APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Filed February 24, 2017]

No. 3:10-cv-00978

ERIC TUTTOBENE, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	) Case No. 3:10-cv-00978
	)
THE ASSURANCE GROUP, INC.,	) Judge Sharp)Magistrate Judge Brown
	)
Defendant.	)
	)

MEMORANDUM

Plaintiffs are six individuals – Eric Tuttobene, Robert Ghiringhelli, Colin Keith Holley, Derrold Nash, Anthony Petitti, Jr., and Harmon G. Pye, III – who are former independent contract agents with Defendant The Assurance Group, Inc.

("TAG"). Plaintiffs bring claims against Defendant TAG for 1) conversion and breach of fiduciary duty; 2) breach of contract; 3) statutory and regulatory violations; and 4) declaratory judgment relief.

Pending before the Court is Plaintiffs' Resubmitted Motion for Partial Summary Judgment, (Docket No. 165), to which Defendant TAG has filed a Response in Opposition, (Docket No. 180). Defendant TAG has also filed a Motion for Summary Judgment, (Docket No. 173), to which Plaintiffs have filed a Response in Opposition, (Docket No. 181), and Defendant TAG has replied, (Docket No. 183). For the reasons set forth below, the Court will deny Plaintiffs' Motion for Partial Summary Judgment and grant in part and deny in part Defendant TAG's Motion for Summary Judgment.

FACTUAL BACKGROUND

Defendant TAG is an insurance marketing firm that, among other things, contracts with certain insurance carriers to market and sell health insurance products underwritten by those carriers. (Docket No. 182 at 1, ¶ 1). Defendant TAG sells those insurance products through both its own licensed insurance agents and independent insurance agents engaged by Defendant TAG as independent contractors. (Id. at 1, ¶ 2). The business relationship between Plaintiffs and Defendant TAG was formalized and governed by contracts called Independent Agent Agreements ("IAA"). (Id. at 2, ¶ 5; Docket No. 177-1 to 177-6, copies of each Plaintiff's IAA except Nash's).

The IAA establishes that agents serve as independent contractors, rather than employees of

Defendant TAG. (IAA at ¶ A. 1). Per the IAA, agents "shall receive commissions on the sale of Insurance Products and Services, such commissions originating from and dependent upon payments made to [Defendant TAG] by the insurance companies …." (IAA at ¶ D.1). The IAA states that "all such commissions shall be paid by [Defendant TAG] to Agent" and prohibits agents from "seek[ing] payment directly from the insurance companies." (Id.). The IAA establishes that Defendant TAG will provide agents with "reasonable notice of pertinent information regarding such commissions and the processes and procedures for Agent to earn and receive such commissions." (Id.). "[T]he amount, rate, timing, payment, determination of when a commission is earned and payable, forfeiture, and other aspects of such commissions shall be determined solely by

[Defendant TAG] or the insurance companies…." (Id.).

The IAA states that if an agent stops working (because of expiration or termination of the IAA) before having "vested" – meaning having worked "five consecutive years[1] … actively soliciting and selling Insurance Products and Services pursuant to [the IAA and renewals thereof]" – then he will receive only one month of commission with subsequent commissions being "considered unearned and forfeited to [Defendant TAG]." (Id.; IAA at ¶ D.3.b.). Furthermore, regardless of an agent's status as vested or not vested, if an agent has unpaid debt owed to Defendant TAG after ninety days of the IAA's expiration or termination, the agent will not receive further commissions and

[1] Some of the IAAs on file state that vesting occurs after five years (Docket Nos. 177-3; 177-4; 177-6), while others state that vesting occurs after three years (Docket Nos. 177-1; 177-2).

any vested status terminates immediately. (IAA at ¶ D.4). The IAA also contains a provision that states "[t]he validity, interpretation, performance and enforcement of [the IAA] shall be governed by the laws of the state of North Carolina." (IAA at ¶ J.1).

All Plaintiffs admit that they had either a business/contractual relationship or contractual association with Defendant TAG.[2] (Docket No. 182 at 2, ¶¶ 4-5; Docket No. 136 at 1, ¶ 2; Docket No. 166-1 at 1, Tuttobene Aff. ¶ 4; Docket No. 167-1 at 1, Ghiringhelli Aff. ¶ 4; Docket No. 168-1 at 1, Holley Aff. ¶ 4; Docket No. 182 at 3, ¶ 10; Docket No. 169-1 at 1, Nash Aff. ¶ 4; Docket No. 134 at 1.

[2] In their affidavits, Plaintiffs state that they had a contractual association with Edward and Beverly Shackelford, the owners of Defendant TAG. However, Plaintiffs admit that the interactions between them and Defendant TAG were business relationships formalized and governed by contracts they executed. (Docket No. 182 at 1-2, ¶¶ 4-5). The IAAs also state that it is made and entered into between the individual agent and Defendant TAG.

¶ 2; Docket No. 170-1 at 1, Petitti Aff. ¶ 4; Docket No. 171-1 at 1, Pye Aff. ¶ 4). At some point in that relationship, Plaintiffs all state that they observed "discrepancies" and "problems" in payments they allege Defendant TAG owed them, and Plaintiffs no longer do business with Defendant TAG. (Docket No. 166-1 at 2, Tuttobene Aff. ¶¶ 6-7; Docket No. 167-1 at 2, Ghiringhelli Aff. 6; Docket No. 182 at 3-5, ¶¶ 11, 13, 16, 18, 20, 21, 23; Docket No. 168-1 at 2, Holley Aff. ¶ 6; Docket No. 170-1 at 2, Petitti Aff. ¶¶ 6-7; Docket No. 135 at 2, ¶ 5). As a result of the alleged discrepancies and problems, Plaintiffs filed suit against Defendant TAG.

STANDARD OF REVIEW

Summary judgment "is appropriate only where 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that

the movant is entitled to judgment as a matter of law.'" Whitfield v. Tennessee, 639 F.3d 253, 258 (6th Cir. 2011) (quoting Fed. R. Civ. P. 56(c)). Where a moving party without the burden of proof at trial seeks summary judgment, the movant "bears the initial burden of showing that there is no material issue in dispute." Lindsay v. Yates, 578 F.3d 407, 414 (6th Cir. 2009) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "Once a moving party has met its burden of production, 'its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.'" Blizzard v. Marion Tech. Coll., 698 F.3d 275, 282 (6th cir. 2012) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)). The nonmoving party "may not rest upon the mere allegations or denials of his pleading." Fed. R. Civ. P. 56(e). See Celotex, 477 U.S. at 322 n.3; Searcy v.

City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994).

The Court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) (citation omitted). "Reviewing the facts in the light most favorable to the unmoving party, the court must ultimately determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Blizzard, 698 F.3d at 282 (internal quotations and citations omitted). The standard of review for cross-motions of summary judgment does not differ from the standard applied when a motion is filed by only one party to the litigation. Taft Broad. Co. v. U.S., 929 F.2d 240, 248 (6th Cir. 1991).

