STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

VALERIE RISSI,

Plaintiff,
v

Case No. 2022-31581-CB
Hon. Michael P. Hatty

NIRVANA OPERATIONS LLC,
REVOLUTION STRAINS INC, AND
IHSAN ULLAH,

Defendant.

OPINION AND ORDER RE:
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (C)(10)

At a session of court held in the courthouse
in the City of Howell, County of Livingston,
State of Michigan, on the **22nd day of September, 2023.**

PRESENT: HONORABLE MICHAEL P. HATTY
BUSINESS COURT JUDGE

THIS MATTER HAVING COME BEFORE THE COURT upon Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10), and the Court having reviewed the filings in this case and the record, and the parties having appeared by and through their respective counsel, and the parties having each presented their oral arguments, and the Court being otherwise fully advised in the premises, the Court now issues this Opinion and Order GRANTING Defendants' Motion for Summary Disposition in part and DENYING in part, for the reasons set forth below.

I. BACKGROUND

Defendant Revolution Strains Inc. (hereinafter "Revolution Strains") is a business located in Howell, operating marijuana provisional centers and medical centers, as well as cultivation/growing centers throughout Michigan. Plaintiff used to own Revolution Strains as her own company. She and Nirvana Operations LLC (hereinafter "Nirvana" or "the LLC") partnered up, and through a Purchase Agreement, Rissi transferred 0.99% of the shares of stock in the corporation to Nirvana (in exchange for $10,000 paid to Rissi).

On or about January 31, 2020, Plaintiff and Nirvana entered into a Re-Amended and Restated Stock Purchase Agreement (hereinafter the "Agreement"), whereby the Plaintiff sold her shares in

Revolution Strains to the LLC, and the LLC agreed to pay Plaintiff $4,500 per month for each municipal license acquired by Revolution Strains for a period of fifteen years and up to five locations. In May 2020, the LLC acquired additional stock in Revolution Strains, becoming a 99% owner of the corporation.

On August 15, 2022, Plaintiff commenced this action, alleging that Defendants failed to pay Plaintiff the amounts she was due under the Agreement, and refused to provide her with financial records even though she is a 1% owner. Plaintiff sued for breach of contract, accounting, breach of fiduciary duty, and statutory conversion.

II. APPLICABLE STANDARDS

A. Summary Disposition under C(8):

MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's claim and results in a determination whether the plaintiff's allegations are sufficient to establish a prima facie case. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify the plaintiff's claim for relief. *Maiden*, 461 Mich at 119. A motion brought under MCR 2.116(C)(8) is decided on the pleadings alone; no other evidence may be considered. MCR 2.116(G)(5). However, in an action based on a contract, the court may examine the contract. *Woody v Tamer*, 158 Mich App 764, 770 (1987).

When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 139 (1997). The court may not consider the merits of the plaintiff's factual allegations, *Mieras v DeBona*, 452 Mich 278, 291 (1996), and it must construe those allegations in the plaintiff's favor. *Wortelboer v Benzie Cty*, 212 Mich App 208, 217 (1995). Mere conclusory statements, however, without supporting allegations of fact are insufficient to state a cause of action.

B. Summary Disposition under C(10):

A motion brought under C(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Summary disposition under C(10) is thus available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Attorney Gen v PowerPick Players' Club of Michigan, LLC*, 287 Mich App 13, 26–27 (2010) (quoting *West v GMC*, 469 Mich 177, 183 (2003)).

In reviewing a motion brought under C(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120 (1999). Affidavits or other documentation submitted in support of or in opposition to a motion for summary disposition under C(10) must contain substantively admissible evidence. MCR 2.116(G)(6).

Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618 (1995). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *See Quinto v Cross & Peters Co*, 451 Mich 358, 363 (1996).

III. DISCUSSION AND ANALYSIS

A. Count I – Breach of Contract

The elements of a breach of contract claim are:

- There is a valid, enforceable contract, which requires parties who were competent to contract entered into an agreement where one party made an offer and the other accepted, and such agreement was made for good and valuable consideration.
- The defendant breached the contract by either refusal to perform, or performance that does not conform to the contract's requirements
- Damages resulted from the breach.

See Kamalnath v Mercy Mem'l Hosp Corp, 194 Mich App 543, 548–549; *see also Woody v Tamer*, 158 Mich App 764, 772 (1987).

It is not disputed that the parties entered into the Re-Amended and Restated Stock Purchase Agreement. However, Defendants contend that Plaintiff overbilled the LLC – charging them $4,500 per month for processor facilities that Revolution Strains owns, when processors are not included as a Municipal License Location. Also, the Coldwater and Marquette Township centers are standalone retail stores, not "provisioning centers" within the meaning of the MMFLA. In addition, Revolution Strains does not have a license in Bay City, so Plaintiff should not have been billing Nirvana for that location. The terms of the Agreement only allow Plaintiff to bill for "Municipal License Locations". Plaintiff overbilled Defendants, and Defendants overpaid ($279,00 when they only owed $184,500). So, when Defendants stopped paying Plaintiff in the summer of 2022, they were really only catching up to the amounts they had already overpaid.

Plaintiff responds that the Agreement from January 2020 defines "municipal license location" for which Plaintiff was supposed to receive $4,500 per month in Section 2b. The Agreement does not reference any statutory citations or definitions, so Defendants should not be allowed to read statutory definitions into the Agreement. Additionally, Plaintiff billed Defendants based on information Defendants provided regarding which licenses qualified under the Agreement. Therefore, the contract language is ambiguous and Plaintiff should be allowed to introduce parol evidence at trial.

In interpreting a contract, the place to begin is the four-corners of the contract. It is well established in Michigan law that the best indication of the parties' intent is the language of the contract itself; courts must avoid the temptation to allow into the record extrinsic evidence of the parties' intentions because this often leads to interpretations that are contradictory and confusing. *See, e.g., Smith v Physicians Health Plan*, 444 Mich 743 (1994). The court may not look beyond the face of

the contract and consider extrinsic evidence unless the contract is ambiguous. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 49 (2005).

Here, Section 2.b. of the Agreement states in pertinent part:

> The term "municipal license locations" shall refer to locations approved by municipalities to operate a provisioning center or co-located marijuana retailer, or any location approved to operate as a marijuana grower or cultivator. Nirvana shall pay to Seller, each monthly installment payment as calculated pursuant to this Section 2(b)(i)-(vi), commencing on the date of the Second Closing and continuing on the same day of each month thereafter for a period of fifteen (15) years unless this Agreement is terminated as set forth herein ("Nirvana Final Payment Date"). No installment payment shall be due until a location with a municipal license been issued a valid state operating license and is in operation for a minimum of thirty (30) days. Once there are six (6) municipal license locations approved as contemplated in this paragraph, Nirvana and its members may seek other licenses in the State of Michigan, and elsewhere, with no obligation to the Seller.

The arguments on this Court come down to interpretation of the Agreement. "Provisioning center" is not defined by the Agreement, but it is defined by a relevant statute – the Medical Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq*. and the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*.

Provisioning center is a term of art defined by MMFLA to mean the following:

> "Provisioning center" means a licensee that is a commercial entity located in this state that purchases marihuana from a grower or processor and sells, supplies, or provides marihuana to registered qualifying patients, directly or through the patients' registered primary caregivers. Provisioning center includes any commercial property where marihuana is sold at retail to registered qualifying patients or registered primary caregivers. A noncommercial location used by a registered primary caregiver to assist a qualifying patient connected to the caregiver through the department's marihuana registration process in accordance with the Michigan Medical Marihuana Act is not a provisioning center for purposes of this act.

MCL 333.27102(w).

MMFLA also defines a marijuana grower as:

> "Grower" means a licensee that is a commercial entity located in this state that cultivates, dries, trims, or cures and packages marihuana for sale to a processor, provisioning center, or another grower.

MCL 333.27102(g).

MMFLA defines "processor" as:

> (v) "Processor" means a licensee that is a commercial entity located in this state that purchases marihuana from a grower and that extracts resin from the marihuana or creates a marihuana-infused product for sale and transfer in packaged form to a provisioning center or another processor.

The Michigan Regulation and Taxation of Marijuana Act (MRTMA), MCL 333.27951 *et seq.* also defines "grower" the following way:

> "Marihuana grower" means a person licensed to cultivate marihuana and sell or otherwise transfer marihuana to marihuana establishments.

MCL 333.27953(j).

MRTMA defines a retailer as:

> (n) "Marihuana retailer" means a person licensed to obtain marihuana from marihuana establishments and to sell or otherwise transfer marihuana to marihuana establishments and to individuals who are 21 years of age or older.

MRTMA defines a processor as:

> (m) "Marihuana processor" means a person licensed to obtain marihuana from marihuana establishments; process and package marihuana; and sell or otherwise transfer marihuana to marihuana establishments.

MRTMA contains a much broader definition that would encompass any kind of business entity engaged in the marijuana industry, but the parties chose NOT to use this term in their Agreement:

> (i) "Marihuana establishment" means a marihuana grower, marihuana safety compliance facility, marihuana processor, marihuana microbusiness, marihuana retailer, marihuana secure transporter, or any other type of marihuana-related business licensed by the marijuana regulatory agency.

MRTMA does not contain any definition of provisioning center.

All the above are the current definitions of these terms as they appear in their respective statutory schemes in the present day, but none of these definitions have changed since the versions that existed in January 2020 when the parties in this case entered into the January 2020 Agreement.

When interpreting terms in contracts, trial courts presume that parties reach their agreement with an awareness of the law in effect at the time of their agreement, including the relevant statutes. *Nationwide Mut Fire Ins Co v Detroit Edison Co,* 95 Mich App 62 (1980); *see also In re Estate of Moukalled,* 269 Mich App 708 (2006); *see also Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39 (2005). Here, where the terms "grower" and "provisioning center" are defined by the statutes that regulate the industry, this Court would be hard-pressed to find the definition of "municipal license location" in the Agreement, which uses those same terms of art to describe the boundaries of "municipal license location", to be ambiguous.

Turning to Defendants' Exhibit 6, Revolution Strains Inc held operating licenses that are for provisioning centers and co-located retailers in Traverse City and in Center Line. These are the only two locations that meet the definition of "municipal license location" as set forth by the Agreement. Revolution Strains' license in Marquette was only as a retailer, and the license for the location in Coldwater was only as a retailer. In addition, the other two licenses held by Revolution Strains for the location in Center Line were for processing facilities.

Finally, Defendants' Exhibit 5 shows that the license for the location in Bay City is held by Nirvana, not by Revolution Strains.

Ergo, Nirvana was paying Plaintiff $4,500 per month for six locations, but should have been paying only for two locations. Nirvana is entitled as a matter of contract to a credit against future payments in the amounts that Nirvana already erroneously overpaid Plaintiff. There remains no genuine issue of material fact on this Count, and this Court can read and apply the language of the Agreement as a matter of law. The evidence and applicable law demonstrate that Defendants did not breach the Agreement when in the summer of 2022 they applied a credit for the amounts they overpaid Plaintiff against their future obligations to Plaintiff. Summary disposition can be GRANTED on this Count in favor of Defendants.

B. <u>Count II – Accounting</u>

Defendants argue that this cause of action sounds in equity, but Plaintiff has failed to make the necessary allegations to state a claim. Specifically, Plaintiff has always had the ability to review the Defendants' financials, in accordance with MCL 450.1487(2), and Defendants have acknowledged their continuing obligations to provide her with the reports from the CPA. Also, through discovery she has received all the documents, and there is nothing so intricate or difficult about the reports that Defendant must prepare an accounting for Plaintiff.

Plaintiff responds that as a 1% owner of the corporation, she has a right as a shareholder to be provided the financial information from the corporation. However, during discovery, Defendants declined to provide some requested documents, stating they did not exist. Furthermore, the State's tax assessments on the Defendant corporation show that the company is doing $16,000,000 in business this year and last. Plaintiff is entitled to know how much of that she should receive.

In *Nogueras v Maisel & Associates of Michigan*, 142 Mich App 71, 80 (1985) this Court noted that an accounting is described as follows:

> A formal account or… an accounting is more than a presentation of financial statements. It encompasses a review of all transactions, including alleged improprieties, which should be reflected in the financial statements. It resembles a trustee's accounting.
>
> If a partner asks his co-partners for an account and does not get it, or is not satisfied with it, he may bring an action for an accounting. This is a comprehensive investigation of transactions of the partnership and the partners, and an adjudication of their relative rights. It is conducted by the court or, more commonly, by an auditor, referee or master, subject to the court's review. Equitable throughout most of its long history, this action is well adapted to the complexity of partners' relations. But its origins lie in the mutual fiduciary obligations of the partners.
>
> An accounting action is designed to produce and evaluate all testimony relevant to the various claims of the partners." (Emphasis added in original, quoting Crane & Bromberg, Law of Partnership (1968), chapter 7, § 72, p. 410).

Defendants cite to *Boyd v Nelson Credit Centers Inc*, 132 Mich App 774, 779-80 (1984), which does indeed say "[a]n accounting is unnecessary where discovery is sufficient to determine the

amounts at issue." (citing *Cyril J Burke, Inc. v. Eddy & Co. Inc.*, 332 Mich. 300, 303 (1952)). However, Defendants have not attached any documentary evidence in support of the CPA reports being delivered to Plaintiff, nor any other financial documents having been turned over or inspected.[1]

Plaintiff responds by submitting Exhibits F, G, and H, which are quarterly excise tax notices sent from the State Department of Treasury to Plaintiff regarding Revolution Strains Inc. These exhibits show extraordinary revenues for the 4th quarter of 2022 and the 1st and 2nd quarter of 2023. In addition, Plaintiff's Exhibit E (Defendants' discovery responses) indicate that Revolution Strains' tax returns for 2021 and 2022 have not been filed yet, and no financial statements have been prepared since January 31, 2020.

Since Defendants rely on disclosure of documents during discovery to effectively moot the action for accounting, and Plaintiff produced exhibits showing that financial documents must be being kept in some fashion because revenue is being generated (Exs. F, G, and H) but financial statements and tax returns have not been produced to Plaintiff (Ex. E), this Court denies summary disposition on Count II. There remains a genuine issue of material fact about whether an accounting needs to be conducted.

C. Count III – Breach of Fiduciary Duty:

The elements of breach of fiduciary duty are the following:

- existence of a fiduciary relationship
- a breach of the fiduciary duty
- causation, and
- damages

Courts have explained that a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508 (1995). Relief is granted when such a position of influence has been acquired and abused or when confidence has been reposed and betrayed. *Id.*

When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581 (1999) (citing *Melynchenko v Clay*, 152 Mich App 193, 197 (1986)). Whether a duty exists is a question of law for the court to decide. *Harts v Farmers Ins Exch*, 461 Mich 1, 6 (1999).

[1] For the first time, in the Reply Brief, Defendants reference and attach an email (Exhibit A) from February 28, 2023 in which Defense counsel claimed to send a copy of the 2021 tax returns for Revolution Strains Inc to Plaintiff's counsel. The actual 2021 tax returns were not attached as an exhibit, and Plaintiff's response email indicates that the 1120-S form was not updated when Defense provided that email. More to the point, providing a single set of tax returns during discovery does not moot an action for an accounting.

Defendants contend that their relationship with Plaintiff is entirely contractual, and that does not create a fiduciary relationship. In addition, Rissi is not a member of Nirvana Operations LLC, so the LLC Members owe her no duty. Defendants also assert there is no factual basis.

Plaintiff responds that the LLC is a 99% member of the Corporation and she is a 1% member. Under *Murphy v Inman*, 509 Mich 132 (2022), Plaintiff has the ability to sue the director of the corporation for breach of fiduciary duty. Nirvana has breached its duty as member/director of the Corporation by failing to provide financial information to Plaintiff and failing to file tax returns.

Defendants make a correct statement of law – that purely contractual relationships do not create fiduciary relationships – but Defendants misapply it. Here, it is well-established that Plaintiff is a 1% owner of Revolution Strains and Nirvana is the other 99% owner, and operates the business. Because the Plaintiff is a minority shareholder in the Corporation, and Defendants are the Corporation and the majority shareholders, Plaintiff may bring a suit against the Corporation and its majority shareholders for breach of fiduciary duty.

In the Complaint, Plaintiff alleges that Defendants have withheld financial information/disclosures from her, have withheld from her information about municipal licenses the Corporation has acquired that may entitle her to additional monies under the Agreement, and that she has suffered damages as a result. All of Defendants arguments regarding Count III are C(8) arguments, not C(10) arguments. Accordingly, this Court analyzes the motion under a C(8) framework. Taking the pleadings as true, as this Court must on a C(8) motion, the Court should find that Plaintiff has adequately pleaded a cause of action for breach of fiduciary duty. This Count shall not be dismissed on summary disposition.

D. Count IV – Conversion

The elements of statutory conversion are:

- Either
    - the defendant stole or embezzled personal property or converted personal property as defined under the common law and put the converted property to their own use,

  or
    - the defendant bought, received, possessed, concealed, or aided the concealment of stolen, embezzled, or converted personal property and knew that the personal property was stolen, embezzled, or converted when they did so,[2]
- The plaintiff suffered actual damages.[3]

The elements of common law conversion are:

- The plaintiff owns or has a qualified interest in identifiable personal property.[4]

[2] S*ee Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197–198 (2005) (holding that mere constructive knowledge that property had been stolen, embezzled, or converted was insufficient to impose liability against recipient of stolen goods).
[3] *See Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 103–104 (2009).
[4] *See Hance v Tittabawassee Boom Co*, 70 Mich 227, 231 (1888) (stating that plaintiff must prove ownership, absolute or qualified, in personal property at issue and noting that it is not enough to present evidence that defendant likely converted some property).

- The plaintiff has possession of the property or the right to immediate possession.[5]
- The defendant wrongfully exerted dominion over the property in denial of or inconsistent with the plaintiff's rights.[6]
- The plaintiff suffered actual damages.

See e.g. Thoma v Tracy Motor Sales, Inc, 360 Mich 434, 438 (1960).

Defendants assert that Plaintiff came into physical possession of an IRS refund check made out to the Corporation. She deposited it, then tried to withdraw the funds. The bank refused to allow the withdrawal, and called Nirvana. On this motion, Defendants argue that Plaintiff lacks legal right to possession and lacks title to the check because the check was made out to Revolution Strains Inc. She was never entitled to withdraw that money based on the refund check, so Nirvana and Revolution Strains could not have converted it to their own use.

Plaintiff responds that the refund check arose from changes made to the December 31, 2021 1120-S tax form for Revolution Strains Inc. Plaintiff was the person who filed 1120-S form on behalf of Revolution Strains. She also cut the check for the Corporation's tax liability in the amount of $25,000. In June 2022, Plaintiff was notified there was an overpayment, and so the IRS issued a refund check of $25,000. Defendants retained the entire check even though the overpayment was made by Plaintiff.

Defendants provide no exhibit(s) related to the claim of conversion. Plaintiff responds by presenting Exhibits J (notice of overpayment from the IRS listing Revolutions Strains as the payee for the refund check); and Exhibit K (Plaintiff's counsel's letter to Defense counsel, asking for reimbursement to Plaintiff of the amount overpaid to the IRS for Revolution Strains).

Checks are considered to be the property of the designated payee. *See e.g., Continental Casualty Co. v. Huron Valley National Bank*, 85 Mich App 319, 322–323 (1978); *see also Trail Clinic P.C. v Bloch*, 114 Mich App 700 (1982).[7] The undisputed evidence – in fact the evidence provided by Plaintiff – shows that Revolutions Strains Inc was the payee on the tax refund check from the IRS arising from the overpayment. Therefore, Revolution Strains Inc was the owner of the IRS refund check. Defendants did not steal, embezzle, or convert the check from the IRS. They were legally entitled to the monies from the check.

In *Citizen Ins Co of America v Delcamp Truck Center Inc*, 178 Mich App 570, 576 (1989), the Court of Appeals held that "[a]n action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount." In Citizens, both Delcamp Truck Center and Bell Equipment Company performed repair services on a garbage truck owned by Cook Sanitation, and insured by Citizens Ins Co. Citizens Ins Co issued a check to Delcamp, but erroneously and apparently inadvertently left Bell Equipment off the

[5] *See Thomas v Watt*, 104 Mich 201, 207 (1895).
[6] *See Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 352 (2015).
[7] (holding that conversion of checks from Blue Cross Blue Shield that were marked with Dr. Banerji's provider number, for services he performed at Trail Clinic, but which were erroneously sent to Westminster Medical Clinic, were converted by Westminster when Westminster deposited the checks in Westminster's account, even though Dr. Banerji no longer worked at Westminster and the checks clearly bore his provider number).

check as a payee. Delcamp cashed the check, squared their books, and issued a credit to Cook Sanitation for the overpayment. The trial court found Delcamp liable for conversion of the overpayment, because failure to return it to Citizens was an act of dominion over monies to which Delchamp was not entitled. The Court of Appeals affirmed.

The *Citizens v Delcamp* case is distinguishable from the case at bar, because Plaintiff Rissi did not perform services for the IRS, nor was she accidentally left off the refund check when it was issued. Plaintiff has failed to develop any contrary facts on this summary disposition motion, but it appears from the limited information provided that Rissi did not pay her own tax liability with that $25,000. Instead, Rissi paid the portion of Revolution Strains Inc's tax liability due on the 1120-S form that represents her 1% interest. That is: she paid on behalf of the Corporation. Therefore, any overpayment would be returned to the Corporation, since it was the tax liability of the Corporation that was being paid off.

Considering the undisputed evidence (Exs. J and K) and the applicable law, there is no genuine issue of material fact that Revolution Strains Inc was the sole payee of the IRS refund check, and therefore the refund was the property of Revolution Strains Inc. Revolution Strains Inc committed no act of conversion because Plaintiff was not legally entitled to those funds. Summary disposition is warranted on this Count.

IV. CONCLUSION

NOW THEREFORE IT IS ORDERED that for the reasons set forth in detail above, Defendants' motion for summary disposition is GRANTED as to Counts I and IV, as there remains no genuine issue of material fact that Defendants did not breach the Agreement and that Defendants did not convert the IRS refund check.

IT IS FURTHER ORDERED that for all the reasons set forth in detail above, Defendants' motion for summary disposition is DENIED as to Counts II and III, as Plaintiff has adequately stated a cause of action for accounting (Count II) and breach of fiduciary duty (Count III), and there remains a genuine issue of material fact as to Count II.

IT IS FURTHER ORDERED that Plaintiff has not sought to amend Counts I and IV, and furthermore this Court finds that amendment would be futile because the evidence regarding the dealings between the parties does not support those causes of action for breach of contract and for conversion, and no amendment to the pleadings could make the evidence show something other than what it does, and therefore Plaintiff shall NOT be permitted to amend the Complaint.

IT IS SO ORDERED.

This is not a final order and does not close the case.

/s/ Hon. Michael P. Hatty
Hon. Michael P. Hatty (P30990)
Business Court Judge