

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
CASE NO. 1:12-CV-1146

Hongda Chem USA, LLC, &
Hongda Group Limited, LLC,

Plaintiffs,

v.

Shangyu Sunfit Chemical Company, Ltd., &
YMS Agriculture International Corp.,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
THIRD-PARTY COMPLAINT**

Shangyu Sunfit Chemical Company, Ltd.,

Third Party Plaintiff,

v.

Gary David McKnight,
Raymond P. Perkins,
Wei Xu,
Eco Agro Resources, LLC,
Vasto Chemical Company, Inc., &
Kadi Resources, LLC,

Third Party Defendants.

Pursuant to Fed. R. Civ. P. 12(b)(6), and also pursuant to Local Rules 7.2 and 7.3, Third-Party Defendants Gary David McKnight, Raymond P. Perkins, Wei Xu, Eco Agro Resources, LLC, (“Eco Agro”), and Kadi Resources LLC (“Kadi”) (collectively “Third-

Party Defendants”) submit this Memorandum of Law in support of their Motion to Dismiss (Doc. 55) the Amended Third Party Complaint (Doc. 51) filed by Shangyu Sunfit Chemical Company, Ltd. (“Shangyu Sunfit”).

I. NATURE OF THE MATTER BEFORE THE COURT

This lawsuit concerns a dispute between Shangyu Sunfit, which is a Chinese manufacturer of a chemical product called N-(n-Butyl) thiophosphoric Triamide (“NBPT”), and Hongda,¹ which agreed to be the exclusive distributor of Shangyu Sunfit’s NBPT in the United States. Hongda filed this lawsuit to recover damages for Shangyu Sunfit’s breach of the exclusivity agreement. (Doc. 37). Specifically, Shangyu Sunfit created a Canadian company called YMS Agriculture International Corp. (“YMS”) for the express purpose of selling NBPT to other North American buyers. (Doc. 24-3; Doc. 37 ¶¶ 24–25). Shangyu Sunfit answered Hongda’s Amended Complaint on April 24, 2014, and asserted counterclaims against Hongda seeking payment of sums allegedly owed for Hongda’s purchase of NBPT. (Doc. 38).

Nearly one year later – despite engaging in no additional discovery – Shangyu Sunfit filed a Third-Party Complaint (Doc. 51) asserting two claims against six Third-Party Defendants.² Shangyu Sunfit alleges the Third-Party Defendants are liable to

¹ “Hongda” refers collectively to Plaintiffs Hongda Chem USA, LLC (“Hongda Chem”) and Hongda Group Limited, LLC (“Hongda Group”).

² As an initial matter, it appears that Shangyu Sunfit’s new claims are improperly styled as an “Amended Third-Party Complaint.” A third-party complaint may only be used to assert a claim for indemnification, subrogation, or some other derivative claim. Fed. R. Civ. P. 14(a). Nevertheless, pursuant to Fed. R. Civ. P. 13(h), Shangyu Sunfit could have joined these new parties to its Second Amended Counterclaims. Thus, the

Shangyu Sunfit for separate and independent violations of the North Carolina Unfair and Deceptive Trade Practices Act (“UDTPA”), N.C. Gen. Stat. § 75-1.1, *et seq.* and the North Carolina Uniform Fraudulent Transfer Act (“UFTA”), N.C. Gen. Stat. § 39-23.1, *et seq.* (*See generally* Doc. 51).

The Third-Party Complaint should be dismissed because it fails to allege sufficient facts to state a claim pursuant to Rule 12(b)(6). The Third-Party Defendants had no contractual relationship with Shangyu Sunfit, and Shangyu Sunfit did not allege that the Third-Party Defendants any made any representation to it. In short, there are no allegations to support Shangyu Sunfit’s Third-Party UDTPA claim. Moreover, Shangyu Sunfit failed to allege the time, frequency, amount, and consideration paid for the alleged fraudulent transfers that are the subject of its UFTA claim. Since an UFTA claim must be pleaded with particularity, Shangyu Sunfit’s UFTA claim must be dismissed pursuant to Rule 9(b).

II. FACTS

Hongda filed a Complaint (Doc. 1) against Shangyu Sunfit October 26, 2012. The Complaint alleged that on September 29, 2011, the parties entered into a five-year Exclusive Sales Contract (Doc. 1.1) by which Shangyu Sunfit agreed that Hongda would be the exclusive distributor of Shangyu Sunfit’s NBPT in the United States and Canada. (Compl. ¶ 20). Hongda alleged that less than one year into the Exclusive Sales Contract, Shangyu Sunfit breached the exclusivity provision by circumventing Hongda and selling

Third Party Defendants will not move to dismiss the Amended Third-Party Complaint on the basis that it violates Rule 14(a).

NBPT in the United States and Canada to other third parties. (*Id.* ¶ 25). The Complaint therefore stated causes of action for (1) declaratory judgment, (2) breach of contract, and (3) intentional interference with contractual relationship. (*Id.* ¶¶ 32–50).

Shangyu Sunfit filed its Answer and Counterclaims (Doc. 8) on November 13, 2012. Hongda filed its Reply (Doc. 12) to Shangyu Sunfit’s counterclaims on December 3, 2012. Through discovery, Hongda learned that YMS was incorporated in Canada in March, 2011 by the same four shareholders that own Shangyu Sunfit. (Docs. 24-2, 24-3, 24-4). Shangyu Sunfit adopted a shareholders resolution authorizing the sale of NBPT to YMS, and YMS then sold Shangyu Sunfit’s NBPT to North American buyers. (Docs. 24-3, 24-5). Accordingly, on April 7, 2014, Hongda (with the Court’s permission) filed an Amended Complaint adding YMS as a party and asserting additional claims against Shangyu Sunfit. (Doc. 37). Shangyu Sunfit answered the Amended Complaint on April 24, 2014, again asserting counterclaims seeking payment of sums allegedly owed for Hongda’s purchase of NBPT. (Doc. 38).

Since that time, Shangyu Sunfit has not engaged in any additional discovery. Nevertheless, on March 2, 2015 – the very last day to join additional parties under the Court’s Scheduling Order (*see* Docs. 45-46) – Shangyu Sunfit filed an Amended Counterclaim and Third Party Complaint. (Doc. 48). Shangyu Sunfit promptly withdrew this pleading after being notified that it contained material designated as “Confidential” under the Court’s Protective Order (Docs. 21-22). On March 4, 2014, Shangyu Sunfit filed its Second Amended Counterclaims and Amended Third-Party Complaint, which no longer contains confidential material. (Doc. 51).

The Amended Third-Party Complaint alleges the Third-Party Defendants are “affiliates” of Hongda. (Second Am. Countercl. ¶¶ 37, 55).³ The Third Party Defendants allegedly planned to manufacture NBPT in China and secretly ship it to the United States in violation of an exclusivity provision that applied only to Hongda. (*Id.* ¶ 38). Mr. Perkins allegedly “suggested that someone had leaked [the Third-Party Defendants’] secret plan when, during the negotiation of the Exclusive Sales Contract, Shangyu Sunfit asked for a reciprocal exclusivity provision. (*Id.* ¶ 40). Three months before this litigation commenced, Perkins and McKnight allegedly “discussed how to obtain NBPT from manufacturers other than [Shangyu] Sunfit in China and covertly sell it in the United States without [Shangyu] Sunfit’s knowledge by using Vasto to import NBPT to the United States, then, after bypassing the usual public paperwork required for importing goods, Vasto would sell the NBPT to Hongda.” (*Id.* ¶ 39).

Shangyu Sunfit further alleges the Third-Party Defendants caused Hongda to withhold payment to Shangyu Sunfit, and to instead use Hongda’s money to invest in a “competing distribution system for the sale of NBPT from China to the United States.” (*Id.* ¶ 41). After the litigation commenced, the Third-Party Defendants allegedly organized Eco Agro to “take over the sale of NBPT in North America.” (*Id.* ¶ 44). Shangyu Sunfit alleges “upon information and belief” that the money owed to Shangyu Sunfit was instead transferred to Eco Agro, Vasto, and KaDi. (*Id.* ¶ 58). Shangyu Sunfit

³ The Third Party Complaint does not assert any new facts against the Third-Party Defendants. Rather, it simply incorporates the allegations contained in Shangyu Sunfit’s Second Amended Counterclaims and contends those allegations establish violations of UDTPA and UFTA. (*See* Am. Third-Party Compl. ¶¶ 17–18, 24–25).

does not provide the date, time, place, amount, or any other details of these alleged transfers.

III. QUESTIONS PRESENTED

1. Should the Court dismiss Shangyu Sunfit's UDTPA claim where Shangyu Sunfit failed to allege any conduct that is "unfair" or "deceptive" under N.C. Gen. Stat. §75-1.1, *et seq.*?
2. Should the Court dismiss Shangyu Sunfits' UFTA claim where the Third Party Complaint, in violation of Fed. R. Civ. P. 9(b), did not describe the purported fraudulent transfers with particularity?

IV. ARGUMENT

A. Standard Of Review For Rule 12(b)(6) Motion.

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of the complaint. *E. Shore Markets, Inc. v. J.D. Associates Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). The Court should dismiss a Complaint "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)). Although the Court must take as true the facts alleged in the Complaint, it should not accept the legal conclusions drawn from the facts. *E. Shore*, 213 F.3d at 180. Similarly, the Court need not accept unwarranted inferences, unreasonable conclusions, or arguments. *Id.*

The Complaint must contain sufficient factual allegations to state a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). Thus, to survive a Rule 12(b)(6) motion, the complaint requires something more than an “unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing *Twombly*, 550 U.S. at 555). Shangyu Sunfit’s Claims

B. Shangyu Sunfit’s Amended Third-Party Complaint Failure to State a Claim under the UDTPA because Shangyu Sunfit Has Not Alleged an Unfair or Deceptive Act or Practice.

A claim under the UDTPA requires proof of three elements: “(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) proximately causing actual injury to [plaintiff] or [plaintiff’s] business.” *AG Sys., Inc. v. United Decorative Plastics Corp.*, 55 F.3d 970, 974 (4th Cir. 1995). The first element – an unfair or deceptive trade practice – “is a somewhat nebulous concept.” *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 902 (4th Cir. 1996). In fact, “no precise definition is possible,” and courts must “base their determinations on the circumstances of each case.” *Id.*

Despite the difficulty in defining an unfair or deceptive trade practice, the Fourth Circuit in *Gilbane* provided some guidance. An “unfair” practice is “immoral, unethical, oppressive, unscrupulous, or substantially injurious.” *Id.* (citations and quotations omitted). Acts are “deceptive” when they “possess[] the tendency or capacity to mislead, or create[] the likelihood of deception.” *Id.* at 903 (citations and quotations omitted). Given this guidance, courts have held that fraud and negligent misrepresentation constitute violations of UDTPA. *Id.* (citations and quotations omitted). On the contrary, a “mere breach of contract, even if intentional, is not an unfair or deceptive act under

Chapter 75.” *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006). And a broken promise is unfair or deceptive “only if the promisor had no intent to perform when he made the promise.” *Gilbane*, 80 F.3d at 903.

At the outset, Shangyu Sunfit cannot establish any *per se* violation of UDTPA – such as fraud or fraudulent misrepresentation – because Shangyu Sunfit has not alleged that any of the Third Party Defendants made any representations to it. (*See generally* Doc. 51). Rather, the Second Amended Counterclaims and the Amended Third-Party Complaint allege that the only adverse party who had communication with Shangyu Sunfit was Hongda.⁴ Thus, Shangyu Sunfit cannot rely on a fraud claim to support its UDTPA claim against the Third-Party Defendants.

Likewise, Shangyu Sunfit cannot rely on the law that a broken promise is unfair or deceptive where “the promisor had no intent to perform when he made the promise.” *See Gilbane*, 80 F.3d at 903. Here, Shangyu Sunfit has not alleged that any promise was made by the Third-Party Defendants to Shangyu Sunfit. Moreover, the defects in Shangyu Sunfits UDTPA claim are evident when considering the law that a “mere breach of contract, even if intentional, is not an unfair or deceptive act under Chapter 75.” *Bob Timberlake*, 176 N.C. App. at 42, 626 S.E.2d at 323. The Third-Parties – who had no contract with Shangyu Sunfit – owed less of a duty to Shangyu Sunfit than Hongda did. And if the intentional breach of a contract does not constitute a UDTPA violation, then

⁴ For this reason, Hongda has not moved to dismiss the UDTPA counterclaim asserted against it. Although Hongda vigorously denies the allegations asserted against it, the UDTPA claims at least survive the 12(b)(6) analysis because Shangyu Sunfit has alleged Hongda never intended to comply with its obligations when it entered into the Exclusive Sales Agreement.

the Third-Parties' alleged conduct – participating in Hongda's breach of contract (*see Countercl. ¶ 38*) – certainly cannot constitute an unfair or deceptive act.

Accordingly, Shangyu Sunfit can only assert an UDTPA claim by alleging that the Third-Party Defendants' conduct was generally “unfair” or “deceptive.” But it is nearly impossible to discern the factual underpinnings for these elements in Shangyu Sunfit's Third-Party Complaint. In paragraph 37 of the Second Amended Counterclaim, Shangyu Sunfit asserts that all six of the Third-Party Defendants “and other, as yet unnamed, conspirators” conspired to sell NBPT in violation of Hongda's contract with Shangyu Sunfit.⁵ This is the lynchpin for all the allegations against all six Third-Party Defendants. Yet this is also nearly the complete “factual” basis for these claims and it is woefully inadequate.

In paragraph 38, Shangyu Sunfit asserts as follows:

“at some point prior to September 2011, the Hongda Affiliates [all six of the newly added Third-Party Defendants plus Hongda] decided they would create a new entity or entities through which they would manufacture NBPT in China, then secretly ship this NBPT to the United States and sell it through such entities in violation of the Agency Contract and related agreements with Sunfit and Albemarle Corporation.

This is one of the few specific allegations supporting Shangyu Sunfit's claims against the Third-Party Defendants but as is clearly evident from its purely conclusory allegations it has simply no factual underpinnings.

⁵ Shangyu Sunfit has repeatedly referred to the contract as an “Agency Contract.” There is no basis in the agreement for referring to the contract as an “Agency Contract,” as the title of the document expressly describes an “Exclusive Sales Agreement.”

Shangyu Sunfit points to nothing to indicate which of the seven defendants were involved in this alleged plot or when or how they would “manufacture NBPT in China” and then secretly ship the NBPT into the U.S. In fact, this allegation is demonstrably false as if NBPT is imported into the U.S. it cannot be done so “in secret” as alleged by Shangyu Sunfit. *See Wuhu Fenglian Co., Ltd. v. US*, 899 F. Supp. 2d 1355, 1359 (Court of Intl. Trade 2013) (discussing import reporting under the PIERS system and U.S. Customs reporting); Thus, it was simply not possible for the Third-Party Defendants and Hongda to conspire to bring NBPT into the U.S. in secret.

The lack of factual support for the new claims against the Third-Party Defendants continues to the reference to an email from 2011 in paragraph 40. Here again, Shangyu Sunfit does nothing more than make false statements to support these new claims. The email does not say what is attributed to it in paragraph 38. At best, a fair reading of the email is that that the one of the individual defendants thought Shangyu Sunfit must have been aware of some of Hongda’s plans to market NBPT itself. None of the companies that are being sued as Third-Party Defendants are even mentioned in this email nor is there any indication in the email that any steps were ever taken to import NBPT in violation of the contract before the contract was terminated and this lawsuit was filed. In fact, a recurring problem with Shangyu Sunfit’s claims is there is no allegation any steps were taken until after this lawsuit was filed.

Shangyu Sunfit goes on to allege that one of the Third-Party Defendants, Eco Agro, was created *after this lawsuit was commenced* to sell NBPT. (Doc. 51, para. 44). Shangyu Sunfit attempts to avoid pleading that Eco Agro is owned by the same

individuals or entities as Hongda, that it was selling the same product (NBPT), or that it received anything of value without fair consideration. It is telling that Shangyu Sunfit did not plead any of these allegations and subject itself to the possibility of sanctions under Rule 11.⁶ Instead, the sum total of the claims are that somehow all the Third-Party Defendants conspired and used money that was owed by Hongda to Shangyu Sunfit to start a competing business *after* this lawsuit was filed by Hongda against Shangyu Sunfit.

Article 2 of the Uniform Commercial Code (U.C.C.) applies to the sale of goods in North Carolina. *See generally* N.C. Gen. Stat. § 25-2-101 (2009) *et seq.* Under Section 2 – 717 of the U.C.C., a buyer, such as Hongda, has the right to withhold and deduct from amounts due the seller, such as Shangyu Sunfit, for amounts it may be owed as a result of the seller’s breach. N.C. Gen. Stat. § 25-2-717 (2009). This principal was recently recognized in *KSW Mechanical Services v. Johnson Controls, Inc.*, 992 F.Supp.2d 135, 143 (E.D. NY 2014) (applying New York’s identical version of UCC section 2-711). Here, the remedy of set-off or withholding payment is especially important as Shangyu Sunfit would effectively be beyond the legal reach of Hongda in China thereby depriving Hongda of its legal rights. This is why Hongda filed a lawsuit in North Carolina as Shangyu Sunfit certainly had no intention of submitting to the jurisdiction of this court. If Hongda did not exercise its right to withhold payment and force Shangyu Sunfit to resolve the dispute in this forum it would be forced to attempt to collect on a judgment in China, something for which there is little possibility of success.

⁶ Eco Agro has advised Shangyu Sunfit’s counsel that it will be seeking sanctions if the pleading against Eco Agro is not withdrawn because it is so baseless and was made with little to no factual investigation.

The remaining allegations against all the Third-Party Defendants are equally devoid of substance and merit. Restating its allegations from the counterclaim against Hongda, *see* Doc. 51 at 20, ¶¶ 17 & 18, Shangyu Sunfit does nothing more than generally state that the Third-Party Defendants “and other, as yet unnamed, conspirators” acted as “the *vehicle* by and through which Hongda” committed its alleged violations of the UDTPA. *Id.* ¶ 19 (emphasis added). How they acted as a “vehicle”, when they so acted, whether any or all of the Third-Party Defendants controlled or otherwise directed the acts or actions of Hongda are never stated. Indeed, Shangyu Sunfit only states that the Third-Party Defendants are only “liable for the same violations of UDTPA as Hongda as co-conspirators or abettors”. *Id.* at ¶ 19. Thus, the UDTPA claims against the Third-Party Defendants are themselves wholly derivative of the claim against Hongda.

For these reasons, Shangyu Sunfit’s UDTPA claim must be dismissed.

C. Shangyu Sunfit’s Third Party Complaint fails to state a claim under the Uniform Fraudulent Transfer Act because Shangyu Sunfit did not identify the purported transfers with particularity.

Count Two of the Amended Third-Party Complaint alleges the Third-Party Defendants violated the Uniform Fraudulent Transfers Act (“UFTA”), N.C. Gen. Stat. § 39–23.1, *et seq.* (Doc. 51, ¶¶ 23–27). UFTA describes two types of fraudulent transfers. First, a transfer is fraudulent as to a creditor regardless of when the creditor’s claim arises if the debtor made the transfer:

- (1) With intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
- b. Intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

N.C. Gen. Stat. § 39-23.4. Second, a transfer is fraudulent as to a creditor whose claim arose before the transfer was made where:

[T]he debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

N.C. Gen. Stat. § 39-23.5(a).

In addition to the pleading requirements of Fed. R. Civ. P. 8(a), *Iqbal*, and *Twombly*, Shangyu Sunfit must satisfy Rule 9(b), which require a party to “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). Allegations pertaining to actual fraud are subject to the heightened pleading standard set forth in Rule 9(b) of the Federal Rules of Civil Procedure, which requires that fraud be pled with particularity. A claim for fraudulent transfer under UFTA must satisfy Rule 9(b)'s particularity requirement. *See Thimbler, Inc. v. Unique Solutions Design, Ltd.*, No. 5:12-CV-695-BR, 2013 WL 4854514, at *7 (E.D.N.C. Sept. 11, 2013) (dismissing an UFTA claim that failed to plead allegations of the fraudulent transfers with particularity); *In re Tanglewood Farms, Inc. of Elizabeth City*, No. 10-06719-8-JRL, 2013 WL 1405757, at *6 (Bankr. E.D.N.C. Apr. 4, 2013) (“A claim alleging an actual fraudulent transfer . . . under North Carolina's UFTA must meet the heightened pleadings standard of Rule 9(b)).

To plead an UFTA claim with particularity, the plaintiff must “state with particularity the factual circumstances constituting the alleged fraud.” *In re Whitley*, No. 10-10426, 2013 WL 486782, at *13 (Bankr. M.D.N.C. Feb. 7, 2013). This requires that the complaint allege “(1) the property subject to the transfer, (2) the timing and, if applicable, frequency of the transfers and (3) the consideration paid with respect thereto.” *Id.*

Here, the Amended Third-Party Complaint merely alleges: “On information and belief, a portion of the revenues due to be remitted to [Shangyu] Sunfit were used to finance the establishment of this new Chinese manufacturer, some were taken by Hongda’s principals, McKnight and Xu, and some were paid to affiliates of Hongda, Eco Agro Resources LLC, Vasto Chemical Company, Inc., KaDi Resources LLC and other, as yet unnamed, conspirators.” (Doc. 51 ¶ 58).

As an initial matter, the Amended Third-Party Complaint never alleges Mr. Perkins received any transfers. Thus, the UFTA claim against Mr. Perkins must be dismissed.

Moreover, the Amended Third-Party Complaint does not provide any of the details required by *Whitley*. First, the pleading does not identify the date or the frequency of any of the purported fraudulent transfers to the Third-Party Defendants. A time allegation is critical to defending the case; without it, the Third-Party Defendants cannot identify on their ledgers the specific transactions that are accused of being fraudulent. Moreover, because § 39-23.5(a) requires that the debtor is insolvent at the time of the transfer,

Hongda must know when the alleged fraudulent transfer occurred in order to know when to evaluate Hongda's solvency.

Second, the Third-Party Defendants must allege what consideration Shangyu Sunfit the Third-Party Defendants gave in return for the purported fraudulent transfers. This is because § 39-23.5(a) requires that the debtor made the transfer "without receiving a reasonably equivalent value in exchange for the transfer." Assuming there were any transfers – which is denied – the Third-Party Defendants cannot begin to establish that the consideration was reasonably equivalent in value if the pleading does not identify the consideration.

Finally, the pleading does not adequately describe "the property subject to the transfer." *Whitley*, 2013 WL 486782, at *13. It generally alleges that "a portion of the revenues due to be remitted to [Shangyu] Sunfit" were transferred to the Third-Party Defendants (Doc. 51 ¶ 58). In other words, Shangyu Sunfit alleges Hongda paid money to the Third-Party Defendants. Shangyu Sunfit does not set forth the amount of the transfers, which further frustrates the Third-Party Defendants' attempts to identify what transactions are alleged to be fraudulent. Moreover, money is fungible, and a plaintiff asserting a fraudulent transfer must specifically trace the disputed assets to the debtor. *See Tanglewood* 2013 WL 1405757, at *7 (dismissing a UFTA claim where the defendant comingled assets with the debtor, and where the plaintiff was unable to establish that the transferred assets were in fact owned by the debtor). Here, Shangyu Sunfit has alleged no facts to establish that the revenues allegedly due to be paid to Shangyu Sunfit were the same assets that were transferred to the Third Party Defendants.

To the extent Shangyu Sunfit seeks relief under N.C. Gen. Stat. § 39-23.4, Shangyu Sunfit has not properly alleged that the Third Party Defendants acted “[w]ith intent to hinder” the creditor. Under Rule 9(b), “intent . . . may be alleged generally.” However, the plaintiff’s complaint still must contain more than “a mere recitation of the statutory elements as conclusory allegations, devoid of any facts or circumstances that would give rise to a plausible claim.” *Thimbler*, 2013 WL 4854514, at *9. In *Thimbler*, the court dismissed a UFTA claim that simply stated the transfers were made “with the intent to hinder, delay or defraud Plaintiff.” Here, Shangyu Sunfit has likewise pleaded nothing more than the statutory intent element: the Third-Party Complaint alleges that the transfers were made “with intent to hinder, delay, or defraud [Shangyu] Sunfit.” Thus, the allegations do not contain sufficient factual allegation to satisfy the pleading requirements of *Iqbal* and *Twombly*.

Overall, Shangyu Sunfit has failed to “inject any measure of substantiation into its allegations regarding the factual circumstances surrounding the fraud.” *Thimbler*, 2013 WL 4854514, at *7. It has not alleged when the transfers were made, to whom they were made, the amount of the transfers, or the consideration received from the transfers. Of course, the reason Shangyu Sunfit did not allege these specifics is that, upon information and belief, no fraudulent transfers ever occurred. This Court should dismiss Shangyu Sunfit’s UFTA claim pursuant to Rule 12(b)(6).

V. CONCLUSION.

For the foregoing reasons, Third-Party Defendants Gary David McKnight, Raymond P. Perkins, Wei Xu, Eco Agro Resources, LLC, Vasto Chemical Company,

Inc., and Kadi Resources LLC respectfully request that the Court dismiss Shangyu Sunfit's Third-Party Complaint in its entirety.

This the 26th day of March, 2015.

Respectfully submitted,

/s/ Matthew S. DeAntonio

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CERTIFICATE OF SERVICE

I certify that on March 26, 2012, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THIRD PARTY COMPLAINT** using the Court's CM/ECF system, which will provide a copy of the same to all parties and counsel of record, addressed as follows:

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Dated this 26th day of March, 2015.

/s/ Matthew S. DeAntonio _____
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