Rule 56 of the Federal Rules of Civil Procedure requires that a party asserting that a fact is genuinely disputed cite to particular materials in the record. Fed. R. Civ. P. 56(c)(1)(A). Failing either to properly support an assertion of fact or to address another party's assertion of fact as required by Rule 56(c) permits the Court to "consider the fact undisputed for purposes of the motion" and "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(2)-(3). Under the Local Rules of Court, parties opposing a motion must file "a response, memorandum, affidavits, and other responsive materials." LR7.01(b).

Defendant TAG has filed a Motion for Summary Judgment as to *all* Plaintiffs' claims, but

rather than providing a full response, Plaintiffs claim that only one issue is ripe for consideration—which is the issue on which they move for partial summary judgment—and state that they "will not attempt to provide voluminous or detailed responses to each of the other points raised in [Defendant TAG's] Motion for Summary Judgment[.]" (Docket No. 181 at 5). The Court found itself looking both to Plaintiff's unverified Amended Complaint (Docket No. 49) and Response to Notice of Filing (Docket No. 191) to discern Plaintiffs' arguments and, in some instances, assessing the merits of Defendant TAG's arguments unaided by briefing from Plaintiffs.

ANALYSIS

In their Motion for Partial Summary Judgment, Plaintiffs ask this Court to find that there is no disputed material fact with respect to

the *existence* of the fiduciary duty they claim Defendant TAG owes them. If this Court makes that finding, Plaintiffs request that the Court impose the burden of production of evidence and the burden of proof on Defendant TAG at trial in order for Defendant TAG to establish its proper discharge of that fiduciary duty in the handling of commissions. Plaintiffs also ask the Court, alternatively or additionally, to grant judgment on the issue of fiduciary liability as a sanction for Defendant TAG's alleged failure to comply with discovery orders pursuant to Rule 37 of the Federal Rules of Civil Procedure.

Defendant TAG moves for summary judgment as to all the claims Plaintiffs bring against it. Defendant TAG first argues that the claims of all Plaintiffs, except for Plaintiff Tuttobene, are time-barred. Second, Defendant

TAG argues that, even if Plaintiffs' claims were not time-barred, Plaintiffs cannot present *prima facie* cases on their asserted claims. Finally, Defendant TAG moves for summary judgment on its counterclaim against Plaintiffs Tuttobene and Petitti.

I. North Carolina Law Governs the Claims Asserted by Parties

As an initial matter, the Court must determine which law governs the claims asserted in the parties' motions. Plaintiffs contend that Tennessee law applies, but Defendant TAG argues that North Carolina law applies pursuant to the choice of law provision in the IAA. In their affidavits, Plaintiffs concede the existence of some contractual relationship with Defendant TAG. (Docket Nos. 166-1 to 171-1). Therefore, the North Carolina choice of law provision in the IAA applies unless, as Plaintiffs argue, there is a contract

defense that makes the IAA unenforceable. Plaintiffs urge the Court not to enforce the terms of the IAA, including the application of North Carolina law, based on the following arguments[3]: 1) the terms of the IAA conflict with Tennessee regulations and federal Medicare regulations; 2) the IAA lacks the mutuality of obligation; 3) the IAA is unconscionable as a contract of adhesion; 4) Defendant TAG later changed some of the material terms of the contract when Plaintiffs accessed a web portal site, allowing Defendant TAG to deceptively procure Plaintiffs' electronic signature; 5) Defendant TAG has not submitted to the Court, and Plaintiffs have not received, a "mutually executed" contract that contains Ed Shackelford's signature; and 6) Defendant TAG may not contract

[3] In some instances, Plaintiffs do not even provide arguments, but rather just state their position with respect to the enforceability of the IAA in a conclusory manner.

for the application of North Carolina law because of the Certificate of Authority sought by Defendant TAG from the state of Tennessee. (Docket No. 49 at 32-35, ¶¶ D(1)-D(2); Docket No. 165 at 6; Docket No. 191 at 2-3). The Court will consider these arguments in reverse order.[4]

Plaintiffs state that Defendant TAG may not contract for the application of North Carolina law "upon the Certificate of Authority ['to effect insurance business'] sought by the Defendant from the State of Tennessee." (Docket No. 49 at 33, D(1) and D(1)(c)). As Plaintiffs do not make this argument in their Motion for Partial Summary Judgment, but rather in their Amended Complaint, Plaintiffs do not cite any authority for the proposition they assert. Plaintiffs provide the

[4] Because the contention is over whether North Carolina law applies pursuant to the IAA or Tennessee law applies, the Court will assess Plaintiffs' arguments under both states' law wherever possible.

Court no basis to conclude that the IAA may not contain a choice of law provision because of the certificate of authority, and the Court does not see how that follows.

To the extent that Plaintiffs highlight that most of the IAAs do not contain a date or signature of Ed Shackelford as CEO of Defendant TAG, Plaintiffs make a statute of frauds argument. Assuming that the statute of frauds even applies to the IAA, it only requires the signature of the party against whom the contract is to be enforced. See Smith v. Hi-Speed, Inc., No. W201501613COAR3CV, 2016 WL 4546057, at *10 (Tenn. Ct. App. Aug. 30, 2016) (citing Tenn. Code. Ann. § 29-2-101(a)(4) (2012)) ("No action shall be brought [upon certain contracts] unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof. shall be in writing,

and signed by the party to be charged therewith ….”). Therefore, Plaintiffs’ contention that Defendant TAG has not submitted a mutually executed contract because Shackelford’s signature does not appear on the IAA is unavailing.

The Court notes Plaintiffs’ argument that Defendant TAG deceptively procured their electronic signature. However, Plaintiffs merely allege that without offering the Court any evidence. As far as the Court can tell, Plaintiffs mention that their contracts were procured by fraud in their Amended Complaint; making a passing reference to “purported ‘electronic signatures’” in their Motion for Partial Summary Judgment; and again mention the electronic signatures in their Response to Defendant’s Notice of Filing of Order. (Docket No. 49 at 33, ¶ D(1)(a); Docket No. 165 at 6; Docket No. 191 at 2). Their reference to the electronic

signatures in their Response to Defendant's Notice of Filing of Order refers the Court back to the allegation of fraud with respect to the signatures made in the Amended Complaint. But an allegation in an unverified complaint is not evidence. Plaintiffs do not point the Court to any place in the record that would support their allegation. Furthermore, none of Plaintiffs' affidavits appears to even mention the alleged mischief with respect to the electronic signatures. Moreover, as far as the Court discerns, the material terms Plaintiffs allege were changed pertain to vesting and continued renewals as to all insurance customers produced by Plaintiffs. (Docket No. 49 at 33, ¶ D(1)(a)). Therefore, it is especially suspect for Plaintiffs to argue, based on their allegation of fraud, that "substantial ambiguity exists regarding the terms of any mutually-executed agreement

which would purport to impose the application of North Carolina law[.]" (Docket No. 191 at 3) (emphasis in the original).

Plaintiffs' arguments that the IAA may not be enforced because it is a contract of adhesion, unconscionable, and lacks mutuality also fail. "Enforcement of a contract is generally refused on grounds of unconscionability where the 'inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.'" Trigg v. Little Six Corp., 457 S.W.3d 906, 912 (Tenn. Ct. App. 2014) (citations omitted); see also Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 213 (1981) (citations omitted) (stating the same). "[A] determination of unconscionability

must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract." Trigg, 457 S.W.3d at 912 (internal quotation marks and citations omitted); see also Brenner, 302 N.C. at 213 (citations omitted) ("In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.").

The unconscionability analysis involves two components: "(1) procedural unconscionability, which is an absence of the meaningful choice on the part of one of the parties and (2) substantive unconscionability, which refers to contract terms

which are unreasonably favorable to the other party." Trigg, 457 S.W.3d at 913 (internal quotation marks and citations omitted). Courts generally apply greater scrutiny to contracts of adhesion when determining if they are unconscionable. See id. at 912 (citation omitted). The Tennessee Supreme Court has defined contracts of adhesion as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." Id. at 912-13 (internal quotation marks and citations omitted). Likewise, under North Carolina law, "[a] party asserting that a contract is unconscionable must prove both procedural and

substantive unconscionability." Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 102, (2008). "[P]rocedural unconscionability involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms." Tillman, 362 N.C. at 102-03 (citations omitted).

Plaintiffs argue that the IAAs demonstrate a lack of mutuality, are unconscionable, and would constitute contracts of adhesion because of the following language:

> Agent acknowledges and agrees that all such commissions shall be paid by the Company to Agent and Agent hereby covenants and agrees that he or she will not seek payment directly from the insurance companies whose products and services are solicited, sold and provided by the Company. The Company shall provide Agent with reasonable notice of pertinent

> information regarding such commissions and the processes and procedures for Agent to earn and receive such commissions. However, the amount, rate, timing, payment, determination of when a commission is earned and payable, forfeiture, and other aspects of such commissions shall be determined solely by the Company or the insurance companies whose products and services are solicited, sold and provided by the Company and Agent pursuant to this Agreement. Agent is responsible for understanding and abiding by the terms and conditions of such commissions, which may be adjusted at any time by the Company or such insurance companies in their sole discretion.

(IAA at ¶ D.1). Plaintiffs contend that the aforementioned provisions regarding compensation are unenforceable because, as they read them, the provisions permit Defendant TAG to pay Plaintiffs what it unilaterally determines, when and if Defendant TAG determines that Plaintiffs should be paid. (Docket No. 49 at 33). Plaintiffs have not provided any evidence to support finding that the

IAAs are contracts of adhesion. In addition to not having presented sufficient facts from which a trier of facts could conclude the existence of both procedural and substantive unconscionability,[5] a common sense reading of the highlighted contract provisions does not require the interpretation offered by Plaintiffs—that interpretation essentially being that Defendant TAG may do as it pleases with respect to commission payments. Because the Court does not read the IAA's provisions in such a way that they are woefully one-sided, Plaintiffs' lack of mutuality argument is unfounded.

Finally, Plaintiffs assert that the IAA is void ab initio and unenforceable as to terms related to

[5] Plaintiffs failed to respond to the argument made by Defendant TAG in its Motion for Summary Judgment that no finder of fact could conclude that the IAAs are unconscionable.

their right to an accounting and receipt of commissions earned because "[t]he terms pertaining to vesting and commissions conflict with Tennessee laws" and "[t]he provisions of the contract patently conflict with Tennessee regulations pertaining to agent compensation, and to federal Medicare regulations." (Id. at D(1)(c)-(d)). However, Plaintiffs list over sixteen provisions from the Tennessee Code Annotated in their Amended Complaint and simply assert that they are applicable without explaining the reason why.[6] (Docket No. 49 at 29-32, C(1)-(16)). In their Motion for Partial Summary Judgment, Plaintiffs again

[6]Plaintiffs assert that T.C.A. § 56-2-201 "includes and incorporates the insurance products marketed by [Defendant TAG] within the State of Tennessee and, accordingly, rendered the Defendant responsible for compliance with the statutory and regulatory provisions of the insurance laws of the State of Tennessee, including those [Plaintiffs proceed to list.]" (Docket No. 49 at 29, C(1)). Tennessee Code Annotated § 56-2-201 simply provides the definition for "kinds of insurance." Evening assuming Defendant TAG markets the kind of insurance listed in that statutory provision, Plaintiffs fail to provide the Court any legal analysis.

list most of the statutory provisions they cite in their Amended Complaint, throw in a couple of Medicare regulations for good measure, and simply state that they are applicable—this time in the context of arguing that Defendant TAG owes them a fiduciary duty to account (Docket No. 165 at 30-34, ¶¶ 16-22).

Plaintiffs do not give the Court legal arguments to assess, but rather make the bald assertion that the facts fit. That may be so, but that is not for the Court to discover. See McPherson v. Kelsey, 125 F.3d 989, 995-6 (6th Cir. 1997) (internal quotation marks and citations omitted) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to … put flesh on its bones."); LidoChem, Inc. v. Stoller Enterprises, Inc., 500 F. App'x 373, 388-89 (6th Cir. 2012) (citation omitted) ("Courts do not

engage in a self-directed inquiry into the facts because district judges are not 'pigs, hunting for truffles.'").

Furthermore, some of the statutory provisions that Plaintiffs cite seem wholly inapplicable. For example, Plaintiffs cite T.C.A. § 56-8-103, but there is no private right of action under it. See Myint v. Allstate Ins. Co., 970 S.W.2d 920, 924 (Tenn. 1998) ("No private right of action may be maintained under [The Insurance Trade Practices Act]."); see also Tenn. Code Ann. § 56-8-101(c). Plaintiffs also cite 42 C.F.R. § 423.2274 to support its argument that Defendant TAG must immediately tender documents related to compensation structure upon Plaintiffs' request. However, the very language Plaintiffs cite refers to requests made by CMS.

Per the foregoing discussion, the Court finds that the IAAs are valid contracts and, as such, their choice of law provisions are enforceable. North Carolina law will govern the parties' claims.

II. Defendant TAG's Motion for Summary Judgment

A. North Carolina's Statutes of Limitations Apply

In its Motion for Summary Judgment, Defendant TAG first argues that the claims of all Plaintiffs, except for Plaintiff Tuttobene, are time-barred by applicable statutes of limitations under North Carolina law. Plaintiffs seem to argue that no statute of limitations has run under North Carolina law and that, even so, the Court should apply the statute of limitations under Tennessee law. (Docket No. 181 at 2-4; Docket No. 191 at 1-2).

A federal court sitting in diversity applies the conflict of law rules of the forum. See Klaxon Co. v.

Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). "Tennessee courts apply the statute of limitations of the forum, as a 'procedural' measure unless the action (1) is one encompassed by the state borrowing statute, Tenn. Code Ann. § 28-1-112, or (2) is one in which the foreign state's limitation is not merely upon the remedy but upon the underlying substantive right." Mackey v. Judy's Foods, Inc., 654 F. Supp. 1465, 1469 (M.D. Tenn. 1987), aff'd, 867 F.2d 325 (6th Cir. 1989). Tennessee's borrowing statute states that "[w]here the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state."

Tenn. Code Ann. § 28-1-112.

