STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

ARCADIA HEALTH SERVICES, INC,
Plaintiff,

v.

Case No. 13-137407-CK
Hon. James M. Alexander

CHARLES SYMES II and
HEALTH CARE PARTNERS INC.,
Defendants,

and

HEALTH CARE PARTNERS, INC
Counter-Plaintiff,

v.

ARCADIA HEALTH SERVICES, INC,
JOHN ELLIOTT, and AARON GOLDSTEIN,
Counter-Defendants.
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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on several motions for summary disposition. In its Third-Amended Compliant, Plaintiff claims that it provides health care staffing and home services across the United States. Defendants are the commissioned sales representatives for Plaintiff in a number of counties in California. For their services, Defendants receive a weekly commission for securing customers. The central agreements between the parties are a 1993 "Agreement for Appointment of Temporary Health Care Services Representative" and a 2000 "Agreement for Appointment of Arcadia Health Services, Inc, Representative."

Following a review, Plaintiff claims that it found that it had overpaid Defendants some $641,000 in worker's compensation premiums going back several years. After initiating the present suit to determine if its claim was valid, Plaintiff decided to recoup this amount by deducting the same from Defendants' ongoing commission payments.

Defendants viewed this act as a material breach, which entitled them to open nonparty Alegre Health Care to provide the same services to clients in the former markets that Defendants operated for Plaintiff. Plaintiff, on the other hand, claims that Defendants' competition was the first material breach. Plaintiff also claims that it overpaid commissions by some $100,000 for each of 13 years – dating back to April 2000.

To its end, Plaintiff then sued on claims of: (1) breach of contract; (2) injunctive relief; (3) misappropriation of trade secrets; (4) business defamation; (5) tortious interference; (6) unjust enrichment; (7) constructive trust; (8) silent fraud / nondisclosure; and (9) breach of fiduciary duty.

Defendant Health Care Partners also filed a First Amended Counterclaim, alleging claims of: (1) breach of contract; (2) breach of fiduciary duty; (3) intentional infliction of emotional distress; (4) declaratory relief; (5) preliminary and permanent injunctive relief; and (6) accounting.

All parties now move for summary disposition for various reasons under MCR 2.116(C)(7), (C)(8) or (C)(10).

A motion under (C)(7) determines whether a claim is barred, among other grounds, by a statute of limitations.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Wade v Dept of

Corrections, 439 Mich 158; 483 NW2d 26 (1992).

A motion under (C)(10) tests the factual support for Plaintiff's claims. Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996), citing Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994).

1. Defendant's motion regarding equitable claims.

Defendants Charles Symes and Health Care Partners first move for summary disposition of Plaintiff's claims for unjust enrichment, constructive trust, and breach of fiduciary duty (Counts VI, VII, and IX respectively) because the parties' relationship is governed solely by contracts.

Indeed, it is well settled that equitable claims (such as unjust enrichment or promissory estoppel) cannot be maintained when there is an express contract covering the disputed subject matter. See, e.g., Campbell v Troy, 42 Mich App 534, 537; 202 NW2d 547 (1972); Martin v East Lansing School Dist, 193 Mich App 166, 177; 483 NW2d 656 (1992); and Belle Isle Grill Corp v Detroit, 256 Mich App 463, 478; 666 NW2d 271 (2003).

Defendants also cite Slusher v Fome, 364 Mich 110, 111-112; 110 NW2d 672 (1961) for the proposition that courts typically dismiss equitable claims "where the equitable claims seek relief identical to and cover the same subject matter found within a breach of contract claim."

In its Response, Plaintiff argues that unjust enrichment claim is appropriate because its basis

is that there has been an overpayment not contemplated by the parties' contract. Plaintiff argues that it brought these claims to recover some $100,000 per year of alleged commission overpayments made from April 2000 to November 21, 2013.

In support, Plaintiff cites to A&P v Miprocom Ltd, an unpublished opinion per curiam of the Court of Appeals, issued August 6, 1999 (Docket No. 205697). In A&P, the parties entered into a written lease that required the plaintiff to pay the property taxes directly to the municipality. To that end, the plaintiff paid $1,509.36 in taxes. The parties subsequently cancelled the lease and entered into an agreement that the defendant would be responsible for any taxes going forward.

Months later, the plaintiff mistakenly paid an additional $10,085 in taxes on the property – despite the prior lease cancellation and release. The Court of Appeals allowed plaintiff to recover this amount under an unjust enrichment theory because the parties' agreement no longer controlled when the mistaken payment was made.

Plaintiff cites to this case as support for its argument that the court of appeals "approved the use of equitable claims such as unjust enrichment and constructive trust to recover overpayment." The Court disagrees. In addition to being nonbinding, the difference between A&P and our case is that here there is an express contract covering the same subject matter – payment of commissions – during the disputed time period. As a result, Plaintiff's reliance on A&P is misplaced.

The Court also rejects Plaintiff's reliance on GM, LLC v Comerica Bank, an unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 291236). The GM panel allowed the plaintiff to seek recovery of mistaken overpayments made to a supplier from the supplier's bank under an unjust enrichment theory. But GM is distinguishable because GM and

the bank (Comerica) did not have any contract. Comerica was the supplier's bank, not GM's. As a result, there was no express contract governing the mistaken payments.

In this case, the parties have express contracts covering the disputed subject matter (commission payments) during the disputed timeframe (April 2000 through November 2013). As a result, these contracts dictate the parties' obligations and duties. For these reasons, Defendants' motion for summary disposition of Plaintiff's unjust enrichment, constructive trust, and breach of fiduciary duty (Counts VI, VII, and IX respectively) claims is GRANTED, and the same are DISMISSED.

2. First material breach.

Next, both Plaintiff and Defendants move for summary disposition under (C)(10) of their breach of contract claims on the basis that the other party was the one to first materially breach the same.

Indeed, "[t]he rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. However, that rule only applies when the initial breach is substantial." Michaels v Amway Corp, 206 Mich App 644, 650; 522 NW2d 703 (1994) (internal quotations and citations omitted).

A "substantial" breach is one that undermines the very essence of or goes "to the heart" of the agreement. Able Demolition, Inc v City of Pontiac, 275 Mich App 577, 586; 739 NW2d 696 (2007).

Plaintiff claims that Defendants first breached the parties' contract by competing with Plaintiff in the same geographical area "in direct violation of noncompete and nonsolicitation provisions in the parties' agreements."

Defendants, on the other hand, claim that "Arcadia materially breached the contract by withholding commissions to defendants as part of its perceived self-help until it recouped the total amount in dispute, $641,000." As a result of this breach, Defendants claim that they were within their right to renounce the agreements and set up a competing company.

As stated, Defendants argue that John Elliott's (Plaintiff's CEO) January 14, 2014 email to Defendant Charles Symes constituted the first material breach. In said email, Mr. Elliott wrote: "This is the last time I tell you (sic) you will be paid nothing unless the law suit (sic) is dropped."

The lawsuit referred to in the email was the current suit – which sought to determine the rights of the parties under the underlying agreements – including (at that time) whether Plaintiff had the right to recoup the disputed $641,000. As a result of this email, Defendants argue that they were within their rights to renounce the agreements and set up a competing company.

And, Defendants argue, payment of commissions goes to the very heart of the commission agreements. The Court agrees. Plaintiff's self-help withholding of commission payments while a lawsuit was pending to determine its legal right to do so was a substantial and material breach of the parties' agreements.

Plaintiff argues, in the alternative, that Defendants were required to rescind the contracts for a first material breach "promptly," and their failure to do so amounts to a waiver. In support, Plaintiff cites Schnepf v Thomas L McNamara, Inc, 354 Mich 393, 397; 93 NW2d 230 (1958). The Schnepf Court reasoned:

> Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed of depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his part. Anything which draws on the other party

> to execute the agreement after the default in respect of time or which shows that it is deemed a subsisting agreement after such default will amount to a waiver. Schnepf, 354 Mich at 398 (internal quotation and citation omitted).

Our Supreme Court cautioned, "It was appellant's duty, when it discovered the apparent breach of the contract, if it intended to insist upon a forfeiture, to do so at once. By permitting appellees to proceed with the performance of the contract, it waived a breach." Schnepf, 354 Mich at 398.

Plaintiff argues that, after the January 9, 2014 "breach," Defendants accepted commission payments on February 21, February 28, and March 7, 2014. As a result, Plaintiff argues that Defendants waived any breach by permitting Plaintiff "to proceed with the performance of the contract."

Defendants, on the other hand, argue that it was clear from the onset that they disputed Plaintiff's entitlement to recoup the $641,000, and the present case was pending before Plaintiff began its self-help recoupment. The original Complaint was filed on November 15, 2013, and it was amended on November 22. Plaintiff claims that they began recouping the $641,000 the next month – in December 2013 – despite the pending lawsuit that sought to determine their right to this recoupment. And Defendants claim that it wasn't clear that Plaintiff was going to continue refusing to pay commissions until Mr. Elliott's January 9 email.

In any event, Defendants argue that it's disingenuous for Plaintiff to claim that they should have been more vocal about their dispute. Defendants argue that they did not stand silent. They were in a no-win situation, and their actions were "the only way to effectively prevent an interruption in service which would damage the elderly and dependent client[s] that defendant served." The Court agrees.

Plaintiff's right to recover $641,000 was the subject of a pending lawsuit when Plaintiff unilaterally decided to stop paying Defendant its entitled commissions. Defendants repeatedly disagreed with Plaintiff's stance that it could recoup said amounts by stopping paying current commissions. This was always clear to Plaintiff. The Court finds that this is not a case where Defendants waived their right to claim first breach by accepting some monies for services already performed just before they announced their rescission of the contract on March 7, 2014.

For all of the foregoing reasons, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, the Court GRANTS Defendants' motion for partial summary disposition regarding first material breach and concludes that Plaintiff committed the first material breach when it instituted self-help to recoup an alleged overpayment of $641,000 by withholding commissions owing to Defendants while litigation on this very subject was pending.

As a result, the Court DISMISSES only Plaintiff's Count I for Breach of Contract.[1]

For the same reasons, Plaintiff's motion for partial summary disposition is DENIED.

3. Counter-Defendants Elliott's and Goldstein's motion for summary disposition.

Counter-Defendants Elliott and Goldstein next argue that Defendants cannot succeed in any breach of contract claim against them because neither was not a party to the 1993 or 2000 Affiliate Agreements that serve as the basis for Defendants' breach of contract and breach of fiduciary duty claims (Counts I and II respectively).

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1 Although Defendants also ask the Court to dismiss Plaintiffs' claims for violation of the Uniform Trade Secrets Act, tortious interference, and other equitable claims, Defendants failed to convince the Court of their entitlement to the same based on a first material breach argument. And Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." National

In their Response, Defendants acknowledge that Elliot and Goldstein are not parties to the Affiliate Agreements, but they can reach Elliot and Goldstein on these claims by piercing the corporate veil. In Rymal v Baergen, 262 Mich App 274; 686 NW2d 241 (2004), the Court of Appeals summarized this doctrine as follows:

> The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations. . . .
>
> For the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity. Further, the corporate entity must have been used to commit a wrong or fraud. Additionally, and finally, there must have been an unjust injury or loss to the plaintiff. There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused. Rymal, 262 Mich App at 293-294 (internal citations omitted).

In the case at bar, there was no allegation or evidence suggesting that Elliot or Goldstein were using the corporate structure in an attempt to avoid legal obligations or indicating that Arcadia Health was a sham corporation or a mere instrumentality of Elliot or Goldstein that they used to commit a wrong. By all appearances, Arcadia Health is a legitimate corporation that once contracted with Defendants.

Further, Defendants' breach of fiduciary duty claim is merely a disguised breach of contract claim. Defendants have failed to allege or show a duty owed by Elliot or Goldstein to Defendants.[2]

Considering only the pleadings and viewing all well-pled factual allegations in the light most favorable to Defendants, the Court finds that Counter-Defendants' Count I for breach of contract and Count II for breach of fiduciary duty against Defendants Elliott and Goldstein are so clearly

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Waterworks, Inc v International Fidelity & Surety, Ltd, 275 Mich App 256, 265; 739 NW2d 121 (2007).
2 The Court also rejects Defendants' reliance on conversion cases Dep't of Agriculture v Appletree Mktg, LLC, 485 Mich 1; 779 NW2d 237 (2010) & Citizens Ins Co v Delcamp, 178 Mich App 570; 444 NW2d 210 (1985) to support

unenforceable as a matter of law that no factual development could possibly justify recovery. As a result, Counts I and II of Defendants' First Amended Counter-Claim are DISMISSED only as to Defendants Elliott and Goldstein.

4. Defendant's motion based on the one-year contractual limitations period.

Finally, Defendants Charles Symes and Health Care Partners move for partial summary disposition on Counts II and III (injunctive relief and misappropriation of trade secrets) Plaintiff's First Amended Complaint because "such claims have been brought outside the applicable contracts' one year limitations period."

The Court notes that Defendants' motion is based on Plaintiff's First Amended Complaint (filed on November 22, 2013), and Plaintiff since Amended its Complaint an additional two times. The Complaint currently before the Court is Plaintiff's Third Amended Complaint (filed on April 11, 2014). Defendants' motion revolves around Plaintiff's claim that it found that it had overpaid Defendants some $641,000 in worker's compensation premiums going back to approximately 2012. And Plaintiff dropped its breach of contract claims relating to the alleged overpayments in the Third Amended Complaint. As a result, Defendants' motion cannot lead to dismissal of any of Plaintiff's claims.

But this claim is a part of Defendants' Counter Claim.[3] As a result, any one-year limitations period may affect Plaintiff's right to self-help when it withheld the $641,000 from commissions owed to Defendants.

In any event, both the 1993 and the 2000 Agreements contain the following provision:

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its breach of fiduciary duty claim.

3 Defendants' Count I for Breach of Contract alleges that Plaintiff breached the Affiliate Agreements by withholding

> **Any lawsuit** or arbitration **seeking enforcement of any right under this agreement**, or arising out of the entering into or termination of this agreement, **shall be barred if not commenced within one year after the right sought to be enforced first arose**. (Both the 1993 and 2000 Agreements at paragraph 15.C) (emphasis added).

Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." Holmes v Holmes, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing St Paul Fire & Marine Ins Co v Ingall, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." Holmes v Holmes, supra at 594; quoting Meagher v Wayne State Univ, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As often repeated by our Supreme Court, "courts must ... give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." Knight Enterprises v Fairlane Car Wash, 482 Mich 1006; 756 NW2d 88 (2008); quoting Klapp v United Ins Group Agency, Inc, 468 Mich 459, 468; 663 NW2d 447 (2003).

Defendants argue that, under this provision, Plaintiff could only seek recoupment of any alleged overpayments if they filed their lawsuit within one year of the overpayments. The Court agrees. It is undisputed that Plaintiff filed its lawsuit to enforce its rights under the 1993 and 2000 Agreements on November 15, 2013. The right that Plaintiff sought to enforce was its obligation to pay Defendants certain commissions. And Plaintiff brought the lawsuit was brought before it instituted self-help in December 2013.

$641,000 in compensation due to offset the alleged overpayment.

Plaintiff attempts to avoid application of the above provision by arguing that: (1) the provision only bars the bringing of a lawsuit (or arbitration) and its perceived "right to recoup overpaid commissions against current commissions"; (2) Plaintiff argues that the Court should read "within one year after the right sought to be enforced first arose" as not starting the clock until "the act or omission was **discovered**"; and (3) a 2002 amendment gave Plaintiff the right to recoup overpaid commissions. Each of these arguments are unconvincing.

With respect to Plaintiff's argument that the provision only bars the filing of a lawsuit, Plaintiff conveniently forgets that it did file a lawsuit, and it did so in November 2013 – one month before it instituted self-help. As a result, any contractual claims arising before November 15, 2012 are barred.

Next Plaintiff wants to change a word in the agreement from "arose" to "discovered." This argument is absurd. The parties were free to agree to any terms they wished. They chose to contract to limit any lawsuit to enforce any right to one year before the right sought to be enforced first **arose**. A claim arises when it's possible to sue to enforce the right. In this case – at the time the overpayment was made.

While Plaintiff wants the Court to read an additional period for discovery, one already exist – the one year that the parties contracted for. And Plaintiff's reliance on a fraud argument to extend this discovery period is misplaced. The difference between fraud and a commission overpayment is that fraud may not be easily discovered as it would be hidden from a plaintiff's view. It was always within Plaintiff's ability to order an accounting on the commission payments. In fact, Plaintiff did just that before the onset of this case – leading to their overpayment claims.

The parties contracted for the one-year period – perhaps so the parties would stay on top of

their bookkeeping and keep from putting themselves in a position where they built large over- or under-payments that neither had the cash flow to cover. The reason doesn't necessarily matter. But it does matter that the parties, in this complex relationship, contracted for the one-year period, and the Court will enforce the same.

Finally, Plaintiff claims that a 2002 Amendment to the agreements gives it the right to recoup any overpayments if made in error. But this amendment, titled "Amendment to 'Positive Pay' Addendum to Representative Agreement," by its terms is an amendment to a "Positive Pay Addendum." It does not, however, state that it amends either the 1993 "Agreement for Appointment of Temporary Health Care Services Representative" or the 2000 "Agreement for Appointment of Arcadia Health Services, Inc, Representative."

And Plaintiff fails to identify the "Positive Pay Addendum" that the 2002 agreement covers. In any event, it does not appear to apply to the 1993 or 2000 Agreements or modify the one-year limitations provisions provided therein.

For all of the foregoing reasons, the Court finds that Defendants' motion for partial summary disposition is GRANTED to the extent that both parties are limited to pursuing claims that arose on or after November 15, 2012.

Summary

To summarize, Defendants' motion for summary disposition of Plaintiff's unjust enrichment, constructive trust, and breach of fiduciary duty (Counts VI, VII, and IX respectively) claims is GRANTED, and the same are DISMISSED.

Defendants' motion for partial summary disposition regarding first material breach is

GRANTED, and Plaintiff's Count I for Breach of Contract is DISMISSED.

Plaintiff's motion for partial summary disposition (re: first material breach) is DENIED

Counter-Defendants Elliott's and Goldstein's motion for summary disposition is GRANTED, and Counts I and II of Defendants' First Amended Counter-Claim are DISMISSED only as to these Defendants.

Defendants' motion for summary disposition regarding the one-year contractual period is GRANTED. The one-year period governs the parties' dispute – whereby any claims preceding November 15, 2012 are barred.

IT IS SO ORDERED.

November 19, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge