 87, 146 N.C.App. at 405. The plain meaning of the discount provision appears to be clear. However, the court cannot view this provision in a vacuum; it must consider the entire agreement and ascertain the intent of the parties with respect to the agreement as a whole. *Int'l Paper Co.,* 385 S.E.2d at 555, 96 N.C.App. at 316. Viewed in this manner, the discount provision is manifestly ambiguous, as the conflicting evidence of the parties indicates.

The principal source of the ambiguity is lack of any specification as to which parties-plaintiffs or defendants-have the right to decide whether defendants cease growing plants for plaintiffs. Plaintiffs' position, reflected in the testimony of Sances, is that the agreement gives them the prerogative to de-

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termine whether or not defendants cease growing the plants. (Sances' 1 Mar. 2007 Aff., ¶ 28; Sances' Depo., pp. 69, 70 (DE # 41-15)). Under this interpretation, plaintiffs could direct defendants not to grow plants and, instead, take the discounts in cash. Plaintiffs' position views as irrelevant defendants' purported readiness to provide plants in 2005 since plaintiffs had chosen to receive cash discounts instead.

***8** Plaintiffs argue that this interpretation is consistent with the purpose of the agreement to compensate them for defendants' provision of unhealthy plants to them in 2003. Plaintiffs contend that they, as the parties who are to be made whole, should logically have the right to determine how that can best be accomplished. This compensatory purpose is referenced in the agreement itself, which states: "In consideration of business losses from infected plant material during the 2003 season, and Alliance Farm's request for reimbursement for over $500,000 U.S. in expenses from their plug crop ... [t]he following consideration will be provided by Ghesquiere Farms...." (Compl., Ex. A, p. 1; *see also id.,* ¶ 5 ("to further compensate [plaintiffs] for [their] 2003 losses from infected runner tips").

Defendants, relying on the testimony of Ghesquiere, contend that the discount provision gives them the right to decide whether to grow plants or pay cash discounts in response to an order from plaintiffs. (Ghes.'s Depo., pp. 57-58 (DE # 41-16)). Under this interpretation, if defendants choose to grow and supply plants, plaintiffs are not entitled to receive cash payment for the discounts instead. In 2005, defendants represent that they chose to provide plaintiffs plants in response to their order and took steps to grow them, and that plaintiffs' claim for cash discounts is therefore unfounded.

The ambiguity of the discount provision is obviously material to plaintiffs' claim for cash discounts. Plaintiffs' motion for summary judgment should accordingly be denied with respect to this issue.

D. Defendants' Counterclaim for Plaintiffs' Non-Purchase of Plants in 2005

In their counterclaim, defendants allege that, based on their correspondence with plaintiffs, they reasonably relied on plaintiffs' order to purchase strawberry runner tips. When plaintiffs cancelled their order, defendants had already incurred substantial expense and had ordered and planted the tips for plaintiffs. Therefore, defendants contend that plaintiffs breached their agreement to buy from defendants in 2005 by inducing defendants' performance and then refusing to pay for the plants that defendants were ready, willing, and able to provide.[FN10] Plaintiffs deny that any such agreement to buy was formed or that defendants acted reasonably in proceeding to grow plants for plaintiffs.

FN10. Defendants' theory assumes that the settlement agreement did not impose on plaintiffs an *obligation* to buy from defendants in 2005 (or 2006), but simply the *right* to buy. Under this rationale, a separate agreement would be needed to bind plaintiffs to making a purchase in 2005 (or 2006). This interpretation appears to be consistent with the language of the settlement agreement, which speaks only in terms of defendants' obligation to sell to plaintiffs in those years. (Compl., Ex. A, ¶ 5).

The principal issues presented by defendants' counterclaim are governed by Article 2 of the North Carolina Uniform Commercial Code ("UCC"), N.C.G.S. §§ 25-2-101, *et seq.,* which, of course, applies to contracts for the sale of goods. A contract for the sale of crops yet to be planted is considered a future contract for the sale of goods which also falls within the ambit of UCC Article 2. *See* N.C.G.S. §§ 25-2-105(1) (crops included in the definition of goods), 25-2-105(2) ("present sale of future goods ... operates as a contract to sell"). Therefore, any contract between defendants and plaintiffs for the sale of strawberry plants would be

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governed by the provisions of UCC Article 2.

***9** Here, there are multiple material issues of fact which preclude the court from granting summary judgment on defendants' counterclaim. Principal among these issues are the following: (1) whether the UCC statute of frauds applies; (2) whether the parties entered into an oral contract on 9 March 2005; (3) whether the 17 March letter was an offer or a confirmatory memorandum of the possible 9 March 2005 contract; (4) whether Ghesquiere's request on 23 March 2005 for different terms constituted a rejection and counteroffer, or acceptance of the original offer and proposals for changes to the contract; and (5) whether it was reasonable for Ghesquiere to rely on Sances' verbal and written communications and begin planting strawberry tips for plaintiffs. Each of these issues is discussed in greater detail below.

