No. COA21-551 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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DAN LEWIS AND DANIEL H. LEWIS FARMS, INC., GEORGE ABBOTT, ROBERT C. BOYETTE AND BOYETTE FARMS, INC., KYLE A. COX, C. MONROE ENZOR, JR., Executor of the Estate of CRAWFORD MONROE ENZOR, SR., ARCHIE HILL, KENDALL HILL WHITNEY E. KING, CRAY MILLIGAN, RICHARD RENEGAR, LINWOOD SCOTT, JR. AND SCOTT FARMS, INC., ORVILLE WIGGINS, ALFORD JAMES WORLEY, Executor of the Estate of DENNIS ANDERSON, CHANDLER WORLEY, HAROLD WRIGHT, and OTHERS SIMILARLY SITUATED,	)	From Wake County
Plaintiffs-Appellees,	)	
v.	)	
FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION (n/k/a UNITED STATES TOBACCO COOPERATIVE, INC.),	)	
Defendant-Appellant.	)	

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PLAINTIFFS-APPELLEES' BRIEF

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PLAINTIFFS-APPELLEES' BRIEF

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INTRODUCTION

If this case were a human it would have its full, unrestricted North Carolina Driver License and would be applying to college. Throughout the tortuous, seventeen year history of this case, the Flue-Cured Tobacco Cooperative Stabilization Corporation ("Cooperative" or "Stabilization") has fought every issue hedgerow to hedgerow, refusing to admit even the most obvious facts until forced to do so by the Court. The most comprehensive discussion of the litigation history of this case can be found in Wake County Superior Court Judge Graham Shirley's exhaustive 188 page "Memorandum and Order on the Parties' Cross-Motions for Summary Judgment." (R p 4760-4947).

The long journey of this case began in early 2005 in the Wake County Superior Court. Following years of litigation, on February 14, 2014, the trial court entered an order granting Plaintiffs' motion for certification of the Class. The Cooperative appealed to the North Carolina Court of Appeals (R p 4765 ¶19) and the North Carolina Supreme Court certified the case for its review prior to the determination of the Court of Appeals (*Id.* ¶20). After briefing and arguments, the Supreme Court

unanimously issued a decision affirming the trial court's order allowing the Plaintiffs' motion for class certification. (*Id.* ¶22).

As this case proceeded in State Court, another case involving this same Defendant was filed in the Eastern District (Speaks v. US Tobacco Cooperative) (R p 4766 ¶29). As Judge Shirley described in his order: "On February 20, 2018, the Speaks Court approved and certified a class in that case that would have, for all practical purposes, enjoined the Plaintiffs' continuing prosecution of this class action." Judge Shirley entered an Order staying these consolidated actions, including discovery, until after the issuance of a decision by the United States Court of Appeals for the Fourth Circuit on the objectors' appeal of the District Court's ruling. (*Id.*)

Pender Sharp, a member of the certified class in this case, objected to the proposed settlement and class certification in Speaks, and appealed the District Court's decision to the Fourth Circuit (R p 4766 n.3). On February 28, 2019, the United States Court of Appeals for the Fourth Circuit issued an opinion reversing the Speaks Court's approval of the settlement and class certification. *Sharp Farms v. Speaks*, 917 F.3d 276 (4th Cir. 2019); (R p 4767 ¶30). Alan Runyan, class counsel in this

case, argued that matter at the Fourth Circuit on behalf of Sharp Farms. *Sharp Farms*, 917 F.3d at 279. While not cited by the Appellant in its brief, the Sharp Farms decision is instructive on many of the issues before this Court.

Following the foray to the Fourth Circuit in the *Sharp* case that resulted in the reversal of the District Court's settlement and certification Order, this case finally found itself back in Wake County Superior Court, where, on May 7, 2019, Judge Shirley entered Orders setting certain deadlines. (R p 4767). After extensive briefing and several hearings, on April 23, 2021, Judge Shirley entered the Order that is the subject of this appeal.

As referenced above, the Cooperative has consistently engaged in litigation tactics that sought to obstruct and delay the administration of justice in this case. Judge Shirley's Order cites numerous examples of the Cooperative's obstructive litigation behavior:

- for nearly 15 years the Cooperative denied in its answers: (1) an agency relationship; (2) its responsibility as an agent; and (3) that Appellants had any right, title, or interest in the tobacco delivered to it or the proceeds from such tobacco. (R p 4762 ¶6, 4764 ¶16, 4903 ¶336).

- For years, the Cooperative repeatedly denied that Plaintiffs had consigned tobacco to it, despite the overwhelming evidence to the contrary. (R p 4762 ¶6, 4764 ¶16).

- during this litigation the defendant committed discovery violation so egregious as to result in a finding that (soon-to-be former) counsel for the Cooperative "had intentionally failed to comply with an order of this Court compelling discovery and had made false and misleading statements to the Court concerning the conduct of the litigation before [Judge Shirley] had been appointed to preside over this action." (R p 4767 ¶32).

- proffered an affidavit of the Chief Financial Officer of the Cooperative, Edward W. Kacsuta, in the summary judgment briefing that is based on inadmissible hearsay, leading Judge Shirley to observe: "Given the hundreds of thousands of pages of documents produced in this case, the Court has not seen a single document that remotely reflects the possible transactions described in Mr. Kacsuta's Affidavit." (R p 4852 ¶231).

- the Cooperative's failure to even attempt to address the Marketing Agreements, noting that: "Given Stabilization's lack of hesitancy to make any argument in this case, their failure to do so on this issue speaks volumes." (R p 4856 ¶240).

- the Cooperative's proffer of an expert witness (Randall Rucker) who "formed his beliefs without ever reviewing a Tobacco Loan Agreement or the Marketing agreements. From a review of his report and the documents Mr. Rucker relied upon, Mr. Rucker did not review any applicable statute or regulation governing the tobacco price support program. [R p 1486-1491]. In fact, Mr. Rucker was unaware there were any agreements between Stabilization and its members prior to the end of the price support." (R p 4859 n.33).

- the Cooperative's mischaracterization of facts: "Stabilization's argument is an inaccurate characterization as to what transpired." (R p 4885 ¶296). The Court then added a footnote: "This is just one of many instances throughout Defendant's Statement of Undisputed Facts where, Stabilization, instead of just stating the facts, attempts to characterize the facts." (R p 4885 n.45)

In its brief, the Cooperative asserts that "Plaintiffs, mostly former Cooperative members or their descendants, want to force the Cooperative to pay them over a billion dollars." (Appellant Brief at p. 3) That is, once again, an inaccurate description of the position of the Plaintiffs. While it is true that adding up the various figures Judge Shirley references in his order may well result in a figure in excess of a billion dollars (after adding 17 years of statutory judgment interest), Plaintiffs have never sought or demanded "over a billion dollars" from the Cooperative. Rather, Plaintiffs simply want what Judge Shirley resoundingly determined is theirs.

STATEMENT OF FACTS

This is a case about an agricultural cooperative, Flue Cured Tobacco Cooperative Stabilization Corporation ("Stabilization"), and the duties and responsibilities it owes to its members and member-patrons under the statutory and common law of North Carolina.