There is no dispute that the party to be charged, Defendant TAG, is a resident of North Carolina. Therefore, in order for North Carolina's statutes of limitations to be applicable, the present cause of action must have accrued in North Carolina. Defendant TAG contends that Plaintiffs' cause of action accrued in North Carolina "because the records (and activities) allegedly giving rise to Plaintiffs' claims were created (and transpired) in North Carolina." (Docket No. 174 at 13). Unsurprisingly, Plaintiffs argue that "[t]he activities which generated the controversy occurred within the State of Tennessee and other states bordering North Carolina" and "[Defendant TAG] does business within the State of Tennessee, and is qualified by both the Tennessee Secretary of State and Commissioner of Insurance." (Docket No. 191 at 2).

The Court "applies the law of the state of the borrowing statute to determine where a cause of action for breach of contract accrued." Combs v. Int'l Ins. Co., 163 F. Supp. 2d 686., 691 (E.D. Ky. 2001), aff'd, 354 F.3d 568 (6th Cir. 2004) (citing Cope v. Anderson, 331 U.S. 461, 466 (1947)).

Neither Defendant TAG nor Plaintiffs cite Tennessee legal authority to support their argument as to place of accrual, and the Court has not discovered any in its search. However, the Court finds Kentucky law instructive on this issue.

Kentucky has a borrowing statute similar to Tennessee's.[7] The Sixth Circuit interpreted the Kentucky borrowing statute in Willits v. Peabody

[7]"When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period." Ky. Rev. Stat. Ann. § 413.320.

Coal Co., 188 F.3d 510 (6th Cir. 1999). In Willits, plaintiffs sued defendant for, *inter alia*, an alleged breach of contract based on defendant's alleged improper deductions from royalty payments due to plaintiff. 188 F.3d at *3. The Sixth Circuit affirmed the district court's ruling and held that under Kentucky law the cause of action accrued in the state where defendant improperly calculated the royalties and from where defendant mailed the payments to the plaintiffs in their various states of residence. Id. at *13. Because the facts of Willits bear a resemblance to those of the case at bar, its reasoning is persuasive.

The factual allegation underlying Plaintiffs' cause of action is that Defendant TAG withheld commission payments and/or overstated deductions. Defendant TAG argues that the records giving rise to Plaintiffs' claims are in North

Carolina. The record supports that assertion in that one of the Plaintiffs states that he "made several trips from Georgia to North Carolina for the primary purpose of obtaining [accounting] information[.]" (Docket No.169-1 at 3, Nash. Aff. ¶ 6). As North Carolina appears to be the place where Defendant TAG allegedly improperly calculated commissions or withheld them altogether, the Court finds that North Carolina is the place where the causes of action accrued and its statutes of limitations apply. That the parties contracted for the application of North Carolina law only bolsters that conclusion.

B. Five of the Six Plaintiffs' Claims are Time-Barred

"Where the statute [of limitations] is properly pleaded and all facts are admitted or established, the question of limitations becomes a mater of law, and summary judgment is appropriate." Blue Cross

& Blue Shield of N. Carolina v. Odell Assocs., Inc., 61 N.C. App. 350, 356 (1983) (citations omitted).

The limitations period for a contract action, conversion action, and a claim of breach of fiduciary duty arising from a contract is three years.[8] See N.C. Gen. Stat. Ann. § 1-52(1); see N.C. Gen. Stat. Ann. § 1-52(4); see Tyson v. N. Carolina Nat. Bank. 305 N.C. 136, 142 (1982). The statute of limitations starts to run on a breach of contract action when the breach occurs, which is when the claim accrues. See Abram v. Charter Med. Corp. of Raleigh, 100 N.C. App. 718, 721 (1990). A claim for conversion "accrues, and the statute of limitations begins to run, when the unauthorized assumption and

[8]Even if the ten-year statute of limitations applicable to constructive fraud claims were appropriate given that the elements for constructive fraud are essentially the existence of a fiduciary duty and a breach thereof, see Keener Lumber Co. v. Perry, 149 N.C. App. 19, 28 (2002), that is of little consequence to Plaintiffs as the Court will find that Defendant TAG owed no fiduciary duty to Plaintiffs.

exercise of ownership occurs[.]" Stratton v. Royal Bank of Canada, 211 N.C. App. 78, 83 (2011) (citation omitted). "[W]hen a breach of fiduciary duty claim is based on a contract, the claim accrues when the cause of action arose." Deyton v. Estate of Waters, No. 10 CS 2582, 2013 WL 1800069, at *10 (N.C. Super. Apr. 25, 2013). The discovery rule is inapplicable to an action for breach of contract and conversion. See Blythe v. Bell, No. 11 CVS 933, 2013 WL 440701, at *16 (N.C. Super. Feb. 4, 2013); see Stratton, 211 N.C. App. at 83.

Plaintiffs' claim for declaratory judgment is likewise subject to a three-year limitations period. "When determining the applicable statute of limitations, [courts] are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs." Baars v. Campbell Univ.,

Inc., 148 N.C. App. 408, 414 (2002) (citation omitted). Hence, the limitations period for a declaratory judgment depends on the underlying claims on which it is based. See Ludlum v. State, 227 N.C. App. 92, 94 (2013) ("[I]f the statute of limitations was properly applied to plaintiff's underlying claims, no relief can be afforded under the Declaratory Judgment Act."). Because Plaintiffs seek a declaration of their rights and status as to the IAA, the three-year limitations period for a contract action applies.

Defendant TAG properly raised and pleaded statutes of limitations as an affirmative defense to Plaintiffs' claims. (Docket No. 51 at 14). Therefore, Plaintiffs' non-statutory claims are time-barred and summary judgment in favor of Defendant TAG is appropriate if established facts show that Plaintiffs did not file suit against Defendant TAG

within the three years of accrual of their causes of action. The factual allegations underlying Plaintiffs' claims for breach of contract, conversion, breach of fiduciary duty, and declaratory judgment are the same. That being so, those causes of action accrued at the same time. Plaintiffs Nash, Petitti, and Tuttobene filed suit on October 18, 2010. Therefore, their claims are time-barred if their causes of action accrued prior to October 18, 2007. Plaintiffs Holley, Ghiringhelli, and Pye filed suit on January 20, 2012. Their claims are time-barred if their causes of action accrued before January 20, 2009. Based on Plaintiffs' own admissions, the statutes of limitations have run on all Plaintiffs' claims except Plaintiff Tuttobene's.

It is undisputed that Plaintiff Nash began a contractual relationship with Defendant TAG in May 2005 and claims to have begun having

problems with false charge backs after several months. (Docket No. 182 at 2-3, ¶¶ 9-11). His business relationship with Defendant TAG ended on September 12, 2006. (Id. at 3, ¶ 13). Therefore, it is clear that Plaintiff Nash's claims are time-barred because his causes of actions accrued before October 18, 2007.

