Rules 12(b) and 12(c)
Effectively Bringing and Defending The Motion

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a. Standard

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1. Federal Question (cases involving violations of the U.S. Constitution or federal laws)

2. Diversity (cases between citizens of different states where the amount in controversy exceeds $75,000)

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a. Exclusive jurisdiction over probate matters

b. Proper jurisdiction over (i) civil actions in excess of $25,000; (ii) actions requesting injunctive relief and declaratory judgments; and (iii) criminal actions where the punishment may exceed one month imprisonment or a fine of $50

Remember the Business Court! N.C. Gen. Stat. § 7A-45.4(a) identifies nine types of disputes that a party *may* designate as "mandatory complex business" cases. N.C. Gen. Stat. § 7A-45.4(b) identifies two types of disputes that *must* be designated as complex business cases. N.C. Gen. Statute 7A-45.4(c) also sets forth the procedure for objecting to a "mandatory complex business" designation.

2. District Court

a. Exclusive jurisdiction over juvenile matters

b. Proper jurisdiction over (i) civil actions for $25,000 or less; (ii) family law matters; (iii) traffic matters; (iv) misdemeanors; and (v) civil commitments

b. Mechanics

i. Timing. Jurisdictional issues can never be waived and should always be raised and resolved at the outset of litigation. A court is required to confirm it has jurisdiction at every stage of litigation.

ii. Burden of Proof. The plaintiff must prove the existence of subject-matter jurisdiction by a preponderance of the evidence. *United States ex rel Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009).

iii. Material Outside Pleadings. Affidavits may be considered in connection with motions under Rules 12(b)(1), (2), (3), (4) and/or (7). *See, e.g., Eaker v. Gower*, 189 N.C. App. 770, 772, 659 S.E.2d 29, 31 (2008); *WNC Holdings, LLC v. All. Bank & Trust Co.*, No. 11 CVS 9668, 2012 WL 4713722 at *6 (N.C. Super. Oct. 2, 2012); *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, ___ N.C App. ___, 2013 WL 5508370 at *2 (2013) (unpublished).

iv. Consequences of a Jurisdictional Defect.

1. Incurable jurisdictional defects require judgments to be thrown out. *Grupo Dataflux v. Atlas Global Group, LP*, 541 U.S. 567 (2004) (dismissing case for lack of subject-matter jurisdiction after 6 ½ years of litigation, including a six day jury trial).

2. A party that files a case in federal court (or removes a case to federal court) can attack jurisdiction after losing the case! *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951) ("To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.").

3. "Jurisdiction to enter final judgment will be upheld even though there was no right of removal when 'the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment.'" *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 231 (4th Cir. 1993), *quoting American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

v. Jurisdictional Discovery. "[A] defendant may dispute the allegations in a complaint that could establish subject matter jurisdiction. In that situation, the court may go beyond the allegations in the complaint and in an

evidentiary hearing determine if there are facts to support the jurisdictional allegations. Under such circumstances, the complaint's allegations ordinarily are not afforded a presumption of truthfulness. If, however, the jurisdictional facts are intertwined with the facts central to the merits of the complaint, a presumption of truthfulness should attach to the plaintiff's allegations. And, most relevant here, the court should resolve the relevant factual disputes only after appropriate discovery." *Rich v. U.S.*, 811 F.3d 140, 145 (4th Cir. 2015) (internal quotations and citations omitted).

c. Practice Pointers

i. For individuals, diversity is based on citizenship, not residence.

1. *See Reece v. Bank of New York Mellon*, 760 F.3d 771 (8th Cir. 2014) ("The allegation that [one party] was an Arkansas 'resident' is inadequate.").

ii. Don't assume that you know your corporate client's principal place of business.

iii. Don't assume your opponent's allegations about its principal place of business are accurate.

iv. Check the party's form of business (*e.g.*, LLC) and allege citizenship of all members if necessary. *See Travelers Indem. Co. of America v. Portal Healthcare Solutions, LLC*, 644 Fed. App'x. 245 (4th Cir. 2016) (requiring parties to address subject matter jurisdiction on appeal because neither the complaint nor the original record on appeal revealed the citizenship of the defendant limited liability company's members).[1]

v. A notice of removal must allege the parties' citizenship at the time the complaint was filed and at the time of removal.

vi. Evidence of diverse citizenship must be in the record if the defendant's answer initially denies the jurisdictional allegations.

1. Pleading lack of knowledge or information sufficient to admit or deny has the effect of a denial pursuant to Fed. R. Civ. P. 8(b)(5).

vii. Amend the pleadings to correct defective jurisdictional allegations. *See* 28 U.S.C. § 1653

[1] In August 2015, the ABA passed a resolution encouraging Congress to amend the federal diversity statute to treat unincorporated entities like incorporated entities, *i.e.*, as citizens of the states where the entity is organized and maintains its principal place of business.

viii. Standing can be considered under 12(b)(1) and 12(b)(6).

1. Conclusory allegations are not sufficient. Plaintiffs' conclusory allegations are not sufficient to survive a challenge under Rule 12(b)(1). *See Neuse River Found.,* 155 N.C. App. at 113, 574 S.E.2d at 51 ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."); *Venable v. GKN Automotive,* 107 N.C. App. 579, 584, 421 S.E.2d 378, 381 (1992) (affirming 12(b)(1) dismissal where plaintiff's allegations were "conclusory in nature"); *see also, e.g., Burgess v. Charlottesville Sav. & Loan Ass'n,* 477 F.2d 40, 43 (4th Cir.1973) ("Mere conclusory allegations in the complaint are insufficient to support jurisdiction.").

2. North Carolina courts do not have subject matter jurisdiction over intra-corporate disputes of out-of-state companies. *Camacho v. McCallum*, 2016 NCBC 79, 2016 WL 6237825 at *3 (N.C. Supr. 2016).

3. No actual injury, no standing. *Coker v. DaimlerChrysler Corp.,* 172 N.C. App. 386, 390, 617 S.E.2d 306, 309 (2005), *aff'd,* 360 N.C. 398, 627 S.E.2d 461 (2006) (no actual injury, only possible future injury, no standing).

II. 12(b)(2) - LACK OF PERSONAL JURISDICTION

a. Standard

i. Generally the same standard in state and federal court

1. "North Carolina's long-arm statute [N.C. Gen. Stat. § 1-75.4] is construed to extend jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause." *Christian Science Board of Directors of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 213 (4th Cir. 2001).

2. "Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014).

ii. General Jurisdiction. Is the defendant "at home in the foreign state?

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

***

"*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. For an **individual**, the paradigm forum for the exercise of general jurisdiction is the individual's **domicile**; for a **corporation**, it is an equivalent place, one in which the corporation is fairly regarded as **at home**. With respect to a corporation, the **place of incorporation and principal place of business** are paradig[m] ... bases for general jurisdiction. Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." That formulation, we hold, is unacceptably grasping.

As noted, the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities*. Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014) (internal quotations and citations omitted).

iii. Specific Jurisdiction. Does the lawsuit arise out of or relate to the defendant's contacts with the forum?

"Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1781 (2017).

"The Fourth Circuit employees a three-prong test to determine whether the exercise of specific jurisdiction comports with the requirements of due process: '(1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the forum state; (2) whether the plaintiff's claims [arose] out of those activities; and (3) whether the exercise of personal jurisdiction is constitutionally reasonable.'" *Hutton v. Hydra-Tech, Inc.*, 213 F. Supp. 3d 746, 752 (M.D.N.C. 2016), *quoting Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 559 (4th Cir. 2014).

b. Mechanics

i. Timing. Personal jurisdiction defenses are waivable. You must make a motion before pleading or include this defense in your answer.

1. Waiver may be implied by conduct even after a Rule 12(b)(2) defense has been formally raised, *e.g.*, filing motions, participating in hearings, participating in discovery.

2. Generally, a motion for an extension of time to answer is not a waiver of a personal jurisdiction defense. *See Rauch v. Urgent Care Pharmacy, Inc.*, 178 N.C. App. 510 (2006).

ii. Burden of Proof. The plaintiff must prove personal jurisdiction by a preponderance of the evidence. *Hutton v. Hydra-Tech, Inc.*, 213 F. Supp. 3d 746, 749 (M.D.N.C. 2016).

iii. Jurisdictional Discovery. Whether to grant discovery on the question of personal jurisdiction lies in the discretion of the court. *Pan-American Products & Holdings, LLL v. R.T.G. Furniture Corp.*, 825 F. Supp. 2d 664 (M.D.N.C. 2011).

iv. Extrinsic Evidence/Evidentiary Hearing. The court may consider any extrinsic material deemed pertinent. Attach any affidavits, authenticated documents, public record documents, etc. necessary to support (or oppose) the motion. *See Simmons v. Corizon Health, Inc.*, 122 F. Supp. 3d 255, 269 (M.D.N.C. 2015) ("The court may consider supporting affidavits when determining whether a plaintiff has made a prima facie showing of personal jurisdiction."). "[A]n 'evidentiary hearing' does not *automatically* involve or require live testimony but requires only that the district court afford the parties a fair opportunity to present both the relevant jurisdictional evidence and their legal arguments." *Hutton*, 213 F. Supp. 3d at 749.

c. Practice Pointers

i. The requirements for general or specific jurisdiction must be met as to each defendant.

ii. The court may not have personal jurisdiction over a subsidiary even if the court has personal jurisdiction over the parent.

iii. A defendant's relationship with a third party, by itself, is not a sufficient basis for jurisdiction.

iv. Amount of business, by itself, is not a sufficient basis for jurisdiction.

v. Consider whether to combine a personal jurisdiction motion with a *forum non conveniens* motion.

vi. Ask for limited jurisdictional discovery if you need it.

vii. Check the legal positions your client (or the opposing party) has taken in the past.

viii. Registration to do business in North Carolina does not mean the company has "consented" to jurisdiction in North Carolina. *See Public Impact LLC v. Boston Consulting Group, Inc.*, 117 F. Supp. 3d 732 (2015).

ix. 29 U.S.C. § 1406(a) authorizes a court to transfer a case, following a finding that it lacks personal jurisdiction. *Wright v. Zacky & Sons Poultry, LLC*, 105 F. Supp. 3d 531 (M.D.N.C. 2015).

****Recent Cases Granting 12(b)(2) Motions (federal courts in the Fourth Circuit)**

- *Hutton v. Hydra-Tech, Inc.*, 213 F. Supp.3d 746 (M.D.N.C. 2016)

  Contacts that were not sufficient to demonstrate purposeful availment:

  -defendant's prior relationship with a North Carolina company, which generated four sales of defendant's aerial lift trucks to the NC company;

  -providing advertising materials to the NC company;

  -defendant's relationship with a Massachusetts company that asked to advertise defendant's trucks in NC;

  -defendant's website, which included defendant's phone number and information on its trucks;

  -defendant's sale of one truck to Surry-Yadkin, EMC after EMC requested a quote from defendant; and

  -defendant's completion of a bill of lading for the shipment of one of its trucks from Indiana to North Carolina.

- *Pathfinder Software, LLC v. Core Cashless, LLC*, 127 F. Supp. 3d 531 (M.D.N.C. 2015)

  Contacts that were not sufficient to demonstrate purposeful availment:

  -defendant's single software support contract with a NC entity amounting to a minimal portion of defendant's annual revenues;

  -defendant's partnership with a NC company to provide software products for a water park located in Georgia;

  -globally accessible website that does not allow visitors to make online purchases; and

  -globally accessible mobile application that can be downloaded by NC residents but cannot be used in NC.

- *PBM Capital Investments, LLC v. General Electric Co.*, 2016 WL 3982590 (W.D. Va. July 22, 2016) (rejecting argument that court could exercise general jurisdiction over GE on the basis that GE operates two "brick and mortar" facilities in Virginia, including a facility that employees 700 manufacturing employees).

    - A zinger from the court!

      "Finally, plaintiff argues, reduction ad absurdum, that the court must have some kind of jurisdiction over GE because it is 'one of the largest corporations in the world, [and] derives substantial revenue from Virginia that would subject it to personal jurisdiction independent of any course of conduct.' This position ignores entirely Daimler's admonitions that 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'"

- *Sarver v. Johnson & Johnson*, 2016 WL 482994 (S.D. W. Va. Feb. 5, 2016) (holding that the court did not have specific personal jurisdiction over a defendant where defendant's conduct suggested nothing more than an intent to market its allegedly defective product in the United States in general, not any specific state).

- *Callum v. CVS Health Corp.*, 2015 WL 5782077 (D.S.C. Sept. 29, 2015) (holding that parent company's sporadic activity in South Carolina—which was unrelated to plaintiff's claims—was not sufficient for court to exercise specific personal jurisdiction).

- *Public Impact, LLC v. Boston Consulting Group, Inc.*, 117 F. Supp. 3d 732 (M.D.N.C. 2015) (holding that the court did not have specific personal jurisdiction over a defendant where plaintiff's trademark claims did not arise out of defendant's contacts with North Carolina).

III. 12(b)(3) - IMPROPER VENUE

a. Standard

i. Federal

1. Specific Statutes

a. 28 U.S.C. § 1400(b) – "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." *See also TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017) (holding that the word "residence" in 1400(b) refers only to the state of incorporation).

2. "Venue in General" – 28 U.S.C. § 1391(b)

A civil action may be brought in—

(1) a judicial district in which any defendant resides,[2] if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

[2] For venue purposes, defendants are residents of any judicial district in which they are subject to the court's personal jurisdiction. 28 U.S.C. § 1391(c)(2).

ii. State

1. Specific Statutes

a. N.C. Gen. Stat. § 1-76 - Venue for certain proceedings dealing with real property is proper in the county in which the land is located.

b. N.C. Gen. Stat. § 55-14-31(a) – Venue for a proceeding to dissolve a corporation is proper in the county where the corporation's principal office is or was last located.

c.

d. Senate Bill 621 – North Carolina Choice of Law and Forum in Business Contracts (effective July 18, 2017)

"[T]he parties to a business contract that satisfies the requirements of subsection (a)[3] of this section may designate in the business contract one or more counties in this State as the proper venue for a dispute arising from the business contract. If the parties do not designate a county in the business contract, a party may bring an action for a dispute arising from the business contract in any county in this State."

2. "Venue in All Other Cases" - N.C. Gen. Stat. § 1-82

"In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in the plaintiff's summons and complaint, subject to the power of the court to change the place of trial ...."

iii. Changing Venue

1. Federal - 28 U.S.C.A. § 1406(a) and 28 U.S.C.A. § 1404(a)

a. 1406(a) - "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such

[3] Subsection (a) requires the business contract to include both of the following provisions: (1) a provision where the parties agree that North Carolina law shall govern their rights and duties in whole or in part, pursuant to G.S. 1G-3; and (2) a provision where the parties agree to litigate a dispute arising from the business contract in the courts of this State.

case to any district or division in which it could have been brought."

b. 1404(a) -"For the convenience of parties and witnesses, in the interest of justice, the district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

2. State - N.C. Gen. Stat. § 1-83

If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

- When the county designated for that purpose is not the proper one.
- When the convenience of witnesses and the ends of justice would be promoted by the change.
- When the judge has, at any time, been interested as party or counsel.
- (4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons.

Remember! In North Carolina, a motion to dismiss based on improper venue is treated as a motion to transfer. *Roberts v. Adventure Holdings, LLC*, 208 N.C. App. 705, 711 (2010) (explaining that even though the defendant's motion to dismiss based on improper venue did not request a change of venue, "our precedent requires that the motion be treated as such").

b. Mechanics

i. Timing. An objection to venue is waived if not specifically raised in a timely manner. *Chillari v. Chillari*, 156 N.C. App. 670 (2003); *Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544 (4th Cir. 2006).

ii. Venue vs. Personal Jurisdiction. Generally, courts will address challenges to personal jurisdiction before considering whether venue is proper. But, courts are not required to proceed in that order, and § 1406(a) permits the court to transfer a case whether the court has personal jurisdiction over the defendants or not. *See Adhikari v. KBR, Inc.*, 2016 WL 4162012 (E.D. Va. Aug. 4, 2016).

iii. Extrinsic Evidence. The court can consider facts outside of the pleadings on a 12(b)(3) motion. *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320 (9th Cir. 1996); *WNC Holdings, LLC v. Alliance Bank & Trust Co.*, 2012 WL 4713722 (N.C. Super. Ct. Oct. 2, 2012) ("[A]ffidavits supporting an objection to venue may be considered and accepted as true in a court's ruling" on an objection to venue.")

iv. Multiple Count Complaints. If your case involves a multiple count complaint, and only one of the claims was filed in an improper county, consult N.C. Rule of Civ. P. 42(b)(1) and N.C. Gen. Stat. § 1-87(a):

1. Rule 42(b)(1) – "The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any . . . number of claims.

2. N.C. Gen. Stat. § 1-87(a) – "When a cause is directed to be removed . . . all other proceedings shall be had in the county to which the place of trial is changed.

See Aldridge v. Kiger, 2016 WL 6539161 (N.C. Super. Ct. Nov. 3, 2016) (Judge Robinson) (transferring the entire action to the county where venue for all claims was proper).

v. Remember! Always review and comply with "meet and confer" requirements before filing a Rule 12 motion in federal court.

c. Practice Pointers

i. Remember that venue is not a jurisdictional issue. A civil judgment otherwise appropriate will not be void on the basis of improper venue. N.C. Gen. Stat. § 1-83; *Brooks v. Brooks*, 107 N.C. App. 44 (1992).

ii. Determine whether a forum selection clause mandates venue in a different forum, *i.e.*, "all disputes shall be litigated in . . . ."

1. The U.S. Court of Appeals for the Fourth Circuit has held that motions to dismiss based upon forum-selection clauses are cognizable as motions to dismiss for improper venue under

12(b)(3), not motions under 12(b)(1) or 12(b)(6). *Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544 (4th Cir. 2006).

iii. Consider whether the potential benefits of a different venue outweigh the potential costs of litigating a 12(b)(3) motion. *See Southeastern Automotive, Inc. v. Genuine Parts Co.*, 2017 WL 1393602 (N.C. Super. Ct. April 17, 2017) (parties litigated venue for more than a year).

iv. The North Carolina Court of Appeals has held that a trial court does not have authority to change venue *sua sponte*. *Zetino-Cruz v. Benitez-Cruz*, 791 S.E.2d 100 (N.C. App. 2016).

v. Federal courts have held that a motion to transfer venue filed pursuant to 28 U.S.C. § 1404 is not deemed to have been waived if not raised in an initial response to the complaint. *See McGuire v. Waste Management, Inc.*, 2011 WL 692203 (D.S.C. Feb. 18, 2011); *Nowotny v. Turnder*, 203 F. Supp. 802 (M.D.N.C. 1962).

IV. 12(b)(4) & (5) - INSUFFICIENT PROCESS & INSUFFICIENT SERVICE OF PROCESS

a. Standard

i. Federal

1. Fed. R. Civ. P. 4

ii. State

1. N.C. Gen. Stat. § 1A-1, Rule 4

b. Mechanics

i. Timing. These defenses are waivable.

ii. 12(b)(4) vs. 12(b)(5). "The defense of insufficiency of process differs from insufficiency of service of process: the former challenges the content of a summons; the latter challenges the manner or method of service. The line between these defenses is more difficult to draw when the defendant contends that the wrong party has been served, but the question is one of sufficiency of service of process. An error in form, not implicating substance, should be overlooked." *Heise v. Olympus Optical Co., Ltd.*, 111 F.R.D. 1, 5 (N.D. Ind. 1986).

c. Practice Pointers

i. Remember! These are "real" defenses. North Carolina requires that service of process statutes be strictly construed and followed. This is true even where defendants have actual notice of the action." *Adams v. GE Money Bank*, 2007 WL 1847283 (M.D.N.C. June 25, 2007) (granting motion to dismiss); *Broughton v. Dumont*, 43 N.C. App. 512, 515 (1979) ("Statutory provisions prescribing the manner of service of process must be strictly construed, and the prescribed procedure must be strictly followed; and unless the specified requirements are complied with, there is no valid service. Service in this case was insufficient. Since there was no valid service of process, the court acquired no jurisdiction over defendant.")

ii. Consider whether you need to obtain a federal summons after removal. *See Davis v. Trans Union, LLC*, 526 F. Supp. 2d 577, 584 (W.D.N.C. 2007) ("In the Fourth Circuit, it is unclear whether a party can complete service of a state summons after removal.")

V. 12(b)(6) - FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

a. Standard

Remember! Federal and state courts have different standards. *Holleman v. Aiken*, 193 N.C. App. 484, 491, 688 S.E.2d 579, 584–85 (2008) (rejecting the federal "plausibility" standard set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Estate of Schwarz v. Schwarz*, No. 16 CVS 3524, 2016 WL 7626400, at *4 (N.C. Super. Dec. 30, 2016) (Judge Gale, denying Defendant's 12(c) motion).

i. Federal - "Plausibility" Standard

> "… Rule 12(b)(6) authorizes a court to dismiss any complaint that does not state a claim "upon which relief can be granted." The aggregation of these specific requirements reveals the countervailing policy that plaintiffs may proceed into the litigation process only when their complaints are justified by both law and fact.
>
> In recent years, with the recognized problems created by "strike suits," see 5A Wright & Miller, *Federal Practice and Procedure*, § 1296, at 46 & n. 9,2 and the high costs of frivolous litigation, the Supreme Court has brought to the forefront the Federal Rules' requirements that permit courts to evaluate complaints early in the process. Thus, in Iqbal, the Court stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " 129 S.Ct. at 1949 (emphasis added) (*quoting Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). The plausibility standard requires a plaintiff to demonstrate more than "a sheer possibility that a defendant has acted unlawfully." *Id*. It requires the plaintiff to articulate facts, when accepted as true, that "show" that the plaintiff has stated a claim entitling him to relief, i.e., the "plausibility of 'entitlement to relief.' " *Id*. (*quoting Twombly*, 550 U.S. at 557, 127 S.Ct. 1955).
>
> To emphasize the Federal Rules' requirements for stating claims that are warranted and therefore form

a plausible basis for relief, the Supreme Court has held that a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. To discount such unadorned conclusory allegations, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S.Ct. at 1950. This approach recognizes that "naked assertions" of wrongdoing necessitate some "factual enhancement" within the complaint to cross "the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 (internal quotation marks omitted).

At bottom, determining whether a complaint states on its face a plausible claim for relief and therefore can survive a Rule 12(b)(6) motion will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief,' " as required by Rule 8. *Iqbal*, 129 S.Ct. at 1950 (alteration in original) (citation omitted) (quoting Fed.R.Civ.P. 8(a)(2)). The Court noted that even though Rule 8 "marks a notable and generous departure from the hyper-technical, codepleading regime of a prior era, ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*

ii. State - "Some Legal Theory" Standard

In ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court reviews the allegations of the Complaint in the light most favorable to Plaintiffs. The Court's inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355

> S.E.2d 838, 840 (1987). The Court construes the Complaint liberally and accepts all allegations as true. *Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009). 30.
>
> Dismissal of a claim pursuant to Rule 12(b)(6) is proper "(1) when the complaint on its face reveals that no law supports [the] claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the . . . claim." *Oates v. JAG, Inc*., 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985); *see also Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986). Otherwise, "a complaint should not be dismissed for insufficiency 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." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (*emphasis omitted*).

Timbercreek Land & Timber Co., LLC, v. Robbins, 2017 NCBC 64 ¶¶ 29-30 (2017).

1. The court is not required to accept as true any conclusions of law or unwarranted deductions of fact. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

2. Conclusory allegations and unreasonable inferences may likewise be disregarded. *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d. 8732, 880 (2005).

    a. Examples of Conclusory Allegations:

        i. Contract: "'An allegation that a valid contract exists between parties is a legal conclusion' not entitled to a presumption of validity." *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC 78 ¶ 28 (2016) (*quoting Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 6, 748 S.E.2d 171, 175 (2013).

        ii. Contract: Allegation that party was a third-party beneficiary to the contract. *FCX, Inc. v. Bailey*, 14 N.C. App. 149, 151, 187 S.E.2d 381, 382

(1972) (affirming 12(b)(6) dismissal of contract claim).

iii. Employment: An "employment manual was part of plaintiff's employment contract." *Guarascio v. New Hanover Health Network, Inc.*, 163 N.C. App. 160, 165, 592 S.E.2d 612, 614 (2004) (affirming 12(b)(6) dismissal of breach of contract claim).

iv. Defamation: Defendant's statements "subject the plaintiff to ridicule, contempt, and disgrace," and "impeach[es] the plaintiff in his profession" *Skinner v. Reynolds*, 237 N.C. App. 150, 156, 764 S.E.2d 652, 657 (2014).

v. The conclusory allegation that he suffered unspecified "lost wages" and "expenses" associated with "mitigating the defamation" is insufficient to inform defendants of the scope of his claim. *Skinner v. Reynolds*, 237 N.C. App. 150, 157, 764 S.E.2d 652, 658 (2014).

vi. Overcoming Public Official Immunity: "… [A] conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 696, 625 S.E.2d 128, 134 (2006) (*citing Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997)).

vii. Vicarious Liability: Employer was aware of employee's fraudulent acts. *Bottom v. Bailey*, 238 N.C. App. 202, 212, 767 S.E.2d 883, 889 (2014).

viii. Trade Secrets: The North Carolina Court of Appeals has held that "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510–11, 606 S.E.2d 359, 364 (2004) (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003)).A

complaint fails to state a claim if it "makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated." *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 327, 660 S.E.2d 577, 585–86 (2008).

ix. Trade Secrets: Examples of "threadbare" but sufficient identification of trade secrets. *The Bldg. Ctr., Inc. v. Carter Lumber, Inc.,* 2016 NCBC 77 ¶ 18 (2016).

b. "… [T]he trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Laster v. Francis,* 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009).

c. The court can consider the contents of documents attached to or referenced to in the complaint without converting the motion into a summary judgment motion.

b. Mechanics

i. Timing.

1. Federal

a. A 12(b)(6) motion "must be made before pleading …." Fed.R.Civ.P. 12(b). But note that the defense of failure to state a claim upon which relief may be granted may later be asserted in a 12(c) motion for judgment on the pleadings. Fed.R.Civ.P. 12(h)(2)(B).

b. A 12(b)(6) motion may be made in lieu of an answer, "[u]nless the court sets a different time …" for serving the answer. Fed.R.Civ.P. 12(a)(4). An example of a court setting a "different time" is Judge Whitney's *Standing Order Governing Civil Case Management*, which requires an answer to be filed concurrently with a 12(b)(6) motion, as follows:

> The filing of any other preliminary motion – including motions made pursuant to Rules 12(b)(3), 12(b)(6), and 12(b)(7) – will NOT presumptively

> toll the time required to plead an answer, counterclaims, and/or third-party complaint…. Accordingly, a defendant who contemplates filing a Rule 12(b)(6) motion must still serve and file a timely responsive pleading and prepare to commence with discovery as provided below.
>
> *Standing Order Governing Civil Case Management Before the Honorable Frank D. Whitney*, Misc. No. 3:07-MC-47 (Doc. No. 2) (W.D.N.C. 2007).

Remember! Review the local rules at the beginning of the case.

2. State

   a. As in the Federal Rules, a 12(b)(6) motion "shall be made before pleading …." N.C. R.Civ.P. 12(b). But note that the defense of failure to state a claim upon which relief may be granted may later be asserted in a 12(c) motion for judgment on the pleadings. N.C. R.Civ.P. 12(h)(2).

   b. A 12(b)(6) motion may be made in lieu of an answer, "[u]nless a different time is fixed by order of the court…" for serving the answer. N.C. R.Civ.P. 12(a)(1).

Remember! Again, review the applicable local rules. To reduce the delay in pleading process, some courts require parties making 12(b)(6) motions to immediately calendar the motion for hearing. For example, in Mecklenberg County Superior Court, the local rules require movants to calendar their Rule 12 motions "within three days of filing …." L.R. 12.1.

ii. Extrinsic Documents. In both federal and state court, **the movant** can provide the court with the documents "which are the subject of a plaintiff's complaint and to which the complaint specifically refers," even if they are not attached to the complaint. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60–61, 554 S.E.2d 840, 847 (2001) (citations omitted) (reviewing loan documents, and noting that contracts likewise could be reviewed). *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (*citing Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir.1999) (stating that "a court may consider [a document outside the complaint] in determining whether to dismiss the complaint" where the document "was integral to and explicitly relied on in the complaint" and there was no authenticity challenge)).

iii. With or Without Prejudice. In both federal and state courts, a 12(b)(6) dismissal is "with prejudice," but the court has discretion to specify it to

be without prejudice. *Johnson v. Bollinger*, 86 N.C. App. 1, 8, 356 S.E.2d 378, 383 (1987); *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009).

iv. An Amended Complaint May Be Susceptible to 12(b)(6). Even if the court has granted a motion to amend, the amended claim may still later be dismissed pursuant to Rule 12(b)(6). *Brown v. Secor*, 2017 NCBC 65 ¶ 29 (N.C. Super. Ct. July ___, 2017) ("Brown first contends that the motion is procedurally improper because, in allowing Brown to amend his complaint, the Court concluded that the claim for breach of contract was not futile. Not so.") (internal citation omitted). *But see In re NC & VA Warranty Co., Inc.*, No. 15-80016, 2016 WL 6658968, at *8 (Bankr. M.D.N.C. Sept. 28, 2016) (stating that a 12(b)(6) motion following a successful motion to amend is essentially a motion for reconsideration because whether the amendment would be futile equates to whether it states a claim upon which relief can be granted).

c. Practice Pointers

i. Use it wisely. Not every complaint cries out for a 12(b)(6) motion. Dismissal at this stage is a fairly high hurdle, and the standard is pleader friendly. However, a targeted approach is possible. A motion to dismiss fewer than all of the claims may be beneficial. For example,

1. An "add on" claim for unfair or deceptive trade practices could be dismissed, eliminating the defendant's exposure to treble damages and attorney fees.

2. Dismissal of some claims could eliminate parties and streamline discovery, or cause settlement to be within closer reach.

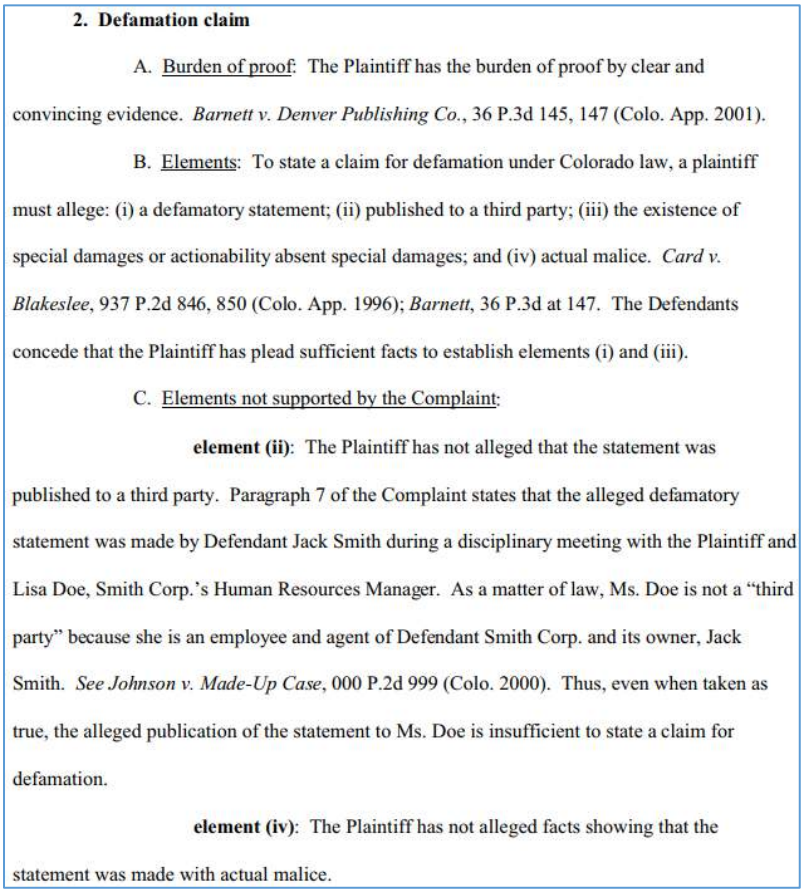
ii. Remove, then move. If removal is possible, it may be that the federal court may be apply a more-stringent standard in some situations.

For example, a recent decision from the Middle District held that the heightened pleading standard for fraud claims applies to actions brought under North Carolina's **unfair or deceptive trade practices** statute alleging detrimental reliance on false representations. *Topshelf Mgmt., Inc. v. Campbell-Ewald Co.*, 117 F. Supp. 3d 722, 731 (M.D.N.C. 2015) (granting 12(b)(6) motion, but without prejudice, noting that the pleading defect may be curable.

iii. Answer concurrently with the 12(b)(6). Answering the complaint concurrently with filing a 12(b)(6) motion cuts off the plaintiff's ability to file an amended complaint as a matter of right, and forces the plaintiff to move to amend.

iv. In response to a 12(b)(6), perhaps amend. If possible to cure the defects asserted by a 12(b)(6) motion, file an amended complaint. Filing an amended complaint as a matter of right moots a pending 12(b)(6) motion. If amendment of right is no longer possible (for example, because the defendant has already answered) move to amend to cure the defect, if possible.

v. When briefing and presenting follow the "formula." Most court opinions and orders dealing with 12(b)(6) follow the basic formula of stating the elements of the particular claim at issue, and then addressing the specific allegations in the complaint that are missing, insufficiently pled, or fatally undercut the claim. Briefs and arguments should follow the same formula. For example, here is a portion of the *Sample Motion to Dismiss* by Judge Marcia S. Krieger of the federal court for the District of Colorado:



2. Defamation claim

A. Burden of proof: The Plaintiff has the burden of proof by clear and convincing evidence. *Barnett v. Denver Publishing Co.*, 36 P.3d 145, 147 (Colo. App. 2001).

B. Elements: To state a claim for defamation under Colorado law, a plaintiff must allege: (i) a defamatory statement; (ii) published to a third party; (iii) the existence of special damages or actionability absent special damages; and (iv) actual malice. *Card v. Blakeslee*, 937 P.2d 846, 850 (Colo. App. 1996); *Barnett*, 36 P.3d at 147. The Defendants concede that the Plaintiff has plead sufficient facts to establish elements (i) and (iii).

C. Elements not supported by the Complaint:

element (ii): The Plaintiff has not alleged that the statement was published to a third party. Paragraph 7 of the Complaint states that the alleged defamatory statement was made by Defendant Jack Smith during a disciplinary meeting with the Plaintiff and Lisa Doe, Smith Corp.'s Human Resources Manager. As a matter of law, Ms. Doe is not a "third party" because she is an employee and agent of Defendant Smith Corp. and its owner, Jack Smith. *See Johnson v. Made-Up Case*, 000 P.2d 999 (Colo. 2000). Thus, even when taken as true, the alleged publication of the statement to Ms. Doe is insufficient to state a claim for defamation.

element (iv): The Plaintiff has not alleged facts showing that the statement was made with actual malice.

http://www.cod.uscourts.gov/portals/0/documents/judges/msk/msk_samp_dis_mot

****EXAMPLES OF SITUATIONS INVITING A 12(B)(6) MOTION**

- Statutes of Limitation (sometimes). "A statute of limitation may be the basis of a 12(b)(6) dismissal only if on its face the complaint reveals the claim is barred." *Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336N.C. 438, 442, 444 S.E.2d 423, 426 (1994).

- Failure to plead with specificity under Rule 9. Judge Schroeder recently provided the following guidance about 12(b)(6) dismissals based on Rule 9:

> Federal Rule of Civil Procedure 9(b) requires a plaintiff making an allegation of fraud to "state with particularity the circumstances constituting fraud." This heightened pleading standard requires the plaintiff to specifically allege "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999); *see also Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008). The Fourth Circuit has cautioned, however, that the court should not lose sight of the four purposes of this heightened pleading standard: to give sufficient notice of the claim to permit a defendant to formulate a defense; to protect against frivolous suits; to eliminate suits where all the fraud facts are learned after discovery; and to protect defendants from harm to their goodwill and reputation. *Harrison*, 176 F.3d at 784. Consequently, "[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which [it] will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Id.*

Humana, Inc. v. Ameritox, ___ F.Supp.3d ___, 2017 WL 3228313 at 5 (M.D.N.C. 2017) (denying 12(b)(6) dismissal).

- Preemption. *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 195 (4th Cir. 2007).

- Governmental Immunity. *Murray v. Univ. of North Carolina at Chapel Hill*, ___ N.C. App. ____, 782 S.E.2d 531 (2016), *aff'd*, 799 S.E.2d 612 (2017) (*per curiam*).

    - Denial of a 12(b)(1) motion is not immediately appealable.

    - Cite, argue, and obtain rulings based on 12(b)(2) and 12(b)(6) in order to preserve the ability to immediately appeal based on governmental immunity. See P*age by & through McCabe v. Shu Chaing*, __ N.C. App. __, 799 S.E.2d 626, 631 (2017).

- Economic Loss Rule. *W4 Farms, Inc. v. Tyson Farms, Inc.*, No. 16 CVS 1112, 2017 WL 3158867, at *9 (N.C. Super. July 24, 2017) (granting 12(b)(6) motion because negligence claim barred by economic loss rule).

- UDTP against insurance carrier by third party. *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996)

- "Scattershot" claims. Numerous courts have explained that "[a] complaint which ***lumps all defendants together*** and does not sufficiently allege who did what to whom, ***fails to state a claim for relief*** because it does not provide fair notice of the grounds for the claims made against a particular defendant." *Tatone v. SunTrust Mortgage, Inc.*, 857 F. Supp. 2d 821, 831 (D. Minn. 2012) (emphasis added). In other words:

> Such a conclusory and shotgun approach to pleading fails to provide each Defendant the factual basis for the claim(s) *against him or it* and therefore deprives them and the court of the opportunity of determining whether there are sufficient facts to make a claim against each Defendant plausible under the various [claims] argued by [the plaintiff]. Consequently, the complaint is vulnerable to dismissal.

Luna-Reyes v. RFI Const., LLC, 57 F. Supp. 3d 495, 503–04 (M.D.N.C. 2014) (emphasis in original). *See also Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 168, 565 S.E.2d 705, 711 (2002); *Caudle v. Life Ins. Co. of N. Am.*, No. 1:14-CV-545-VEH, ___ F. Supp. 2d ___, 2014 WL 2999178, at *3 (N.D. Ala. June 27, 2014) ("Ms. Caudle's simply lumping all the Honda Defendants together as 'Honda entities' in an unacceptable shotgun format does not satisfy her Rule 8 obligation[.]"); *Gibbs v. United States*, 865 F. Supp. 2d 1127, 1151 (M.D. Fla. 2012) (adopting Magistrate's Recommendation) ("Moreover, in a case with multiple defendants, the complaint should contain specific allegations with respect to each defendant; generalized allegations 'lumping' multiple defendants together are insufficient to permit the defendants, or the court, to ascertain exactly what plaintiff is claiming."); *Jarosiewicz v. Cnty. of Rutherford*, No. 1:05CV211, 2005 WL 2000238, at *1 (W.D.N.C. Aug. 18, 2005); *In re Ernie Haire Ford, Inc.*, 459 B.R. 824, 835 (Bankr. M.D. Fla. 2011); *Giscombe v. ABN Amro Mortgage Grp., Inc.*, 680 F. Supp. 2d 1378, 1381 (N.D. Ga. 2010).

- *Res judicata*. *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156 (4th Cir. 2008) (affirming 12(b)(6) dismissal); *ACC Const., Inc. v. SunTrust Mortg., Inc*., 239 N.C. App. 252, 261, 769 S.E.2d 200, 206, *review denied*, 772 S.E.2d 722 (N.C. 2015) (affirming 12(b)(6) dismissal).

- Shareholder without an injury distinct from corporation. Shareholders "generally may not bring individual actions to recover what they consider their share of damages suffered by the corporation." *Raymond James Capital Partners, L.P. v. Hayes*, __ N.C. App. __, __, 789 S.E.2d 695, 699 (2016) (*quoting Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220–21 (1997)). This general rule also applies to members of an LLC. *White v. Hyde*, 2016 NCBC 72 ¶ 53.

VI. 12(b)(7) - FAILURE TO JOIN A NECESSARY PARTY

a. Standard

i. Federal.

1. Fed.R.Civ.P. 19(a)(1) *Required Party.*

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

2. Judge Biggs recently summarized the Rule 19 analysis as follows:

> Rule 12(b)(7) provides that an action may be dismissed for failure to join a party under Rule 19. See Fed. R. Civ. P. 12(b)(7). The moving party on a Rule 12(b)(7) motion to dismiss bears the burden of showing that an absent party is necessary and indispensable pursuant to Rule 19. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005). "The inquiry contemplated by Rule 19 is a practical one" which is left "to the sound discretion of the trial court." *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980). The court must initially determine whether the absent party should be joined as a party to the action in accordance with the criteria set forth in Rule 19(a). *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 (4th Cir. 2000). If joinder of an otherwise required party is not feasible, the court must then determine whether, under Rule 19(b), the absent party is indispensable such that the action cannot proceed in that party's absence. Fed. R. Civ. P. 19(b); *Pettiford v. City of Greensboro*, 556 F.Supp.2d 512, 517 (M.D.N.C. 2008) (*citing Wood*, 429 F.3d at 92). Generally, "courts are extremely reluctant to grant motions to dismiss based on nonjoinder, and dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result." *RPR & Assocs. v. O'Brien/Atkins Assocs.*, P.A.,

921 F.Supp. 1457, 1463 (M.D.N.C. 1995), aff'd, 103 F.3d 120 (4th Cir. 1996).

Landress v. Tier One Solar LLC, __ F.Supp.3d. __, No. 1:15CV354, 2017 WL 1066648, at *3 (M.D.N.C. Mar. 21, 2017).

ii. **State**

1. N.C. R.Civ.P. 19(a). Necessary joinder. Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

2. "A party is not a necessary party simply because a pending action might have some impact on the party's rights, or otherwise affect the party. Instead, one "whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others" is a "proper" party, but not a necessary party. *Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc*., 12 N.C. App. 448, 452 (1971). Unlike necessary parties, a proper party may, but is not required to, be joined. *Id*. at 451. "Whether proper parties will be ordered joined rests within the sound discretion of the trial court." *Long v. City of Charlotte*, 306 N.C. 187, 212 (1982)."

   Cape Hatteras Electric Membership Corp. v. Stevenson, 2014 NCBC 63 ¶ 10 (2014).

b. Mechanics

i. Timing. The defense of failure to join a necessary party can be raised in any pleading, by motion, or at trial. Fed.R.Civ.P. 12(h)(2); N.C. R.Civ.P. 12(h)(2).

ii. Extrinsic Evidence. Although the Court may consider evidence outside the pleadings on a Rule 12(b)(7) motion, it "must accept all factual allegations in the complaint as true and draw inferences in favor of the non-moving party." *Window World of St. Louis, Inc. v. Window World, Inc.,* 2015 NCBC 77, No. 15 CVS 2, 2015 WL 4730298, at *1 (N.C. Super. Aug. 10, 2015) (*citing Quinn v. Fishkin*, 2015 U.S. Dist. LEXIS 101518, at *10, 2015 WL 4635770 (D.Conn. Aug. 4, 2015) (quoting 5C Wright & Miller, *Federal Practice and Procedure* at § 1359)).

iii. Movant bears burden. The movant bears the burden of establishing that a non-party is necessary and indispensable. *Landress v. Tier One Solar LLC*, __ F.Supp.3d. __, No. 1:15CV354, 2017 WL 1066648, at *3 (M.D.N.C. Mar. 21,

2017). Motion should include any extrinsic material necessary to show that a non-party is necessary. *Dunlop v. Beloit College*, 411 F. Supp. 398, 23 Fed. R. Serv. 2d 42 (W.D. Wis. 1976).

iv. Dismissal is usually *without* prejudice. A dismissal based on 12(b)(7) is on a decision on the merits, and is without prejudice. *Fairfield Mountain Prop. Owners Ass'n, Inc. v. Doolittle*, 149 N.C. App. 486, 487, 560 S.E.2d 604, 605 (2002).

v. Dismissal can be *with* prejudice. If joinder of a necessary party would be futile, for example if the statute of limitations will have run before all necessary parties are joined, the dismissal is with prejudice. *See Bailey v. Handee Hugo's, Inc*., 173 N.C. App. 723, 620 S.E.2d 312 (2005).

vi. Necessary party in bankruptcy. The court can stay the proceedings until the party in bankruptcy can be joined. *See Landress v. Tier One Solar LLC*, __ F.Supp.3d. __, No. 1:15CV354, 2017 WL 1066648, at *3 (M.D.N.C. Mar. 21, 2017).

c. Practice pointers and examples.

i. Zoning and other quasi-judicial decisions. Challengers to zoning decisions must name the re-zoning applicant as a party in the petition for writ of certiorari. Failure to name the applicant is a failure to perfect the appeal from the zoning board, and results in a dismissal with prejudice. *Hirschman v. Chatham County*, __ N.C. App. __, 792 S.E.2d 211 (2016).

ii. Insurance coverage. Third party claimants are do not have a legal interest in the coverage question, and are not necessary parties. *Scottsdale Ins. Co. v. B & G Fitness Ctr., Inc*., No. 4:14-CV-187-F, 2015 WL 4641530, at *4 (E.D.N.C. Aug. 4, 2015) (*citing Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App 169, 172, 550 S.E.2d 822, 824 (2001); *Scottsdale Ins. Co. v. RSE Inc.*, 303 F.R.D. 234, 237 (E.D.Pa.2014)).

iii. Real estate. Actions affecting boundaries and title require joinder of all owners, including those holding inchoate marital interests. *See Boone v. Rogers*, 210 N.C. App. 269, 708 S.E.2d 103 (2011).

VII. 12(c) - MOTION FOR JUDGMENT ON THE PLEADINGS

a. Standard – Same as 12(b)(6)

i. Federal

1. "A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is analyzed under the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir.2002). Thus, the court assumes the factual allegations in the Amended Complaint to be true and draws all reasonable factual inferences in Plaintiffs' favor as the nonmoving parties. *See id.* at 406. Unlike on a Rule 12(b)(6) motion, however, on a Rule 12(c) motion the court may consider the Answer as well. *Rinaldi v. CCX, Inc.*, No. 3:05–CV–108, 2008 WL 2622971, at *2 n. 3 (W.D.N.C. July 2, 2008). … The test applicable for judgment on the pleadings is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." *Id. Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011) (denying 12(c) motion).

ii. State

1. "When a defendant moves for judgment on the pleadings pursuant to Rule 12(c), the standard of review is essentially the same as that under Rule 12(b)(6)." *Dicesare v. Charlotte-Mecklenburg Hosp. Auth.*, 2017 NCBC 32 ¶ 37. The purpose of Rule 12(c) is "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974); *see* N.C. Gen.Stat. § 1A-1, Rule 12(c) (2003). Judgment on the pleadings is proper when all of the material issues of fact are admitted in the pleadings, and only questions of law remain. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

b. Mechanics

i. <u>Timing.</u>

1. Federal - "After the pleadings are closed—but early enough not to delay trial …." Fed.R.Civ.P. 12(c).

2. State – **"**After the pleadings are closed but within such time as not to delay the trial …." N.C. R.Civ.P. 12(c).

ii. Extrinsic Documents. As with 12(b)(6) motions, both federal and state courts may consider documents referred to, or the subject of, the complaint, even if not attached to the complaint, so long as there is no dispute as to their authenticity. *Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 435 (M.D.N.C. 2011) (citing *Bradley v. Ramsey*, 329 F.Supp.2d 617, 622 (W.D.N.C. 2004) and *Lefkoe v. Jos. A. Bank Clothiers*, No. 06–CV–1892, 2008 WL 7275126, at *3–*5 (D.Md. May 13, 2008) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1134–35 (11th Cir.2002), for this holding)); see also *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007).

iii. Are the Pleadings Closed? Both federal and state courts will deny or refused to consider a 12(c) motion if the pleadings are not closed. Filing a counterclaim with the answer keeps the pleadings open until the reply is filed. Filing an amended complaint or counterclaim reopens the pleadings until responsive pleadings are filed.

c. Practice Pointers

i. Counterclaim to set up 12(c)? Because the court can consider admitted facts contained in any of the pleadings, under certain circumstances it may be possible to set up a 12(c) motion by filing a counterclaim—e.g., for declaratory judgment—in order to obtain certain admitted facts (e.g., dates, whether the plaintiff executed certain documents, the authenticity of controlling documents, etc.), which can be used for a 12(c) motion.