Under the UCC statute of frauds, to be enforceable contracts for the sale of goods in excess of $500 must be in writing and signed by the party against whom enforcement is sought, with some limited exceptions. N.C.G.S. § 25-2-201(1). It does not appear that plaintiffs ever signed any writing or contract committing it to the 2005 shipments. However, one or more of the exceptions may apply, such as when one party sends a confirmatory writing to another party acknowledging the contract or when the goods are specially manufactured for the buyer and not suitable for sale to others. *See id.* § 25-2-201(2), (3). Issues relating to the statute of frauds were not addressed by either side in their briefs.

Another related issue in dispute is whether the parties reached an oral agreement on 9 March 2005, which was confirmed by the 17 March letter, or whether the 17 March letter was merely an offer to purchase plants that year. The language in the letter is subject to both interpretations. It begins with a note from Sances' assistant, stating, "Following is our Strawberry agreement for the 2005 growing season. Please sign and return two copies with original signatures. We will sign and return a signed copy for your records." (17 Mar. 2005 Letter, p. 1). The first sentence indicates that an agreement has already been reached, possibly during the 9 March 2005 telephone conversation. However, the second and third sentences seem to indicate that the 17 March letter was an offer and by signing the document Ghesquiere could accept the offer.[FN11] Of course, defendants argue that the first interpretation was intended and plaintiffs argue that the latter interpretation was intended.

FN11. The North Carolina UCC speaks directly to methods of acceptance in section 25-2-206(l)(b). Although an order to buy goods can be construed as inviting acceptance by promise to ship the goods or actual shipment of the goods, this is only where the order does not otherwise unambiguously specify the manner for acceptance. N.C.G.S. § 25-2-206(l)(b). If the fact finder determines that Sances unambiguously specified that the only way to accept the offer was to sign the 17 March letter and return a copy to Sances, then beginning performance by purchasing strawberry plant material would not constitute acceptance.

Further, there are disputes about what transpired during the conversation between Sances and Ghesquiere in Solvang, California on 23 March 2005. If the 17 March letter is determined to be an offer, then Ghesquiere may have accepted that offer and merely suggested different terms during the 23 March meeting. Under the UCC, if acceptance was made conditional on assent to the different terms, then no contract was formed. N.C.G.S. § 25-2-207(1). However, if the different terms were merely suggestions or Ghesquiere's attempt to persuade Sances to change his mind, then perhaps Ghesquiere did accept the 17 March offer (if construed as an offer), and the different terms were not made part of the contract. If a contract was formed on 9 March and the 17 March letter was merely a confirmatory memorandum, then Ghesquiere may

still have been merely suggesting different terms at the 23 March meeting. Certainly, the fact finder must make a determination about what was said during the 23 March meeting. Finally, the fact finder must determine whether it was reasonable for Ghesquiere to begin fulfilling Sances' original order by purchasing plant material on 24 March 2005 while in California, in light of the disagreement between Sances and Ghesquiere during the 23 March meeting regarding the time and place of inspection and payment. Clearly there are many disputed factual issues that remain for the fact finder with respect to defendants' counterclaim. Accordingly, defendants' motion for summary judgment on this claim should be denied.

IV. PLAINTIFFS' CLAIM REGARDING 2006 PURCHASES PROVIDED FOR IN THE AGREEMENT

***10** In their pleadings and motions, the parties focus on liability with respect to the 2004 and 2005 shipments provided for in the agreement, and pay scant attention to plaintiffs' claim relating to shipments to be made in 2006. The court will therefore address the claim briefly, finding that plaintiffs are not entitled to summary judgment on it.

Plaintiffs contend that the alleged breaches which occurred in 2005 entitle them to recover damages regarding the shipments to be made in 2006 under the agreement, as well as those to be made in 2005. Plaintiffs seek payment of cash discounts for 2006. (*See* Compl., ¶ 63). Under this theory, determination of defendants' liability regarding any 2006 shipments hinges on resolution of the same material issues of fact underlying defendants' liability with respect to the 2005 shipments. These issues preclude summary judgment with respect to any 2006 purchases just as they preclude summary judgment with respect to the 2005 shipments.

Defendants deny any liability with respect to 2006 shipments. In addition to denying any breach of the agreement, they contend that because plaintiffs did not order any plants from them in 2006 (a fact that does not appear to be disputed), they were not under any obligation to provide plants or discounts in lieu of plants and therefore did not breach the agreement with respect to any purchases in 2006. The agreement is ambiguous as to whether defendants have any obligation to either grow plants or pay discounts in lieu of plants absent an order from plaintiffs. There is no provision that expressly addresses this issue. This ambiguity provides an additional basis for denying summary judgment with respect to any shipments to be made in 2006.

CONCLUSION

For the foregoing reasons, it is RECOMMENDED that both plaintiffs' and defendants' motions for summary judgment be DENIED.

The Clerk shall send copies of this Memorandum and Recommendation to counsel for the respective parties, who have ten business days to file written objections. Failure to file timely written objections bars an aggrieved party from receiving a de novo review by the District Judge on an issue covered in the Memorandum and Recommendation and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Judge.

ORDER

LOUISE W. FLANAGAN, Chief United States District Judge.