It is undisputed that Plaintiff Petitti began a contractual relationship with Defendant TAG in June 2005 and claims to have begun observing discrepancies in payments from Defendant TAG near the end of 2006. (Docket No. 134 at 1-2, ¶¶ 2, 4; Docket No. 182 at 4, ¶ 18). His business relationship with Defendant TAG ended around September 2008. (Docket No. 170-1 at 2, Petitti Aff. ¶ 7). If Defendant TAG withheld commission payments and/or made improper deductions, that must have first happened no later than the end of

2006. Because Plaintiff Petitti's causes of action accrued before October 18, 2007, his claims are time-barred.

It is undisputed that Plaintiff Holley began a contractual relationship with Defendant TAG in 2004 and claims to have begun observing discrepancies in commission payments in 2007. (Docket No. 132 at 2-3, ¶¶ 3, 6; Docket No. 182 at 4, ¶ 20). Plaintiff Holley's business relationship with Defendant TAG ended in 2008. (Docket No. 182 at 5, ¶ 21). Because Plaintiff Holley's causes of action accrued before January 20, 2009, his claims are time-barred.

It is undisputed that Plaintiff Ghiringhelli claims to have begun encountering problems with receiving his commission payments from Defendant TAG at some point in their business relationship, which ended in 2008. (Docket No. 131 at 3, ¶ 6;

Docket No. 182 at 5, ¶ 23). His claims are time-barred because they accrued prior to January 20, 2009.

It is undisputed that Plaintiff Pye began a contractual association with Defendant TAG in 2005 and claims to have begun experiencing problems with his commission payments that same year. (Docket No. 135 at 1-2, ¶¶ 2, 5; Docket No. 182 at 3, ¶ 15). Plaintiff Pye ended work with Defendant TAG in April 2006. (Docket No. 182 at 4, ¶ 16). Plaintiff Pye's claims are barred by the applicable statutes of limitations because they accrued before January 20, 2009.

Plaintiffs' attempt to defeat Defendant TAG's argument that almost all Plaintiffs have time-barred claims is unavailing. Plaintiffs argue that the separate-accrual rule discussed in Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014)

is applicable and not exclusive to a copyright action, which Petrella was. (Docket No. 181 at 3-4). However, North Carolina law governs this case. In Assurance Grp., Inc. v. Bare, 2016 N.C. App. LEXIS 157, 782 S.E.2d 581 (N.C. Ct. App. 2016), the Court of Appeals of North Carolina upheld the trial court's grant of summary judgment to TAG because of the time-barred claims in a suit involving plaintiffs who were dismissed from the case at bar for lack of subject matter jurisdiction. (Docket No. 63). In Bare, the court rejected the argument that the limitations period had not run "because [defendants] continued to receive monthly commission payments under the contract and [those] 'discrete' payments trigger new statute of limitations periods in a manner analogous to the 'separate-accrual rule' for federal copyright claims." 2016 N.C. App. LEXIS at *7. The court explained:

> The heart of this dispute is a disagreement about what the Assurance Group owes Defendants under the terms of their contracts. Although the contract may require the Assurance Group to periodically make payments to Defendants, the underlying contract dispute remains the same. Thus, once Defendants learned that the Assurance Group was not paying them what they believed they were owed under the contract, the limitations period began to run on these claims.

Bare, 2016 N.C. App. LEXIS at *8. This Court follows that reasoning.[9]

For the reasons stated above, the Court will grant summary judgment to Defendant TAG on the time-barred claims brought by Plaintiffs Nash, Petitti, Holley, Ghiringhelli, and Pye. The Court will also grant summary judgment as to those

[9] The Supreme court of North Carolina declined to review the decision of the Court of Appeals of North Carolina in Bare. Furthermore, the Supreme Court of the United States denied the Petition for Writ of Certiorari in that case, which asked the Court to decide whether Petrella's separate accrual rule applies to the commission payments at issue in Bare.

Plaintiffs' claims that Defendant TAG violated certain statutory and regulatory provisions for the reason stated *supra* in Section I. Defendant TAG concedes that Plaintiff Tuttobene's claims are not time-barred, (Docket No. 174 at 3), so the Court will now consider them below.

C. Defendant TAG Does Not Owe Plaintiff Tuttobene a Fiduciary Duty

Defendant TAG argues that it is entitled to summary judgment on Plaintiff Tuttobene's claim that it breached its fiduciary duty to account, properly and completely, with respect to commission payments due. Its argument is simple: it cannot have breached a fiduciary duty because no fiduciary relationship existed between it and Plaintiff Tuttobene. See Dalton v. Camp, 353 N.C. 647, 651 (2001) (citation omitted) ("For a breach of fiduciary duty to exist, there must first be a

fiduciary relationship between the parties.").

North Carolina law recognizes both *de jure* and *de facto* fiduciary relationships. See Lockerman v. S. River Elec. Membership Corp., 794 S.E.2d 346, 351 (N.C. Ct. App. 2016). "[A] fiduciary relation exists in fact … [when] there is a confidence reposed on one side, and resulting domination and influence on the other [(*de facto*)]." Id. (citing Abbitt v. Gregory, 201 N.C. 577, 598 (1931)). In order to establish the existence of a fiduciary relationship, "it is not sufficient for plaintiff to allege merely that defendant had won his trust and confidence and occupied a position of dominant influence over him." Rhodes v. Jones, 232 N.C. 547, 548-9 (1950) (stating the elements that constitute a constructive fraud claim, which include a fiduciary relationship). Rather, "i[t] is necessary for plaintiff to allege the facts and circumstances …

which created the relation of trust and confidence[.]" Rhodes, 232 N.C. at 549; see also Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 482 (2004).

A jury usually decides the factual question of whether a fiduciary relationship exists. See Lockerman, 794 S.E.2d at 351. However, finding the existence of a *de facto* fiduciary relationship demandingly requires that "one party figuratively holds all the cards—all the financial power or technical information, for example[.]" Id. at 352 (internal quotation marks and citation omitted). "[T]his Court can determine the adequacy of the evidence to support such a jury finding as a matter of law." Id. at 351 (citation omitted).

"[P]arties generally owe no special duty to one another beyond the terms of [their] contract[.]" Branch Banking & Trust Co. v. Thompson, 107 N.C.

App. 53, 61 (1992) (citation omitted). Even if parties are "mutually interdependent businesses," a fiduciary relationship does not exist where they enter into an arms-length contract. See Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 219 N.C. App. 615, 621 (2012) (citation omitted). "Typically, in an arm's length relationship, … where the part[ies] have equal bargaining power, resulting superiority and influence does not exist. Therefore, neither party becomes the fiduciary of the other." Keister v. Nat'l Council of Young Men's Christian Ass'n of U.S., No. 12 CVS 1137, 2013 WL 3864583, at *6 (N.C. Super. July 18, 2013).

Defendant TAG argues that it did not stand in a fiduciary position vis-á-vis Plaintiff Tuttobene. It contends that Plaintiff Tuttobene's concessions, specifically that Plaintiff Tuttobene is an "independent agent" who had a "contractual

association" with Defendant TAG that was supposed to be "a mutually-beneficial financial arrangement," demonstrate this. (Docket No. 166-1 at 1, Tuttobene Aff. ¶¶ 4-5). The Court agrees.

