IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARTH NEWMAN, Plaintiff, v. POLLOCK COHEN, LLP, STEVE COHEN, CHRISTOPHER K. LEUNG, and ADAM POLLOCK, Defendants.	)	Civil Action No. 2:20-cv-01973-RJC The Honorable Robert J. Colville *ELECTRONICALLY FILED*

DEFENDANTS' BRIEF IN SUPPORT OF
THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Pollock Cohen, LLP, Steve Cohen, Christopher K. Leung, and Adam Pollock respectfully submit the following Brief in Support of their Motion to Dismiss Plaintiff's Amended Complaint:[1]

I. Introduction

It is a fundamental tenet of contract law that a breach of contract claim's purpose is to provide the plaintiff the benefit of his bargain—not to award the plaintiff with *more* than he

[1] Contrary to the assertions in Newman's Motion for Leave to Amend his Complaint (Doc. No. 17), Newman's amendment effectively relieves none of Defendants' concerns with his initial Complaint. Why Defendants did not consider Newman's "offer" to be a serious attempt to avoid motions practice is plain: The Amended Complaint has all the same claims as the original; it even contains the exact same number of paragraphs. The only change is that Newman inserted "(in the alternative)" below Count IV (Unjust Enrichment), Count V (Breach of Fiduciary Duty), and Count VI (Promissory Estoppel). But Defendants' Motion to Dismiss sought dismissal of Counts IV and VI for multiple reasons, including their legal insufficiency under Rule 12(b)(6)—a vulnerability Newman's amendment does nothing to address. Newman's change to Count V makes even less sense, as it fails to address *any* of Defendants' rationale for seeking dismissal of that claim. Thus, the only effect of Newman's amendment is to force the Parties and the Court to expend additional time, effort, and resources addressing a nearly identical complaint: In other words, the exact result Defendants' counsel sought to avoid when they declined Newman's counsel's proposal to merely plead legally deficient claims in the alternative. In the end, because Newman's amendment is the procedural equivalent of merely rearranging deck chairs on the Titanic, Defendants now move to dismiss his Amended Complaint in its entirety, with prejudice, for nearly all the same reasons they moved to dismiss his initial Complaint.

bargained for. That is what Darth Newman is asking for here: a contractual benefit the other party never agreed to give him.

Specifically, Newman demands that his former law firm pay him an annual bonus tied to the Firm's contingency recoveries in cases that conclude *after* his for cause termination, but which were pending back when he was still employed by the firm. And he seeks this annual bonus not only for the year 2020, when he was fired, but in perpetuity, whether the Firm earns a fee in a case, whether next year or ten years from now.

Newman seeks this windfall despite the lack of any language in the parties' agreement that plausibly supports such a one-sided outcome. To do so, Newman's Complaint seeks to recast the bonus as a "revenue share." But the plain text of the agreement is a "bonus," and simply is not a "revenue share." And neither the plain text of the agreement, nor common sense, provide for bonuses long after his employment concludes.

Because all of Newman's claims hinge on that same, flawed argument, none of them are fit to survive a motion to dismiss. For that reason, as detailed below, Newman's Amended Complaint should be dismissed in its entirety, with prejudice.

II. Statement of Relevant Facts[2]

In early 2018, Pollock contacted Newman about working at Pollock Cohen. (Am. Compl. at ¶ 15). After Newman initially worked at the Firm as an independent contractor, Pollock and Newman discussed Newman joining Pollock Cohen full time. (*Id.* at ¶¶ 18, 22). Newman agreed and joined Pollock Cohen as Special Counsel in April 2018. (*Id.* at ¶ 24).

[2] While Defendants would contest certain allegations in Newman's Amended Complaint, they accept the factual allegations in the Amended Complaint as true solely for the purpose of this Motion to Dismiss.

Pollock Cohen and Newman later agreed on a compensation plan for Newman, which contained the following term:

> We will pay you an annual bonus of 10% of all "contingency recoveries" (as defined below) up to the first $2 million per year … Contingency recoveries includes both fee awards and our part of contingency wins/settlements/awards. Bonus is calculated before deductions for overheads/comp and non-case specific expenses.

Id. at ¶ 29 (citing Exhibit B to Amended Complaint).

Pollock Cohen agreed to pay Newman an "annual bonus" consisting of a percentage of "contingency recoveries." (*See* Ex. B). As that language makes plain, Pollock Cohen did not guarantee Newman a "revenue share" or grant him any ownership interest in the Firm. (*See id.*). Nor did the Firm promise Newman that he would receive compensation from contingency recoveries in perpetuity should he no longer be employed at Pollock Cohen.[3] (*See id.*).

In March 2020, Pollock Cohen terminated Newman's employment. (Am. Compl. at ¶ 42).[4] To assist Newman in finding another job, the Firm agreed to, among other things, give Newman a positive, public-facing reference and to keep his profile active on Pollock Cohen's website until he found new employment. (*Id.* at ¶¶ 43, 48).

What Pollock Cohen would *not* agree to do, however, was to rewrite Newman's contract to provide him with benefits above and beyond those to which the parties had agreed. Specifically, Pollock Cohen did not agree to pay Newman's demand for an annual bonus arising from contingency recoveries from cases that resolved *after* he was fired. (*See id.* at ¶ 64). When the Firm did not give in to Newman's demands for this substantial unearned compensation, he sued Pollock Cohen and three of its partners in the Court of Common Pleas of Allegheny County on

[3] Notably, this is not a case where any salary wages are unpaid. Newman's complaint is filled with details about his salary structure, but he notes that every penny of salary wages were fully paid, with interest.

[4] While not pleaded in his Complaint, Newman was terminated for cause based on his poor performance.

November 24, 2020. (*See generally* Am. Compl.). Defendants later removed the case this Court based on diversity of citizenship. (*See generally* Notice of Removal).

III. Standard of Review

Rule 12(b)(6) gives district courts the power to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12 (b)(6). In essence, Rule 12(b)(6) tests the legal sufficiency of the complaint: If the plaintiff has not pleaded enough facts to create a facially plausible claim for relief, his claims should be dismissed. *Hull v. Welex Inc.*, No. 02-7735, 2002 U.S. Dist. LEXIS 24772 (E.D. Pa. Dec. 30, 2002) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

When analyzing a complaint under this Rule, while a district court should accept the plaintiff's well-pleaded factual allegations as true, the court should disregard any legal conclusions. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although the district court's analysis is generally limited to the complaint itself, the court can—and should—consider other documents that are "integral to or explicitly relied upon in the complaint." *Hull*, 2002 U.S. Dist. LEXIS 24772, at *4 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

IV. Argument

A. Newman's WPCL claim fails because there is no contractual basis that he "earned" the funds to which he claims entitlement.

Newman's WPCL claim cannot survive a motion to dismiss because he cannot establish that a plausible, contractual basis exists to award him the damages he seeks. The WPCL creates no right to compensation but merely creates a statutory remedy for breach of a wage contract already in place. *Weldon v. Kraft, Inc.,* 896 F.2d 793, 800-01 (3d Cir. 1990). Under the WPCL, the burden falls on Newman to prove that the proceeds he seeks were "earned"—i.e.,

his right to those proceeds vested—while he was actually employed at Pollock Cohen, consistent with the terms of his employment agreement ("the Agreement"). *Blackwell-Murray v. PNC Bank*, 963 F. Supp. 2d 448, 470 (E.D. Pa. 2013). As detailed below, nothing in the language of the Agreement or Pennsylvania law entitles Newman to the compensation he seeks.