This matter comes before the court on the memorandum and recommendation ("M & R") of United States Magistrate Judge James E. Gates (DE # 59), recommending the court deny the motions for summary judgment filed by plaintiffs (DE # 39, corrected as to signature at DE # 43) and defendants (DE # 37). Both sides have filed objections to the M & R, and the matter is ripe for decision. Except as otherwise noted, the court adopts the M & R as its own, and denies the motions for summary judgment. Accordingly, this case shall proceed to trial.

***11** Also before the court is defendants' motion

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in limine as to parol evidence (DE # 67), filed August 1, 2007. Defendants argue therein that the Settlement Agreement and Addendum are unambiguous, and therefore the court cannot and should not entertain parol evidence of the parties' intent in entering these contracts, or of possible additional terms governing the contractual relationship. The court heard argument on the motion at the final pretrial conference, and took it under advisement. Because the court holds on the motions for summary judgment that the contracts are ambiguous, the motion in limine is denied.

DISCUSSION

The district court conducts a *de novo* review of those portions of a magistrate judge's memorandum and recommendation to which specific objections are filed. *See* 28 U.S.C. § 636(b); Local Civil Rule 72.4(b), EDNC. Those portions of the memorandum and recommendation to which only general or conclusory objections are lodged may be affirmed by the district court unless clearly erroneous or contrary to law. *See Camby v. Davis,* 718 F.2d 198, 200 (4th Cir.1983). Upon careful review of the record, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

The court adopts defendants' undisputed first objection, and notes defendant Strawberry Hill, Inc. was dissolved by corporate action, not administrative action. The court also adopts defendants' undisputed third objection, and notes that defendants sought summary judgment in their favor on all of plaintiffs' claims. The court also adopts defendants' undisputed fourth objection, and notes Sances did not accurately quote the Settlement Agreement in the March 17, 2005 letter to Ghesquiere.

The court declines to adopt the other objections made by the parties, which are all contested, because of the ultimate determination, after review of the evidence, that key issues of material fact preclude entry of summary judgment. In so ruling, the court does not engage in factfinding that is binding at trial. On motions for summary judgment, the court does not find facts; it instead reviews the evidence presented to determine if relevant disputes preclude entry of judgment. While Fed.R.Civ.P. 56(d) does authorize the determination of certain facts, which would be binding at trial, the court has not engaged in such a process on the instant motions, except as noted below.

The court has reviewed the Settlement Agreement and Addendum, and concurs with the magistrate judge's conclusion that several ambiguities preclude entry of summary judgment. The first such ambiguity is whether the contracts allow for or preclude plaintiffs' claim for consequential damages arising from the 2004 shipments. The contracts do not on their faces address the issue, and they do not contain integration or merger clauses, nor other indication that they are fully integrated. Accordingly, the parties may present parol evidence in an attempt to establish or extinguish the claim to these damages. *See Smith v. Central Soya of Athens, Inc.,* 604 F.Supp. 518, 525-26 (E.D.N.C.1985). Second, ambiguity exists as to the proper construction of the term "ceases," as it relates to the 2005 and 2006 seasons, and the court will also entertain parol evidence as the parties' intent vis-à-vis this term. Additionally, the court notes ambiguity as to whether the Settlement Agreement and Addendum contemplated any need for additional writing(s) to bind the parties for the sale of a particular number of strawberry runner tips in the years covered by the contracts. (*See* M & R at 17.)

***12** Because ambiguities appear to exist in the Settlement Agreement and Addendum, defendant's motion in limine as to parol evidence must be denied. This evidence is appropriately considered where a contract is ambiguous, and both parties can use the evidence to establish their position as to the parties' intent in forming the contracts, or to establish the existence of consistent additional terms. *See Smith,* 604 F.Supp. at 524. Furthermore, the district court is fully able to assign the proper weight to the evidence presented, and the introduction of parol

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evidence does not necessarily place either side in jeopardy of losing on the ultimate issues. *C.f. Schultz v. Butcher,* 24 F.3d 626, 631-32 (4th Cir.1994) (holding evidence should not be excluded under Fed.R.Evid. 403 on the ground that it is unduly prejudicial, in bench trial, because trial judge can properly weigh evidence); *see also Nat'l R.R. Passenger Corp. v. Catalina Enterprises, Inc. Pension Trust,* 147 Fed. Appx. 378, 384-85 (4th Cir.2005) (Widener., J., dissenting) (discussing generally the broader admissibility of evidence in bench trials).

CONCLUSION

After careful consideration, the court adopts the memorandum and recommendation of Magistrate Judge Gates as its own, and for the reasons stated therein, except as modified by this order, plaintiffs' motion for summary judgment (DE # 39, corrected as to signature at DE # 43) and defendant's motion for summary judgment (DE # 37) are hereby DENIED. Additionally, defendant's motion in limine as to parol evidence (DE # 67) is hereby DENIED.

SO ORDERED,

E.D.N.C.,2007.
Pacific AG Group v. H. Ghesquiere Farms, Inc.
Not Reported in F.Supp.2d, 2007 WL 2410595 (E.D.N.C.), 63 UCC Rep.Serv.2d 805

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