

APPENDIX

TABLE OF CONTENTS

APPENDIX A:	Fourth Circuit Court of Appeals Opinion (June 25, 2026).....	1a
APPENDIX B:	District Court Memorandum of Decision and Order in Case No. 3:21-cv-501 (Oct. 1, 2025)	15a
APPENDIX C:	District Court Memorandum of Decision and Order in Case No. 3:23-cv-598) (Oct. 1, 2025)	20a
APPENDIX D:	District Court Memorandum and Recommendation in Case No. 3:21-cv-501 (Aug. 27, 2025)	24a
APPENDIX E:	Redacted Amended Complaint filed in Case No. 3:21-cv-501 (Sept. 16, 2022).....	39a
APPENDIX F:	Amended Complaint filed in Case No. 3:23-cv-598 (Oct. 5, 2023)	86a
APPENDIX G:	Petitioner’s Amended Citizenship Disclosure filed in Case No. 3:23-cv- 598 (Feb. 10, 2025).....	101a

APPENDIX A

[FILED: JUNE 25, 2026]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-2199

FS MEDICAL SUPPLIES, LLC,
Plaintiff – Appellant,

v.

TANNER PHARMA UK LIMITED; RAYMOND
FAIRBANKS BOURNE, a/k/a Banks Bourne; MARY
EVERETT WHITEHURST BOURNE, a/k/a Molly
Bourne,

Defendants – Appellees.

No. 25-2200

FS MEDICAL SUPPLIES, LLC,
Plaintiff – Appellant,

v.

TANNERGAP, INC.; TANNER PHARMA UK
LIMITED,

Defendants – Appellees.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Martin K. Reidinger, Chief District Judge. (3:23-cv-00598-MR-WCM; 3:21-cv-00501-MR-WCM)

Argued: March 25, 2026

Decided: June 25, 2026

Before DIAZ, Chief Judge, and WYNN and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Chief Judge Diaz wrote the opinion, in which Judge Wynn and Judge Quattlebaum joined.

ARGUED: Kent Alden Yalowitz, ARNOLD & PORTER KAYE SCHOLER LLP, New York, New York, for Appellant. Jonathan Y. Ellis, MCGUIREWOODS LLP, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Lex M. Erwin, Kevin Y. Zhao, MAYNARD NEXSEN PC, Charlotte, North Carolina, for Appellant. Robert W. Fuller, Amanda P. Nitto, Anna Claire Tucker, Charlotte, North Carolina, Erik R. Zimmerman, Emma W. Perry, ROBINSON, BRADSHAW & HINSON, P.A., Chapel Hill, North Carolina, for Appellees Raymond Fairbanks Bourne and Mary Everett Whitehurst Bourne. Mark E. Anderson, Raleigh, North Carolina, Bradley R. Kutrow, Hannah K. Caison, Charlotte, North Carolina, Anne L. Doherty, MCGUIREWOODS LLP, Richmond, Virginia, for Appellees Tanner Pharma UK Limited and TannerGAP, Inc.

DIAZ, Chief Judge:

District courts generally have diversity jurisdiction over suits between “citizens of different States” even when additional foreign parties are present. 28 U.S.C. § 1332(a)(3).¹ In this appeal, we consider this provision when a mix of domestic and foreign parties appear on both sides of the caption.

Here, a limited liability company (LLC) with both domestic and foreign members sued a domestic corporation, domestic individuals, and a foreign corporation. Applying Section 1332(a)(3), the district court dismissed the case for lack of subject matter jurisdiction.

As we explain, because plaintiff is a dual-citizen LLC, we must test whether diversity jurisdiction is satisfied for each of its members. When we do so, we’re left with a dispute between a foreign citizen plaintiff and a mix of domestic and foreign citizen defendants. Since that isn’t a suit between “citizens of different States,” there’s no diversity jurisdiction under Section 1332(a)(3). So the district court was right to dismiss for lack of subject matter jurisdiction.

I.

A.

This case stems from a contract dispute. In the early days of the COVID-19 pandemic, FS Medical Supplies, LLC, agreed to supply TannerGAP, Inc., and Tanner Pharma UK Limited personal protective equipment and other COVID-related products for distribution. But when FS Medical learned that the Tanner Defendants entered

¹ Provided also that the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a)(3).

a direct contract with one of its suppliers, it sued for breach.

B.

FS Medical first sued the Tanner Defendants in California state court. But the defendants removed that action to federal court, and the district court granted their subsequent motion to dismiss for lack of personal jurisdiction. So FS Medical tried again, this time in the Western District of North Carolina.

FS Medical asserted subject matter jurisdiction under 28 U.S.C. § 1332, claiming the amount in controversy exceeded \$75,000 and all parties were “citizens of different states and foreign states.” Joint Appendix (J.A.) 54. FS Medical alleged that its four members were citizens of California and Texas, TannerGAP was a North Carolina corporation with its principal place of business in North Carolina, and Tanner Pharma UK was a foreign corporation with its principal place of business in the United Kingdom.

After conducting limited jurisdictional discovery, FS Medical amended its complaint to add two defendants, Tanner Pharma UK’s owners: Raymond Bourne and Stephen Scalia, both domiciled in North Carolina. All defendants moved to dismiss, and the district court granted the motions in part (dismissing FS Medical’s claim under the North Carolina Unfair Deceptive Trade Practices Act).

A few days later, FS Medical filed a second case against Raymond Bourne, Molly Bourne (Raymond’s wife and another Tanner Pharma UK owner), and Tanner Pharma UK, also in the Western District of North Carolina. FS Medical again asserted diversity jurisdiction, alleging that its members were citizens of

Texas and California, Tanner Pharma UK was a United Kingdom citizen, and the Bourne Defendants were North Carolina citizens.

The court consolidated the two cases for discovery and set a status conference and hearing on various pending motions. The day before the hearing, FS Medical told the court that one of its members, Zhen Zhen Tong, was actually a citizen of China. After it learned of the mistake, FS Medical instructed Ms. Tong to “transfer[] her shares in the LLC to [fellow member and her husband] Mr. Mao” so that the LLC would have “three members, not four, [all of whom are] U.S. citizens living in Texas and California.” J.A. 266–67.

But the transfer didn’t solve the potential jurisdictional defect, because “diversity is measured at the time the complaint is filed.” J.A. 267. Defendants immediately moved to dismiss both cases for lack of subject matter jurisdiction.²

C.

A magistrate judge considered whether a suit brought by an LLC with both domestic and foreign citizen members against a domestic corporation, domestic individuals, and a foreign corporation satisfies Section 1332(a)(3)’s diversity requirement. That is, whether the suit is between “citizens of different States and in which citizens or subjects of a foreign state are additional parties.” 28 U.S.C. § 1332(a)(3).

² FS Medical filed suit a third time, without Ms. Tong as a member, to “moot out the jurisdictional issue.” J.A. 267, 308. Defendants moved to dismiss that action under 28 U.S.C. § 1359 and other grounds. The magistrate judge recommended granting the motions, but the district court has yet to rule. *See FS Med. Supplies, LLC v. TannerGAP, Inc. et al*, No. 3:25-cv-00102-UJ1-WCM.

The judge noted that “no controlling case law directly address[es] the precise [diversity jurisdiction] situation presented here.” J.A. 315. But citing our decision in *General Technology Applications, Inc. v. Exro Ltda*, 388 F.3d 114 (4th Cir. 2004), and the Supreme Court’s decision in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), the judge found no diversity jurisdiction.

The judge recognized that “where an entity has multiple citizenships, [they all] must be considered in the jurisdictional analysis.” J.A. 316 (citing *Gen. Tech.*, 388 F.3d at 121–22). And because FS Medical had both domestic and foreign members when it filed the first two complaints, neither could be ignored. Nor could the judge disaggregate FS Medical’s citizenship, treating it “as a domestic citizen (by virtue of the Texas and California citizenship of certain of its members) for the purpose of one portion of the (a)(3) analysis, while, at the same time, [treating it] as an ‘additional party’ (by virtue of the foreign citizenship of its other member).” J.A. 316 (citing *Grupo Dataflux*, 541 U.S. at 579).

So the judge recommended dismissing the case for lack of subject matter jurisdiction. And without jurisdiction, FS Medical wasn’t entitled to relief under Rule 41(b) of the North Carolina Rules of Civil Procedure to permit it to file a new action within one year of dismissal.³

³ Rule 41(b), known as the North Carolina savings statute, allows a court dismissing a case without prejudice to specify that a new action based on the same claims that would otherwise be barred by the statute of limitations “may be commenced within one year or less after such dismissal.” N.C. Gen. Stat. § 1A-1, Rule 41(b).

The district court overruled FS Medical’s objections, accepted the magistrate judge’s recommendation, and dismissed the case for lack of jurisdiction.

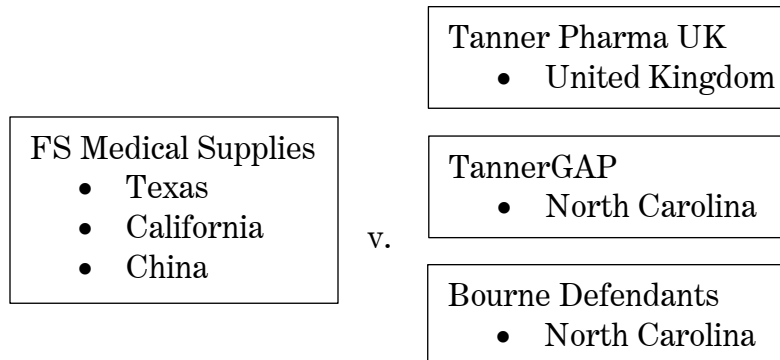
This appeal followed.

II.

We review a district court’s dismissal for lack of subject matter jurisdiction de novo. *Evans v. United States*, 105 F.4th 606, 612 (4th Cir. 2024).

A.

We first sort out the parties’ citizenships. When the two cases were filed, FS Medical was a citizen of Texas, California, and China. *See Gen. Tech.*, 388 F.3d at 120 (“[An LLC] has the citizenship of its members.”). The two corporate defendants, Tanner Pharma UK and TannerGAP, were citizens of the United Kingdom and North Carolina, respectively. *See* 28 U.S.C. § 1332(c)(1) (“[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business.”). And the Bourne Defendants were North Carolina citizens. *See Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998) (“[S]tate citizenship for purposes of diversity jurisdiction depends . . . on national citizenship and domicile.”). So the diversity landscape looked like:



8a

B.

The diversity jurisdiction statute, 28 U.S.C. § 1332(a), sets forth four ways to establish jurisdiction (when the amount in controversy exceeds \$75,000). This case involves subsection (a)(3), which applies in actions between “citizens of different States *and* in which citizens or subjects of a foreign state are additional parties.” *Id.* § 1332(a)(3) (emphasis added).

1.

We begin and end with the first clause of (a)(3): there must be citizens of different States on both sides of the case caption. And in determining whether there are, we can’t “disregard either [the domestic or foreign] aspect of [a dual-citizen LLC’s] citizenship.” *Gen. Tech.*, 388 F.3d at 122. Put another way, we must “test” diversity for each LLC member to determine whether there is subject matter jurisdiction.

We derive this testing requirement from our decision in *General Technology* and the Supreme Court’s analysis in *Grupo Dataflux*.

In *General Technology*, we considered whether a Colombian corporation (Exro) could bring a derivative action on behalf of an LLC (EXG) with members from Colombia and Virginia against the LLC itself and two other U.S. citizen defendants. 388 F.3d at 120.⁴ When “we align[ed] EXG as a defendant, then Exro (Col[o]mbia) [was] suing EXG (Col[o]mbia and Virginia) and the other

⁴ “In a derivative action, where there are three parties conceptually presented as ‘A’ v. ‘B’ v. ‘C,’ the parties must be aligned for diversity purposes. Generally, the represented entity (i.e., the entity on whose behalf the suit is initiated—‘B’), here EXG, is aligned as a defendant.” *Gen. Tech.*, 388 F.3d at 120.

[U.S.] defendants.” *Id.* We concluded that “[t]he alien citizenship on both sides . . . destroy[ed] diversity.” *Id.*

True, *General Technology* wasn’t an (a)(3) case because there weren’t U.S. citizens on both sides. But if we had only “tested” EXG’s domestic citizenship (as FS Medical suggests we do here) there would have been diversity under (a)(2) for disputes between “citizens of a State and citizens or subjects of a foreign state,” in that case *Colombia v. Virginia*. See 28 U.S.C. § 1332(a)(2). Still, we found “no basis upon which to disregard either aspect of EXG’s citizenship.” *Gen. Tech.*, 388 F.3d at 121–22.

So too in *Grupo Dataflux*. There, a partnership with Mexican and U.S. citizen partners sued a Mexican corporation. *Grupo Dataflux*, 541 U.S. at 569. As the Supreme Court concluded, “complete diversity did not exist given the altogether evident Mexican citizenship of both [defendant] and two of [plaintiff’s] limited partners.” *Id.* at 585–86. In other words, when the Court *tested* the partnership’s Mexican citizenship, the Mexico v. Mexico line-up destroyed diversity.

If the Court had focused solely on the partnership’s U.S. citizenship, there would have been no diversity defect under (a)(2). Although the Court didn’t “specifically validate this [testing] aspect of the case because it was concentrating on whether a later withdrawal of the foreign partners could cure the jurisdictional defect, it would not have reached the issue it did address if the case presented no underlying jurisdictional defect.” *Gen. Tech.*, 388 F.3d at 122 n.5.⁵

⁵ We take the same approach in suits with purely domestic parties. Say an LLC with North Carolina and Virginia members sues a Virginia citizen. Virginia’s presence on both sides would destroy

2.

Applying these principles here, when we test FS Medical’s Chinese citizenship, there isn’t a U.S. citizen on the plaintiff side. So we don’t have a suit between “citizens of different States.” 28 U.S.C. § 1332(a)(3).

FS Medical says that only its domestic citizenship “counts” for this analysis. Opening Br. at 25. In its view, clause one of (a)(3) “is met because there is [complete diversity] between all the State citizenships of [the LLC] (Texas and California) and all the State citizenships of the [domestic] defendants (North Carolina).” Reply Br. at 1–2.

That analysis may be appropriate for dual-citizen individuals, for whom we *can* ignore foreign citizenship. *See Gen. Tech.*, 388 F.3d at 121. But it doesn’t work for an LLC. *See id.* (finding that an LLC is “like a corporation whose citizenship can be ‘dual’” and “therefore, its foreign citizenship cannot be ignored”).

In short, we can’t do as FS Medical asks and disregard the LLC’s foreign member. Neither the diversity jurisdiction statute nor our case law supports such an approach. Rather, we apply “the long-standing requirement of *complete* diversity . . . to the dual citizenship of corporations,” domestic or foreign. *Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254 (4th Cir. 2009) (no diversity jurisdiction in suit brought by “an alien (Bulgarian) against a corporation with the dual citizenship of Florida and a foreign state, Liberia”).

diversity. Even FS Medical agrees that we can’t simply disregard an LLC’s member in that context. *See* Oral Argument at 14:30–14:42.

And when we test FS Medical’s foreign citizenship, we have a dispute between a foreign citizen (FS Medical) against another foreign citizen (Tanner Pharma UK) and U.S. citizens (TannerGAP and the Bourne Defendants). That isn’t a dispute between “citizens of different States.” So FS Medical can’t satisfy the first clause of 28 U.S.C. § 1332(a)(3).⁶

3.

Tango Music, LLC v. DeadQuick Music, Inc., 348 F.3d 244 (7th Cir. 2003), doesn’t persuade us otherwise. There, the court found (a)(3) diversity jurisdiction when a dual-citizen LLC (New Jersey and United Kingdom) sued a domestic corporation (Delaware and New York) and a United Kingdom individual. *Id.* at 245. But the question there was whether having citizens from the *same* foreign country on either side satisfied (a)(3)’s additional foreign party requirement. *Id.* The court said yes. *Id.* at 246.

Our sister circuit didn’t directly answer the question before us—whether jurisdiction is destroyed when the sole plaintiff is a dual-citizen LLC. And if such a holding can be gleaned from the case, it’s inconsistent with *Grupo Dataflux*. See, e.g., *ImagineX Consulting, L.P. v. Reprivata, L.L.C.*, No. 1:20-cv-03045-DDD-KLM, 2021

⁶ FS Medical says the district court agreed with its reasoning on clause one and found diversity jurisdiction lacking only because of clause two: the LLC’s Chinese member couldn’t be disaggregated to satisfy the additional foreign party requirement. Reply Br. at 2. That was error, says FS Medical, because another foreign party, Tanner Pharma UK, could satisfy it. *Id.*

But that’s wrong twice over. First, the magistrate judge addressed clause one, correctly explaining that neither the domestic nor foreign citizenship of a dual-citizen LLC could be ignored. J.A. 316. Second, whether Tanner Pharma UK satisfies clause two’s additional foreign party requirement is irrelevant where we don’t have citizens of different States to begin with.

WL 520107, at *1 (D. Colo. Feb. 11, 2021) (finding that *Grupo Dataflux* commands that LLCs with both domestic and foreign citizen members “must be treated as aliens for jurisdictional purposes”).

To satisfy diversity jurisdiction under 28 U.S.C. § 1332(a)(3), there must be a U.S. citizen on each side of the dispute. When we consider FS Medical’s foreign member, as we must, we’re left with no U.S. citizen on the plaintiff side, destroying diversity.⁷

III.

If we find jurisdiction lacking—as we do—FS Medical asks us to dismiss the foreign defendant, Tanner Pharma UK, to preserve diversity. But the jurisdictional defect stems from FS Medical’s involvement in this case, not Tanner Pharma UK’s. Dismissing the latter wouldn’t cure the defect.

IV.

Finally, FS Medical asks us to invoke North Carolina’s savings statute and dismiss the case without prejudice, allowing FS Medical to refile within a year. *See* N.C. Gen. Stat. § 1A-1, Rule 41(b). A federal court sitting in diversity may grant relief under the statute, which would then allow an action otherwise barred by the statute of limitations to proceed. *See Topshelf Mgmt., Inc. v. Campbell-Ewald Co.*, 203 F. Supp. 3d 608, 611 (M.D.N.C. 2016). But without subject matter jurisdiction, we (along with the district court) are powerless to act. *See*

⁷ Nor does any other subsection of Section 1332(a) support jurisdiction. FS Medical can’t satisfy (a)(1) for a dispute between “citizens of different States” for the same reason it fails (a)(3): the LLC’s *foreign* member. The same holds true for (a)(2), involving disputes between “citizens of a State and citizens or subjects of a foreign state.”

Shortt v. Richlands Mall Assocs., Inc., No. 90-2056, 1990 WL 207354, at *4 (4th Cir. Dec. 19, 1990) (“[A] court lack[ing] subject matter jurisdiction . . . is generally barred from taking any action which would go to the merits of the case.”).

FS Medical argues that Rule 41(b) involves a collateral issue, over which we retain jurisdiction. Not so.

True, “a federal court may consider collateral issues after an action is no longer pending,” *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (citation modified). Collateral issues are those “premised on the court’s inherent authority to engage in . . . judicial acts attendant to the presence of a live controversy before the court.” *Shortt*, 1990 WL 207354, at *4 (citation modified).

Issuing sanctions, for example, fits the bill. *See e.g., Willy*, 503 U.S. at 138. Doing so is “not a judgment on the merits of an action” but “requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.” *Id.* (citation modified). A court has an “interest in having rules of procedure obeyed,” which “does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction.” *Id.* at 139.

But North Carolina’s savings statute doesn’t involve the court’s own interests or governing procedures. Rather, the statute affects a party’s right to bring suit. Because that’s not a collateral issue, we (and the district court) have no jurisdiction. So we can’t grant FS Medical relief.⁸

⁸ Even if we had jurisdiction, the equities don’t warrant discretionary relief. *See 84 Lumber Co. v. Ba* App. 1995) (a judge “may, in his

* * *

For the reasons given, we affirm the district court's judgment.

AFFIRMED

discretion,” grant Rule 41(b) relief). FS Medical has been litigating this case since 2021. It alone is to blame for not discovering the jurisdictional defect earlier so as to not run up against the statute of limitations. *See WG/Welch Mech. Contractors, LLC v. Int’l Ass’n of Sheet Metal, Air, Rail & Transpo. Workers*, 684 F. Supp. 3d 432, 438 (D. Md. 2023) (“[T]he law places the burden on Plaintiff to obtain knowledge of the requisite facts to plead diversity of citizenship adequately *before* it files its complaint in federal court” (citation modified)).*rkley*, 461 S.E.2d 780, 782 (N.C. Ct.

APPENDIX B

[FILED: OCTOBER 1, 2025]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL CASE NO. 3:21-cv-00501-MR-WCM**

FS MEDICAL	)	
SUPPLIES, LLC,	)	
Plaintiff,	)	
vs.	)	<u>MEMORANDUM OF</u>
TANNERGAP, INC.,	)	<u>DECISION AND</u>
et al.,	)	<u>ORDER</u>
Defendants.	)	
	)	

THIS MATTER is before the Court on multiple motions,¹ including the Defendants' Rule 12(b)(1) Motion to Dismiss Amended Complaint [Doc. 294]; the Memorandum and Recommendation of the Magistrate regarding these pending motions [Doc. 311]; the Plaintiff's Objection to the Memorandum and Recommendation [Doc. 313]; and the Plaintiff's Motion for

¹ The other motions currently pending before the Court are Tanner Pharma UK Limited and TannerGAP, Inc.'s Motion to Quash and for Protective Order [Doc. 229]; FSMS's Motion to Dismiss Counterclaims and Strike Defenses [Doc. 235]; FSMS's Motion for Leave to Amend Complaint [Doc. 239]; the Plaintiff's Motion for Sanctions for Spoliation of Evidence [Doc. 261]; and the Defendants' Motion to Compel [Doc. 266].

Assignment of District Judge, Hearing on Motions, and Setting of Rule 16 Status Conference [Doc. 305].

Pursuant to 28 U.S.C. § 636(b) and the Standing Orders of Designation of this Court, the Honorable W. Carleton Metcalf, United States Magistrate Judge, was designated to consider the Defendants' Motion to Dismiss as well as the other pending motions and to submit a recommendation for their disposition. On August 27, 2025, the Magistrate Judge issued a Memorandum and Recommendation regarding these motions. [Doc. 311]. The parties were advised that any objections to the Magistrate Judge's Memorandum and Recommendation were to be filed in writing within fourteen (14) days of service. [*Id.*]. The Plaintiff filed its Objections on September 9, 2025. [Doc. 313]. After receiving an extension of time to do so, the Defendants filed a reply thereto on September 30, 2025. [Doc. 315].

With the filing of the objection and reply to the Memorandum and Recommendation, this matter is just now ripe for disposition. Nevertheless, the Plaintiff has for months now complained of the lack of attention given to this matter by the Court. The Court notes, however, that this matter was reassigned to a District Judge *on the day any matter became ripe for a District Judge to address*. Counsel's demands prior to that date were not only unfounded, but rude.²

² This Court has experienced two of the five district court judgeships in this district being vacant now for many months. As a result, the Court has had to rely on visiting judges from other districts to sit by designation and address pending matters. As this Court has explained on several occasions, the availability of any particular visiting judge is only known some days or weeks in advance, while a matter becomes ripe for re-assignment with relatively little notice. Thus, the *ripeness* of any particular motion or matter is and has been

In addition, the Court notes that the procedural posture of this case is largely the result of the Plaintiff's own making. The Plaintiff attempted to amend its claims shortly before summary judgment, which forced the Court to continue that deadline and with it, the approaching trial date. While the motion to amend was still pending, and shortly before a motions hearing was to be held, the Plaintiff filed an Amended Citizenship Disclosure, revealing a basic factual error about the citizenship of one of its four members. This disclosure derailed the motions hearing and forced the Court to turn its attention to the threshold question of subject matter jurisdiction. By the time that the Plaintiff filed its "Motion for Assignment. . . ," the briefing on these jurisdictional motions had been complete for only four months. In that motion, as well as in multiple email communications to the Clerk of Court since its filing, the Plaintiff has repeatedly prodded the Court to "move this case forward." This has done little to achieve the Plaintiff's aims.

After a careful review of the Memorandum and Recommendation, the Court concludes that the Magistrate Judge's proposed conclusions of law are correct and are consistent with current case law. Accordingly, the Court overrules the Plaintiff's Objection and accepts the Magistrate Judge's recommendation that the Defendants' Motion to Dismiss be granted due to a lack of subject matter jurisdiction. This matter therefore

the trigger for reassignments. If counsel were paying attention, counsel would have known this. Yet counsel demanded reassignment before any action from a district court judge was needed. Counsel offers no explanation for this.

will be dismissed without prejudice, and the other pending motions will be denied without prejudice.³

IT IS, THEREFORE, ORDERED that the Plaintiff's Objection [Doc. 313] is **OVERRULED**, and the Magistrate Judge's Memorandum and Recommendation [Doc. 311] is **ACCEPTED**.

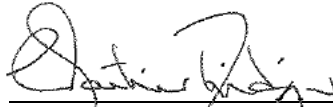
IT IS FURTHER ORDERED as follows:

- (1) The Defendants' Rule 12(b)(1) Motion to Dismiss Amended Complaint [Doc. 294] is **GRANTED**, and this matter is hereby **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.
- (2) The Plaintiff's Motion for Assignment of District Judge, Hearing on Motions, and Setting of Rule 16 Status Conference [Doc. 305] is **DENIED AS MOOT**.
- (3) Tanner Pharma UK Limited and TannerGAP, Inc.'s Motion to Quash and for Protective Order [Doc. 229]; FSMS's Motion to Dismiss Counterclaims and Strike Defenses [Doc. 235]; FSMS's Motion for Leave to Amend Complaint [Doc. 239]; the Plaintiff's Motion for Sanctions for Spoliation of Evidence [Doc. 261]; and the Defendants' Motion to Compel [Doc. 266] are **DENIED WITHOUT PREJUDICE**.

³ In its Objections, the Plaintiff states that, in the event that the Court determines that subject matter jurisdiction is lacking, the Court "should entertain a motion under Rule 21 to dismiss TPUK, which would eliminate the aliens-on-both-sides problem." [Doc. 313 at 4]. To date, however, the Plaintiff has not filed any such motion. To the extent that the Plaintiff's statement in its objection can be construed as a motion to dismiss, it is procedurally improper, as motions are not to be included in responsive pleadings. *See* LCvR 7.1 (c)(2).

19a

IT IS SO ORDERED this the 1st day of October,
2025.

A handwritten signature in black ink, appearing to read "Martin Reidinger", written over a horizontal line.

Hon. Martin Reidinger
Chief United States District Judge

APPENDIX C

[FILED: OCTOBER 1, 2025]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL CASE NO. 3:23-cv-00598-MR-WCM**

FS MEDICAL	)	
SUPPLIES, LLC,	)	
Plaintiff,	)	
vs.	)	<u>MEMORANDUM OF</u>
TANNERGAP, INC.,	)	<u>DECISION AND</u>
et al.,	)	<u>ORDER</u>
Defendants.	)	
	)	

THIS MATTER is before the Court on the Defendants' Rule 12(b)(1) Motion to Dismiss Amended Complaint [Doc. 104]; the Memorandum and Recommendation of the Magistrate regarding this motion [Doc. 119]; the Plaintiff's Objection to the Memorandum and Recommendation [Doc. 120]; and the Plaintiff's Motion for Assignment of District Judge, Hearing on Motions, and Setting of Rule 16 Status Conference [Doc. 113].

Pursuant to 28 U.S.C. § 636(b) and the Standing Orders of Designation of this Court, the Honorable W. Carleton Metcalf, United States Magistrate Judge, was designated to consider the Defendants' Motion to Dismiss as well as the other pending motions and to submit a recommendation for its disposition. On August 27, 2025,

the Magistrate Judge issued a Memorandum and Recommendation regarding this motion. [Doc. 119]. The parties were advised that any objections to the Magistrate Judge's Memorandum and Recommendation were to be filed in writing within fourteen (14) days of service. [*Id.*]. The Plaintiff filed its Objections on September 9, 2025. [Doc. 122]. After receiving an extension of time to do so, the Defendants filed a reply thereto on September 30, 2025. [Doc. 122].

With the filing of the objection and reply to the Memorandum and Recommendation, this matter is just now ripe for disposition. Nevertheless, the Plaintiff has for months now complained of the lack of attention given to this matter by the Court. The Court notes, however, that this matter was reassigned to a District Judge *on the day any matter became ripe for a District Judge to address*. Counsel's demands prior to that date were not only unfounded, but rude.¹

In addition, the Court notes that the procedural posture of this case is largely the result of the Plaintiff's own making. The Plaintiff attempted to amend its claims shortly before summary judgment, which forced the Court to continue that deadline and with it, the

¹ This Court has experienced two of the five district court judgeships in this district being vacant now for many months. As a result, the Court has had to rely on visiting judges from other districts to sit by designation and address pending matters. As this Court has explained on several occasions, the availability of any particular visiting judge is only known some days or weeks in advance, while a matter becomes ripe for re-assignment with relatively little notice. Thus, the *ripeness* of any particular motion or matter is and has been the trigger for reassignments. If counsel were paying attention, counsel would have known this. Yet counsel demanded reassignment before any action from a district court judge was needed. Counsel offers no explanation for this.

approaching trial date. While the motion to amend was still pending, and shortly before a motions hearing was to be held, the Plaintiff filed an Amended Citizenship Disclosure, revealing a basic factual error about the citizenship of one of its four members. This disclosure derailed the motions hearing and forced the Court to turn its attention to the threshold question of subject matter jurisdiction. By the time that the Plaintiff filed its "Motion for Assignment. . . ," the briefing on these jurisdictional motions had been complete for only four months. In that motion, as well as in multiple email communications to the Clerk of Court since its filing, the Plaintiff has repeatedly prodded the Court to "move this case forward." This has done little to achieve the Plaintiff's aims.

After a careful review of the Memorandum and Recommendation, the Court concludes that the Magistrate Judge's proposed conclusions of law are correct and are consistent with current case law. Accordingly, the Court overrules the Plaintiff's Objection and accepts the Magistrate Judge's recommendation that the Defendants' Motion to Dismiss be granted due to a lack of subject matter jurisdiction. This matter therefore will be dismissed without prejudice.²

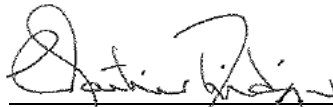
² In its Objection, the Plaintiff states that, in the event that the Court determines that subject matter jurisdiction is lacking, the Court "should entertain a motion under Rule 21 to dismiss TPUK, which would eliminate the aliens-on-both-sides problem." [Doc. 120 at 4]. To date, however, the Plaintiff has not filed any such motion. To the extent that the Plaintiff's statement in its objection can be construed as a motion to dismiss, it is procedurally improper, as motions are not to be included in responsive pleadings. *See* LCvR 7.1(c)(2).

IT IS, THEREFORE, ORDERED that the Plaintiff's Objection [Doc. 120] is **OVERRULED**, and the Magistrate Judge's Memorandum and Recommendation [Doc. 119] is **ACCEPTED**.

IT IS FURTHER ORDERED as follows:

- (1) The Defendants' Rule 12(b)(1) Motion to Dismiss Amended Complaint [Doc. 104] is **GRANTED**, and this matter is hereby **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.
- (2) The Plaintiff's Motion for Assignment of District Judge, Hearing on Motions, and Setting of Rule 16 Status Conference [Doc. 113] is **DENIED AS MOOT**.

IT IS SO ORDERED this the 1st day of October, 2025.



Hon. Martin Reidinger
Chief United States District Judge

APPENDIX D

[FILED: AUGUST 27, 2025]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
3:21-cv-00501-UJ1-WCM**

FS MEDICAL	)	
SUPPLIES, LLC,	)	
Plaintiff,	)	
v.	)	
TANNERGAP, INC.	)	MEMORANDUM
and TANNER	)	AND
PHARMA UK	)	RECOMMENDATION
LIMITED,	)	
Defendants.	)	
	)	

This matter is before the Court on multiple motions, including Defendants' Rule 12(b)(1) Motion to Dismiss Amended Complaint (Doc. 294), which has been referred to the undersigned for the entry of a recommendation.¹

¹ The other motions currently pending before the undersigned are Tanner Pharma UK Limited's and TannerGAP, Inc.'s Consent Motion to File Exhibits Under Seal (Doc. 212), Tanner Pharma UK Limited and TannerGAP, Inc.'s Motion to Quash and for Protective Order (Doc 229), FSMS's Motion to Dismiss Counterclaims and Strike Defenses (Doc. 235), FSMS's Motion to File Under Seal Second Amended and Supplemental Complaint (Doc. 237), FSMS's Motion for Leave to Amend Complaint (Doc. 239), Defendants' Joint Motion to Seal Confidential Information Contained in Plaintiff's

I. Relevant Procedural Background

On September 23, 2021, FS Medical Supplies, LLC (“FSMS”) filed its original Complaint against TannerGAP, Inc. (“GAP”) and Tanner Pharma UK, Limited (“TPUK”). *FS Med. Supplies, LLC v. TannerGAP, Inc. & Tanner Pharma UK Ltd.*, No. 3:21-cv-00501-UJ1-WCM (“*FSMS I*”), Doc. 1. Therein, FSMS alleged that this Court had federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because the amount in controversy, exclusive of interest and costs, exceeded \$75,000 and because all parties were “citizens of different states and foreign states.” *Id.* at ¶¶ 1–4, 8. Specifically as to citizenship, FSMS alleged that it was a limited liability company whose members were citizens of either California or Texas, that GAP was a North Carolina corporation with its principal place of business in North Carolina, and that TPUK was a “European corporation with its principal place of business in the United Kingdom.” *Id.* at ¶¶ 1–4.

GAP and TPUK moved to dismiss, based on, among other things, an alleged lack of personal jurisdiction. Docs. 15, 16. That motion was denied without prejudice and the parties were given an opportunity to conduct jurisdictional discovery. Doc. 21.

On September 16, 2022, FSMS filed an Amended Complaint that named GAP and TPUK and added Raymond Fairbanks Bourne (“Bourne”) and Stephen John Scalia (“Scalia”) as defendants. Like the original Complaint, the Amended Complaint asserted that federal subject matter jurisdiction existed pursuant to 28 U.S.C.

Proposed Second Amended and Supplemental Complaint (Doc. 256), Plaintiff’s Motion for Sanctions for Spoliation of Evidence (Doc. 261), and Defendants’ Motion to Compel (Doc. 266).

§ 1332. *FSMS I*, Doc. 58. With respect to the newly added defendants, FSMS alleged that Bourne and Scalia were domiciled in North Carolina. *Id.* at ¶¶ 13, 14.

All Defendants moved to dismiss. Docs. 62, 65, 67, 69, 71.

On July 17, 2023, the undersigned issued recommendations concerning the disposition of those motions. Doc. 110.

On September 20, 2023, and while the recommendations were pending, FSMS filed a separate case, this time against Bourne and Mary Everett Whitehurst Bourne a/k/a Molly Bourne (collectively, the “Bourne Defendants”) and TPUK. *FS Med. Supplies, LLC v. Tanner Pharma UK Ltd., Raymond Fairbanks Bourne, & Mary Everett Whitehurst Bourne*, No. 3:23-cv-00598- UJ1-WCM (“*FSMS II*”), Doc. 1. FSMS again asserted that this Court had federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Specifically, FSMS alleged that it was a limited liability company with four members (two domiciled in Texas and two domiciled in California), that TPUK was “a company organized under the laws of England and Wales” with a principal place of business in North Carolina, and that the Bourne Defendants were domiciled in North Carolina. *Id.* at ¶¶ 4–7; *see also FSMS II*, Doc. 3 (FSMS’s Citizenship Disclosure).

On September 30, 2023, the presiding District Judge granted in part and denied in part the pending motions to dismiss in *FSMS I*. Doc. 117.

On October 5, 2023, FSMS filed an Amended Complaint in *FSMS II*, and again asserted federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332. *FSMS II*, Doc. 33.

On January 17, 2024, the undersigned conducted a motions hearing and an initial pretrial conference in *FSMS I* and *FSMS II* and subsequently, recommended that the two cases be consolidated for discovery. *FSMS I*, Doc. 147; *FSMS II*, Doc. 75.

That recommendation was adopted and, on March 14, 2024, a pretrial order and case management plan was entered. *FSMS I*, Doc. 164; *FSMS II*, Doc 81.

By order filed on January 3, 2025, the undersigned stayed a January 6, 2025 deadline for the filing of dispositive motions, continued the trial of *FSMS I* and *FSMS II*, and directed the clerk to set a status conference and a hearing on numerous pending motions.

On January 7, 2025, the Clerk noticed those proceedings for February 11, 2025 at 10:00AM.

On February 10, 2025 (the day before the hearing), FSMS filed an Amended Citizenship Disclosure in *FSMS II* stating that as of September 20, 2023 (the date FSMS filed its original Complaint in *FSMS II*), one of its members, Zhen Zhen Tong, was a citizen of “California/China.” *FSMS II*, Doc. 103 (the “Amended Citizenship Disclosure”).²

Additionally on February 10, 2025, Zhen Zhen Tong transferred her interest in FSMS to her fellow member and husband by way of an “Assignment of Membership Interest.” See *FS Med. Supplies, LLC v. TannerGAP, Inc., Tanner Pharma UK Limited, Raymond Fairbanks*

² The parties appear to agree, and the undersigned assumes, that Zhen Zhen Tong was also a citizen of China on September 23, 2021, the date the original Complaint was filed in *FSMS I*.

Bourne, and Mary Everett Whitehurst Bourne, No. 3:25-cv-00102-UJ1-WCM (“*FSMS III*”), Doc. 37-3.3.³

By midnight on February 10, 2025, Defendants had filed Rule 12(b)(1) Motions to Dismiss in *FSMS I* and *FSMS II*, challenging this Court’s subject matter jurisdiction based on an alleged lack of diversity. *FSMS I*, Doc. 294; *FSMS II*, Doc. 104.

On February 11, 2025, the parties appeared before the undersigned. At the beginning of that proceeding, FSMS reported that it had “quite recently discovered that we had a factual mistake in our understanding of the citizenship of one of the members of the plaintiff” and specifically that FSMS had discovered that one of its members was “a nonresident permanent . . . green card holder, nonresident alien.” *FSMS I*, Doc. 298 at 7. FSMS further advised that it had, that morning, initiated a third action, *FSMS III*.⁴

After hearing from the parties, and in light of the Amended Citizenship Disclosure, the Rule 12(b)(1) Motions and the filing of *FSMS III*, the undersigned held all other motions previously set for hearing in both *FSMS I* and *FSMS II* in abeyance pending resolution of the question of subject matter jurisdiction.

This Memorandum now follows.

³ The Court may take judicial notice of the filings made in related matters. *See Colonial Penn Ins. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989).

⁴ One of the motions that had been noticed for hearing on that date was a request by FSMS for leave to file a second amended complaint in *FSMS I*, and a proposed amended complaint had been submitted. *FSMS I*, Docs. 239, 240. The original Complaint filed in *FSMS III* appears to be identical to the proposed second amended complaint that is the subject of the pending motion to amend in *FSMS I*.

II. Discussion

A. Subject Matter Jurisdiction

Pursuant to 28 U.S.C. § 1332(a), this Court has “original subject matter jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between”

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a).

Here, there is no dispute that the amount in controversy exceeds the jurisdictional threshold.

With respect to citizenship, it appears that at the time both *FSMS I* and *FSMS II* were filed, FSMS was a limited liability company whose members were citizens of Texas, California, and China. Therefore, FSMS was a citizen of Texas, California, and China. *Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011) (“For purposes of diversity

jurisdiction, the citizenship of a limited liability company ... is determined by the citizenship of all of its members”).

It also appears that TPUK was a citizen of a foreign state, that GAP was a citizen of North Carolina, and that the Bourne Defendants were citizens of North Carolina.

Defendants contend that, under these circumstances, the requirements of 28 U.S.C. § 1332 are not met.

FSMS acknowledges that “[n]umerous cases have construed paragraph (a)(2) as not conferring jurisdiction ‘over a lawsuit involving an alien on one side, and an alien and a citizen on the other side.’” *FSMS I*, Doc. 297 at 4; *see also Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004) (citing *Universal Licensing Corp. v. Paola del Lungo S.P.A.*, 293 F.3d 579, 581 (2d Cir. 2002)). FSMS argues, though, that jurisdiction exists pursuant to paragraph (a)(3), “regardless of whether aliens are on one or *both* sides of the case.” *FSMS I*, Doc. 297 at 4 (emphasis in briefing).

Courts considering paragraph (a)(3) have found that “federal diversity jurisdiction is not defeated where (1) there is a legitimate controversy between diverse citizens and aliens are additional parties; and (2) there is complete diversity as to the citizens.” *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1298 (9th Cir. 1985) (collecting cases); *see also* 13E Fed. Prac. & Proc. Juris. § 3604 (3d ed.) (“the language of Section 1332(a)(3) is broad enough to allow aliens to be additional parties on both sides of the dispute. Under this interpretation, jurisdiction would exist if a New Yorker, and a Canadian, sued a Californian, and a German, assuming, of course, that there was a legitimate dispute between the two Americans.”).

Here, FSMS argues that its domestic citizenship (based on either the citizenship of its Texas and/or California members) may be used to satisfy the requirement that this suit be between “citizens of different States” because the “domestic members of [FSMS] have citizenships completely diverse from the domestic citizenship of the Defendants,” which is North Carolina. *FSMS I*, Doc. 297 at 10.

The parties do not cite any controlling authority from the Fourth Circuit directly addressing the precise issue presented here, which is whether for the purposes of 28 U.S.C. § 1332(a)(3) a limited liability company may be considered both: 1) a citizen of a State (based on the citizenship of only its domestic members) *and* 2) an “additional” party that is a citizen of a “foreign state” (based on the citizenship of only its foreign member).

Some courts have suggested that such an interpretation is proper. For example, in *Tango Music, LLC v. Deadquick Music, Inc.*, the court stated:

Tango is a limited liability company, and for diversity purposes the citizenship of such an entity is that of its members. *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir.1998). One of its members is a citizen of New Jersey, another a citizen of the United Kingdom. The principal defendant, DeadQuick, is a citizen of Delaware and New York, but one of the individual defendants is a citizen of the United Kingdom and the other a citizen of either the United Kingdom or Virginia. *So while the U.S. parties are diverse*, there are U.K. citizens on both sides of the case, and we must decide whether that destroys diversity jurisdiction.

348 F.3d 244, 245 (7th Cir. 2003) (emphasis added).

Similarly, in *Digital Media Solutions, LLC v. Zeetogroup, LLC*, No. 3:22- cv-01184-AHG, 2024 WL 1268164, at *3 (S.D. Cal. Mar. 25, 2024), the court stated that jurisdiction under paragraph (a)(3) would exist between a hypothetical plaintiff limited liability company with citizenships of Canada, Florida, Delaware, and New Jersey and a defendant limited liability company with alien citizenship and Texas citizenship “because the action would be between completely diverse U.S. citizens of different States (Florida, Delaware, and New Jersey on one side and Texas on the other), in which citizens or subjects of a foreign state (Canada on one side and [defendant’s member’s] foreign state of citizenship on the other) are ‘additional parties.’”

Other courts, however, have rejected this approach.

For example, in *FPACP4 Lex, LLC v. Stantec, Inc.*, 586 F. Supp. 3d 824 (N.D. Ill. 2022), the court concluded that it lacked subject matter jurisdiction pursuant to paragraph (a)(3) in a suit brought by a limited liability company with domestic and foreign members against two corporations, one a citizen of Minnesota and the other a citizen of Canada. There, all parties agreed that “there is no diversity jurisdiction over a case in which there are foreign parties on both sides of the suit and a U.S. citizen on only one side.” *Id.* at 825–26 (quoting *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 875 (7th Cir. 2004)). Defendants argued that jurisdictional discovery would reveal there to be “citizens of diverse states on both sides, as well as citizens of foreign states” but the court concluded that even if the plaintiff’s domestic citizenship was diverse from the Minnesota defendant, the plaintiff was also “inevitably a

citizen of at least one foreign state, thus destroying diversity.” *Id.* at 826-827.

Similarly, in *New York Metropolitan Regional Center, L.P. v. Mammoet USA Holdings, Inc.*, 552 F. Supp.3d 451 (S.D.N.Y. 2021), the plaintiff, a limited partnership with partners having New York and foreign citizenship, asserted claims against a corporation with Texas citizenship. The plaintiff argued that its New York partner was diverse from the Texas defendant, and that its foreign partner was an “additional party” pursuant to paragraph (a)(3). The court held that it lacked subject matter jurisdiction, explaining that while the plaintiff had multiple citizenships, it was a single party, which could not be “disaggregated, with its members being treated as ‘distinct part[ies] with [their] own citizenship, as if the partners were personally named as parties.’” *Id.* at 456 (modification in original); *see also Pattern Energy Grp., LP v. Perillo*, No. 1:25-cv-00785, 2025 WL 1112848, a *5 (S.D.N.Y. April 15, 2025) (“For 28 U.S.C. § 1332(a)(3) to apply, this Court would need to disaggregate Pattern’s foreign-based partners from the corporate entity and construe those partners as ‘additional parties.’” *Metropolitan Regional Center* is instructive in its thorough and reasoned rejection of an identical argument.”) (citing 552 F. Supp. 3d at 455-58).

Additionally, in situations involving corporations with dual citizenship, courts have rejected efforts by parties to rely on one of those two citizenships to meet the jurisdictional requirements of paragraph (a)(3). *See Phoenix Trading FZCO v. Dennis Corp.*, No. 4:22-cv-02355-RBH, 2022 WL 18674462, at *2 (D.S.C. Aug. 29, 2022) (“Although two Plaintiffs—Absolute Power Solutions, Inc. and Block Zero HS, Inc.—are citizens of Delaware (their state of incorporation), they are also citizens of the UAE (their principal places of business).

Such dual citizenship does not confer diversity jurisdiction.”); *ACCO Brands USA LLC v. Piñeyro Lara Comercial S.A.*, 27 F.Supp.3d 256, 260 (D.P.R. 2014) (“Plaintiffs would not be permitted to choose one of [defendant’s] two citizenships in order to satisfy section 1332(a)(3)’s minimal diversity requirement; diversity would fail because [defendant’s] foreign citizenship would result in no United States citizen appearing on the defendants’ side of the suit.”); *Caribbean Telecommunications, Ltd. v. Guyana Tel. & Tel. Co.*, 594 F. Supp. 2d 522, 530 (D.N.J. 2009) (“The federal diversity statute does not permit domestic corporations to select among their two jurisdictional citizenships in order to preserve or defeat diversity. Diversity must be satisfied by both corporate citizenship designations; otherwise, the corporate citizenship provision would accomplish nothing. The Court sees no reason why alien corporations should be treated any differently.”) (internal citations omitted); *IGY Ocean Bay Props., Ltd. v. Ocean Bay Props. I Ltd.*, 534 F. Supp. 2d 446, 449 (S.D.N.Y. 2008) (“For Defendants’ theory to prevail, however, Plaintiffs would have to be considered not only as ‘additional parties,’ but also as citizens of a domestic state as well. The argument thus reduces to an internal contradiction, insofar as it suggests that Plaintiffs be treated as aliens to satisfy one element of § 1332(a)(3)’s diversity requirement, but then as domestic citizens to meet the other part of that provision’s jurisdictional test.”).

Here, although no controlling case law directly addressing the precise situation presented here has been found, the Fourth Circuit has held that where an entity has multiple citizenships, all of those citizenships must be considered in the jurisdictional analysis. *See Gen. Tech. Applications, Inc. v. Exro Ltda.*, 388 F.3d 114, 121–22 (4th Cir. 2004) (finding that an unincorporated association’s

citizenship was that of its members—Columbia and Virginia—and that the court could “find no basis upon which to disregard either aspect” of the association’s citizenship); *accord Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254 (4th Cir. 2009) (“[A] corporation with its principal place of business in one of the United States and incorporated under the laws of a foreign state has dual citizenship for purposes of diversity jurisdiction. It is both a citizen of a State and a citizen of a foreign state. Thus, this case involves a claim by an alien (Bulgarian) against a corporation with the dual citizenship of Florida and a foreign state, Liberia. Under the long-standing requirement of complete diversity, which is applied to the dual citizenship of corporations, we find subject matter jurisdiction lacking.”) (internal citation omitted).

While FSMS has multiple citizenships, it remains a single party and the undersigned is not convinced that FSMS can be treated as a domestic citizen (by virtue of the Texas and California citizenship of certain of its members) for the purpose of one portion of the paragraph (a)(3) analysis, while, at the same time, be treated as an “additional party” (by virtue of the foreign citizenship of its other member). *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 579 (2004) (“It is true that the court ‘looks to’ the citizenship of the several persons composing the entity, but it does so for the purpose of determining the citizenship of the entity that is a party, not to determine which citizens who compose the entity are to be treated as parties.”); *see also N.Y. Metro. Reg’l Ctr., L.P. II v. Mammoet USA Holding, Inc.*, 552 F. Supp. 3d 451, 456 & 458 (S.D.N.Y. 2021) (explaining that “[*Carden v. Arkoma Associates*, 494 U.S. 185 (1990)] and *Grupo Dataflux* thus stand for the (somewhat tautological) proposition that, for purposes of Section 1332(a), a ‘single artificial entity’ party is but one party and that its

citizenship—and only its citizenship—matters for purposes of complete diversity” and that “to the extent [*Tango Music*] can be read to hold that a single LLC member (or partner) can be treated as an ‘additional party,’ that holding did not survive *Grupo Dataflux*, which was decided the following year”); *FPACP4 Lex*, 586 F. Supp. 3d at 826 (“the *Tango* court’s passing comment on this issue—which was not the focus of its decision, as the question presented was whether the presence of citizens of the same foreign state on both sides of the litigation destroyed the diversity that otherwise existed between the completely diverse domestic citizens...is inconsistent with the Supreme Court’s jurisdictional analysis in *Grupo Dataflux*....”).

Accordingly, the undersigned finds that at the time the original Complaint was filed in this matter, the Court lacked subject matter jurisdiction.

B. Additional Matters

As noted above, there are multiple other motions pending in this case.

By separate order, the undersigned is issuing a ruling on the three pending Motions to Seal. Docs. 212, 237, and 256.

Because the undersigned will recommend that the Defendants’ Rule 12(b)(1) Motion to Dismiss Amended Complaint (Doc. 294) be granted and that FSMS’s claims be dismissed without prejudice, the undersigned will also recommend that the other motions pending before the undersigned be denied without prejudice. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013) (a dismissal for lack of jurisdiction must be without

prejudice, “because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits”).

Finally, FSMS requests that, in the event the Court finds subject matter jurisdiction to be lacking, the order of dismissal make clear that the “a new action based on the same claim may be commenced within one year or less after such dismissal” pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. *FSMS I*, Doc. 297 at 15. FSMS, though, does not explain how such relief could be granted by a court that does not have subject matter jurisdiction. *See e.g., Martin Marietta Corp. v. Forsyth Cnty. Zoning Bd. of Adjustment*, 65 N.C. App. 316, 317 (1983) (“Because the court was ‘without authority to enter any order granting any relief,’ ... it did not have authority to grant petitioner the relief of thirty days within which to commence a new action based on the same claim; and its action in this respect is void.”) (internal citation omitted).

III. Recommendation

For the reasons set forth above, the undersigned
RESPECTFULLY RECOMMENDS:

1. That Defendants’ Rule 12(b)(1) Motion to Dismiss Amended Complaint (Doc. 294) be **GRANTED**, and that this matter be **DISMISSED WITHOUT PREJUDICE**.
2. That the following motions be **DENIED WITHOUT PREJUDICE**:
 - a. Tanner Pharma UK Limited and TannerGAP, Inc.’s Motion to Quash and for Protective Order (Doc 229);
 - b. FSMS’s Motion to Dismiss Counterclaims and Strike Defenses (Doc. 235);
 - c. FSMS’s Motion for Leave to Amend Complaint (Doc. 239);

- d. Plaintiff's Motion for Sanctions for Spoliation of Evidence (Doc. 261); and
- e. Defendants' Motion to Compel (Doc. 266).

Signed: August 27, 2025

/s/ W. Carleton Metcalf

W. Carleton Metcalf

United States Magistrate Judge

Time for Objections

The parties are hereby advised that, pursuant to Title 28, United States Code, Section 636, and Federal Rule of Civil Procedure 72(b)(2), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within **fourteen (14)** days of service of same. **Responses to the objections must be filed within fourteen (14) days of service of the objections.** Failure to file objections to this Memorandum and Recommendation with the presiding District Judge will preclude the parties from raising such objections on appeal. *See Thomas v. Arn*, 474 U.S. 140, 140 (1985); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984).

APPENDIX E

[FILED: SEPTEMBER 16, 2022]

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

Civil Action No. 3:21-CV-00501-RJC-DCK

FS MEDICAL
SUPPLIES, LLC,

Plaintiff,

v.

TANNERGAP, INC.;
TANNER PHARMA UK
LIMITED; RAYMOND
FAIRBANKS BOURNE;
and STEPHEN JOHN
SCALIA,

Defendants.

AMENDED
COMPLAINT

JURY TRIAL
DEMANDED

Plaintiff FS Medical Supplies, LLC (“FSMS”) brings the following complaint against Defendants TannerGAP, Inc. (“TannerGAP”), Tanner Pharma UK Limited (“Tanner Pharma UK”) (collectively, the “Corporate Defendants”), Raymond Fairbanks Bourne, and Stephen John Scalia:

INTRODUCTION

1. This case arises from Defendants’ immoral, unethical, unscrupulous, and deceptive business conduct, which has proximately caused FSMS hundreds of millions of dollars in damages. The Corporate Defendants (along with other affiliates) hold themselves out as the “Tanner

Pharma Group.” The two individual defendants exercise control over the Tanner Pharma Group and were the driving force of the unfair and deceptive conduct giving rise to this lawsuit.

2. At the beginning of the COVID-19 pandemic, Defendants contacted FSMS and learned that FSMS was able to source and procure reliable, high-quality medical supplies at a time of unprecedented demand, extremely limited supply, and severely disrupted supply chains. Recognizing the value FSMS brought to the table, Tanner Pharma Group executives called FSMS “our partner” and executed two contracts with FSMS—one promising that no TannerGAP affiliate would circumvent FSMS by dealing direct with suppliers secured by FSMS, and the second agreeing that TannerGAP and Tanner Pharma UK would pay FSMS the true direct cost of any product purchased from a manufacturer or supplier sourced by FSMS plus half the gross profits yielded by the sale of the product to an ultimate customer.

3. In August 2020, Defendants realized that they had a potentially massive business opportunity to sell antigen test kits manufactured by a Chinese manufacturer called Zhejiang Orient Gene Biotech Co., Ltd., a public company based in Huzhou, Zhejiang, China (“Orient Gene”). FSMS had a pre-existing relationship with Orient Gene developed as a part of its executives’ deep and wide network in China. Having gained FSMS’s trust, Defendants demanded that they be allowed to issue Purchase Orders directly to that supplier, and urgently insisted that they have direct access to Orient Gene personnel. But FSMS’s trust was misplaced. Defendants turned on FSMS, concealing the size and scope of the business opportunity, secretly signing Orient Gene to an exclusive distribution agreement, inducing Orient Gene to conceal information about its relationship with Tanner

Pharma UK from FSMS, and even deceiving FSMS about the pricing received from Orient Gene.

4. The Corporate Defendants have gone on to sell *nearly two billion dollars'* worth of products procured from Orient Gene to the UK Government and other customers. Under the parties' distribution agreement, FSMS's share of the gross profits is at least \$200 million. Defendants' unethical, immoral and deceptive practices proximately caused loss in this amount, and under North Carolina's Unfair and Deceptive Trade Practices Act, FSMS is entitled to treble damages from each Defendant jointly and severally.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because all parties are citizens of different states and foreign states and the amount in controversy exceeds \$75,000.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because all Defendants reside in this District for the purposes of the venue statute, and because a substantial part of the events and omissions giving rise to this action occurred in this District.

PARTIES

7. Plaintiff FS Medical Supplies, LLC is a limited liability company organized under the laws of Delaware, with its principal place of business in Weatherford, Texas. FSMS has four members: Laird Q. Cagan, Jim Mao, and their respective spouses. Mr. Cagan and his spouse are domiciled in Texas. Mr. Mao and his spouse are domiciled in California.

8. Defendant TannerGAP, Inc. is a corporation organized under the laws of North Carolina.

9. Defendant Tanner Pharma UK Limited is a limited liability company organized under the laws of England and Wales.

10. TannerGAP and Tanner Pharma UK, along with other affiliates, hold themselves out as the “Tanner Pharma Group.” Tanner Pharma Group’s website describes itself as “a 20-year old specialist pharmaceutical services provider headquartered in Charlotte, NC USA.”

11. TannerGAP’s principal place of business is in Charlotte, North Carolina, the location from which its activities are directed, controlled, and coordinated.

12. Tanner Pharma UK’s principal place of business is in Charlotte, North Carolina, the location from which its activities are directed, controlled, and coordinated.

13. Defendant Raymond Fairbanks Bourne is an individual domiciled in Charlotte, North Carolina. He is the sole officer of TannerGAP. He is the sole Director of Tanner Pharma UK. Defendant Bourne indirectly owns 100% of the shares of TannerGAP and 75% of the shares of Tanner Pharma UK. (His wife owns the remaining 25%.) The Tanner Pharma Group website says that he is the “founder and CEO of Tanner Pharma Group.”

14. Defendant Stephen J. Scalia is an individual domiciled in Charlotte, North Carolina. The Tanner Pharma Group website holds him out as President of “Tanner Pharma Group,” saying that he “leads the company’s business activities with oversight of the commercial divisions, cross-functional departments, the Corporate Governance Team and the Senior Management Team.”

15. Defendants Bourne and Scalia direct, control, and coordinate the activities of TannerGAP and Tanner

Pharma UK from the corporate headquarters of Tanner Pharma Group in Charlotte, North Carolina.

GENERAL ALLEGATIONS

A. Creation of FSMS

16. Laird Q. Cagan and Jim Mao established FSMS in March 2020 at the beginning of the COVID-19 pandemic in order to source personal protective equipment (“PPE”) and other COVID-related products.

17. FSMS’s President, Mr. Cagan, is Managing Director and co-founder of Cagan McAfee Capital Partners, LLC, a private investment firm. Mr. Cagan has been actively involved in over 40 high-growth companies over the past 30 years as investor, founder, board member, and CEO in a variety of industries including Healthcare and Medical Technologies. He has assisted more than 10 companies in which he had ownership interests to become publicly traded on a U.S. exchange; over a billion dollars in equity capital has been invested in those companies. Before founding Cagan McAfee, Mr. Cagan worked at Goldman, Sachs & Co. and Drexel Burnham Lambert, and earned a BS, MS and MBA from Stanford University.

18. FSMS’s Treasurer, Mr. Mao, is the founding and managing partner of Citta Capital, a Silicon Valley based venture capital firm focused on investing in early growth stage technology startups in a variety of industries including Healthcare Technologies. Before founding Citta, he was a Partner of WestSummit Capital, a leading global technology growth investor firm that focuses on companies in North America and China. Before that, Mr. Mao was a seasoned senior executive in both start-up and established companies. He co-authored 5 US patents. A native Chinese speaker, Mr. Mao earned a BA and MA

from the University of Waterloo in Ontario, Canada and an MBA from the University of Southern California.

19. In the early days of the pandemic, governments, hospitals, and healthcare providers around the world struggled to source the PPE, diagnostic tests, and medical devices necessary to protect healthcare workers and care for patients. Matters were made more desperate when unscrupulous manufacturers and distributors began to flood the market with cheap, ineffective, and even counterfeit products that put lives in further danger.

20. Confident that they could leverage their expertise and network of reliable manufacturers to aid in the global response to this historically unprecedented crisis, Messrs. Cagan and Mao founded FSMS. Almost immediately, they set to work 16-hour days, procuring and delivering badly needed medical supplies to providers in some of the world's hardest hit communities, including a million high-quality masks to Mount Sinai Hospital in New York—the epicenter of the pandemic—in those dark, early days, when PPE was a matter of life or death for hospital staff.

21. Believing that they could do more, in June 2020, FSMS's Mr. Cagan posted a general inquiry on the website of the Young Presidents Organization (<https://www.ypog.org>), an online leadership and networking community where chief executives exchange thoughts and share ideas. FSMS's post, which was not targeted to any specific individuals or entities, sought partners who could assist with the work of responding to the crisis. The post's subject line read: "Seeking advice to create a global sales channel partners network for PPE."

B. June 2020: Defendants' Early Focus on Rapid Tests and Promise Not to Circumvent FSMS

22. On June 2, 2020, Jonathan Bracey e-mailed FSMS's Laird Cagan. Mr. Bracey noted that he was reaching out to FSMS through and on behalf of Raymond "Banks" Bourne, the founder and CEO of Tanner Pharma Group.

23. In this initial e-mail to FSMS, Mr. Bracey described Tanner Pharma Group as "international distributors of mainly pharmaceutical products" who "ship to around 150 counties every month with an established global partner network." He added that many customers "are coming to us with PPE enquiries" and "we are actively looking for appropriate partners to support that...so your email was timely!" His message came from an e-mail address with an "@tannerpharma.com" domain and his signature block identified him as "EVP Corporate Development" of Tanner Pharma Group. (Mr. Bracey's LinkedIn profile similarly holds himself out as "Executive Vice President, Corporate Development of Tanner Pharma Group.")

24. After an initial conversation, Mr. Bracey wrote to FSMS's Mr. Cagan "I need to catch up with my boss (who is in Charlotte) and we will be in touch." The next day, Mr. Bracey wrote: "we would like to follow up with a call asap" and reiterated "Steve Scalia is our Company President—based in Charlotte." He added that Tanner Pharma Group wanted to focus on "rapid test kits and prices" from a supplier Mr. Bracey called Healgen. ("Healgen" is the U.S. subsidiary of Orient Gene.)

25. On June 4, Mr. Bracey reported to Defendant Scalia that FSMS "can get us the Healgen (or as [Cagan] put it the Orient Gene Biotech...) rapid test kit"

26. Orient Gene is a well-respected manufacturer of medical supplies and devices with a reputation of producing high-quality and reliable products. FSMS's

Mr. Mao had established a relationship with Orient Gene based on his own excellent reputation developed through years of working on projects in China, including the manufacture of high-quality medical supplies. FSMS had already done business with Orient Gene. In ordinary times, FSMS's trusted business relationship with Orient Gene would have been valuable. In the midst of a global pandemic characterized by unrestrained demand and a fraught supply chain, the relationship was priceless.

27. By the time that Mr. Bracey reached out to FSMS at Defendant Bourne's behest, FSMS already had negotiated and executed a Framework Purchase Agreement with Orient Gene and Healgen (entered into on May 25, 2020, and which contained a non-circumvention provision) for the purchase of antigen rapid test kits and other medical supplies. FSMS had already sold Orient Gene products in the first half of 2020.

28. Following initial communications and conversations between Mr. Cagan of FSMS on the one hand and Defendant Scalia and Mr. Bracey of Tanner Pharma Group on the other, Defendant TannerGAP and FSMS executed a Mutual Non-Disclosure and Non-Circumvention Agreement (the "Non-Circumvention Agreement") on June 8, 2020. The Non-Circumvention Agreement recited that FSMS "has relationships with manufacturers of various personal protection equipment ('PPE') including, but not limited to . . . diagnostic rapid tests," and that TannerGAP "has relationships with healthcare distributors who purchase such products." The recital also confirmed the parties' "desire to form a business relationship to sell PPE to such consumer retailers." The agreement confirmed that FSMS's relationships with manufacturers of PPE and diagnostic rapid tests "are considered **Personal Relationships** to [FSMS]." The agreement described its purpose as

allowing each party to “make introductions of relationships” to the other and effectuate the parties’ “desire to protect those relationships from circumvention by the other Party.”

29. TannerGAP, acting “for itself and for its affiliated entities,” promised that “it shall not conduct business with any Personal Relationships of [FSMS], or sources or contacts of [FSMS], that are originally made ... available by [FSMS]..., at any time or in any manner, without the express written permission (not to be unreasonably withheld) of [FSMS].”

30. TannerGAP also agreed to “indemnify [FSMS] against any losses and liabilities arising out of the disclosure or use of any Confidential Information by the Recipient other than as authorized in this Agreement.”

31. Also on June 8, 2020, Defendant Scalia promised to send FSMS a distribution agreement to “memorialize our partnership.” Defendant Scalia also indicated that “JB [Jonathan Bracey] will continue to be your primary POC [Point of Contact]” and further noted that “[w]e are working on a simple draft Distribution Agreement to memorialize our partnership JB will drive this from our side.”

32. On June 9, 2020, in an internal Tanner Pharma Group email, Defendant Scalia indicated an intention to “bid on Rapid Test tenders” with FSMS in a “profit sharing” arrangement.

33. On June 10, 2020, Defendant Scalia sent a draft distribution agreement to FSMS. He asked FSMS to “[t]ake a close look at the profit sharing language in the Unit Price section.”

34. The draft agreement recited that FSMS is engaged in “the supply and sale of finished Personal

Protective Equipment and Diagnostic Rapid Tests” and that TannerGAP wanted to sell “personal protective equipment (including, but not limited to, respirators, masks, gloves, gowns, bodysuits and hand sanitizer) and diagnostic rapid tests (including, but not limited to, the Healgen IgG/IgM Antibody Rapid Test Cassette) that FSMS has or will procure from various manufacturers in international markets.”

35. The draft agreement set the price for covered products as “the true cost of the product as purchased by FSMS from its manufacturer/supplier, plus half of the Gross Profit collected from the sale of the product to TANNER’S customer.”

36. Also on June 3, 2020, Mr. Bracey requested a call with FSMS to discuss various items, including “Rapid tests.”

C. FSMS Procures Sample Test Kits for the UK Government

37. On August 20, 2020, Mr. Bracey asked for and received internal confirmation that Tanner Pharma Group had executed an agreement with FSMS containing a non-circumvention clause.

38. On information and belief, Defendants had already identified an opportunity for Tanner Pharma Group to sell large quantities of antigen rapid test kits to the UK Government’s Department of Health and Social Care.

39. On August 29, 2020, Mr. Bracey informed FSMS that Tanner Pharma Group had an urgent opportunity to bid on selling a large amount of antigen rapid test kits to the UK Government. To compete for the UK Government opportunity, Tanner Pharma Group needed to provide 500 units for quality testing as quickly as possible. He

stressed the urgency of procuring the 500 units. As Mr. Bracey put it in an internal email to Defendant Scalia and several TannerGAP employees, “[w]e might have a fast ball opportunity with FSMS in the uk.”

40. On September 2, 2020, as a result of FSMS’s relationship with Orient Gene, FSMS’s Mr. Mao was able to procure the 500 units for testing; these were in a shipment that Orient Gene had already sent to the United States for another customer. At Mr. Mao’s direct personal request to Orient Gene’s Chairman, Xiaoliang Fang, Orient Gene agreed to divert the 500 units that had already been allocated to other customers to FSMS.

41. At Defendants’ request, FSMS coordinated the pickup of these samples from Orient Gene’s U.S. subsidiary, Healgen, in Houston, Texas, by Tanner Pharma Group’s third-party logistics vendor, which rushed them to Tanner Pharma UK’s personnel standing by in the UK.

42. Because the 500 sample units were a small order, Orient Gene charged FSMS a price of \$5.00 per unit; lower prices would be available for larger orders. Orient Gene promised to rebate that price should a larger order follow, and FSMS’s Mr. Cagan reported that fact to Defendants. Since the UK Government would not pay for the 500 units, FSMS and the Corporate Defendants agreed to split the cost. On September 18, 2020, TannerGAP wired a payment to FSMS that included its \$2,500 share of the cost of the 500 units.

43. The 500 units arrived in the UK on September 7, and on September 9, 2020, Mr. Bracey informed FSMS that “we passed first stage of validation” and said “can u [sic] call me ASAP.”

44. The 500 units that FSMS procured were critical to Tanner Pharma UK's ability to obtain contracts with the UK Government. Without FSMS's efforts, it would likely have been impossible for Tanner Pharma UK to source high-quality antigen test kits in order to compete for the UK Government opportunity. Without FSMS's direct intervention with Orient Gene, shipping the sample units to the UK Government from China would have taken at least a month and possibly longer, instead of only a few days—if the units could have been secured at all. FSMS's ability to get these samples and get them quickly was critical to Tanner Pharma UK even being considered for the UK Government opportunity. As Mr. Bracey himself put it, the UK Government had “£500m set aside for these test kits...big prize for first to cross the line with this race.” (£500 million was equivalent to about \$650 million in September 2020.)

45. On September 10, 2020, Mr. Bracey informed FSMS that he had spoken with [REDACTED] and “[t]hey are pushing us to get the next kits to them ASAP (they have more companies in the mix than just us it seems!).” According to Mr. Bracey, the UK Government urgently needed an additional 4,250 samples to conduct further clinical testing to validate the efficacy of the product: “Can you press [Orient Gene] on this please ASAP and let us know?”

46. Once again, FSMS answered the call. FSMS worked with Orient Gene to obtain the additional 4,250 units on an urgent basis; the units arrived in the UK on September 23, 2020. Again, because the 4,250 sample units were a small order, Orient Gene charged FSMS a price of \$5.00 per unit. The Corporate Defendants agreed to split the cost, and indeed TannerGAP's September 18,

2020 wire to FSMS included its 50% share of the cost of the 4,250 units.

47. Thus, due to FSMS's existing relationship with Orient Gene and its direct appeal for expedited treatment under special circumstances, FSMS was able to source the thousands of units needed to win the UK Government opportunity, despite extraordinarily high demand, a chaotic marketplace, and backlogs for new orders. Getting the above two batches of products to the UK Government for trial testing ahead of other competitors ensured that Orient Gene's products were the first antigen test certified by UK authorities, locked in the first-mover advantage, and paved the way for what would become a multi-billion-dollar relationship. Without FSMS's efforts, none of this would have been possible.

48. FSMS did this work in good faith and in reliance on the integrity and honesty of Defendants, and with the understanding that the commercial relationship between FSMS and the Corporate Defendants would be a "profit split" in which the Corporate Defendants would pay FSMS its true direct costs, plus half of the gross profit collected from the sale of the product to the Corporate Defendants' customers.

D. The Distribution Agreement

49. On September 11, 2020, TannerGAP and Tanner Pharma UK signed a Distribution Agreement with FSMS. The contract defined these two entities as "TANNER."

50. The contract recited that "TANNER and FSMS desire to establish a relationship, pursuant to which FSMS (or its appropriate affiliates) will supply TANNER Covered Products for the Territory (as those terms are hereafter defined), and TANNER, desires to purchase

Covered Products for supply in the Territory (as hereinafter defined), on the terms and conditions set forth below.”

51. Section 4 expressly included Orient Gene antigen rapid test kits in the definition of “Covered Product(s).”

52. Section 6 provides: “TANNER will collaborate with FSMS prior to TANNER submitting a bid in connection [with a tender to a government], including the estimated quantities of Covered Products to be supplied pursuant to such tender.”

53. Section 7.1 provides: “TANNER shall collaborate with FSMS prior to quoting, shipping or otherwise distributing Covered Product in any country for the first time.”

54. Section 8.1 provides: “The Parties shall work together to satisfy Covered Product requirements to TANNER customers.”

55. Section 8.2 provides: “TANNER agrees that it shall purchase Covered Products from FSMS for use in accordance with the terms of this Agreement.”

56. Section 9 set the price for each Covered Product as “the true direct cost (the ‘Direct Cost’) of the product as purchased by FSMS from its manufacturer/supplier, including all Direct Costs of transportation and duty, tariffs and taxes, plus half of the Gross Profit collected from the sale of the product to TANNER’s customer.”

57. Section 10 provides:

If TANNER identifies an opportunity to quote the Covered Products for a customer in the Territory, then TANNER will collaborate with FSMS to set the best price to maximize the likelihood of winning the business and making a

profit. If TANNER's quote is successful and TANNER desires to purchase units of a Covered Product, then TANNER shall deliver a written or electronic purchase order (each, a "Purchase Order" or "PO"), during the Distribution Term for the Covered Products stating the quantity of units of the Covered Product This Agreement shall allow TANNER to enter into a direct PO or contract with the manufacturer of a Covered Product so long as the financial arrangement outlined in Section 9 above shall be maintained as if TANNER purchased Covered Products directly from FSMS with a 50% gross profit participation to each Party.

58. Section 11 provides that "TANNER and FSMS will work together on logistics for shipment of Covered Products"

59. Section 14.3 requires that: "TANNER shall use its commercially reasonable efforts to ensure that the Covered Products are imported into the Territory with a minimum of delay and to attend to and complete in a proper and efficient manner all necessary documents and formalities in connection with such importation."

60. Section 16.4 provides that, in the case of termination by either party, the previously executed Non-Circumvention Agreement would "remain in place and in effect and neither party shall circumvent the other Party with any relationship originally established by the first Party To be clear, the manufacturer of any Covered Product shall be considered a prior relationship of FSMS in regard to the Covered Product and TANNER will not do any business involving of said Covered Products from such manufacturer."

61. Section 19.1 provides that the parties will “implement regular product reporting transmitting to FSMS mutually agreed data elements (“Data Reports”), on at least a monthly basis, so that FSMS will receive, for all ordered Covered Product, information as permitted by Applicable Law, regarding the quantity, use and destination of all ordered Covered Products.”

62. No provision of the Distribution Agreement purports to limit joint and several liability between TannerGAP and Tanner Pharma UK in the event of a breach.

E. Defendants Circumvent FSMS’s Relationship With Orient Gene

63. Even before signing the Distribution Agreement, Defendants began coopting FSMS’s relationship with Orient Gene. In a telephone conversation on or about September 1, 2020, Defendant Scalia asked FSMS to include language in the Distribution Agreement permitting Defendants to place orders directly with Orient Gene. On information and belief, Defendants Scalia and Bourne insisted on inserting this language so that they and the Corporate Defendants could later claim that FSMS had given up its profit-sharing rights. Unsuspecting of the ruse, FSMS agreed, but made it clear that it was doing so “as an accommodation,” and that the financial arrangement outlined in the contract “shall be maintained as if TANNER purchased product directly from FSMS with a 50% gross profit participation to each Party.”

64. In a communication to another potential customer on September 7, 2020, regarding “Rapid Antigen / Antibody test kits,” Mr. Brace represented that Tanner Pharma Group was “*working directly with the manufacturer*” on both of these items. The Antigen kit

is the latest version and is proving very popular.” This statement revealed Defendants’ true state of mind—even before signing the Distribution Agreement on September 11, they already intended to cut FSMS out of the loop, work directly with Orient Gene, and take the money for themselves. That is to say, Defendants never intended to honor their promise of “a 50% gross profit participation to each Party.”

65. Consistent with this intention, on September 9, 2020, Mr. Bracey began pressuring FSMS to put Defendants directly in touch with Orient Gene: “really need the account opening form signed by [Orient Gene] and a call set up with them ASAP” and “[r]eally need to talk with them [Orient Gene] ASAP please.” FSMS provided Defendants with the requested Orient Gene account opening form later that day.

66. Mr. Cagan asked what he needed to speak to Orient Gene about, to which Mr. Bracey responded: “Who our point of contact is - and talking with them directly. How the process works for them. Setting up our account (QA and finance matters related to that). All standard stuff that you do with a new supplier. **But we need to talk with them directly**[.]”

67. On September 10, 2020, after repeated requests, FSMS agreed to set up a call with Orient Gene, which was held later that day. Mr. Bracey wrote: “Appreciate the intro to OG.”

68. By September 15, 2020, Tanner Pharma Group executives had already set up direct calls among themselves, Elsa Zhao (Executive Vice President of Sales for Orient Gene), and representatives of the UK Government, cutting out FSMS. Defendants concealed this fact from FSMS and did not include FSMS in the written correspondence or telephone calls.

69. On September 21, 2020, Mr. Bracey reported in an internal communication that “Tanner Pharma UK Ltd is close to having an NDA executed with Healgen and Orient Gene” and asked Defendant Scalia whether it would be “faster” “to put in place a joinder agreement between DHSC - Tanner Pharma UK Ltd - Healgen/OG?” Later that day, Mr. Bracey followed up: “[W]e can take Healgen off these agreements. We only need to include Orient Gene (who we are purchasing the product from of course).” Defendants did not inform FSMS of this development.

70. On September 22, 2020, Tanner Pharma UK executed a non-disclosure agreement with the UK Government. Defendants did not inform FSMS of this development.

71. On September 23, 2020, representatives of Defendants and the UK Government discussed the contents of a “Joinder Agreement” to send to Orient Gene as soon as possible. Defendants Bourne and Scalia and several employees of Tanner Pharma Group’s Legal Department located in North Carolina were involved in these discussions. Defendants did not inform FSMS of these discussions.

72. On or about September 23, 2020, Tanner Pharma UK entered into a direct, secret contract with Orient Gene to purchase antigen rapid test kits to sell to the UK Government. Defendants did not inform FSMS of this and in fact induced Orient Gene to keep it a secret from FSMS.

73. Between September 21 and September 23, 2020, Tanner Pharma UK issued Purchase Orders directly to Orient Gene for [REDACTED] units at a price of [REDACTED] per unit. Defendants did not inform FSMS of this fact and indeed induced Orient Gene to keep it secret from FSMS.

F. Defendants' Active Concealment and Deception

74. On September 21, 2020, Mr. Bracey wrote to a group of TannerGAP and Tanner Pharma UK employees, copying Defendant Scalia and Mr. Taylor, requesting that the employees “keep the details limited to only those within the Company — and UK Government — and Orient Gene/Healgen who are working on this.” Defendants had earlier referred to FSMS as their “partner”; Mr. Bracey now reiterated “keep the subject close to us; not one for discussion with our partners (at least not yet).”

75. On September 29, 2020, Mr. Mao asked for an update. Mr. Bracey did not tell FSMS that Tanner Pharma UK had entered into a contract with Orient Gene. He did not tell FSMS that Tanner Pharma UK had ordered hundreds of thousands of units from Orient Gene. He did not tell FSMS the price Defendants had negotiated with Orient Gene. He responded deceptively: “waiting to hear test results next week.”

76. On October 3, 2020, Tanner Pharma UK and the UK Government signed a contract for the supply of antigen rapid test kits from Orient Gene in two shipments for a total price of £10 million (equal to about \$13 million): the first, for [REDACTED] units; and the second, for [REDACTED] units. Defendant Bourne signed the contract on behalf of Tanner Pharma UK in his capacity as Director. Defendants did not inform FSMS of this fact.

77. On October 8, 2020, Mr. Bracey wrote to TannerGAP employees in North Carolina that he was having a call with Defendant Scalia about the “UK Gov/Orient Gene project” and that he was “Trying to finalise the ‘next’ PO.....big numbers...!!!!” He further stated that it would be “nearly 20x the current order!!!

BIG!!!!!!” Defendants did not inform FSMS of this development.

78. Mr. Cagan asked for an update on October 9. Mr. Bracey did not tell FSMS that Tanner Pharma UK had entered into a contract with Orient Gene and had already ordered hundreds of thousands of units from Orient Gene. He did not tell FSMS the price Defendants had negotiated with Orient Gene. He did not mention the contract with the UK Government, or the “next” PO with “big numbers.” He responded deceptively: “Still waiting for 3B results. Swab samples have been given to uk gov for review. Will update u when I hear from them.”

79. On October 13, Mr. Cagan asked for another update. Mr. Bracey still said nothing about the contracts with the UK Government or Orient Gene, the millions of units ordered, the prices, or anything else of substance. Again, he stalled: “Apologies for the delay. [REDACTED]”

I need to send you some questions that we have to submit to them. About to drop it over to you on an email. And then we shud get some time to talk it thru. But swabs got a big thumbs up today!! The lateral flow tests are still pending 3B field tests results. They need patients to test them on and apparently that part of the process takes time.”

80. On October 19, Mr. Cagan asked for results of the 3A test. Mr. Bracey stalled again—"I don't think we have any specifics. Will check. But it passed 3a. Still waiting to hear about 3b. I chased them on Friday."

81. On October 21, 2020, Mr. Bracey stated in an internal email that the cost Tanner Pharma UK paid per rapid test kit from Orient Gene for the UK Government contract was [REDACTED]

82. On October 22, 2020, Defendant Scalia wrote to FSMS: “[W]e are processing a conditional transaction for Orient Gene Antigen Rapid Test Cassettes for the UK Government.... a total of 2mm units.... This is an estimate of how the numbers are shaping up:... **Cost per unit: \$5/ea.**” (Emphasis added.) This statement was false and intended to mislead FSMS, as Tanner Pharma UK paid Orient Gene █████ per test, and Tanner Pharma UK had already signed a contract with the UK government, and indeed was already working on a much bigger order.

83. FSMS immediately responded to Defendant Scalia, stating: “While we are pleased with the progress of a first large order, I’m disappointed you have progressed without informing us. You have obviously had numerous conversations directly with OG on this as product is already in the UK. As discussed, we asked to be included in all conversations and correspondence with OG. Beyond being informed, it is important for us to [] lead any negotiations with them, including on pricing.”

84. On October 23, 2020, Messrs. Cagan and Mao spoke with Defendant Scalia and Mr. Bracey, who finally admitted that Tanner Pharma UK had entered into a direct contract with Orient Gene. FSMS requested all correspondence and agreements with Orient Gene pursuant to the requirements of the Distribution Agreement. Defendant Scalia and Mr. Bracey refused to provide the information, referencing a non-disclosure provision included in Tanner Pharma UK’s contract with Orient Gene.

85. In a follow-up call on October 24, 2020, Defendant Scalia and Mr. Bracey again refused to provide FSMS with a copy of the Orient Gene contract. During this call, FSMS referenced the requirements of the Distribution Agreement and stated that Defendants should have

involved them in negotiations with Orient Gene concerning the price of test kits. Defendant Scalia claimed “now Tanner was doing all the work on the sourcing side” and that FSMS did not deserve to be paid other than at the initial sample price of \$5 per unit. When pressed by FSMS that it could have helped secure a better price to maximize the profit under the Distribution Agreement to both parties, Defendant Scalia admitted that they had, in fact, negotiated a lower price than \$5 per unit, saying, in words or substance: “we’re not stupid, we did get a better price.”

86. In early November 2020, ahead of sending FSMS a further profit split reconciliation, Defendant Scalia, Mr. Bracey, and Maryori Alvarenga (a TannerGAP executive based in North Carolina) internally discussed withholding certain information from FSMS regarding the UK tenders. Specifically, Defendant Scalia confirmed to Mr. Bracey: “Yes JB. Let this ride for now (i.e. don’t engage with FSMS on invoices related to Rapid Tests). We’re going to be transparent on the sales side (customer side). I have what I need to do that – just need the cost and invoice for shipping the 2mm units.”

87. On November 15, 2020, Defendant Scalia provided FSMS with what he claimed was “the profit split in accordance with our agreement” for Tender No. 1 in the amount of 2,000,000 units. In this “Profit Share - Initial Calculation” chart, Defendant Scalia listed a Purchase Order and four corresponding invoices reflecting a cost basis of \$5.00 per unit. In total, after deducting shipping expenses and splitting the purported gross profit, Defendant Scalia stated that FSMS’s share was \$1.2 million. These computations were false and understated the amount owed to FSMS.

88. By January 2021, the UK Government had ordered 56.25 million units from Tanner Pharma UK.

89. On February 11, 2021, Defendant Scalia sent FSMS reconciliation sheets purporting to compute FSMS's share of gross profits on the first three tenders from the UK. These reconciliations all used \$5.00 per unit as the cost, despite the fact that the true cost was far less. Defendant Scalia said that Tender No. 1 had "already completed, [was] reconciled and paid to FSMS in November." He claimed that Tender No. 2 had generated a profit share of \$5.3 million for FSMS. Regarding Tender No. 3, Defendant Scalia claimed that because the antigen rapid test kits were sold to the UK Government for less than the \$5.00 per-unit price purportedly paid to Orient Gene, no profit split was owed. In this e-mail, Defendant Scalia also admitted that Tanner Pharma Group had "smaller contracts going to non-government customers that will trigger a profit split this month."

90. Public source information indicates that the UK Government has awarded nearly £1.5 *billion* (equivalent to approximately \$2 billion) in contracts to Tanner Pharma UK for the sale of Orient Gene's antigen rapid test kits through August 2022.