Looking at the facts in the light most favorable to Plaintiff Tuttobene, the evidence is inadequate to support a finding by a trier of fact that a fiduciary relationship existed between the parties. Under North Carolina law, the contractual relationship between Defendant TAG and Plaintiff Tuttobene cannot give rise to a fiduciary relationship. Plaintiff Tuttobene has not offered the Court any facts to suggest that a relation of trust and confidence was formed between him and Defendant TAG. Neither has he pointed to facts that show that his relationship with Defendant TAG was anything other than arms-length or that there was unequal bargaining power, even if this

Court would characterize the parties' business relationship as mutually interdependent.

Defendant TAG especially relies on Sec. Nat. Bank of Greensboro v. Educators Mut. Life Ins. Co., 265 N.C. 86 (1965) to argue that no fiduciary relationship existed. In that case, the Supreme Court of North Carolina held that "[a] contract to pay renewal commissions creates a debtor-creditor relationship[,]" not a fiduciary relationship. Sec. Nat. Bank of Greensboro, 265 N.C. at 94 (citation omitted). However, the court immediately offered an explanation: "The contract contains no provisions which create a trust relationship, expressly or by necessary implication, running in favor of Agent as *cestui que trust*." See id. That suggests, then, that even though the IAA does not contain a provision that expressly creates a trust relationship, it nevertheless may by implication.

Therefore, the following language in the IAA gives the Court pause: "Agent shall receive commissions … originating from and dependent upon payment made to [Defendant TAG] by the insurance companies[.]"; "Agent … agrees that all such commissions shall be paid by [Defendant TAG] to Agent and Agent … will not seek payment directly from the insurance companies[.]"; "[I]f the third-party insurance company … does not make payment of such commission amount to [Defendant TAG] then Agent shall not receive such commissions and [Defendant TAG] has no oblilgation or responsibility to make such payment[.]" (IAA at ¶ D.1 and D.3.a).

Even though Plaintiff Tuttobene never specifically points to the aforementioned language, the Court discerns that it is such language that

makes him argue that "[Defendant TAG] received in trust from various nationwide insurance carriers payments on behalf of the Plaintiffs, through an arrangement in which the collected funds would be accounted and eventually paid to the individual Plaintiffs, following appropriate deductions." (Docket No. 165 at 1). However, North Carolina law prevents such an interpretation.

In Highland Paving Co., LLC v. First Bank, 227 N.C. App. 36, 42-43 (2013), the North Carolina Court of Appeals found that plaintiff failed to allege a fiduciary relationship between it and defendant bank. It reasoned that "[t]he only relationship between plaintiff and the [defendant] bank was that created by the contract wherein the bank agreed to hold any proceeds from defendant Southeast's land sales in escrow and then distribute the proceeds to plaintiff upon inspection

of the completed work." Id. If North Carolina law does not recognize the existence of a fiduciary relationship when one party holds money in escrow for another party, it is difficult to imagine a fiduciary relationship blossoming out of the circumstances of this case.

Having decided that no trier of fact could find that a fiduciary relationship existed, the Court will grant summary judgment in favor of Defendant TAG as to Plaintiff Tuttobene's claim that Defendant TAG owed a fiduciary duty to account and breached it.

D. Defendant TAG is Not Entitled to Summary Judgment on Plaintiff Tuttobene's Breach of Contract Claim

It is not entirely clear to the Court whether Plaintiff Tuttobene pursues, in earnest, his breach

of contract claim against Defendant TAG.[10] Furthermore, as Defendant TAG notes, it is contradictory for Plaintiff Tuttobene to, at once, bring a claim for breach of contract and seek a declaratory judgment that the contract is void and enforceable. Nevertheless, the Court will not construe Plaintiff Tuttobene's breach of contract claim as having been abandoned.[11]

Under North Carolina law, "[t]he elements of a claim for breach of contract are (1) existence of a

---

[10] In Plaintiffs' Partial Motion for Summary Judgment, Plaintiffs state the following:

> The "contract" between the parties has no relevance to the disputed case issues. It is of minimal interest only because the contract was the mechanism through which the entrustment of the funds to TAG occurred. There are no legitimate "breach of contract" issues in the case. The agents did their work. Their commissions were paid by the carriers. Those commissions were received by TAG… Disingenuously, Defendant TAG appears to be arguing that the "contract" somehow insulates TAG from its fundamental fiduciary duty to its agents. (Docket No. 165 at 2-3, ¶ 3).

[11] It appears to the Court that Plaintiff Tuttobene asserts that there are no legitimate breach of contract issues only because Defendant TAG argues that, under the contract, it was not required to provide an accounting. However, the Court disagrees.

valid contract and (2) breach of the terms of that contract." Johnson v. Colonial Life & Acc. Ins. Co., 173 N.C. App. 365, 369 (2005) (internal quotation marks and citation omitted). Per the Court's discussion in Section I *supra*, the IAA is a valid contract. The relevant question, then, is whether Defendant TAG has breached the terms of the IAA.

In Plaintiffs' Amended Complaint, Plaintiff Tuttobene states that "[Defendant TAG] … owed a contractual duty to properly receive, account, record, and preserve the records pertaining to the commissioned funds entrusted to the Defendant for the Plaintiffs' benefit, and to thereafter pay, in a timely and reasonable manner, the net funds payable under the terms of the contract. In moving for summary judgment on Plaintiff Tuttobene's breach of contract claim, Defendant TAG argues that 1) the terms of the IAA impose no such duty on

it; 2) Plaintiff Tuttobene offers no evidence as to the existence of damages; 3) even if there were evidence that Defendant TAG failed to pay commissions after the termination of the IAA, such nonpayment did not constitute a breach of the IAA because Plaintiff Tuttobene was not vested; and 4), even if he were vested, because Plaintiff Tuttobene has debts owed to Defendant TAG that were not fully paid within ninety days of the termination of the IAA, he is not entitled to any further commissions under any applicable vesting schedule. (Docket No. 174 at 23-26). The Court will address each argument in turn.

i. The Language of the IAA is Ambiguous

Defendant TAG argues that the terms of the IAA do not require it to provide Plaintiff Tuttobene with a full accounting of his sales and commission history on demand. It points to the following

contract provision: "[Defendant TAG] shall provide Agent with reasonable notice of pertinent information regarding such commissions and the processes and procedures for Agent to earn and receive such commissions." (IAA at ¶ D.1).

Under North Carolina law, "[a] contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court." Waters v. Peaks, 775 S.E.2d 925, *5 (N.C. Ct. App. 2015) (internal quotation marks omitted) (citing Dep't. of Transp. v. Idol, 114 N.C. App. 98, 100 (1994)). "If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury. [A]mbiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the "parties." Waters, 775 S.E.2d at *5 (N.C. Ct. App. 2015) (internal quotation marks and citations omitted).

"One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing." Fulford v. Jenkins, 195 N.C. App. 402, 404 (2009) (citation omitted). The following principles of contract interpretation are also applicable to the IAA:

> Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. Intent is derived not from a particular contractual term but from the contract as a whole.

State v. Philip Morris USA Inc., 363 N.C. 623, 631-32 (2009) (citations omitted).