Its procedural history, with which the Court is already familiar, is extensive. It has been progressing through the North Carolina courts since early 2005. Initially, it began as two actions commenced within 4 weeks of each other. After one case unsuccessfully attempted to certify a settlement class and the failure of two mediations, the two actions were consolidated in one complaint in 2009. The claims substantially survived a motion to dismiss. (R pp 97-105). The class was then certified by the Superior Court in 2014. (R pp 106-121). This certification was affirmed on discretionary review by the North Carolina Supreme Court in December 2016. *Fisher v. Flue Cured Tobacco Stabilization Corporation,* 369 N.C. 202, 794 S.E. 2d 699 (2016). In the spring of 2019, the class survived a collateral attack that sought to force its inclusion in a federal court settlement, *Sharp Farms v. Speaks*, 917 F. 3d 276 (4th Cir. 2019), found collusive by this Court in early 2018. (R pp 172-216).

This month, January 2022, marks the seventeenth anniversary of the filing of these claims. In the early days, there was little argument over what was genuinely disputed; rather, the fight concerned whether these plaintiffs could legally pursue resolution of this dispute as a class action. With the success of class certification, Stabilization, through its

counsel, began filling the record with other issues (and tactics) to blur the reality of its simplicity. Both parties moved for summary judgment, Defendants on the entire case and the Plaintiffs on the issue of liability and ownership of assets. (*See* R. p. 86-89, 1055-1152). The trial court conducted three hearings, reviewed hundreds of pages of briefing, and thousands of pages of the Defendant's own documents to issue a 187-page order on partial summary judgment finding:

- Defendant converted assets owned by the growers;
- Defendant reached the contract with the growers for the amounts retained in excess of the reasonable reserve along with an accounting;
- The growers were entitled to a constructive trust on the 1982-1984 Loan Tobacco and FETRA Tobacco retained in excess of a reasonable reserve;
- The growers were entitled to a distribution of the monies represented by the certificates of interest and the proceeds from the sale of the 1982-1984 Loan Tobacco and FETRA Tobacco minus a reasonable reserve;
- The growers were entitled to a declaratory judgment that the members who produced the net gains from the sale of the 1982-1984 Loan Tobacco and FETRA Tobacco are the owners of those gains and entitled to a distribution of those gains minus a reasonable reserve;
- the expulsion of the membership in 2005 was improper, in violation of the stock certificates and bylaws and not authorized by statute; and

- Defendant committed an Unfair and Deceptive Trade Practice in keeping the FETRA Tobacco and proceeds from the sale of the same to itself and not distributing the proceeds less a reasonable reserve.

(*See* R. p. 4760-4946).

On 21 May 2021, twenty-eight days after the Liability Order was filed, the Cooperative filed the notice of appeal at issue, asserting in a letter to Judge Shirley that proceedings in the Superior Court were automatically stayed. Judge Shirley apparently disagreed, and on 21 June 2021, set the damages case for trial on 4 October 2021. The following day, the Superior Court announced a hearing to consider the effect of the appeal on Superior Court proceedings. Prior to that hearing, the Plaintiffs filed an emergency Motion to Show Cause to stop the Cooperative's lenders from liquidating assets covered by the Liability Order. On 7 July 2021, two hours before this Motion to Show Cause was to be heard, the Cooperative filed for reorganization in the Bankruptcy Court for the Eastern District of North Carolina. In addition to preventing the hearing on the liquidation of assets, the filing also prevented the Superior Court from conducting the hearing on the effect

of this appeal which had been set for the same time.[1] The Bankruptcy Court lifted the automatic stay of this case to permit the parties to prosecute and defend this appeal. *In re: U.S. Tobacco Cooperative, Inc. et al*, Case No. 21-1511-5-JNC, DE 179 (Bankr. E.D.N.C. Aug. 12, 2021).

There are four fundamental concepts underlying this case. First, there is no corporate entity whose interest is different than the interest of its members. The entity is a cooperative. The members are the real parties in interest. Therefore, any earnings belong to the members not to the cooperative, and they belong to them based on their patronage. The only portion of those earnings that may be retained by the cooperative is that portion held in trust for the benefit of them collectively – a reserve, and it must be reasonable.

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[1] After Judge Shirley set the October damages trial date, the Cooperative did not seek a stay of the trial from Judge Shirley pursuant to Rule 8 of the Rules of Appellate Procedure, nor did it apply to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23 of the Rules of Appellate Procedure. Instead, the Cooperative filed bankruptcy 2 hours before Judge Shirley was to hear from the parties on the effect of the Cooperative's appeal on future Superior Court proceedings foreclosing the trial court's ability to consider the issue. Likewise, the Stay Order does not allow the parties to engage with the Superior Court, pursuant to the Rules of Appellate Procedure, to secure a ruling on whether the underlying Superior Court action will be stayed pending the appeal.

Second, membership in this cooperative has always been limited to producers of flue cured tobacco. All class members had to be producers of flue cured tobacco when they joined and all class members were members of the cooperative during the period of their patronage. All had to pay $5.00 for a uniformly worded share of stock, and they all had to sign a uniformly worded marketing agreement. All class members had to pay the same, annually determined, assessments on each pound of their marketed tobacco. However, the patronage interest that accrued when they were a member did not vanish when they ceased to patronize Stabilization or no longer had a share of stock because it was involuntarily cancelled.

Third, all of the class members' interests that are the subject of this class action are liquidated. First, each member's $5, whose stock certificate was involuntarily terminated in the 2004-06 membership purge, is "held" in an account called "stock redemption payable." The value of that cancelled stock in 2006 was approximately $4,004,400. Second, the remaining accounting entries (retained earnings excepted) are for amounts created after the Commodity Credit Corporation ("CCC") liens on class member tobacco were paid off using member assessments

and then the redeemed tobacco was sold. The principal value of these liquidated patronage interests was "held" by Stabilization in 2006 in three accounts: "capital equity credits," "additional paid in capital," and "contributed capital". The "capital equity credits" are for the 1967-73 certificates of interest already allocated to approximately 217,851 class members. Their principal value in 2006 was $26,802,854.00. The second and third entries, "additional paid in capital" and "contributed capital," are proceeds from the sale of class member tobacco that was collateral for the CCC loans. This tobacco was redeemed with (1) monies from an account created by pooled No Net Cost ("NNC") assessments paid by flue-cured farmers on each pound of tobacco marketed between 1982 and 2004, and (2) from pooled gains on the sale of class members' consigned tobacco during those same crop years. Their net principal values in 2006 were $182,157,494 and $126,417,817, respectively. [2] (R p 169 ¶403, 170 ¶407). Stabilization records show that 111,236 class members paid NNC assessments between 1982 and 2004. The fourth entry is "retained

[2] These amounts represent the pre income tax amounts of the sales of the 1982-84 Loan Tobacco and FETRA Tobacco.

earnings" in the 2006 amount of approximately $100,000,000. These are earnings from the investment of the previous three accounts.

Fourth, Stabilization has been asserting since the inception of this case that the sum of all of these is a reasonable reserve. It was reasonable when there were 803,912 members in 2003, but Stabilization contends it is still reasonable after the membership purge of 2004-06, which left 940 members, even though all of this money was generated as the result of the sale of farmers' tobacco and assessments paid by, or for the benefit of the farmers, some current, but most former. It was reasonable when the reserve was $402.00 per member in 2003, but Stabilization contends it was still reasonable in 2006 when the reserve was $344,000 per member.

The undisputed facts which undergird these four concepts are these: Stabilization's actions between 1946 and 2004 were undertaken as the agent of its principals - the flue-cured tobacco farmers. Each year, Stabilization and the CCC memorialized their respective duties in a contract ("Tobacco Loan Agreement"). The farmers and Stabilization also memorialized their respective duties in a contract ("Agreement and Receipt"). When the farmers delivered their tobacco to an auction warehouse during those years because it had not been sold at auction to

a third party, it was consigned for a price support loan advance made to the farmers by the CCC through its agent, also Stabilization.[3] Stabilization took delivery of members' consigned tobacco, graded it, processed it, transported it, insured it, fumigated and stored it. The costs for these activities were included in the members' price support loans. The accounting for each crop year occurred when all the loan tobacco for that year had been sold to third parties, which was usually years after its delivery. Stabilization did not carry the consigned tobacco or the assessments on its books as an asset because they were the "marketing agent" for the members: title to consigned tobacco remained with the farmers until sold by their agent, Stabilization. (*See* R. p. 4768-4826, 4833-40).

Between 1946 and 1982, if there was a gain from the sale of the consigned tobacco after the CCC's loan was repaid, it was the farmer's gain, not the Cooperative's. This was both a statutory and a contractual requirement. The net gain was either distributed on a pro rata basis to

[3] Between 1946 and 2004, Stabilization's articles ("Powers") have recognized this dual agency: "to act as agent or representative of any member or members and as agent or representative of any department, agency or corporation of the United States Government, in any of the activities mentioned in Article II hereof [Purposes]". (R. p. 320-28).

the farmers whose tobacco produced it or withheld as a reserve. Between 1946 and 1982, Stabilization both distributed and reserved farmer gains. If reserved, the gains were allocated to those whose tobacco produced it. If there was a loss (the consigned tobacco sold for less than the price support advance plus costs), because the loan was non-recourse, the loss was borne by the CCC (taxpayers). (R. p. 4775-79, 4833-34).

Between 1982 and 2004, the accounting changed but the relationships between the CCC, the farmers and Stabilization did not. During these 22 years, because of the No Net Cost Tobacco Act of 1982[4] ("NNC Act"), the loans remained non-recourse but any net gains on the sale of the farmers' consigned tobacco were required to remain in an account to cover past or future years losses incurred between 1982 and 2004. The farmers also had to pay an assessment, determined annually on every pound marketed between 1982 and 2004. The assessment was deducted from the farmers' checks whether tobacco was sold to third parties or consigned to Stabilization. The farmers' gains when the consigned tobacco was sold (if any) and NNC assessments, were used to

[4] *See* 7 U.S.C. §§ 1445-1, 1445-2 (1982) (repealed by Pub. L.108-357, Title VI, § 612(a), Oct. 22, 2004, 118 Stat. 1523). (R. p. 242-251).

pay for losses when the sale of the consigned tobacco (in any year) did not cover the CCC loan amounts (in any year). The purpose of the NNC Act was to make the farmers bear program losses rather than the taxpayers when farmers' loan tobacco did not sell for at least the cost advanced to them. (R. p. 4775-4800, 4828-47).

In 1990, when there was an anticipated excess of farmer NNC assessments, $165,000,000 of these assessments was used to redeem approximately 44,000,000 pounds of members' flue-cured tobacco from the 1982-84 crop years. With the CCC lien removed, Stabilization sold the tobacco to third parties for $181,157,494.00. (R p 4938 ¶403). In its 30 April 1994 consolidated financial statement, Stabilization recorded the anticipated sales value as a "deposit due patrons". One year later, Stabilization reclassified it as "additional paid in capital." (*See* R. p. 4801-03, 4881-87).

In 2005, as a result of the termination of the federal price support program by the Fair and Equitable Tobacco Reform Act of 2004 ("FETRA")[5], the CCC released its lien on 83,600,000 pounds of farmers' tobacco held as collateral by Stabilization using NNC assessments to pay

[5] 7 U.S.C. § 519(a) and (b). (R. p. 220-221).

the liens. The remaining NNC assessments were then required to be distributed to the farmers. Stabilization then sold the tobacco for $126,417,817.00, (R p 4939 ¶407), retained the proceeds of sale and called it "contributed capital." (R. p. 4808-14, 4870-81).

Though facially these facts may appear complex, they are not: Farmers' tobacco was sold to third parties by their agent and the loans advanced by the CCC to them were either paid off by the proceeds from those sales or by the assessments collected to cover losses. When the value of these assessments exceeded the losses, the excess assessments were used to pay off the loans. Stabilization then sold the redeemed tobacco and retained the proceeds. Stabilization's right to keep those proceeds is the core issue in this case.

Twelve years ago, the trial court noted, and Stabilization's counsel agreed, that this case is about the reasonableness of Stabilization's reserves:

> The Court: The core of this case is what a reasonable reserve is.
>
> Mr. Martin: That's right.

(R p 331).

There is only one real factual issue in this case: What reserve, if any, was reasonable for Stabilization to retain in 2004-05 when it terminated the membership of over 800,000 members?[6] That question is ready for a jury trial in the Superior Court after determination of this appeal.

STATEMENT OF STANDARD OF REVIEW

The Plaintiffs agree with Defendant that this Court reviews the trial court's legal conclusions *de novo*. *Erthal v. May*, 223 N.C. App. 373,

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[6] "…[E]ven assuming the Cooperative can now----in 2018-2019--justify its large pool of reserves based on an evolving business strategy undertaken over the last 15 years, the *Fisher-Lewis* case turns on the reasonableness of the reserve in 2004-2005, when the Cooperative eliminated 99% of members and extinguished their accrued interest in the reserve. That the Cooperative's circumstances may have changed in more recent years has little relevance for *Fisher-Lewis* class members and their claims."

Sharp Farms, 917 F. 3d at 303.

736 S.E.2d 373 (2012). Both parties agree that the Court's findings of fact are not at issue in this appeal because those facts were derived from the documents and testimony of the Defendant and its witnesses.[7] This Court should affirm the granting of summary judgment if it can be sustained on any grounds. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). "Rule 56 does not require that a party move for summary judgment in order to be entitled to it." *Erthal*, 223 N.C. App. at 387, 736 S.E.2d at 523 (quoting *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.* 77 N.C.App. 149, 151, 334 S.E.2d 499, 501 (1985), *disc. review denied,* 315 N.C. 391, 338 S.E.2d 880 (1986)). The North Carolina Supreme Court has held that "even if the parties have only moved for partial summary judgment, it is not error for the trial court to grant summary judgment on all claims where both parties are given the opportunity to submit evidence on all claims before the trial court." *Id.* (citing *A–S–P Associates v. City of Raleigh,* 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979) (holding that summary judgment on all claims was proper because evidence was submitted relating to all claims, despite

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[7] As the trial court recognized, the Defendant does not dispute the facts, but only attempts to characterize them. (R p 4885 n. 45)

that motion only requested summary judgment as to some claims before the trial court)).[8]

ARGUMENT

I. The trial court correctly entered summary judgment on plaintiffs' claim that the Cooperative's conversion of the FETRA tobacco violated North Carolina's unfair and deceptive trade practices statute.

The trial court found as undisputed facts that at the time Congress terminated the Federal Tobacco Price Support Program in 2004 through the enactment of FETRA, Defendant held 156.3 million pounds of members tobacco as collateral for federal price support loans ("FETRA Tobacco"). (R pp 4870-71 ¶265 citing R pp 817-18). This tobacco had been consigned to Defendant as member-producers' agent in exchange for price support loans. (*Id.*). In accordance with the statutory basis of cooperatives (they can make no profit for themselves, (N.C. Gen. Stat. §§ 54-130)) and the terms of the Marketing Agreements, Defendant received this tobacco as agent for the members who produced it. Title/ownership did not pass as a result of that consignment by the member principals to their agent, the Cooperative. (R pp 4841-43 ¶211). All of the Defendant's

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[8] In support of the cross motions for summary judgment, the parties submitted 4,751 pages of evidence, 530 pages of briefing, and arguments at three separate hearings (446 pages of transcripts). (*See* R p 8-4759, Doc. Ex. 1-531, T1-T3).

activities with respect to this tobacco were as producer-members' agent to the grower principals and all of the costs of Defendant's activities were made part of the price support loans secured by member's tobacco and NNC assessments. In short, the Defendant contributed nothing financially, rather, it was the agent for those who did. The trial court properly concluded that the funds derived from the sale of the FETRA tobacco are patronage source funds. (R p 4883 ¶290).

On 24 March 2005, when CCC released its security interest (after repayment of loans from NNC assessments and tobacco sales) in the FETRA tobacco, the Cooperative claimed the tobacco as its own to the exclusion of its principals, contending it was a gift from the federal government. (R p 4908 ¶349 citing Def. Ex. 151, R p 2862). The Cooperative denied that the members whose patronage created the FETRA Tobacco had any right or title to either the tobacco or its proceeds. (*Id.* citing Def. Ex. 145, R pp 2842-44). The Cooperative converted the proceeds of the FETRA tobacco by claiming ownership thereof to the exclusion of its principals, those members through whose patronage the tobacco existed. The trial court properly found that this act of conversion, was undertaken by the Cooperative "within the construct of a fiduciary

relationship." (R p 4929 ¶406). This conversion occurred after the Cooperative purged its membership roll terminating the membership interests of 800,766 members. (R p 4814). When the Cooperative sold the FETRA tobacco for in excess of $126 million, it kept the proceeds separate from its now former members. (R pp 4941-42 ¶447). The trial court properly found the act of converting the FETRA Tobacco and its proceeds took place as a matter of the Cooperative's "day to day activities of handling, marketing and selling its members' tobacco." (*Id.*).

The elements of a claim for relief for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, plaintiffs must show: (1) an unfair or deceptive act or practice by defendant; (2) in or affecting commerce; (3) which proximately caused actual injury to plaintiffs. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1983), *disc. review denied* 335 N.C. 770, 442 S.E.2d 519 (1994). Chapter 75 defines "commerce" to include "all business activities, however denominated." N.C. Gen. Stat. § 75.1.1(b). The North Carolina Supreme Court has held that "'[b]usiness activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or *whatever other*

activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.* 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991) (emphasis added).

A. Defendant's conduct was "in or affecting commerce."

In response to the trial court's ruling that Defendant's conversion of the FETRA Tobacco to its own use, subsequent sale, and retention of more than $126 million in proceeds constitutes conduct "in or affecting commerce," Defendant has argued that it amounts rather to "internal conduct of individuals within a single business." (Appellant Brief at 29) Defendant's reliance on *White v. Thompson*, 364 N.C. 47, 691 S.E.2d 676 (2010) ignores the vast factual differences between that case and this, not least of which is that the Cooperative's conduct affected, one way or another, every flue cured tobacco producer whose patronage created the FETRA tobacco. *White* involved a partnership with three individuals as partners, and the court scrutinized the actions of one insofar as they affected the other two. *Id.* at 48, 691 S.E.2d at 677. The current case involves at least thousands of businesses, whether individual or corporate, each of which was required by law to engage in commercial activity with the Cooperative as a precondition to participation in the

federal price support program. 7 U.S.C. §§ 1445-1(a)(4) & (d)(B)(ii), 1445-2(a)(3) (repealed 2004).

Far more instructive than *White* is a recent Court of Appeals opinion in which a condominium association's "improper conversion" of a $5,000 insurance payment intended for the plaintiff property owner-member was found to be "in or affecting commerce" despite the defendants' contention that the matter was an "intra-corporate dispute." *Faucette v. 6303 Carmel Road, LLC*, 242 N.C. App. 267, 276, 775 S.E.2d 316, 324 (2015). In *Faucette*, not only did the defendant condominium association fail to turn over the insurance settlement proceeds belonging to plaintiff, it conditioned payment of the money on plaintiff agreeing to release claims unrelated to the insurance money. *Id.* at 276-77, 775 S.E.2d at 324. The Court of Appeals found that the conduct amounted to "an inequitable assertion of power or position," and thus was "unfair or deceptive within the meaning of the statute," concluding that "[w]ithholding money owed from an insurance carrier's settlement payment in order to force the rightful recipient of those funds to resolve other, unrelated business disputes is conduct 'in or affecting commerce' under Chapter 75." *Id.* Here, the Cooperative, as agent for hundreds of

thousands of tobacco industry entities, then disenfranchised them and then converted their property. The Cooperative sold that property to third party entities in the chain of commerce, and engaged in an inequitable assertion of power or position over its terminated members. The trial court correctly found such conduct to satisfy the elements of Chapter 75.

B. Whether an act or practice violates Chapter 75 is a question of law.

The trial court found no genuine issue of material fact in its consideration of Plaintiffs' claim for conversion of the FETRA Tobacco, and accordingly granted summary judgment to Plaintiffs on that claim. (R p 4943 ¶1.c). Based on that ruling, and the undisputed facts supporting that ruling, the trial court concluded as a matter of law that the conversion of the FETRA Tobacco constituted an unfair trade practice. (R p 4942 ¶449). Defendant claims that such a holding "treated" conversion as a *per se* violation of Chapter 75. Appellant's Brief at 30. The trial court made no such finding. Although an act of conversion can be sufficient to support an unfair trade practice, *Love v. Pressley*, 34 N.C. App. 503,516-17, 239 S.E.2d 574, 583 (1977), the trial court below clearly demonstrated that it understood that conversion is not a *per se* violation:

the court found an unfair trade practice in relation to Defendant's conversion of the FETRA tobacco, but not as regards Defendant's conversion of the 1982-1984 Loan Tobacco. (R pp 4943 ¶1.b.,; 4946 ¶9.a.).

Defendant's contention that the trial court's 187-page order found no wrongdoing more aggravated than breach of contract is wholly unsupported. Initially, as just discussed, the unfair trade practice at issue is one of conversion, not breach of contract. (R p 4943 ¶1.b. & c.). In addition, here the conversion was committed by an agent against its principal. (R pp 4825-4828 ¶¶175-179). The trial court held: "As an agent, the cooperative, as a matter of law, is a fiduciary to its principal, the member. *S.N.R. Mgt. Corp. v. Danube Partners, 141, LLC*, 189 N.C. App. 601, 614, 659 S.E.2d 442, 452 (2004) [parenthetical omitted]. The fiduciary relation applies to all things within the scope of the agency. *Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 206 (1951)" (*Id.* ¶176). "The cooperative, as a fiduciary, 'is held to a standard stricter than the morals of the market place . . . [n]ot honesty alone, but the punctilio of an honor the most sensitive, is [then] the standard of behavior.'" (*Id.* ¶178 (citation omitted)). In the context of a cooperative, the trial court observed, "[t]he agency creates a fiduciary relationship and an equitable duty to pay to

the patron what is justly due him as his pro rata share of the net margins." (*Id.* ¶179 (citation omitted)). Most egregious of all, the conversion by Defendant was against its former members, members who just months before had been purged without a hearing.

What Defendant characterizes as garden variety breach of contract is rather, in view of the undisputed facts of this case, a brazen breach of fiduciary duty on a massive scale, perhaps unparalleled in this State. The trial court's conclusions are based on a substantial foundation of findings of wrongdoing by Defendant, and support its holding that Defendant's conversion of the FETRA Tobacco constituted unfair and deceptive trade practices. *See Love*, 34 N.C. App. at 516, 239 S.E.2d at 583 (affirming trial court's determination that landlord's conversion violated Chapter 75 because "implicit" in jury's verdict was finding that landlord had failed to return converted property upon demand).

II. The trial court properly granted summary judgment in favor of plaintiffs on the 1967-1973 Certificates of Interest Distribution Claim.

A. Redemption of the 1967-73 Certificates of Interest.

Plaintiffs requested that the court below distribute to Defendant's members improperly retained funds. (R p 47, ¶115). Defendant complains that the court below erred in ordering the distribution of the

approximately $21 million remaining in the 67-73 COI. (Appellant Brief at 33-35). In making its argument, Defendant contends that the trial court erroneously equated the demand to the conversion claim. Defendant misconstrues the trial court's order.

The trial court did not base the decision on "Plaintiffs' conversion claim" as argued by Defendant. (*Id.* at 33). Although the trial court did cite to several paragraphs of its "conversion" analysis, a review of those paragraphs reflect an analysis of whether a demand was necessary in order to properly allege a claim for conversion. (R p 4935 ¶423 citing R pp 4900-03, ¶¶330-337). The court found that each period the COIs were open for redemption, the first being in 2011-12, a demand had been made for the distribution by the Plaintiffs. (*Id.; see also* R p 4936 ¶426 ("As demands for the distribution of the funds existed at the time the Certificates of Interest were opened for redemption, these sums are now due to Plaintiffs… .")). Defendants do not contest this factual finding of the trial court.

B. Notice of the five periods of redemption.

Defendant, for the first time, argues that it gave sufficient notice to the holders of the Certificates of Interest of the redemption periods.

(Appellant Brief at 35-37).[9] However, in its arguments and supporting record materials submitted to the trial court in support of its own motion for summary judgment and in opposition to Plaintiffs' motion, Defendant failed to demonstrate that it had provided anything approaching sufficient notice of redemption offers to expelled former members. In this effort, as shown by the record before this court, Defendant relied on more than 2,500 pages of records and affidavits. (*See generally* R pp 1153-1532, 1542-3780, 4576-4665, 4669-4759). Further the trial court questioned Defendant on this very issue-on two separate occasions:

> The Court: [H]ow was notice given of the rights to redeem, do you know?
>
> Mr. Whitman: I'm not – I don't specifically know that, Your Honor. I think that we sent notice out to the membership. I know all the Board members indicated to their members in district meetings that people were encouraged to redeem those. I'm not sure whether we published in the newspapers or not. We made reasonable and thorough efforts to notify folks that they should tender those certificates.
>
> . . .

[9] *See, e.g., Osborne v. Redwood Mountain, LLC,* 275 N.C. App. 144, 150, 852 S.E.2d 699, 703 (2020)("A contention not raised in the trial court may not be raised for the first time on appeal."); *Anthony v. City of Shelby*, 152 N.C. App. 144, 147, 567 S.E.2d 222, 225 (2002) ("It is well established that if an argument is not raised in the trial court, this Court will not consider it on appeal.")

> The Court: Was notice given to any holder of a certificate that was no longer a member?
>
> Mr. Whitman: Only if we did publication, Your Honor. I'm not saying that we did or didn't. I didn't look at that issue and I don't want to answer a question I don't know the answer to.
>
> I know that the Board made efforts, as I said – I understand your question is people that were not members. I understand that. I know that we were trying to get the word out during those years that people that had COIs were encouraged to redeem them for payment. And at least – We know that at least folks that held those certificates to the amount of $6 million were aware and did tender their shares.

(22 December 2020 Hearing, Transcript at 19-20).

Thus, Defendant clearly knew that the trial court was concerned about the notice Defendant had or had not given to COI holders who were no longer members. Notwithstanding, Defendant did not provide the court with any additional information when the issue came up again two-plus months later during the third and final summary judgment hearing, on 4 March 2021. During this hearing the trial court again inquired of Defendant about notice given to the purged members of the redemption periods for the COIs:

> The Court: With respect to the certificates of interests [sic] from the sale of the '69 through '73 crop years, were those individuals – those who held those certificates members at the time Stabilization opened up the certificates for redemption?

Mr. Whitman: Most were not, Your Honor.

The Court: All right. Yet my understanding, according to the affidavits, is notice was only given to the members or made available to people at Cooperative facilities.

Mr. Whitman: My understanding is that the Cooperative sent notice to its membership. Directors were advising people in their districts. If you wanted – The Cooperative wanted people to claim their COIs. The right to redemption, Your Honor, specifically to your question was not connected to active membership.

The Court: Well, I understand that –

Mr. Whitman: Okay.

The Court: - but I'm just thinking about the notice that was given as set forth in the affidavits. It appears that only members were given or people who someone knew might be a member was given.

Mr. Whitman: Un-huh.

The Court: It wasn't given to all – Can you tell me whether notice was given to all the holders of the certificates of interest?

Mr. Whitman: I cannot tell you that, Your Honor. I can tell you the intent was to get notice to as many of them as possible.

(4 March 2021 Hearing, Transcript at 47-48).

Between the end of this, the third and final summary judgment hearing in early March, 2021 and the 23 April 2021 entry of the order that is the subject of this appeal, the record reflects no further filings or

efforts on the part of Defendant to clarify its presentation to the trial court on this issue.

After inquiring about evidence of notice at the hearings and reviewing the record before it, the trial court held as a matter of law that the evidence of record was insufficient to serve as notice to non-member holders of COIs of the offers of redemption, concluding: "There is no evidence that Defendant even attempted to notify the majority of the certificate holders who were no longer members because of the involuntary termination of their memberships." (R p 4935, ¶424).

For the first time in this case, Defendant attempts to show "some" evidence of its effort during the first redemption period to give notice to COI holders who were no longer members that they had three months to redeem their certificates of interest from the 1982-1984 crop years. This late, inadequate showing does not create a jury question on the issue of the distribution of the COIs. First, the trial court, while addressing the issue of notice, did not premise the decision on an alleged failure of notice. Rather, as discussed above, the trial court properly found that the Plaintiffs made a demand for the distribution which was sufficient. Second, the materials contained in the Supplement to Appendix never

were cited in defendant's voluminous summary judgment briefing, were not, as demonstrated above, argued in court hearings, and were not presented to the trial court by way of supplement after the hearing before the entry of summary judgment. Third, and perhaps most significant, is that all of the documents in the supplement to appendix concern 2012. That is, they pre-date all of the other redemption periods, including those that occurred after class certification. "A party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A–1, Rule 56(e), showing that there is a genuine issue of material fact for trial." *Strickland v. Doe*, 156 N.C. App. 292, 294-95, 577 S.E.2d 124, 128 (2003) (citing *G & S Business Services v. Fast Fare, Inc.,* 94 N.C. App. 483, 486, 380 S.E.2d 792, 794, *appeal dismissed and disc. review denied,* 325 N.C. 546, 385 S.E.2d 497 (1989)).

III. The trial court correctly concluded that Plaintiffs' claims were timely filed and not barred by any applicable statute of limitations.

The trial court correctly granted summary judgment in favor of Plaintiffs on the Cooperative's statute of limitations defense for claims related to the sales proceeds of the 1982-1984 Loan Tobacco. Basing its

decision on undisputed facts in the record, the trial court concluded that the Cooperative's actions beginning in late 2004, in which it canceled the memberships of approximately 99.99 percent of its members and terminated the former members' patronage interests in the reserve, started the limitations period. (R p 4908).

The Cooperative claims that the statute of limitations began to run in 1993, when the Cooperative informed its members that it was placing funds from the 1982-1984 Loan Tobacco into an "unallocated reserve for future use." (Appellant's Brief at 41). Defendant contends that its decision to reflect the funds as unallocated on its books should have been interpreted by its farmer-members as the Cooperative making a hostile assertion of ownership, and thus a repudiation of the agency relationship. *Id.* This alleged repudiation, Defendant argues, gave rise to legal claims and started the running of the statute of limitations. *Id.* This argument turns the reality of the 1993 accounting decision on its head.

The Cooperative presents a new theory on appeal surrounding the statute of limitations which it did not present to the trial court. The Cooperative argued below that the Plaintiffs had notice of the Board's plan to grow the reserve since at least 1979, and also were put on notice

in 1992 that the Cooperative intended to grow the reserve as a hedge against the possible end of the price support program. (*See* Doc. Ex. 96). The Cooperative now argues its decision to reflect the 1982-1984 Tobacco Loan funds as unallocated rather than allocated should have been interpreted by its farmer members as the event where Cooperative repudiated its fiduciary duty to the Plaintiffs and thus triggered the statute of limitations. Defendant's argument should not be considered on appeal. *See, e.g., Osborne,* 275 N.C. App at 150, 852 S.E.2d at 703; *Anthony*, 152 N.C. App. at 147, 567 S.E.2d at 225.

This court recently held that "[t]he essence of conversion is not the acquisition of property by the wrongdoer, *but a wrongful deprivation of it to the owner*." *Stitz v. Smith*, 272 N.C. App. 415, 420, 846 S.E.2d 771, 774 (2020) (citing *Horry v. Woodbury*, 189 N.C. App. 669, 678, 659 S.E.2d 88, 93 (2008) (McCullough, J., dissenting) (emphasis in *Stitz* opinion), *rev'd*, 363 N.C. 7, 673 S.E.2d 127 (2009)). As the trial court found, the agency relationship continued throughout the 1990s and did not end until the Plaintiffs' membership interests were terminated in 2005. (R. p. 4905). Only then was there a wrongful deprivation against the owners-that is, the growers, by their agent, Stabilization. In *Stitz*, the agent sold

the bonds at issue more than 3 years before the action was commenced. The court held that the limitations period did not begin to run until defendants refused to turn over the proceeds after demand by plaintiffs shortly before filing suit. *Stitz*, 272 N.C. App. at 419-20, 846 S.E.2d at 774. The conversion claim arose from the refusal to honor the payment demand, not the Defendant's acquisition of the property. It was then that the agency relationship terminated. Here, the trial court found it to be undisputed that (a) the 1982-1984 Loan Tobacco funds arose out of the agency relationship between Plaintiffs and Defendants; and (b) the agency relationship did not end until Plaintiffs' membership interests were terminated or deemed "withdrawn" in 2005. (R p 4905). Until that termination, there was not a wrongful deprivation to the owner (growers) to give rise to the conversion claim within the agency relationship.

Stabilization's reliance on *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938) is misplaced. *Teachey* involved a trust relationship contemplating a single transaction: conveyance of real property to plaintiffs' mother. *Id.* at 291-92, 199 S.E. at 86-87. When the defendant trustee conveyed the property to a different person, he not only repudiated the trust, but the purpose of the trust no longer existed. That

is, the trust was over. It had been repudiated "by clear or unequivocal acts or words." *Id.* at 293, 199 S.E. at 87.

Teachey provides little guidance in this case because the undisputed facts reveal no "clear or unequivocal acts or words" of repudiation of the trust relationship prior to 2004. There is no evidence that Stabilization notified the membership of its repudiation of their agency relationship in the 1990s. The Defendant included five citations to the record on appeal to support its claim. First, is the affidavit of Jim Stocks (R 1240-42), who states the Board announced at an annual membership meeting it was keeping these proceeds in the capital reserve. (R. p. 1241 ¶11). The 1993 Annual Meeting minutes do not confirm this statement was ever made. (R. p. 2265-67). The second citation is to the July 1990 newsletter, but as the trial court recognized, this newsletter only notified the membership that the Board may place the funds from this sale in reserve. (R. p. 4801, 2130-31). Third and fourth are the 1992 and 1993 consolidated financial balance sheets which list the funds realized as shareholder equity as additional paid in capital. (R. p. 2213 and 2236). Finally, the Cooperative cites the trial court order discussing these proceeds, R. p. 4801-02, but as the court found, those actions were

not a "*wrongful deprivation of it to the owner*." *Stitz*, 272 N.C. App. at 420, 846 S.E.2d 774.

As the undisputed evidence shows, the Cooperative did not clearly or unequivocally repudiate its agency relationship with its members in the 1990s. The court record yielded "no evidence of any demand or refusal or adverse relationship between the parties until 2004 when Plaintiffs were informed that they would be deemed to have withdrawn if they did not sign a 2005 marketing agreement." (R. p. 4908, 16 September 202 Hearing, Transcript at 99-100). The trial court also recognized that the Cooperative had denied any existence of an agency relationship in this case for some fifteen years, repeatedly denying "in its Answers (1) an agency relationship; (2) its responsibility as an agent; and (3) that Plaintiffs had any right, title, or interest in the tobacco delivered to it or the proceeds from such tobacco." (*See* R. p. 4903, 4762 ¶6, 4764 ¶16). Having lost its original argument, the Cooperative now has retreated and retrenched behind yet another weak position, claiming to have unequivocally repudiated in 1993 an agency relationship that until a year ago it refused to acknowledge. Defendant's argument should not be considered for the first time on appeal. *Osborne,* 275 N.C. App. at 150.

This court's recent decision in *Stitz* is on point and the facts of *Teachey* provide little guidance in this case. The trial court was correct to determine as a matter of law that the statute of limitations on the claims related to the 1982-1984 Loan Tobacco began to run in 2005 when the Cooperative wrongfully deprived the owners (growers) of their assets. The trial court's determination that Plaintiffs are entitled to summary judgment on Stabilization's statute of limitations defense should be affirmed.

IV. The trial court properly held the business judgment rule inapplicable.

Defendant's initial argument that the business judgment rule bars Plaintiffs' claims was premised on its contention that the claims are derivative in nature:

> In this appeal defendant argues that class certification is improper. Defendant contends that the trial court found that the "central issue common to all Plaintiffs is whether they are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as a reasonable reserve." Defendant asserts that *this issue involves a challenge to its business judgment and therefore "constitutes a prototypical derivative claim."*

Fisher, 369 N.C. at 210, 794 S.E.2d at 706 (emphasis added). As the trial court concluded when it granted Plaintiffs' motion for summary judgment on 18 January 2018, the claims are not derivative. (R p 4887 ¶302; R p 6466-67). The Cooperative did not appeal that decision. Notwithstanding that decision, Defendant now contends that the rule is a bar to Plaintiffs' direct claims against it. (Appellant Brief at 46-56). A review of the trial court's analysis of the business judgment rule evidences that it clearly understood the principles of the rule and correctly applied them in concluding that the business judgment rule does not apply to the claims presented in this action. (*See* R pp 4887-98).

A. The business judgment rule does not bar Plaintiffs' direct claims.

The business judgment rule developed as a result of shareholder *derivative* actions: "Viewed in historical perspective, the evolving law of shareholder derivative actions also presaged what is now referred to as the business judgment rule." *Alford v. Shaw,* 318 N.C. 289, 298, 349 S.E.2d 41, 47 (1986). In *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), the court explained "[t]he business judgment rule, stated simply, provides that when a corporation's decision not to assert a claim represents a good faith business judgment by its directors, a shareholder

will not be permitted to substitute his judgment for that of the company's management by asserting the claim in a *derivative* action." *Id.* at 107, 250 S.E.2d at 298 (citation omitted, emphasis added).[10]

The trial court properly understood this standard of review in light of Plaintiffs' claims arising from the duties Defendant owed to them based in the contracts entered into, the duties and obligations it owed as agent for Plaintiffs, and its obligations to its members arising from its By-Laws. (R pp 4888-90 ¶¶303-06). The trial court properly recognized that the claims Plaintiffs asserted, seeking damages *from* the Cooperative rather than *for* the Cooperative, are not derivative. (R p 4890 ¶¶307-308).

1. The trial court properly applied the law.

Defendant argues that the trial court "missed the point that *Happ* [*v. Creek Pointe Homeowner's Ass'n*, 215 N.C. App. 96, 717 S.E.2d 401

[10] The business judgment rule developed as a "rule [to] *protect* corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment." *State ex rel. Long v. ILA Corp.,* 132 N.C. App. 587, 602, 513 S.E.2d 812, 822 (1999) (citation omitted) (emphasis added). It is a rule of evidence for the protection of directors and officers acting in good faith on behalf of a corporation. *Id.* at 601, 513 S.E.2d at 821-22 (1999)(quoting Russell M. Robinson, *Robinson on North Carolina Corporation Law* § 14.06 at 281 (5th ed. 1995)).

(2011)] applied the business judgment rule to a direct claim against an association." (Appellant Brief at 48-49). The trial court did not miss the import of *Happ.* Indeed, the trial court properly analyzed whether, in the case before it, the business judgment rule was available to Defendant as a defense. (R pp 4887-98).[11] The court in *Happ* considered the specific claims brought against the defendant homeowners association for dissolution, for declaratory relief and for injunctive relief to be "analogous [to] case law regarding shareholder *derivative* disputes [applying the business judgment rule]." *Id.* at 106, 717 S.E.2d at 407 (citing *Swenson*, 39 N.C.App. at 107, 250 S.E.2d at 298 (emphasis added)). *Happ* does not stand for the proposition that the business judgment rule is applicable to Plaintiffs claims against Defendant, which are not analogous to derivative disputes.

Defendant cites *Swenson* arguing that the business judgment rule is a proper defense when the corporation is a "real" defendant and "not just a nominal defendant, as in derivative actions." (Appellant Brief at 49). In *Swenson*, itself a derivative action, the question addressed by the

[11] The holding in *Happ* does not stand for a bright-line holding that the business judgment rule applies in every case against an "association" against every claim asserted against it.

court was "to what extent, if any, is a corporation entitled to defend itself against a *derivative* action when it is named as party defendant." 39 N.C. App. at 98, 250 S.E.2d at 293 (emphasis added). The court concluded that in a *derivative* action, a corporate defendant could not rely on the business judgment rule unless it was more than simply a nominal party. *Id.* at 100-01, 250 S.E.2d at 294.

Defendant also relies on the trial court's decision in *Lockerman v. South River Electric Membership Corp.,* 2012 WL 3252720, at *6 (N.C. Super. Ct. Aug. 8, 2012)(unpublished), *aff'd* 250 N.C. App. 631, 794 S.E.2d 346 (2016), for the proposition that the business judgment rule is available as a defense to direct claims against a membership cooperative. (Appellant Brief at 49). While the trial court in *Lockerman* did find the rule **applied to certain** direct claims against the membership cooperative, it **also found it inapplicable to others**: "[t]he business judgment rule is an appropriate standard to examine [the defendant]'s adoption of the policy in the first instance, **but it is not the standard to determine whether the adopted policy was then fairly and appropriately applied**… ." *Id.* ¶34 (emphasis added). Below, the trial court properly understood this distinction. (R p4892 ¶313). As applied to the case *under consideration*,

the conclusion from *Lockerman* is that the rule applies to the board's decision to retain a reasonable reserve for a membership of hundreds of thousands of growers, but it does not apply to the decision to wrongfully convert those funds and breach its contractual obligations to its members by claiming ownership of the funds to the exclusion of the producers whose patronage produced the reserves after expelling 99.99% of those producers. *Sharp Farms*, 917 F.3d at 283.

Plaintiffs are just like third parties claiming injury resulting from wrongful breach of contract and conversion by a corporate actor. The trial court properly recognized what Plaintiffs claims against Defendant are and are not. (R pp 4889-90 ¶306) The court below appropriately considered *Lockerman* and its holding concerning the business judgment rule. (R pp 4891-4894 ¶¶310-15) "Plaintiffs do not assert that the Board did not have discretion to set up a reasonable reserve, only that [Defendant] breached its contractual, statutory, and legal obligations to distribute all but a reasonable [] reserve." (R p 4893 ¶314) The case before the court "militate[s] against the defense of the business judgment rule." (*Id.* ¶315).

The business judgment rule cannot apply to such direct claims as Plaintiffs present otherwise the rule creates corporate immunity from wrongs directly done to any party, affiliated with the corporate entity or not. (*See* R p 4894 ¶316 ("Shielding a cooperative from liability for wrongs it has caused to others is not why the business judgment rule evolved. It was not created to allow a corporation to escape liability to an injured party directly injured by its actions."); note 49). The trial court properly concluded that "[t]he business judgment rule cannot shield [Defendant] from injury it directly caused to its members." (R pp 4895-96 ¶319).

2. The trial court properly found the directors not disinterested, not impartial, and did not act in good faith or exercise due care.

The trial court properly found the business judgment rule inapplicable for two additional, **alternative** reasons: (1) that the directors were neither disinterested nor impartial (R pp 4897-98 ¶¶321-22) and (2) that the directors failed to act in good faith or exercise due care. (R pp 4898-99 ¶¶323-28).

a. The directors were not and are neither disinterested nor impartial.

The trial court properly concluded that the directors, members of the Cooperative, had a financial interest in the decisions at issue:

- "[T]aking steps to expel members without a hearing, while creating a reserve in excess of $200 million, which the involuntarily expelled members substantially created, established a continuing conflict of interest barring the rule's application." (R p 4897 ¶321);

- "[T]he 2004 directors who were also members…would directly benefit by the decisions they made to retain all capital and substantially reduce the membership rolls." (R pp 4897-98 ¶322).

- "Those who made the decisions at issue had a stake in those decisions, different from and adverse to those members they expelled without a hearing because they were unwilling or unable to execute a 2005 Marketing Agreement." (R pp 4897-98 ¶322).

- As a result of the director decisions, the reserves attributable to the purged members "went from $427.00 to $0.00 per individual," while the reserves for the remaining members (including director members) went from "$427.00 to $365,000.00" (R p 4898 ¶322 (citing *Sharp Farms*, 917 F.3d at 300)).

- The Directors had a direct financial interest in making these decisions.

b. The directors failed to act in good faith or exercise due care.

The trial court properly cited evidence in support of its conclusion that the directors failed to act in good faith or exercise due care. The directors:

- Failed to allocate the patronage source income received from the sale of the 1982-1984 Loan Tobacco as required by its by-laws (R p 4898 ¶324);

- Removed members from the Cooperative without a hearing as required by the Stock Certificates and the by-laws (*Id.* ¶325);

- Imposed on the involuntarily removed members a requirement to present a stock certificate in order to receive payment for the stock violating the express terms of the certificates, the by-laws and the Articles of incorporation. (R pp 4898-99 ¶325);

- Claimed ownership to the FETRA Tobacco to the exclusion of the members whose patronage produced the tobacco and who paid the no net cost assessments (R p 4899 ¶326);

- Failed to pay or direct the payment to the members of the certified class the COIs (*Id.* ¶327).

The trial court properly concluded that the directors failed to act in good faith or exercise due care and that the business judgment rule does not provide Defendant a shield from liability to Plaintiffs and its order should be affirmed.

B. The trial court's order does not strip the board of the discretion to set a reasonable reserve.

Defendant complains that the trial court's determination that it is for the jury to decide what amount, if any, was withheld in excess of a reasonable reserve "strips" the directors of their discretion to set a reasonable reserve, even if the business judgment rule does not apply.

(Appellant Brief at 57-61). Defendant asserts, for the first time on appeal, that the only issue which a jury can consider is whether the board acted in good faith when it exercised its discretion in setting the reserves. (*Id.* at 57). This argument was not presented to the trial court for consideration or ruling. Defendant's argument should not be considered on appeal. *See, e.g., Osborne,* 275 N.C. App. at 150, 852 S.E.2d at 703; *Anthony*, 152 N.C. App. at 147, 567 S.E.2d at 225.

In *42 East, LLC v. D.R. Horton, Inc.,* 218 N.C. App. 503, 722 S.E.2d 1 (2012), relied on by Defendant, (Appellant Brief at 58-9), the court found that findings of fact by the trial court were not supported by evidence and were material to the conclusion that the defendant "did not act in good faith *and* make a reasonable effort to obtain insurable title to the property as defined by the Lot Purchase Agreement." *Id.* at 508, 722 S.E.2d at 12 (emphasis added). As such, the "reasonableness" of the defendant's efforts was also subject to scrutiny. Defendant's board's discretion in setting the "reasonable" reserves is likewise subject to scrutiny.

Defendant was contractually limited to retain only "reasonable" reserves. (R p 2042). There is a dispute between the parties as to

whether the vast reserves held by Defendant are or are not reasonable. If reserves are maintained in excess of what is reasonably required, the excess is not properly withheld. The board's discretion is not without limitation. *See Gaines v. Long Mfg. Co.,* 234 N.C. 331, 337, 67 S.E.2d 355, 360 (1951) ("However, this discretion is not an unlimited one. It must not be abused. The controlling management must act in good faith and not in arbitrary disregard of the rights of the minority stockholders."). The 2004 decision to retain all capital was made by the directors while the member purge commenced and proceeded. The number of members who could ultimately claim an interest in the retained capital was reduced.[12] The trial court properly found that the amounts of the vast reserves which Defendant can retain as reserves are those which reasonable or proper reserves and because there is a factual dispute on that issue, it is proper for the jury to decide that issue. (*See, e.g.,* R pp 4993-96 ¶¶1.b., 1.c., 2.b., 3.b., 4.b., 5.c.).

[12] The Board did not exercise any discretion to determine a reasonable reserve as concerns the proceeds of the FETRA Tobacco—it simply declared the tobacco was a "gift" from the federal government and the resulting funds belonged to it. (R p 4813, 4899).

Defendant contends that the evidence of the board's good faith is undisputed. (Appellant Brief at 59-60). To the contrary, as the trial court found, the evidence supporting the contrary conclusion is substantial. *Supra,* Sec. IV.A.2. The trial court properly determined that the exercising of discretion by the board in its determination of what the proper reserves should be concerned issued of material fact to be decided by the jury. The trial court's order should be affirmed.

V. The trial court carefully and correctly narrowed the issues for trial as required by Rule 56.

Plaintiffs always have understood the issues in this case to require a jury trial of some limited scope, as reflected in the fact that they moved only for partial summary judgment. (R pp 86). By contrast, Defendant moved for complete summary judgment, contending that the record reveals no genuine issue of material fact. (R p 1055). Rule 56(d) provides:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court . . . shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further

> proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

N.C.R. Civ. P. 56(d). The trial court took this directive very seriously, issuing a remarkable 187 page document exhaustively detailing both the law of cooperatives generally as well as the history of the federal tobacco price support program and the Defendant's role in it. From this undisputed factual foundation, the trial court reached its rulings on all but one of the fundamental issues in this case, including, but not limited to, holding (a) that Plaintiffs are the owners of any net gains based on patronage (R pp 4839-4887); (b) that an agency relationship exists (with associated fiduciary duties) between Plaintiffs and the Cooperative (R pp 4825-4827); and (c) that the Cooperative disavowed any responsibility to pay Plaintiffs anything other than the par value of their stock prior to the filing of this class action complaint. (R pp 4805-4808).

The court made painstakingly specific rulings on each cause of action, including carefully accounting for the single remaining issue of fact concerning the proper reserve. For example, regarding the claim for conversion of the 1982-1984 Loan Tobacco funds, the court found that "there is a genuine issue of material fact as to what constitutes a

reasonable reserve, and partial summary judgment is therefore inappropriate at this stage[.]" (R p 4904). Likewise, on the Marketing Agreement breach of contract claim, the trial court found that the question of the reasonable reserve precluded summary judgment. (R p 4915).

Summary judgment on conversion of the FETRA Tobacco proceeds was appropriate because of the underlying conduct of the Cooperative. The trial court found that "there is no genuine issue of material fact that Stabilization: (a) claimed ownership and assumed control of the FETRA Tobacco owned by Plaintiffs and the proceeds derived therefrom; (2)[sic] to the exclusion of Plaintiffs; and (3)[sic] denied that Plaintiffs had any interest in the FETRA Tobacco or funds derived therefrom." (R p 4909). Defendant's liability to distribute the proceeds from the sale of the FETRA tobacco still is subject to a jury's finding regarding a reasonable reserve (R pp 4944-4945), but the jury's conclusion cannot cleanse the Defendant's conduct in exercising ownership over the property of the Plaintiffs. As discussed above and found by the trial court, even patronage funds held in reserve are the property of the Cooperative's members, not the Cooperative. Given the Cooperative's glaring breaches

of fiduciary duty, the trial court's reasoning here applies as well to the claim for unfair and deceptive trade practices. The trial court properly made findings of undisputed fact and narrowed the scope of controversy to the amount of a reasonable reserve in a manner consistent with the letter and the policy of Rule 56(d).

CONCLUSION

Defendant has failed to show a genuine issue of material fact preventing the entry of judgment as a matter of law in favor of the Plaintiffs. For the reasons stated, and upon the authorities cited, the Plaintiffs respectfully request that this Court affirm the 23 April 2021 Memorandum and Order on the Parties' Cross-Motions for Summary Judgment.

Respectfully submitted, this the 24th day of January, 2022.

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Pursuant to N.C.R. App. 33(b), I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure and this Court's order dated 20 January 2022 (granting Plaintiffs-Appellees' Motion to Increase Word Limit), counsel for Plaintiffs-Appellees certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is fewer than 11,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

This the 24th day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I certify that the foregoing **Plaintiffs-Appellees' Brief** has been filed with the Clerk of the North Carolina Court of Appeals by electronic submission. I further certify that the foregoing brief was served upon the following parties shown below *via* e-mail and first class, U.S. mail:

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