It is important to focus on what Newman is actually seeking: a *bonus* for cases that were settled by the Firm *after* he was fired. The Agreement does not promise Newman any kind of "revenue share." No reasonable interpretation of the Agreement supports Newman's arguments that Pollock Cohen agreed to provide him a "revenue share" that would obligate the Firm to pay him proceeds from its fee awards and settlements for an indefinite period. Unilaterally rebranding an "annual bonus" as a "revenue share"—a term that appears nowhere in the Agreement—does not make it so. The Agreement instead refers to the compensation Newman seeks as an "annual bonus," so it must be treated as a bonus. And the Agreement defines that bonus to consist entirely of "contingency recoveries," which "includes both fee awards and [the Firm's] part of contingency wins/settlements/awards."

Thus, Newman must prove that his right to a portion of those "contingency recoveries" vested while he was still employed at Pollock Cohen, consistent with the terms of the Agreement. But that he cannot do, as Newman did not "earn" the bonuses before his employment ended. Had these cases settled before Newman left the Firm, he would be entitled to a bonus set out in his employment agreement. But they did not settle during his employment. And however much Newman may now want to rewrite his contract, he did not bargain for anything more than what the Agreement details. Thus his argument that he is somehow entitled to a bonus outside the terms of the contract fails, because Pennsylvania law has never supported such a broad definition of an "earned" bonus.

To be sure, "[t]he mere fact that certain compensation is not payable until a future date is not necessarily fatal to a WPCL claim so long as the employee is deemed to have 'earned' it during his employment." *Riseman v. Advanta Corp.*, 39 F. App'x 761, 765 (3d Cir. 2002). In *Riseman*, the company had set very specific milestones for bonus eligibility and those events occurred while the employee was still at the company. *Riseman v. Advanta Corp.*, No. 98 Civ. 6671, 2001 U.S. Dist. LEXIS 15760, at *3–6 (E.D. Pa. Sep. 7, 2001). Accordingly, while the fact that compensation is payable at a future date is "not necessarily fatal" to Newman's claim from the outset, he would still need to meet his burden of proof: he would have the burden to show that he earned the bonus because the triggering events occurred during his employment.

In fact, later case law citing *Riseman* makes clear that, in scenarios like that here, employees are generally not considered to have earned compensation payable in the future if they are no longer employed when the bonus-triggering event occurs. For instance, courts agree that in most cases involving commission payments on sales, courts "hold that the WPCL applies to commissions generated from sales completed before an employee's termination, but not to sales completed after the employee's termination." *Bowers v. Foto-Wear, Inc.*, No. 3:CV-03-1137, 2007 U.S. Dist. LEXIS 20253, at *27 (M.D. Pa. Mar. 22, 2007) (citing *Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577, 1579 (E.D.Pa.1985) ("Plaintiff clearly has no right under the [commission] Plans to receive commissions on sales made after his termination.")).

Importantly, courts hold that when payment of compensation requires a condition precedent to occur, and that condition precedent does not occur until *after* the employee's termination, the employee did not "earn" that compensation during his employment. *Meister v. Sun Chem. Corp.*, No. 18-3233, 2018 U.S. Dist. LEXIS 176295, at **7-8 (E.D. Pa. Oct. 15, 2018) (citing *Riseman*, 39 F. App'x at 765). Thus, when an employee "earning" pay is contingent on

some event that does not occur before his employment ends, he cannot have "earned" that compensation under the WPCL.

That is just what happened here. Under the Agreement, the bonus payments Newman seeks are tied to "contingency recoveries," which have the word "contingency" in their name. (Ex. B). Whether there would even *be* "contingency recoveries" for Newman could not occur until a particular case resolved. Thus, Newman had no "vested" interest in a contingent outcome that occurred *after* his termination. Without that condition precedent satisfied before his employment ended, Newman cannot have "earned" the compensation he demands.

Any other interpretation would lead to absurd results. If Newman were entitled to proceeds from every single case active on March 25, 2020—just by virtue of being employed at the time—Pollock Cohen could conceivably be on the hook to pay him an annual bonus for *years and years* during which he is *not* working at the Firm. For example, in Newman's view, he could have performed minimal work on a case the day before his termination and then still collect 10% of a multi-million-dollar recovery five years down the road. The language of the Agreement does not support that interpretation, and to impose that meaning on the Agreement would violate the first canon of contract law: To give effect to the parties' intent. *Melton v. Melton*, 831 A.2d 646, 653-54 (Pa. Super. 2003) ("When interpreting the language of a contract, the intention of the parties is a paramount consideration."); *Empire Sanitary Landfill, Inc. v. Riverside Sch. Dist.*, 739 A.2d 651, 655 (Pa. Commw. 1999) ("[B]efore a court may interpret a contract in such a way as to reach an absurd result, it must endeavor to reach an interpretation that is reasonable in light of the parties' intentions.").

And when discerning the parties' intent, the nature of the subject-matter is another important consideration—here, the nature of contingency fees, including their uncertainty.

Stamerro v. Stamerro, 889 A.2d 1251, 1258 (Pa. Super. 2005) ("[T]he court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement. The court will adopt an interpretation that is most reasonable and probable bearing in mind the objects which the parties intended to accomplish through the agreement."). Considering that context, it is unreasonable to conclude—and unsupported by the plain text of the Agreement—that the Firm agreed to pay Newman essentially in perpetuity for any contingency recoveries from cases that were active on his termination date.

At bottom, Pennsylvania law does not support Newman's claim for an ongoing, post-termination bonus. The contract language at issue is not broad enough to entitle Newman to a cut of contingency recoveries that might not happen until years down the road, if at all. With no contractual entitlement to that compensation, Newman cannot sustain a claim under the WPCL.

B. Newman's breach of contract claim fails because he cannot establish that Defendants breached any contractual agreement with him.

Newman's breach of contract claim fails for largely the same reasons that his WPCL claim fails. In short, he cannot prove that Defendants breached any agreement to provide him the proceeds he desires because nothing in the contract shows an agreement to pay him those proceeds in the first place.

To plead a cause of action for breach of contract under Pennsylvania law, a plaintiff must establish three elements: (1) the existence of a contract, including its essential terms; (2) a breach of the contract; and (3) resultant damages. *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016). Courts have not hesitated to dismiss breach of contract claims under Rule 12(b)(6) when there is no evidence on the face of the contract that the parties agreed to the criterion that gives rise to the alleged breach. *See, e.g.*,

Capital Funding, VI, LP v. Chase Manhattan Bank USA, N.A., No. 01-CV-6093, 2003 U.S. Dist. LEXIS 12102, at **15-16 (E.D. Pa. Mar. 21, 2003) (dismissing breach of contract claim under Rule 12(b)(6) when the contract language did not demonstrate that the defendant ever agreed to the duty it allegedly breached).

Like his WPCL claim, Newman's breach of contract claim cannot survive a motion to dismiss because the contract language at issue fails to demonstrate that Defendants ever agreed to pay him post-termination annual bonuses, let alone in perpetuity. The contract refers to an "annual bonus," not a revenue share or other instrument that could possibly survive termination of Newman's employment. (*See* Ex. B). To write the kind of guarantee Newman seeks into the agreement would flout one of the most fundamental canons of contract law: that courts must not ignore the plain language of an agreement "to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Shionogi Ir. Ltd. v. United Research Labs., Inc.*, No. 11-2861, 2011 U.S. Dist. LEXIS 91817, *12 (E.D. Pa. Aug. 16, 2011); *see also Winshall v. Viacom Int'l., Inc.*, 76 A.3d 808, 816 (Del. 2013) (noting that breach of contract claims should not be used to "give the plaintiffs contractual protections that 'they failed to secure for themselves at the bargaining table.'").

In sum, the language of the agreement does not entitle Newman to an annual bonus of contingency recoveries after his termination, and this Court should not retroactively impose a contractual obligation on Defendants to which they never agreed. For that reason, Newman's breach of contract claim should be dismissed.

C. Newman's promissory estoppel claim is insufficient under Pennsylvania law.

Newman's promissory estoppel claim fails because his allegations are legally insufficient to invoke this equitable doctrine.

As a preliminary matter, Newman cannot make out a promissory estoppel claim because the parties had a contract (a contract which Newman now seeks to rewrite). Promissory estoppel, in contrast, "is invoked in situations where the formal requirements of contract formation have not been satisfied and where justice would be served by enforcing a promise." *Carlson v. Arnot-Ogden Mem'l Hosp.*, 918 F.2d 411, 416 (3d Cir. 1990). Where, as here, "the parties formed an enforceable contract," this claim must be dismissed. *Id.*

Even if the parties did not have a contract, this claim would fail on the merits. To establish promissory estoppel under Pennsylvania law, a plaintiff must show that: "(1) the promisor makes a promise that he reasonably expects to induce action or forbearance by the promisee, (2) the promise does induce action or forbearance by the promisee, (3) and injustice can only be avoided by enforcing the promise." *Id*.

First, Newman cannot satisfy the first element because the agreement does not support the promise that Newman claims to have received: a "revenue share." (Am. Compl. at ¶ 103). As detailed above, nothing in the terms of Newman's employment plausibly entitled to him to expect ongoing, post-termination compensation from contingency recoveries—irrespective of how far in the future the case resolved—from any case that happened to be active on the date of his termination. It defies logic and the clear words of the agreement. Without a clear, "express promise," Newman cannot satisfy the first element of a promissory estoppel claim. *Stilwell Value Partners I, L.P. v. Prudential Mut. Holding Co.*, No. 06-4432, 2007 U.S. Dist. LEXIS 59653, at *19 (E.D. Pa. Aug. 15, 2007).

Newman also cannot demonstrate that "injustice can only be avoided" under the circumstances by enforcing Defendants' alleged promise to pay him the funds he seeks, as required by the third element. Again, nothing in the Parties' agreement demonstrates that Defendants ever

intended to give Newman a bonus tied to proceeds from contingency recoveries *after* his termination. There would be no "justice" in rewriting that contract after the fact to bestow a benefit on Newman for which he did not bargain in the first place.

For the reasons above, Newman's promissory estoppel claim has no more merit than his other claims and cannot withstand a motion to dismiss.

D. Newman cannot sustain a quasi-contract claim under Pennsylvania law because he cannot show Defendants were unjustly enriched under the circumstances.

Next, Newman claims entitlement to payment by Defendants through yet another form of equitable relief—the quasi-contract doctrine of *quantum meruit*. This claim also fails because a claim for unjust enrichment is not available when a claim "sounding in breach of express contract is" available. *Shafer Elec. & Const. v. Mantia*, 96 A.3d 989, 996 (Pa. 2014); *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987) ("Where an express contract governs the relationship of the parties, a party's recovery is limited to the measure provided in the express contract; and where the contract 'fixes the value of the services involved,' there can be no recovery under a quantum meruit theory.").

Further, Newman's unjust enrichment claim would be legally insufficient for the same reasons as his promissory estoppel claim. To prove a quasi-contract claim for unjust enrichment, a plaintiff must demonstrate: (1) benefits conferred on the defendant by the plaintiff; (2) appreciation of such benefits by the defendant; (3) acceptance and retention of such benefits by the defendant; (4) under such circumstances that it would be unjust for the defendant to retain the benefits without paying the plaintiff for their value. *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Sup. 2006) (citing *AmeriPro Search, Inc.*, 787 A.2d at 991). When unjust enrichment exists, the law

implies a quasi-contract that requires the defendant to pay the plaintiff for the value of the benefit conferred. *Id.* (quoting *AmeriPro Search, Inc.*, 787 A.2d at 991).

The key determination of any unjust enrichment claim "is whether the enrichment of the defendant is unjust." *Id.* (quoting *AmeriPro Search, Inc.*, 787 A.2d at 991). "The doctrine does not simply apply because the defendant may have benefited as a result of the actions of the plaintiff." *Id.*

Newman's claim fails because, *inter alia*, he cannot establish the final—and most important—element of his claim: that Defendants' enrichment was *unjust* under the circumstances. For the reasons above, to conclude that not paying Newman a bonus for post-termination contingency recoveries, a bonus that Defendants never agreed to pay him, would be an *injustice* would stretch the word beyond recognition. Therefore, Newman cannot prove this critical element of his unjust enrichment claim, and thus his claim fails as a matter of Pennsylvania law.

E. Newman's breach of fiduciary duty claim is barred by the gist of the action doctrine and should be dismissed.

Next, Newman's breach of fiduciary duty claim cannot survive dismissal either, as the gist of the action doctrine bars such claims when the alleged breach of fiduciary duty is grounded in contractual obligations. *Alpart v. Gen. Land Partners, Inc.*, 574 F. Supp. 2d 491, 499 (E.D. Pa. 2008); *see also DePuy Synthes Sales, Inc. v. Globus Med., Inc.*, 259 F. Supp. 3d 225, 238 (E.D. Pa. 2017) (granting motion to dismiss breach of fiduciary duty claim based only on contractual duties).

Newman's claim is plainly based on nothing but contractual duties, and the fiduciary duty cause of action in his Amended Complaint makes no mention of any alleged breach that is not directly tied to the contract between him and Defendants. (Am. Compl. at ¶¶ 98-101). When a plaintiff makes "'no allegations of breach of fiduciary duty or duty of loyalty that transcend or

exist outside of' the parties' contractual agreements," as is the case here, the gist of the action doctrine bars a breach of fiduciary duty claim. *Certainteed Ceilings Corp. v. Aiken*, No. 14-3925, 2015 U.S. Dist. LEXIS 10881, at *9 (E.D. Pa. Jan. 29, 2015*); Seifert v. Prudential Ins. Co.*, No. 13-7637, 2014 U.S. Dist. LEXIS 83168, at *20 (E.D. Pa. June 18, 2014) ("in an employment context, an employer-employee relationship does not in and of itself give rise to a fiduciary relationship. While in certain situations employees may owe fiduciary duties to their employers, the converse is not necessarily true.").

Newman's claim makes no mention of any duty beyond those purportedly contained in the contract between him and Defendants, and for that reason, his claim is barred and should be dismissed.

F. Newman's declaratory judgment claim is founded on the same flaws as his other claims and should be dismissed alongside them.

Finally, Newman's declaratory judgment claim fails for several reasons. First, his claim is meritless because it is based on the same faulty foundation as his other claims: As noted above, Newman's Amended Complaint fails to show that he has any plausible right to relief under the contract at issue. But in addition, Newman's declaratory judgment claim fails because it duplicative of his other claims.

"Courts routinely dismiss declaratory judgment claims when they are duplicative of breach of contract claims." *LM Gen. Ins. Co. v. Lebrun*, No. 19-2144, 2020 U.S. Dist. LEXIS 115436, at *33 (E.D. Pa. July 1, 2020) (collecting cases); *see also In re Lincoln Nat'l COI Litig.*, 269 F. Supp. 3d 622, 639-40 (E.D. Pa. 2017) (granting motion to dismiss and holding that the declaratory judgment claim was duplicative of the breach of contract claim, where the plaintiffs requested declaratory relief resolving the parties' obligations under the applicable insurance policies); *Nova*

Fin. Holdings Inc. v. Bancinsure, Inc., No. 11-07840, 2012 U.S. Dist. LEXIS 53800, at *4 (E.D. Pa. Apr. 17, 2012) (same).

Newman's declaratory judgment claim differs from his breach of contract claim in name only, as he requests essentially the exact same relief in both. (Am. Compl. at ¶¶ 71-74). Thus, this claim is just the sort of duplicative declaratory judgment claim courts dismiss without hesitation. For that reason, Newman's declaratory judgment should face the same fate as his other claims and be dismissed under Rule 12(b)(6).

V. Conclusion

For the reasons detailed above, Defendants request that this Court dismiss Newman's Amended Complaint in its entirety, with prejudice, under Rule 12(b)(6).

Date: March 3, 2021

Respectfully submitted,

JACKSON LEWIS P.C.

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