91. On information and belief, TannerGAP, Tanner Pharma UK and other affiliates continue to sell Orient Gene-supplied products to the UK Government and other customers, without paying the amounts owed to FSMS.

G. Turks and Caicos Sales

92. In January 2021, Defendants Bourne and Scalia and employees of TannerGAP and Tanner Pharma UK began working on supplying antigen tests to the Ocean

Club Resorts in Turks and Caicos based on their “access to Antigen Rapid Tests from Orient Gene.”

93. On January 20, 2021, employees of the TannerGAP and Tanner Pharma UK in England and in North Carolina contacted Elsa Zhao (Vice President of Sales) of Orient Gene regarding “more enquiries [] now for OG kits (probably due to the business we have completed with the UK Gov and it being on their website)[.]”

94. On January 21, 2021, the Turks and Caicos Hotel & Tourism Association (the “TCHTA”) placed an order with TannerGAP for [REDACTED] units of Orient Gene’s antigen rapid test kits.

95. On January 21, 2021, Tanner Pharma UK referred the customer to TannerGAP in response to a second inquiry for purchase of antigen rapid tests from a pharmacy/wholesaler in Turks and Caicos: “Please let me pass you over to Gaby [Bedoya], who will be able to assist you in taking your enquiry forwards. Gaby is our contact ***within our Gap division, based in NC.***” (emphasis added). In response, Ms. Bedoya said: “Following up to your inquiry kindly note that the product we have access to is the Orient Gene test kits, we have actually suppl[ied] them to the UK Government.”

96. On January 28, 2021, TannerGAP generated a Purchase Order (#PO-21216) addressed to Orient Gene for the purchase of [REDACTED]

—the exact amount required for the TCHTA transaction.

97. On January 29, 2021, Ms. Alvarenga (EVP of TannerGAP) responded to an ongoing e-mail thread among employees of TannerGAP and Tanner Pharma UK concerning a shipping and U.S. customs issue that

threatened to derail the TCHTA deal and proposed a solution: “Would it help if we move the [TCHTA] transaction to Tanner Pharma UK books?”

98. On February 1, 2021, Tanner Pharma UK submitted a Purchase Order (#PO-21252) to Orient Gene for the TCHTA transaction [REDACTED]

—once again, the exact amount needed for the TCHTA transaction. On information and belief, this purchase order replaced the purchase order (#PO-21216) that had previously been generated by TannerGAP and reflected the transfer of the TCHTA transaction to “Tanner Pharma UK’s books,” as directed by Ms. Alvarenga.

99. On January 30, 2021, TannerGAP’s Ms. Bedoya informed Orient Gene (with a cc: to Mr. Bracey, Lorena Mora, and others) that they were working on another two potential orders for two additional customers. Ms. Bedoya requested that Orient Gene “honor” the [REDACTED] price per test. Orient Gene responded that it would.

100. In March 2021, Tanner Pharma UK completed additional orders of Orient Gene’s antigen rapid test kits to the Caribbean and Turks and Caicos. Mr. Bracey noted that Tanner Pharma Group would need to provide FSMS with a “reconciliation” consisting of the “Buy Price,” “Sell Price,” and “GP [Gross Profit] (with shipping etc taken into account).”

101. On April 1, 2021, Defendant Scalia sent FSMS a reconciliation for sales of Orient Gene’s antigen rapid test kits to the Turks and Caicos Islands. Defendant Scalia again used the fake price of \$5.00 per unit as the cost basis, even though that was not the true cost, and remitted to FSMS a purported 50% profit share of approximately \$26,500. This was false and deceptive.

102. On April 15, 2021, Defendant Scalia sent another false and deceptive reconciliation to FSMS for transactions to the Turks and Caicos Islands using the fake price of \$5.00 per unit.

103. In May 2021, employees of TannerGAP and Tanner Pharma UK continued to work together to sell Orient Gene's antigen rapid test kits in additional markets, including Australia, Mexico, Brazil, and Argentina. Defendants did not collaborate with FSMS in pursuing these opportunities in new markets and failed to involve or otherwise inform FSMS regarding these pursuits.

PERSONAL JURISIDCTION ALLEGATIONS

104. This Court has personal jurisdiction over Defendants for four reasons: (A) consent by the Corporate Defendants; (B) general jurisdiction; (C) specific jurisdiction; and (D) jurisdiction over Tanner Pharma UK as an alter-ego of Tanner Pharma Group.

A. Consent By the Corporate Defendants

105. Section 8.1 of the Distribution Agreement, signed by TannerGAP and Tanner Pharma UK, expressly incorporates Tanner Pharma Group's "standard terms and conditions." Although the Distribution Agreement recites that those terms and conditions are attached as an exhibit, Defendants did not physically attach them to the contract. However, they are on Tanner Pharma Group's website. They include a North Carolina choice of forum clause, which provides: "Each party hereby irrevocably consents to the personal jurisdiction of [the] courts [of the State of North Carolina] and each party hereto waives and agrees that it shall not assert that such forum is inconvenient or improper."

B. General Jurisdiction

106. The Court has general jurisdiction over all Defendants.

107. A corporation is subject to general jurisdiction in the state where it is incorporated and in the state of its principal place of business. A corporation's principal place of business is the place where its officers direct, control, and coordinate its activities. Individuals are subject to general jurisdiction in their state of domicile.

108. TannerGAP's state of incorporation is North Carolina. Its principal place of business is also in North Carolina, because North Carolina is the place where its officers direct, control, and coordinate its activities.

109. Tanner Pharma UK's principal place of business is in North Carolina, because North Carolina is the place where its officers direct, control, and coordinate its activities.

- a. Defendant Bourne, who is Tanner Pharma UK's sole Director, works and resides in North Carolina. He was the ultimate decisionmaker for Tanner Pharma UK.
- b. Defendant Scalia, who is the President of Tanner Pharma Group, works and resides in North Carolina. At all relevant times, he was the "eyes and ears" of Defendant Bourne, providing general oversight and reporting to Bourne. From his North Carolina office, he functioned as the "boss" of Tanner Pharma UK. He provided instructions to Tanner Pharma UK employees on how they dealt with the UK Government, FSMS, Orient Gene, and other entities. With Defendant Bourne, he controlled the strategic decisions of

Tanner Pharma UK and instructed Tanner Pharma UK employees on profit-sharing and contractual agreements. Among other things, Scalia decided on the terms of contracts such as the Distribution Agreement with FSMS.

- c. William “Bill” Taylor, who works and resides in North Carolina, serves as General Counsel for Tanner Pharma Group and its related entities, including Tanner Pharma UK. From his office in North Carolina, Mr. Taylor provided counsel and legal services to Tanner Pharma UK, including with respect to the Distribution Agreement and Non-Circumvention Agreement.
- d. Tanner Pharma UK’s Rule 30(b)(6) witness testified that the “head office” in Charlotte provided services to Tanner Pharma UK: “it would be what I would describe as head office functions in Charlotte, like legal, like finance, and they perform those activities for us.”
- e. Tanner Pharma Group’s website describes itself as “a 20-year old specialist pharmaceutical services provider headquartered in Charlotte, NC USA.”
- f. At all relevant times, no contract could be signed on behalf of Tanner Pharma UK other than by Defendant Bourne who lives and works in North Carolina.
- g. At all relevant times, no payment could be made from Tanner Pharma UK’s bank

account without the approval of Defendant Scalia or the Controller of Tanner Pharma Group, who worked in North Carolina.

- h. At all relevant times, no purchase order could be issued by Tanner Pharma UK without approval from specified authorized individuals who worked in Charlotte, North Carolina.
- i. At all relevant times, Tanner Pharma UK's email, inventory, and financial control systems were managed from North Carolina.
- j. At all relevant times, the compensation of Tanner Pharma UK's executive-level employees was set by Defendants Bourne and Scalia in North Carolina.
- k. At all relevant times, the decision of what entity within the Tanner Pharma Group would be allocated revenue was made by senior executives in North Carolina, including Defendant Scalia, Mr. Taylor, and Tanner Pharma Group's head of finance, all of whom lived and worked in North Carolina.

110. Defendant Scalia is domiciled in North Carolina.

111. Defendant Bourne is domiciled in North Carolina.

C. Specific Jurisdiction

112. The North Carolina General Assembly has enacted a long-arm statute allowing the courts of the state to exercise personal jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth

Amendment. This standard is met when a defendant has purposefully availed itself of the privilege of doing business under the laws of the state. The analysis typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there, looking to the negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.

113. Here, Tanner Pharma UK, acting through its Director, employees, and agents, negotiated, executed, performed, and breached the Distribution Agreement and the Non-Circumvention agreement in North Carolina.

114. *First*, agents of Tanner Pharma UK located in North Carolina negotiated the two contracts at issue, including Defendant Scalia, as well as the Tanner Pharma Group Legal Department. Although Defendant Scalia was not an *employee* of Tanner Pharma UK, he was still an agent of Tanner Pharma UK, exercising supervisory authority over it at the behest and instruction of Defendant Bourne—the sole Director. Defendant Scalia, in turn, supervised the Legal Department. According to Tanner Pharma UK's Rule 30(b)(6) witness, Defendant Scalia “ultimately made the decision of what went in and what didn't” in the Distribution Agreement with FSMS, while the “legal aspects” of the contract “would have been worked on by the legal team” in North Carolina.

115. *Second*, agents of Tanner Pharma UK executed the two contracts in North Carolina. Defendant Bourne executed the Distribution Agreement in North Carolina and Tanner Pharma Group's General Counsel, Mr. Taylor, executed the Non-Circumvention Agreement in North Carolina.

116. *Third*, Defendant Bourne as Director of Tanner Pharma UK and Defendant Scalia as President of Tanner

Pharma Group engaged in extensive conduct in North Carolina related to the performance and breach of the Distribution Agreement and Non-Circumvention Agreement.

- a. At all relevant times, Defendant Bourne exercised his power as the sole director of Tanner Pharma UK to direct, control, and coordinate the activities of the corporation from his seat in North Carolina. On information and belief, both Defendant Scalia and Mr. Bracey regularly reported to and took direction from Mr. Bourne concerning the strategic priorities of Tanner Pharma UK, its business relationship with FSMS, and its efforts to sell Orient Gene products to the United Kingdom and other customers.
- b. Defendant Scalia, who served as Defendant Bourne's principal agent in directing, controlling, and coordinating the activities of Tanner Pharma UK, exercised his authority in North Carolina. Mr. Bracey described Defendant Scalia as his "boss." In this role, Defendant Scalia personally and at the behest of Defendant Bourne directed employees and agents of Tanner Pharma UK to engage in deceptive and unfair conduct, including by instructing these employees and agents to conceal or withhold information from FSMS as part of Defendants' scheme to deceive FSMS about the price paid to Orient Gene and the profits owed to FSMS under the Distribution Agreement.

117.*Fourth*, Tanner Pharma UK, through Mr. Bracey and at the behest of Defendants Bourne and Scalia, regularly directed or otherwise relied on employees of TannerGAP based in North Carolina to perform services on behalf or for the benefit of Tanner Pharma UK while those TannerGAP employees were in North Carolina. These North Carolina employees, who performed services in support of the UK deal and other transactions subject to the Distribution Agreement, were agents of Tanner Pharma UK. For example:

- a. On August 31, 2020, Mr. Bracey directed Lorena Mora to send FSMS the forms necessary to “set up” FSMS as a supplier for Tanner Pharma UK. Ms. Mora is an employee of TannerGAP who provides business development services to the Tanner Pharma Group divisions. She works in Charlotte, North Carolina.
- b. During her 30(b)(6) deposition as corporate representative for TannerGAP, Katie Smoot (who is based in North Carolina) admitted that she and other TannerGAP employees located in North Carolina provided services to Tanner Pharma UK in connection with transactions subject to the Distribution Agreement, including the UK and Turks and Caicos deals.

- c. Tanner Pharma UK obtained legal advice concerning the FSMS relationship from Tanner Pharma Group's General Counsel while he was physically present in North Carolina.
- d. Jim Leonard, Senior Vice President and Global Controller of Tanner Pharma Group located in North Carolina, approved Tanner Pharma UK's purchase orders to Orient Gene for supply to the UK Government.
- e. Tanner Pharma UK's payments to FSMS and to Orient Gene were all approved by Defendant Scalia or Mr. Leonard while both were physically present in North Carolina.
- f. Internal communications produced by the Corporate Defendants during jurisdictional discovery further make clear that Defendant Scalia and a team of TannerGAP employees in North Carolina were routinely responding to and facilitating the UK Government and Turks and Caicos opportunities, including: Ms. Bedoya; Ms. Mora; Ms. Alvarenga; Mr. Leonard; Mr. Taylor; and Catherine Williams, among others.
- g. Mr. Bracey instructed TannerGAP employees in North Carolina to "keep the details limited only to those within the Company — and UK Government — and Orient Gene/Healgen who we are working with" and reminded TannerGAP employees in North Carolina "to keep the

subject close to us” because it is “not one for discussion with our partners.”

- h. In addition, Ms. Bedoya and Ms. Mora served as direct points of contact with Orient Gene and facilitated the purchase of antigen test kits on behalf of Tanner Pharma UK that were ultimately sold to the UK Government.

118.*Fifth*, upon information and belief, Mr. Bracey was physically present in North Carolina in October 2020, at which time he discussed the UK Government – Orient Gene relationship with his boss, Defendant Scalia, and other employees of TannerGAP.

119.*Sixth*, Tanner Pharma UK routinely entered into contracts and other agreements with Orient Gene, the UK Government, and third-parties that included North Carolina choice of law and North Carolina forum selection provisions. For example:

- a. Tanner Pharma UK issued dozens of purchase orders to Orient Gene which incorporated by reference “Tanner’s terms and conditions,” including the North Carolina choice of law and North Carolina choice of forum clauses described above.
- b. Tanner Pharma UK issued several invoices to the UK Government for the sale of Orient Gene antigen tests, which also incorporated by reference “Tanner’s terms and conditions,” including the North Carolina choice of law and North Carolina choice of forum clauses described above.
- c. Tanner Pharma UK entered into at least fifty (50) bilateral contracts with third

parties expressly selecting North Carolina law and a North Carolina forum.

This pattern and practice of selecting North Carolina for the resolution of its legal disputes demonstrates that Tanner Pharma UK has purposefully availed itself of the privileges and responsibilities of doing business in the state such that it would be consistent with traditional notions of fair play and substantial justice if Tanner Pharma UK is required to appear in this forum.

120. *Seventh*, at least some test kits manufactured by Orient Gene were shipped to and stored in TannerGAP's warehouse in North Carolina.

D. Alter Ego Allegations—Tanner Pharma UK

121. The Court may also exercise jurisdiction over Tanner Pharma UK because it is an alter ego of the Tanner Pharma Group, which is headquartered in North Carolina.

122. Tanner Pharma UK was grossly undercapitalized at the time the Distribution Agreement was executed, with a mere £62,000 in shareholder capital. For a company that was about to launch a two-billion-dollar business, this was woefully inadequate.

123. Tanner Pharma UK was also insolvent. It ran an operating loss of £678,000 in 2019, and ended the year with negative shareholder equity of approximately £804,000. In other words, over the life of the company, it had lost about a million dollars, many times the amount of shareholder capital that had been invested.

124. Tanner Pharma UK was being kept afloat through a siphoning of funds from other divisions of Tanner Pharma Group. For example, in 2019, even though it operated at a loss, it received “income from shares in

group undertakings” (*i.e.*, intercompany transfers) that avoided even deeper insolvency.

125. On information and belief, Tanner Pharma UK does not observe corporate formalities and maintain proper corporate records by maintaining records of shareholder meetings, director meetings, or other shareholder actions.

126. Tanner Pharma UK does not have any officers.

127. Tanner Pharma UK is controlled by a dominant stockholder, Defendant Bourne.

128. Throughout the parties’ relationship, Tanner Pharma UK employees and TannerGAP employees communicated to FSMS in a manner suggesting no distinction among any Tanner Pharma Group entities, and with public-facing material such as their website making no such distinction. Similarly, in internal communications, Tanner Pharma UK employees and TannerGAP employees worked seamlessly as a group without distinguishing which entity was an employee’s technical employer. Rather, Tanner Pharma Group employs a “matrix” form of organization in which employees in one location provide services to entities in all locations. It would be unfair to allow Tanner Pharma UK to play a corporate shell game to evade personal jurisdiction in North Carolina, having represented itself as being a part of a unified entity headquartered in Charlotte, North Carolina.

129. Tanner Pharma UK and its affiliates intermingle funds. With regard to a transaction that was originally booked to TannerGAP and then switched to Tanner Pharma UK, Tanner Pharma UK’s Rule 30(b)(6) witness testified: “It’s irrelevant really which division, which entity the transaction would have gone through.”

130. Tanner Pharma UK and its affiliates share their sole director and officer (Defendant Bourne) and their sole controlling shareholder (also Defendant Bourne).

131. Tanner Pharma UK's head office functions are performed by personnel who are housed in common office space from which they control its affiliates.

132. Tanner Pharma UK has a low degree of discretion. It cannot approve a vendor, sell to a customer, issue a purchase order, issue an invoice, cut a check, or agree on terms without approval from someone in Charlotte, North Carolina. Even compensation is set in Charlotte.

FIRST CLAIM

Breach of Contract—Distribution Agreement (Corporate Defendants)

133. FSMS incorporates by reference the foregoing allegations as if set forth herein.

134. The Distribution Agreement is a contract binding on Defendants TannerGAP and Tanner Pharma UK.

135. The Distribution Agreement is governed by Delaware law.

136. Delaware law provides that “[a]n obligation or written contract of several persons shall be joint and several, unless otherwise expressed.” Del. Code Ann. tit. 6, § 2701.

137. No provision of the Distribution Agreement limits or alters the joint and several liability of the signatories to it.

138. Defendants TannerGAP and Tanner Pharma UK breached the contract by:

- a. Failing to purchase Covered Products from FSMS for use in accordance with the terms of this Agreement as required by § 8.2.
- b. Failing to work together with FSMS to satisfy requirements for Orient Gene products to Tanner Pharma UK and TannerGAP customers in violation of § 8.1.
- c. Failing to collaborate with FSMS prior to submitting bids to customers, including the UK Government in violation of § 6;
- d. Failing to collaborate with FSMS prior to quoting, shipping or otherwise distributing Orient Gene products in the UK and elsewhere in violation of § 7.1.
- e. Failing to collaborate with FSMS to set the best price to maximize the likelihood of winning business and making a profit upon identifying an opportunity to quote the Covered Products for a customer, in violation of § 10.
- f. Failing to deliver purchase orders to FSMS for Covered Products or, alternatively, maintaining the financial arrangement as if Tanner Pharma UK and TannerGAP had purchased Covered Products directly from FSMS with a 50% gross profit participation going to FSMS, in violation of § 10.
- g. Failing to work together with FSMS on logistics for shipment of Orient Gene products, in violation of § 11.

- h. Failing to use commercially reasonable efforts to ensure that the Covered Products are imported into the Territory, in violation of § 14.3.
- i. Doing business with Orient Gene, the manufacturer of Covered Products, in violation of § 16.4.
- j. Failing to participate in regular product reporting to FSMS mutually in violation of § 19.1.

139.FSMS was damaged by the foregoing breaches in an amount to be proved at trial, but not less than \$200,000,000.00.

SECOND CLAIM

Breach of Contract—Non-Circumvention Agreement (Corporate Defendants)

140.FSMS incorporates by reference the foregoing allegations as if set forth herein.

141.The Non-Circumvention Agreement is a binding and enforceable contract of TannerGAP “on behalf of itself and its affiliated entities,” including Tanner Pharma UK.

142.The parties’ September 11, 2020 Distribution Agreement did not supersede or terminate the Non-Circumvention Agreement.

143.Defendants Tanner GAP and Tanner Pharma UK breached the Non-Circumvention Agreement by purchasing antigen rapid test kits directly from Orient Gene for sale to the UK Government and other customers while concealing material facts from FSMS and failing to obtain FSMS’s express written permission.

144.FSMS was damaged by the foregoing breaches in an amount to be proved at trial, but not less than \$200,000,000.00.

THIRD CLAIM
Breach of Contract—Implied Covenant of
Good Faith and Fair Dealing
(Corporate Defendants)

145.FSMS incorporates by reference the foregoing allegations as if set forth herein.

146.Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract. The implied covenant requires that a party refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of its bargain. The implied covenant is designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain. Under the implied covenant, when exercising a discretionary right, a party to the contract must exercise its discretion reasonably. The implied covenant gives force to what the parties who negotiated the express terms of the contract would have agreed to proscribe had they thought to negotiate with respect to that matter.

147.The implied covenant prevented Defendants TannerGAP and Tanner Pharma UK from dealing direct with Orient Gene, hiding the truth from FSMS, cutting FSMS out of the chain of communication, secretly ordering product from Orient Gene, and keeping the fruits of the bargain all for themselves.

148.Similarly, the implied covenant prevented Defendants TannerGAP and Tanner Pharma UK from

deceiving FSMS by using an artificially inflated cost of \$5.00 in computing the amount they owed to FSMS. Defendants TannerGAP and Tanner Pharma UK did not pay Orient Gene \$5.00 per antigen rapid test kit. Instead, Orient Gene offered, and Defendants TannerGAP and Tanner Pharma UK paid, a bulk discount price ranging between [REDACTED], depending on sales volume.

149.To the extent the Distribution Agreement left any discretion to Defendants TannerGAP and Tanner Pharma UK to compute the amount owed to FSMS, or to deal directly with Orient Gene, the implied covenant of good faith and fair dealing forbade them to compute the amount they owed to FSMS on the basis of a fake price of \$5.00 per unit.

150.FSMS was damaged by the foregoing breaches in an amount to be proved at trial, but not less than \$200,000,000.00.

FOURTH CLAIM
Unfair and Deceptive Trade Practices
(All Defendants)

151.FSMS incorporates by reference the foregoing allegations as if set forth herein.

152.Defendants' actions alleged herein constitute unfair and deceptive trade practices in violation of Chapter 75 of North Carolina's General Statutes.

153.Defendants' deceptive and unfair conduct was in or affecting commerce in that the transactions at issue involved parties in North Carolina, California, and Texas for the sale of more than \$1 billion worth of COVID-19 rapid test kits manufactured in China and destined for consumers around the globe, including a billion units sold to the United Kingdom.

154. Defendants' conduct, as alleged in detail above and incorporated herein by reference, was unethical, unscrupulous, immoral, and deceptive.

155. Defendants' conduct was immoral, unethical, and unscrupulous because they never intended to perform under the terms of the Distribution Agreement when they entered into it. Evidencing this intent is Defendants' conduct related to Orient Gene, the manufacturer of the tests. Before the parties executed the Distribution Agreement, Defendants secretly intended and began working behind the scenes to "cut out" FSMS from the relationship with Orient Gene by negotiating directly with Orient Gene without FSMS's knowledge or consent, holding out the relationship with Orient Gene to business partners and prospective customers as Defendants' own, and inducing Orient Gene to participate in Defendants' concealment. Defendants intended to sideline FSMS from dealings with Orient Gene so Defendants could underreport sales, cost data, and gross profits to FSMS.

156. Defendants' conduct in signing a contract with Orient Gene that induced Orient Gene to stop communicating with FSMS effectively cut off FSMS's ability to purchase or sell products that it otherwise could have procured and sold for a profit, creating damages beyond those based on the Corporate Defendants' breaches of the Distribution Agreement and Non-Circumvention Agreement. These damages arose from Defendants' scheme to induce and then betray FSMS.

157. Defendants' unethical, unscrupulous, immoral, and deceptive conduct continued after execution of the Distribution Agreement. On multiple occasions, Defendants affirmatively misrepresented to FSMS that Tanner Pharma UK paid Orient Gene \$5.00 per antigen test. For example, Defendants prepared and provided to

FSMS reconciliation sheets to accompany profit sharing payments to FSMS, which reflected costs at \$5.00 per antigen test. These representations were false and deceptive. Tanner Pharma UK paid Orient Gene between [REDACTED] per test kit, depending on the size of the order. FSMS itself paid Orient Gene a net price of only \$2.50 for the sample kits FSMS sourced for the UK deal after the rebate provided by Orient Gene.

158. By lying about the per-unit cost paid to Orient Gene, Defendants systematically and deceptively understated the true gross profits earned from each transaction and the share owed to FSMS. Defendants' deception has deprived FSMS of hundreds of millions of dollars in profits rightfully owed to FSMS under the Distribution Agreement.

159. By sending FSMS approximately \$6.5 million, Defendants attempted to lull FSMS such that it would not further inquire into the true revenues and costs to determine the profit split to which it was owed. This was part of Defendants' scheme to deceive FSMS.

160. When pressed by FSMS to provide documents substantiating the actual cost paid to Orient Gene for test kits, Defendants repeatedly refused to provide the information. Defendants understood that if they disclosed the actual cost paid to Orient Gene, FSMS would discover that Defendants had wrongfully withheld millions of dollars in profits owed to FSMS.

161. To maintain their deception, Defendants instructed their employees and agents to conceal information from FSMS and to avoid "engaging" FSMS. For example, on September 21, 2020, Mr. Bracey wrote to a group including Defendant Scalia requesting that they "keep the details limited to only those within the Company — and UK Government — and Orient

Gene/Healgen who are working on this.” Similarly, on February 25, 2021, Ms. Bedoya wrote to Defendant Scalia and others that “we have not spoken to laird [about the Turks & Caicos deal] as advised by you.” These and other efforts to conceal information from FSMS are memorialized in internal communications between Defendants’ employees and agents.

162. Defendants also induced Orient Gene to withhold information from FSMS concerning the actual price paid to Orient Gene by Defendants.

163. Defendants’ secretive circumvention of FSMS is contrary to ethical practices of companies in the medical supply industry. Companies that “play by the rules” do not circumvent their business partners after promising not to do so.

164. Defendants’ pattern and practice of concealing information from FSMS and secretly circumventing FSMS allowed Defendants to convert for themselves profits they had promised to “share” with their “partner,” FSMS.

165. Defendants’ calculated concealment and knowing false representations to FSMS stated herein, as well as cutting FSMS out of business deals, constituted egregious behavior and aggravating circumstances that make this more than an ordinary breach of contract; Defendants’ conduct constituted unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 *et seq.*

166. Defendants’ unethical, unscrupulous, immoral, and deceptive acts occurred in North Carolina. Defendants’ actions, both in-state and out-of-state impacted their business in the state of North Carolina. Defendants’ contacts with North Carolina were not incidental contacts; rather, they were intentional,

systematic, substantial, continuous, and part of a companies-wide plan. Defendants were actively engaged in commerce within North Carolina, making N.C. Gen. Stat. § 75-1.1 *et seq.* applicable to their conduct.

167. Defendant Scalia personally participated in the unfair and deceptive conduct. He personally directed employees and agents of Tanner Pharma UK to engage in deceptive and unfair conduct, including by instructing these employees and agents to conceal or withhold information from FSMS as part of Defendants' scheme to deceive FSMS about the price paid to Orient Gene and the profits owed to FSMS under the Distribution Agreement. He personally sent false and deceptive information to FSMS, and personally approved payments to FSMS that he knew were wrong.

168. Given the scope and scale of the unfair and deceptive conduct at issue in this case, and the lifelong personal friendship between Defendants Scalia and Bourne—Bourne either directed the scheme or ratified it. Scalia was Bourne's "eyes and ears," and Bourne discussed the sale of Orient Gene products to the UK Government with Mr. Bracey and with Defendant Scalia on a weekly basis, if not more frequently. Further, a sophisticated and engaged individual such as Bourne had to have known that Tanner Pharma UK was keeping *all* the gross profits from sales to the UK Government, rather than splitting them with FSMS.

169. Defendants' unfair and deceptive conduct proximately caused actual injury to FSMS in an amount to be proved at trial, but not less than \$200,000,000.00.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, as to each of the above counts, as follows:

- a. Compensatory damages in an amount to be proved at trial, but not less than \$200,000,000.00;
- b. Treble Damages, pursuant to N.C. Gen. Stat. § 75-1.1 and 75-16;
- c. Costs and attorney's fees, pursuant to N.C. Gen. Stat. § 75-16.1 and the Distribution Agreement;
- d. Pre-judgment and post-judgment interest at the legal rate; and
- e. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: September 16, 2022

/s/ Kent A. Yalowitz

Kent A. Yalowitz (*admitted pro hac vice*)

NY State Bar No. 2188944

Carmela T. Romeo (*admitted pro hac vice*)

NY State Bar No. 5058151

Eliseo R. Puig (*admitted pro hac vice*)

CO State Bar No. 49022

ARNOLD & PORTER KAYE SCHOLER LLP

250 W 55th Street

New York, NY 10019

212-836-8000

kent.yalowitz@arnoldporter.com

carmela.romeo@arnoldporter.com

eliseo.puig@arnoldporter.com

Counsel for Plaintiff FS Medical Supplies, LLC

/s/ Lex M. Erwin

Lex M. Erwin

NC State Bar No. 34619

David A. Luzum

NC State Bar No. 41398

NEXSEN PRUET, PLLC

227 W. Trade Street, Suite 1550

Charlotte, NC 28202

Telephone: (704) 339-0304

Facsimile: (704) 338-5377

lerwin@nexsenpruet.com

dluzum@nexsenpruet.com

Counsel for Plaintiff FS Medical Supplies, LLC

APPENDIX F

[FILED: OCTOBER 5, 2023]

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

Civil Action No. 3:23-cv-00598-RJC-WCM

FS MEDICAL
SUPPLIES, LLC,

Plaintiff,

v.

TANNER PHARMA UK
LIMITED, RAYMOND
FAIRBANKS BOURNE
A/K/A “BANKS”
BOURNE, and MARY
EVERETT
WHITEHURST
BOURNE A/K/A MOLLY
BOURNE,

Defendants.

AMENDED
COMPLAINT
JURY TRIAL
DEMANDED

Plaintiff FS Medical Supplies, LLC (“FSMS”) brings this Complaint against Defendants Tanner Pharma UK Limited (“TPUK”), Raymond Fairbanks Bourne a/k/a “Banks” Bourne, and Mary Everett Whitehurst Bourne a/k/a Molly Bourne (together with Banks Bourne, the “Bourne Defendants”).

INTRODUCTION

1. This is a fraudulent conveyance case, brought because Defendant Raymond Fairbanks Bourne stripped

TPUK of the cash needed to pay TPUK's just debts. Plaintiff, FSMS, sued TPUK and its corporate affiliate for breach of contract in March 2021. Mr. Bourne then directed TPUK to pay at least \$200 million in dividends to himself and his wife, stripping the company of sufficient assets to pay FSMS. Under North Carolina's voidable transfer statutes, the dividend payments must be unwound because (1) the dividends reflect numerous "badges of fraud," supporting the conclusion that they were intended to hinder, defraud or delay creditors; and (2) TPUK did not receive value for the dividends and their payment rendered TPUK insolvent within the meaning of the relevant statutes. As a consequence, the dividends must be unwound and FSMS is entitled to preliminary and permanent injunctive relief preventing further dissipation of TPUK's assets.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because all parties are citizens of different states and foreign states, and the amount in controversy exceeds \$75,000.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because all Defendants reside in this District for the purposes of the venue statute.

PARTIES

4. Plaintiff FS Medical Supplies, LLC is a limited liability company organized under the laws of Delaware, with its principal place of business in Weatherford, Texas. FSMS has four members: Laird Q. Cagan, Jim Mao, and their respective spouses. Mr. Cagan and his spouse are domiciled in Texas. Mr. Mao and his spouse are domiciled in California.

5. Defendant Tanner Pharma UK Limited is a company organized under the laws of England and Wales. TPUK's principal place of business is in Charlotte, North Carolina, the location from which its activities are directed, controlled, and coordinated.

6. Defendant Raymond Fairbanks Bourne a/k/a "Banks" Bourne is an individual domiciled in Charlotte, North Carolina. He is the sole Director of TPUK, owning 75% of its shares. He directs, controls, and coordinates TPUK's activities from Charlotte, North Carolina.

7. Defendant Mary Everett Whitehurst Bourne a/k/a Molly Bourne is an individual domiciled in Charlotte, North Carolina. She is the wife of Defendant Raymond Fairbanks Bourne, and owns the remaining 25% of TPUK's shares.

FACTS

I. The Underlying Suit

8. In June 2020, TPUK signed a non-disclosure and non-circumvention agreement to evaluate whether to work with FSMS to distribute COVID-19 medical supplies. The purpose of the contract was to protect each party's prior business relationships from circumvention by the other party. TPUK promised that it "shall not conduct any business with . . . sources or contacts of [FSMS]" without FSMS's express written permission.

9. Upon seeing FSMS's product and pricing list, TPUK's President was ecstatic, writing to his team: "This is gold . . . Well worth half the profits to have a supply partner like FS Medical."

10. In August 2020, TPUK identified a massive business opportunity to sell millions of COVID-19 antigen tests to the UK Government, but in order to compete for

this opportunity, TPUK urgently needed to ship a small batch of sample tests to the UK Government. TPUK immediately turned to FSMS, which was able to negotiate with its supplier, Zhejiang Orient Gene Biotech Co., Ltd. (“Orient Gene”), to re-route sample tests within days to provide to the UK Government. Given the small order size, Orient Gene charged FSMS a premium of \$5.00 per unit; however, Orient Gene promised that larger orders would be available at a lower price and to rebate half the higher price should a larger order follow.

11. TPUK, its affiliate, and FSMS then signed a Distribution Agreement (“Agreement”) on September 11, 2020 in which TPUK and the affiliate (collectively identified in the Agreement as “TANNER”), promised to buy COVID-19 antigen tests from FSMS unless “directed by FSMS” to buy directly from its supplier, and even then only “so long as the financial arrangement” was “maintained as if TANNER purchased Covered Products directly from FSMS with a 50% gross profit participation to each Party.”

12. TPUK, however, never intended to honor the Distribution Agreement. Within two weeks of signing the contract, TPUK secretly contracted with Orient Gene to buy the same test kits it had already promised to buy from FSMS. TPUK then deceived FSMS about its relationship with Orient Gene, lied to FSMS when asked about the contract with the UK Government and its progress, and provided FSMS with false and deceptive reconciliation sheets purporting to show a cost basis of \$5.00 per unit while refusing to disclose the true cost of the kits.

13. On November 15, 2020, TPUK’s principal, Steve Scalia, provided FSMS with a reconciliation sheet which contained false computations and deceptively understated the amount owed to FSMS. Even though FSMS had a

right to payment under the Agreement, TPUK and its affiliates intentionally and deceptively cut FSMS out of its partnership with Orient Gene and the hundreds of millions of dollars in revenue generated through the sale of Orient Gene's products to the UK Government. FSMS suffered hundreds of millions of dollars in damages as a proximate result of TPUK's egregious conduct. FSMS's claims accrued beginning in September 2020.

14. FSMS asserted its right to payment in a letter sent on February 24, 2021 to TPUK, requesting "payment of the difference between the amount [TPUK] [] paid to FSMS, pursuant to the correct reconciliation sheets, and 50% [of] the correct gross profits calculated by using the actual amount paid by [TPUK] directly to Orient Gene." FSMS further requested documents showing the true purchase price of the goods from Orient Gene. TPUK responded on March 3, 2021 by refusing FSMS's demands.

15. FSMS filed a complaint in the Superior Court of California, County of Santa Clara on March 24, 2021, seeking damages for breach of contract. The case was removed to the United States District Court for the Northern District of California on April 26, 2021. TPUK moved to dismiss the case not on the merits, but for lack of personal jurisdiction. After TPUK's personal jurisdiction motion in that court was successful, FSMS refiled in this District on September 23, 2021. *See* W.D.N.C. Case No. 3:21-cv-00501-RJC-WCM (the "Underlying Action"). After jurisdictional discovery, FSMS filed an Amended Complaint. *Id.* at ECF 40. As relevant here, FSMS's Amended Complaint seeks at least \$200,000,000 in damages for breach of contract. (The Amended Complaint also seeks treble damages for the defendants' violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1

(“UDTPA”), but the Court granted a motion to dismiss that claim.) A redacted copy of that Amended Complaint is attached as **Exhibit A** and each and every paragraph of the entire Amended Complaint is incorporated by reference as fully as if it were written out in the body of this Complaint.¹

II. TPUK Dissipates Assets

16. During calendar year 2021, TPUK issued approximately \$100 million in dividends to its two shareholders, the Bourne Defendants (the “2021 Dividend”). FSMS discovered the 2021 Dividend only after TPUK filed its required financial statements for that year—six months late.

17. As a company registered in the United Kingdom, TPUK is required to make annual financial disclosures nine months after the close of each fiscal year with an agency of the UK Government called the Companies House.

18. The September 2022 deadline for TPUK to make its 2021 disclosure came and went without a filing. Further months passed with no disclosure. Then, on March 7, 2023, Companies House issued a “strike off” notice threatening to dissolve TPUK and seize its assets unless TPUK filed its 2021 financial statement. Only after this strike off notice—and after FSMS alerted the Court in the Underlying Action to this alarming development—did TPUK file its 2021 disclosure, revealing for the first time that Mr. Bourne had drained the company of \$100 million dollars. Notably, as the sole director of TPUK, Mr.

¹ In the Underlying Action, TPUK opposed the public disclosure of certain pricing information. The unredacted version of the Amended Complaint, filed under seal, is available to the Court on PACER. *See* W.D.N.C. Case No. 3:21-cv-00501-RJC-WCM, ECF 40.

Bourne had exclusive power to decide whether TPUK would issue dividends to its shareholders (*i.e.*, to Mr. Bourne himself and his wife). As director, Mr. Bourne also was responsible for ensuring that TPUK met its disclosure obligations. Thus, Mr. Bourne chose to pay himself and his wife \$100 million dollars and to conceal that fact from FSMS for months.

19. The 2021 Dividend was more than the entire profit earned by TPUK during 2021 and more than 80% of *all* cash generated from operating activities. After paying the 2021 Dividend, TPUK was left with inadequate assets to satisfy the amount of FSMS's then-accrued contract claim, which was for more than \$100 million as of year-end 2021.

20. All or part of the 2021 Dividend was issued after FSMS threatened to file suit in February 2021 and/or after FSMS actually filed suit in March 2021.

21. After discovering the 2021 Dividend, FSMS demanded that Mr. Bourne and TPUK cease and desist from further dissipation of assets, disclose all transfers of any money or other property that TPUK made to insiders since September 2020, and provide records sufficient to identify the location and status of all funds and any related proceeds transferred to Mr. Bourne or his wife. Mr. Bourne and TPUK refused to disclose where the money went and would not commit to abstaining from further dissipation of TPUK's assets during the pendency of FSMS's claim.

22. FSMS filed this action on September 20, 2023. The next day, FSMS moved for a temporary restraining order and preliminary injunction providing that, until judgment is made and entered in the present action, (1) TPUK shall not issue dividends or transfer any property to the Bourne Defendants or any other person or entity

on their behalf; and (2) the Bourne Defendants, and any person acting in concert with them or under their direction, shall not transfer any property directly or indirectly traceable to or comingled with any dividends previously issued by TPUK.

23. After FSMS filed its motion for injunctive relief, counsel for TPUK indicated via letter on September 26, 2023 that TPUK would “represent to the Court that no distributions or dividend payments will be made during the pendency of the Motion for Preliminary Injunction until the Court rules on it.” No commitment was made by the Bourne Defendants to disclose the location or status of the 2021 Dividend or any related proceeds.

24. On September 29, 2023, TPUK filed its 2022 financial statement with Companies House. That disclosure revealed that TPUK issued an additional \$100 million in dividends to Mr. Bourne and his wife during calendar year 2022 (the “2022 Dividend”).

25. The 2022 Dividend was more than the entire profit earned by TPUK in 2022. It also was more than all cash TPUK generated from operating activities that year. And by year-end 2022, TPUK had just \$10.5 million in net assets when the value of FSMS’s then-accrued contract claim was at least \$140.4 million.

26. In its 2022 filing with Companies House, TPUK projected a significant drop in revenues as the pandemic subsided: “As a result of the end of the compulsory testing for Covid- 19 following the end of the global pandemic, going forward, there is expected to be a significant fall in revenue due to the decreased demand for Covid-19 test kits.”

27. TPUK’s prediction proved to be accurate. From 2020 to 2022, TPUK’s sales to the UK Government

accounted for 97.2% of its gross revenues. Public records indicate that in 2023, TPUK has sold nothing to the UK Government. It is thus all but assured that TPUK's 2023 revenues will be dramatically lower than in the preceding three years.

28. Given the paltry amount of TPUK's net assets at year-end 2022 and the strong indications that TPUK's lucrative business selling Covid-19 test kits to the UK Government has come to an end, TPUK's "commitment" to abstain from further transfers to the Bourne Defendants rings hollow. The fact of the matter is that Mr. Bourne has already depleted TPUK's assets. There are no funds left to dissipate.

FIRST CLAIM

(Transfer With Intent To Hinder, Delay or Defraud – N.C. Gen. Stat. § 39-23.4(a))

29. FSMS repeats and realleges the foregoing allegations as if set forth herein.

30. FSMS is a "creditor" of TPUK as defined by N.C. Gen. Stat. § 39-23.1(4): "A person that has a claim."

31. Defendant Raymond Fairbanks Bourne caused TPUK to transfer at least \$200 million to himself and his wife, Mary Everett Whitehurst Bourne, with the intent to hinder, delay, or defraud a creditor of TPUK.

32. The following "badges of fraud" support the inference of Mr. Bourne's intent to hinder, delay, or defraud a creditor (*i.e.*, FSMS):

a. The transfer was to an insider – Defendant Raymond Fairbanks Bourne is TPUK's sole director. As such he is an insider by operation of N.C. Gen. Stat. § 39-23.1(7)(b)(1) and (3). Defendant

Mary Everett Whitehurst Bourne is an insider by operation of N.C. Gen. Stat. § 39-23.1(7)(b)(6).

b. The transfer was concealed – TPUK concealed the 2021 Dividend for nearly a year, first by refusing to provide financial information during jurisdictional discovery in the Underlying Action and then by inexplicably delaying for six months the required filing of its 2021 financial statements. When FSMS demanded disclosure of the location and status of the funds, TPUK and the Bourne Defendants refused to provide any information. They also did not disclose the fact of 2022 Dividend until September 29, 2023, despite FSMS's inquiries about further transfers, the filing of this lawsuit, and FSMS's motion for emergency injunctive relief. Defendants did all this while FSMS was prosecuting a claim against TPUK for hundreds of millions of dollars in the Underlying Action.

c. Before the transfer was made, the debtor had been sued – FSMS threatened suit by letter dated February 24, 2021, and filed suit against TPUK on March 24, 2021. TPUK issued most or all of the \$200 million in dividends after those events.

d. The transfer constituted a large proportion of the debtor's assets – The 2021 Dividend constituted approximately 64% of the net reported assets that TPUK would have had but for the dividend. The 2021 Dividend also corresponded to 71% of TPUK's combined net income for 2020 and 2021, 84% of TPUK's combined operating cash flows for 2020 and 2021, and 83% of the cash TPUK would have had on hand but for the dividend. Taken together, the 2021 and 2022 Dividends accounted for 95% of total net income from 2020 to 2022, 92% of

operating cash flow, and 91% of the cash TPUK would have had on hand but for the dividends.

e. The debtor concealed assets – TPUK concealed the dividends, and the Bourne Defendants have refused to disclose the location of the money. Discovery is needed at this juncture to determine the extent to which Defendants have further removed and concealed assets.

f. The debtor received no value – TPUK received no consideration for the dividends.

g. The debtor became insolvent after the dividend was declared – At the time dividends were issued, FSMS's contract claim (and other claims) had accrued. Estimated conservatively, the value of the contract claim alone exceeded \$100 million at year-end 2021 and \$140 million at year-end 2022. After the 2022 Dividend was issued, TPUK had just \$10.5 million in net assets remaining. TPUK also projected a significant drop in revenue in 2023. That prediction has proven accurate—TPUK has sold no products in 2023 to the UK Government, the customer that accounted for 97.2% of its gross revenues from 2020 through 2022. Issuing the dividends thus pushed TPUK into insolvency, leaving it without any hope of satisfying the judgment sought.

h. The debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer, and the debtor reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due – TPUK received no value in exchange for the dividends. At the time of the transfers, Defendants were well aware of FSMS's

cause of action and claims for payment rightfully owed to FSMS.

i. The debtor did not transfer the assets in the course of legitimate estate or tax planning – Defendants have offered no evidence supporting any suggestion that the dividends were issued in the course of legitimate estate or tax planning.

SECOND CLAIM

(Transfer Without Receiving Reasonably Equivalent Value – N.C. Gen. Stat. §§ 39-23.4(a)(2) and 23.5)

33. FSMS repeats and realleges the foregoing allegations as if set forth herein.

34. Defendant TPUK transferred at least \$200 million to Defendant Raymond Fairbanks Bourne and Defendant Mary Whitehurst Bourne without receiving reasonably equivalent value in exchange for the transfer.

35. TPUK was engaged in a business for which its remaining assets were unreasonably small in relation to the business.

36. When TPUK issued the dividends, TPUK was insolvent because of the accrual of FSMS's contract claim (even without taking into account FSMS's other claim). Indeed, the amount of the contract claim alone at year-end 2022 exceeded TPUK's then-existing net assets, even before it issued the dividends.

37. In the alternative, TPUK became insolvent as a result of issuing the dividends. After TPUK issued the 2021 Dividend, TPUK was left with \$55.9 million remaining net assets. After the 2022 Dividend, TPUK's net assets were significantly smaller—just \$10.5 million. At both points in time, TPUK had insufficient assets to cover FSMS's then-accrued contract claim.

**THIRD CLAIM
(Constructive Trust)**

38. FSMS repeats and realleges the foregoing allegations as if set forth herein.

39. A constructive trust has arisen and is necessary to prevent the unjust enrichment of the Bourne Defendants or their transferees, who hold cash issued as dividends by TPUK or the proceeds of such cash, or property purchased with such cash, as a result of the fraudulent conveyances described above, making it inequitable for any of them to retain such cash or property against the claim of FSMS, the beneficiary of the constructive trust so imposed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

- a. Avoidance of all dividends or other avoidable transfers by TPUK to the extent necessary to satisfy FSMS's claim;
- b. A temporary restraining order and a preliminary injunction ordering that, until judgment is made and executed in the present action (1) TPUK shall not issue further dividends transferring any property to Defendants Raymond and/or Mary Bourne; (2) Defendants Raymond and Mary Bourne, and any person acting in concert with them or under their direction, shall not transfer any property directly or indirectly traceable to or comingled with any dividends issued by TPUK;
- c. Imposition of a constructive trust on funds transferred by TPUK to the Bourne Defendants or

property that was comingled with or traceable to such transfers;

- d. An accounting of all funds traceable to the avoidable transfers at issue in this case;
- e. Such additional provisional remedies as the Court may determine just and proper to preserve its power to effectuate a judgment, including, without limitation, attachment, garnishment, appointment of a receiver, arrest and bail;
- f. Costs and attorney's fees;
- g. Prejudgment interest; and
- h. Such other relief as justice may require.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

This is the 5th day of October, 2023.

/s/ Kent A. Yalowitz

Kent A. Yalowitz (*Admitted Pro Hac Vice*)

N.Y. State Bar No. 2188944

Carmela T. Romeo (*Admitted Pro Hac Vice*)

N.Y. State Bar No. 5058151

ARNOLD & PORTER

KAYE SCHOLER LLP

250 W 55th Street

New York, NY 10019

212-836-8000

kent.yalowitz@arnoldporter.com

carmela.romeo@arnoldporter.com

– and –

Eliseo R. Puig (*Admitted Pro Hac Vice*)

Colorado State Bar No. 49022

ARNOLD & PORTER

KAYE SCHOLER LLP

1144 Fifteenth Street, Suite 3100

Denver, CO 80202

303-863-1000

eliseo.puig@arnoldporter.com

/s/ Lex M. Erwin

Lex M. Erwin

N.C. State Bar No. 34619

David A. Luzum

N.C. State Bar No. 41398

Kevin Y. Zhao

N.C. State Bar No. 53680

MAYNARD NEXSEN PC

227 W. Trade Street, Suite 1550

Charlotte, NC 28202

Telephone: (704) 339-0304

Facsimile: (704) 338-5377

lerwin@maynardnexsen.com

dluzum@maynardnexsen.com

kzhao@maynardnexsen.com

Counsel for Plaintiff

APPENDIX G

[FILED: FEBRUARY 10, 2025]

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

FS MEDICAL
SUPPLIES, LLC,

Plaintiff,

v.

TANNER PHARMA UK
LIMITED, RAYMOND
FAIRBANKS BOURNE
A/K/A “BANKS”
BOURNE, AND MARY
EVERETT
WHITEHURST
BOURNE A/K/A MOLLY
BOURNE,

Defendants.

Civil Action No.
3:23-CV-598-RJC-WCM

**PLAINTIFF’S AMENDED
CITIZENSHIP DISCLOSURE**

Plaintiff FS Medical Supplies, LLC (“FSMS”) hereby amends its “Disclosure by Party or Intervenor in a Diversity Case” form (“Diversity Disclosure”), filed on September 20, 2023. As of the date FSMS filed the Diversity Disclosure, the citizenship of FSMS’s members were as follows:

Name	Citizenship
Laird Cagan	Texas
Sherry Cagan	Texas
Jim Mao	California
Zhen Zhen Tong	California/China

THIS the 10th day of February, 2025.

/s/ Kent A. Yalowitz

Kent A. Yalowitz (*admitted pro hac vice*)

N.Y. State Bar No. 2188944

Carmela T. Romeo (*admitted pro hac vice*))

N.Y. State Bar No. 5058151

ARNOLD & PORTER

KAYE SCHOLER LLP

250 W 55th Street

New York, NY 10019

212-836-8000

kent.yalowitz@arnoldporter.com

carmela.romeo@arnoldporter.com

– and –

Eliseo R. Puig (*admitted pro hac vice*)

Colorado State Bar No. 49022

ARNOLD & PORTER

KAYE SCHOLER LLP

1144 Fifteenth Street, Suite 3100

Denver, CO 80202

303-863-1000

eliseo.puig@arnoldporter.com

/s/ Lex M. Erwin

Lex M. Erwin

N.C. State Bar No. 34619

David A. Luzum

N.C. State Bar No. 41398

Kevin Y. Zhao

N.C. State Bar No. 53680

MAYNARD NEXSEN PC

227 W. Trade Street, Suite 2300

Charlotte, NC 28202

Telephone: (704) 339-0304

Facsimile: (704) 338-5377

lerwin@maynardnexsen.com

dluzum@maynardnexsen.com

kzhao@maynardnexsen.com

Counsel for Plaintiff