The Court finds that the contract provision Defendant TAG highlights is ambiguous. Even though the IAA does not explicitly state that Defendant TAG is required to provide an

accounting to its agents, the language of the IAA is certainly susceptible to that interpretation. The amount of money Defendant TAG received from insurance companies, which would then go to Plaintiff Tuttobene, strikes the Court as being "pertinent information regarding such commissions." This is especially so given that the IAA forbids Plaintiff Tuttobene from seeking payment directly from the insurance companies. Furthermore, providing Plaintiff Tuttobene with documentation of itemized, documented deductions from his commission payments could be interpreted as being party of the "reasonable notice of … the processes and procedures for the Agent to earn and receive such commissions" that Defendant TAG is obligated to provide. Although Defendant TAG contends that the IAA does not require an accounting, ambiguities will be construed against it

as the party who drafted the IAA. Because the contract is ambiguous, Defendant TAG is not entitled to summary judgment on Plaintiff Tuttobene's breach of contract claim.

ii. There is a Genuine Issue as to the Existence of Damages

Defendant TAG also argues that summary judgment as to Plaintiff Tuttobene's breach of contract claim is appropriate because that claim requires a showing of damages, of which Plaintiff Tuttobene has provided no evidence. (Docket No. 174 at 23). It relies on Piedmont Inst. of Pain Mgmt. v. Staton Found., 157 N.C. App. 577 (2003) and Jay Grp., Ltd. v. Glasgow, 139 N.C. App. 595 (2000) for that proposition. However, reliance on those cases is misplaced as neither one deals with a claim for breach of contract. Moreover, Defendant TAG asserts an incorrect statement of the law. It is true that summary judgment is appropriate

where there is no evidence of an element of a claim. See Piedmont, 157 N.C. App. at 589 (citation omitted) ("A party is entitled to judgment as a matter of law if the non-movant fails to forecast evidence with respect to an essential element of a claim."). Under North Carolina law, however, showing damages is not an element for a breach of contract claim. See Hodges v. Young, 209 N.C. App. 753, *2 (2011) (collecting cases) ("Unlike claims of negligence, the existence of damages is not an element of a *prima facie* claim for breach of contract."). In Hodges, the Court stated that "[plaintiff's] ability to prove damages arising from Defendants' alleged breach of the contract is irrelevant in a summary judgment hearing, and entry of summary judgment based on the theory that [plaintiff] failed to prove damages would have been error." 209 N.C. App. at *2 (citation omitted).

Even if a showing of damages were required for Plaintiff Tuttobene's breach of contract claim, there would exist a genuine issue as to the existence of damages, thereby precluding summary judgment in favor of Defendant TAG. Defendant TAG argues, and Plaintiff Tuttobene admits, that "[a]s to the commission payments that Plaintiffs claim TAG owes to them, Plaintiffs have shown no evidence that TAG was paid such commissions by the carriers." (Docket No. 182 at 6, ¶ 27). However, Plaintiff Tuttobene qualifies that admission by arguing that Defendant TAG "has admitted throughout the record … that the agents are entitled to the accounting … that the information 'will be forthcoming[,]' [and that] TAG has never denied in any pleading that it has received commissions on behalf of each Plaintiff agent, including residuals which continued to accrue on a

monthly basis long after the agents left their relationship with TAG." (Id.). The Court's discussion *infra* in Section III.B addresses Plaintiff Tuttobene's contention that Defendant TAG has admitted that the agents are entitled to an accounting, which "will be forthcoming."

For now, suffice it to say that the Court finds that there is a genuine issue as to the existence of damages based on the record. In Plaintiff Tuttobene's affidavit, he gives an estimate of the amount he might be owed and states that "it is difficult to be precise in projecting the amount of money owed to [him] by TAG, due to the fact that they have exclusive possession and control[12] over all of the relevant records[.]" (Docket No. 166-1,

[12]Defendant TAG disputes the argument that Plaintiff Tuttobene cannot state the precise amount of money Defendant TAG owes him because such information is in Defendant TAG's exclusive control. (Docket No. 130 at 10). In light of the other evidence in the record, Defendant TAG's quarrel does not change the outcome.

Tuttobene Aff. ¶¶12-14). Importantly, deposition testimony by Terry Best, former Senior Financial Analyst and Vice President of Finance at Defendant TAG, and Randy Hoover, former Chief Operating Officer for Defendant TAG, tends to suggest that Defendant TAG experienced some problems paying agents' commissions. For example, Best testified that the woman working at the help desk that was set up to field agents' complaints about nonpayment "said repeatedly that she received calls from agents and had taken information in and the agent still was not paid for whatever reason." (Docket No. 137-8 at 20). Hoover testified that "[he was not] sure, quite frankly, if TAG knows" whether Plaintiffs are owed money and that "with the sheer number of calls and the sheer number of challenges that [Defendant TAG] had … things slipped between the cracks." (Docket No. 137-9 at

9). Furthermore, the Expert Witness Report, (Docket No. 164), establishes that some money may be owed to Plaintiff Tuttobene.

iii. Plaintiff Tuttobene's Vesting Status and Alleged Unpaid Debt Do Not Prevent Payment by Defendant TAG

Defendant TAG contends that it did not breach the IAA by not paying renewal commissions to agents who were not vested under its terms. The IAA contains the following:

> Upon the expiration or termination of this Agreement, the Company shall pay commissions due to Agent in accordance with any commission policy or procedure then in effect; however, unless Agent is "vested" as set forth below, Agent will receive commission advances limited to one month's commission to be measured from the date of such expiration or termination, and any subsequent commissions shall be considered unearned and forfeited to the Company.

(IAA at ¶ D.1). Defendant TAG argues that Plaintiff Tuttobene has not identified any evidence from which a finder of fact could conclude that he

was vested under the agreement. Defendant TAG submits the declaration of Mark Carter, the Chief Financial Officer of Defendant TAG, which states that "[n]one of the six Plaintiffs were vested under the terms of their Agreements with TAG." (Docket No. 177 at 5, ¶ 24). The Court understands that it is Plaintiff Tuttobene's position that he vested immediately when he was hired. (Docket No. 49 at 33, D(1)(a); Docket No. 164 at 4). But again, at the summary judgment stage, the Court requires evidence. Plaintiff Tuttobene fails to mention vesting in his affidavit and chose not to respond to Defendant TAG's argument in its Motion for Summary Judgment that he had not vested. It is no answer to contend, as Plaintiff Tuttobene does, that only one issue is ripe for the Court's consideration and ignore the others.

What the Court has before it is Plaintiff

Tuttobene's IAA, which states that he vests after five consecutive years of actively soliciting and selling insurance products and services. (Docket No. 177-3, IAA at ¶ D.3.b). Given that Plaintiff Tuttobene was an independent agent of Defendant TAG from 2008-2010, his tenure with Defendant TAG falls well below the five-year vesting mark. Even if Plaintiff Tuttobene's contract had stated that he vests after three years, as some IAAs in the record state, he still would not have vested by the terms of the contract.

Although the Court agrees with Defendant TAG that no trier of fact could find that Plaintiff Tuttobene was vested, that does not imply that Defendant TAG owes Plaintiff Tuttobene no money whatsoever. Even if Plaintiff Tuttobene is not entitled to commission payments forfeited because of ending his work with Defendant TAG without

having attained vested status, it would be unjust for Plaintiff Tuttobene not to be able to recover commission payments that would have been paid to him *during* his time with Defendant TAG and any deductions improperly made during that time.

Lastly, Defendant TAG argues that, under the IAA, Plaintiff Tuttobene is not entitled to any commissions, even if he had vested, because of his unpaid debts to Defendant TAG. It points to the following language in the IAA:

> Regardless of whether Agent is vested or not vested under this Agreement, if Agent has any outstanding debts to the Company upon the expiration or termination of this Agreement (without any renewal hereof), then Agent must pay such debts in full to the Company within ninety (90) days of such expiration or termination. If such debts are not paid in full within this ninety (90) day period, then Agent shall not receive any further commissions under such vesting schedule or otherwise and any such vested status shall immediately terminate.

(IAA at ¶ D.4). Plaintiff Tuttobene argues that Defendant TAG "should not be permitted to make a statement of fact regarding information which it exclusively controls, but which it has refused to provide, despite Court orders." (Docket No. 182 at 6, ¶ 28). The Court agrees that Defendant TAG should produce more than just a declaration, (Docket No. 177 at 5, ¶ 25), stating that Plaintiff Tuttobene had unpaid debts. Furthermore, unpaid debts should not prevent Plaintiff Tuttobene from recovering what he would have received—assuming he has not received his due—while working as an independent agent for Defendant TAG. Again, it would be unjust for Defendant TAG to withhold properly calculated commission payments and then use Plaintiff Tuttobene's alleged unpaid debts to shield itself from having to make any payments.

For the reasons stated above, the Court will

deny summary judgment in favor of Defendant TAG as to Plaintiff Tuttobene's breach of contract claim.

E. Defendant TAG is Not Entitled to Summary Judgment as to Plaintiff Tuttobene's Conversion Claim

Defendant TAG argues that it is entitled to summary judgment as to Plaintiff Tuttobene's claim for conversion because he has not identified with specificity the amount or location of funds allegedly converted. Under North Carolina law, "[a] conversion is 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" Stratton v. Royal Bank of Canada, 211 N.C. App. 78, 83 (2011) (citation omitted). "There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and

wrongful possession or conversion by the defendant." Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 523 (2012) (citation omitted). "[T]he general rule is that 'money may be the subject of an action for conversion *only* when it is capable of being identified and described.'" Variety Wholesalers, 365 N.C. at 528 (citation omitted) (emphasis in original) (finding that "evidence of multiple wire transfers of specific sums totaling $887,889.37 from [plaintiff's] account to the Wachovia lockbox account" possibly sufficient for a trier of fact to conclude that the identifiable fund requirement was met).

Even though Plaintiff Tuttobene has not identified with specificity the amount of funds allegedly converted, the Court finds that summary judgment in favor of Defendant TAG is

inappropriate given that Defendant TAG has prevented Plaintiff Tuttobene from identifying specific funds by not providing the itemized documentation Plaintiff Tuttobene requests. Once a proper accounting is had, Plaintiff Tuttobene may be able to identify a sum certain.

F. Defendant TAG is Entitled to Summary Judgment as to Plaintiff Tuttobene's Request for Declaratory Judgment

The Court will grant summary judgment in favor of Defendant TAG with respect to Plaintiff Tuttobene's request for declaratory judgment. Plaintiff Tuttobene seeks from the Court a declaratory judgment that the IAA is void and enforceable. Per the discussion *supra* in Section I, Plaintiff Tuttobene has not provided the Court with evidence from which a trier of fact could conclude that the IAA was void based on the arguments he put forward.

G. Defendant TAG is Entitled to Summary Judgment as to Plaintiff Tuttobene's Claim for Violations of Statutes and Regulations

For the reason stated above in Section I, the Court will grant summary judgment in favor of Defendant TAG as to Plaintiff Tuttobene's claim that Defendant TAG violated statutory and regulatory requirements. It is no answer for Plaintiff Tuttobene to assert that "the issues pertaining to statutory and regulatory requirements … should be addressed at the trial of the case, and may not be resolved until the Court makes a finding of fact on the sharply disputed factual issue of whether or not [Defendant TAG] has: (1) received commissions earned by the agents each month; (2) failed to account to the agents their net entitlement." (Docket No. 181 at 6).

H. Defendant TAG is Not Entitled to Summary Judgment as to its Contract Counterclaims against Plaintiff Tuttobene and Plaintiff Petitti

Defendant TAG asks the Court to grant summary judgment in its favor as to its breach of contract counterclaim against Plaintiffs Tuttobene and Petitti. Defendant TAG argues that Plaintiff Tuttobene owes TAG $7,244.46 and Plaintiff Petitti owes $65.86. It contends that this has not been denied and that, under the IAA, all expenses remain due and payable to it even after termination of the IAA. Plaintiffs Tuttobene and Petitti argue that this issue is not ripe for consideration until Defendant TAG produces the documentation it has for claiming debt. (Docket No. 181 at 5). The Court agrees.

III. Plaintiffs' Motion for Partial Summary Judgment

A. Plaintiffs are Not Entitled to Partial Summary Judgment

Plaintiffs contend that they are entitled to judgment as a matter of law "on the narrow legal issues of the fiduciary burden of proof owed by Defendant [TAG][.]" (Docket No 165 at 3). They cite Tennessee law to support their argument that Defendant TAG owes them a fiduciary duty. However, the Court – per the discussion in Section I and II.C. – has found that North Carolina law applies and, under North Carolina law, Defendant TAG does not owe Plaintiffs a fiduciary duty. For that reason, the Court will deny Plaintiffs' Motion for Partial Summary Judgment.

B. The Court will Not Sanction Defendant TAG under Rule 37 of the Federal Rules of Civil Procedure

Plaintiffs ask this Court to sanction Defendant TAG pursuant to Rule 37 of the Federal Rules of Civil Procedure for Defendant TAG's

supposed discovery defaults with respect to providing accounting information. (Docket No. 165 at 34). Looking at the record and the parties' arguments with respect to this issue, Defendant TAG has provided some accounting information, but not enough to let Plaintiffs know if Defendant TAG has provided some accounting information, but not enough to let Plaintiffs know if Defendant TAG withheld commissions and verify the reason Defendant TAG made certain deductions and charges.

At this time, it is unnecessary to impose sanctions on Defendant TAG because of the accounting information it has not provided. This is so because the Court will order a proper accounting at Defendant TAG's expense given that Plaintiff Tuttobene's claims for breach of contract and conversion survive.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment, (Docket No. 165), will be denied. Defendant TAG's Motion for Summary Judgment, (Docket No. 173), will be denied with respect to Plaintiff Tuttobene's claims for breach of contract and conversion and with respect to its counterclaims against Plaintiffs Tuttobene and Petitti. Defendant TAG's Motion for Summary Judgment will be granted as to Plaintiff Tuttobene's claims for 1) breach of fiduciary duty; 2) declaratory judgment; and 3) violations of statutes and regulations. It will also be granted with respect to all claims asserted by Plaintiffs Nash, Petitti, Holley, Ghiringhelli, and Pye.

A separate order shall be entered.

/s/Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE