UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EMPOWER HEALTH LLC, ET AL., Plaintiffs,	:	CIVIL ACTION NO. 3:10-CV-1163 (JCH)
v.	:	
PROVIDENCE HEALTH SOLUTIONS LLC, Defendant.	:	SEPTEMBER 24, 2012

RULING RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. No. 118) and PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS (Doc. No. 126)

I. INTRODUCTION

Plaintiffs Empower Health, LLC ("Empower Health") and Daniel Dunlop brought this diversity action against defendant Providence Health Solutions, LLC ("PHS")[1] alleging breach of contract; violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110 et seq.; breach of the covenant of good faith and fair dealing; tortious interference with business expectations; and unjust enrichment. See Amended Complaint (Doc. No. 33).[2] The plaintiffs also demanded an accounting under the alleged contract between the parties.[3] On June 3, 2011, the court terminated as moot in part and denied in part PHS's Motion to Dismiss ("Ruling Mot. Dismiss") (Doc. No. 43). PHS filed an Amended Answer to the Amended Complaint on November

[1] Providence Health Solutions, LLC has changed its name to ShapeUp Inc. and does business under the name Shape Up The Nation. See Defendant's Amended Memorandum of Law in Support of Defendant's Motion for Summary Judgment (Doc. No. 121) at 1. For the sake of consistency with prior filings and rulings in this case, the court will continue to use the original name to refer to defendant.

[2] Plaintiffs withdrew their claim of promissory estoppel. See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Doc. No. 136) at 1 n. 1.

[3] Because the court regards an accounting as a form of remedy, it will not address the issue at the summary judgment stage.

22, 2011 (Doc. No. 112), in which it alleged in a counter claim violations of CUTPA and breach of the covenant of good faith and fair dealing against the plaintiffs. On February 28, 2012, PHS filed this Motion for Summary Judgment as to all of the plaintiffs' claims ("Def.'s Mot. Summ. J.") (Doc. No. 118). On April 5, 2012, the plaintiffs filed their own Motion for Summary Judgment as to both of PHS's counterclaims ("Pls.' Mot. Summ. J. Counterclaims") (Doc. No. 126).

II. STANDARD OF REVIEW

A motion for summary judgment "may properly be granted . . . only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." In re Dana Corp., 574 F.3d 129, 151 (2d Cir. 2009). Thus, the role of a district court in considering such a motion "is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." Id. In making this determination, the trial court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. See Fed R. Civ. P. 56(c); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 274 (2d Cir. 2009).

"[T]he moving party bears the burden of showing that he or she is entitled to summary judgment." United Transp. Union v. Natn'l R.R. Passenger Corp., 588 F.3d 805, 809 (2d Cir. 2009). Once the moving party has satisfied that burden, in order to defeat the motion, "the party opposing summary judgment . . . must set forth 'specific facts' demonstrating that there is 'a genuine issue for trial.'" Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56(e)). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a

reasonable jury could decide in the non-movant's favor." Beyer v. County of Nassau, 524 F.3d 160, 163 (2d Cir. 2008) (quoting Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)); see also Havey v. Homebound Mortgage, Inc., 547 F.3d 158, 163 (2d Cir. 2008) (stating that a non-moving party must point to more than a mere "'scintilla'" of evidence in order to defeat a motion for summary judgment) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

III. FACTUAL BACKGROUND

Empower Health is a Connecticut limited liability company, in which Mr. Dunlop is a member. See Plaintiffs' Local Rule 56(a)(2) Statement (Doc. No. 138) ("Pls.' 56(a)(2)") at Statement of Disputed Material Fact ¶ 7; Defendant's Reply to Plaintiffs' Local Rule 56(a)(2) Statement (Doc. No. 147-1) ("Def.'s Reply Pls.' 56(a)(2)") at ¶ 7. PHS is a corporate wellness company offering team-based wellness software and consulting services. See Pls.' 56(a)(2) at Statement of Disputed Material Fact ¶ 8; Def.'s Reply Pls.' 56(a)(2) at ¶ 7. PHS was started by Brad Weinberg and Rajiv Kumar in August 2007. See Def.'s 56(a)(1) at ¶ 1, 3; Pls.' 56(a)(2) at ¶ 1, 3.

A. The Agreement

Prior to the development of a business relationship between Mr. Dunlop and PHS, Mr. Dunlop was an employee at Aetna Insurance Company ("Aetna"). See Defendant's Local Rule 56(a)(1) Statement (Doc. No. 118-7) ("Def.'s 56(a)(1)") at ¶ 6; Pls.' 56(a)(2) at ¶ 6. The parties dispute exactly how Mr. Dunlop became aware of PHS, but agree that while Mr. Dunlop was still an employee of Aetna he contacted PHS through PHS's website and broached the idea of his leaving Aetna to do business with PHS. See Def.'s 56(a)(1) at ¶ 7-8; Pls.' 56(a)(2) at ¶ 7-8. Mr. Dunlop presented himself

as a successful industry specialist who had a detailed knowledge of the wellness products market and had contacts in the area of potential use to PHS. See Def.'s 56(a)(1) at ¶ 8; Pls.' 56(a)(2) at ¶ 8.

During April and May 2008, PHS communicated with several Aetna employees, including Mr. Dunlop, and did product demonstrations for Aetna while Mr. Dunlop was an employee there. See Def.'s 56(a)(1) at ¶ 12-13; Pls.' 56(a)(2) at ¶ 12-13. Mr. Kumar first spoke with Mr. Dunlop in April 2008, for about 20-40 minutes, and subsequently spoke with Mr. Dunlop about six times between April and May 2008 about PHS's product. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 25-26; Def.'s Reply Pls.' 56(a)(2) at ¶ 25-26. Prior to signing the Agreement, Mr. Kumar had conversations with Mr. Dunlop wherein Mr. Dunlop expressed an interest in PHS, its philosophy, and in bringing sales to PHS as an independent consultant. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 28; Def.'s Reply Pls.' 56(a)(2) at ¶ 28. Prior to signing the agreement, Mr. Dunlop had previously declared personal bankruptcy (in which a lawsuit for back rent against him was discharged), closed his own chiropractic business, and was terminated from his prior job. See Def.'s 56(a)(1) at ¶ 9; Pls.' 56(a)(2) at ¶ 9. Mr. Dunlop did not disclose those facts to PHS in 2008. See Def.'s 56(a)(1) at ¶ 10; Pls.' 56(a)(2) at ¶ 10.

For at least the period of April through June 2008, Mr. Dunlop and PHS negotiated a marketing agreement whereby Mr. Dunlop (acting through Empower Health, a company formed by Mr. Dunlop) would market PHS products and generate sales for PHS. See Def.'s 56(a)(1) at ¶ 17-18; Pls.' 56(a)(2) at ¶ 17-18. Mr. Weinberg downloaded the original version of what would become a marketing agreement from the

internet. See Def.'s 56(a)(1) at ¶ 19; Pls.' 56(a)(2) at ¶ 19. In May and June 2008, the parties exchanged emails proposing amendments to the marketing agreement. See Def.'s 56(a)(1) at ¶ 20; Pls.' 56(a)(2) at ¶ 20. A preliminary draft of the marketing agreement was modified to change the commission structure from one that was account-based to one that was based on products and programs sold. See Def.'s 56(a)(1) at ¶ 21; Pls.' 56(a)(2) at ¶ 21.

On June 15, 2008, PHS and Mr. Dunlop (acting through Empower Health), entered into a contract (the "Agreement") in which Empower Health stated its intention to market PHS products and generate sales for PHS. See Def.'s 56(a)(1) at ¶ 22-23; Pls.' 56(a)(2) at ¶ 22-23. The contract was entered into freely and voluntarily. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 6; Def.'s Reply Pls.' 56(a)(2) at ¶ 6. In exchange for Empower Health's promotional and sales efforts, the Agreement established a two-tiered structure for the payment of commissions to Empower Health. See Def.'s 56(a)(1) at ¶ 25; Pls.' 56(a)(2) at ¶ 25. First, "[f]or each product/program that [Empower Health] closes for a [PHS] product, a sales commission of 10% of the net sales revenue collected shall be paid to [Empower Health]." Id. Second:

> For products sold through partnerships and relationships with, as examples, but not limited to: third party administrators, broker networks, health carriers, technology companies, wellness and disease management vendors, and other financial institutions where [Empower Health] provided an Introduction to [PHS] and in which the partner organization receives a referral commission, [Empower Health] will receive a 10% commission on net sales revenue (Net Revenue minus the partner's referral commission).

Id. The referral commission language related to the second tier of the compensation structure was added at Mr. Dunlop's request. See Def.'s 56(a)(1) at ¶ 31; Pls.' 56(a)(2) at ¶ 31. Mr. Dunlop's intent in requesting the language regarding partner organization

referral commission was to state that Empower Health's 10 percent commission would be calculated after the referral commission was paid. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 64; Def.'s Reply Pls.' 56(a)(2) at ¶ 64.

The parties agreed to "pay and be responsible for their own costs and expenses incurred or arising in connection with their own performance" under the Agreement. See Def.'s 56(a)(1) at ¶ 26; Pls.' 56(a)(2) at ¶ 26. The Agreement defined the parties' relationship as "independent contractors only" and further provided that "[n]either Party will have the authority to enter into contracts, assume, create or incur any obligation or liability or make arrangements of any nature whatsoever for, in the name of, or on behalf of, the other Party." See Def.'s 56(a)(1) at ¶ 27; Pls.' 56(a)(2) at ¶ 27. At the time Empower Health entered the Agreement, Mr. Dunlop's expectation was that "if [Empower Health] didn't sale [sic] a product, [it] didn't get paid on it, or if [Empower Health] didn't sell a program [it] didn't get paid on it." See Def.'s 56(a)(1) at ¶ 29; Pls.' 56(a)(2) at ¶ 29.

The Agreement also stated that neither party shall be liable to the other "for any loss of profits, loss of business, loss of use or data, interruption of business, or for indirect special, incidental, exemplary, multiple, punitive or consequential damages of any kind, whether based on contract, tort (including, without limitation, negligence), warranty, guarantee or any other legal or equitable grounds. . . ." See Def.'s 56(a)(1) at ¶ 28; Pls.' 56(a)(2) at ¶ 28.

B. Events Following the Signing of the Agreement

During the period of time relevant to these events, obtaining Aetna as a customer was key to the survival of PHS and to its financing. See Def.'s 56(a)(1) at ¶ 16; Pls.' 56(a)(2) at ¶ 16.

The parties, however, dispute exactly what Mr. Dunlop did in order to secure (or not secure) Aetna as a customer for PHS. According to PHS, Mr. Dunlop had an initial call with Mr. Kumar and invited, on behalf of Aetna, PHS to do a demonstration for Aetna; was present in the room for a short period of time as an Aetna employee at one of PHS's onsite presentations at Aetna; and occasionally offered tidbits of advice to PHS regarding how to work with Aetna following Mr. Dunlop's termination from Aetna in August 2008. See Def.'s 56(a)(1) at ¶ 59. Mr. Dunlop, however, asserts that he, via Empower Health, promoted Providence's products to Aetna; provided important information and key points of business intelligence to Mr. Kumar to help with the promotional efforts; met with Mr. Kumar and Mr. Weinberg prior to their first meeting with Aetna; and was told by Mr. Kumar and another key PHS executive that he would receive commissions based on his work with Aetna. See Pls.' 56(a)(2) at ¶ 59. The parties dispute whether PHS has consistently maintained that Empower did not close the Aetna relationship under the Agreement. See Def.'s 56(a)(1) at ¶ 60; Pls.' 56(a)(2) at ¶ 60.

The parties do agree that Mr. Dunlop's employment with Aetna was terminated for lack of performance. See Def.'s 56(a)(1) at ¶ 32; Pls.' 56(a)(2) at ¶ 32. Mr. Dunlop informed Mr. Kumar that he had been fired when Mr. Kumar asked if Mr. Dunlop was still working at Aetna. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 33;

Def.'s Reply Pls.' 56(a)(2) at ¶ 33. Following his separation from Aetna, Mr. Dunlop had no direct communications with Aetna regarding PHS. See Def.'s 56(a)(1) at ¶ 33; Pls.' 56(a)(2) at ¶ 33.

The parties dispute whether Mr. Dunlop represented to PHS at some point during their business relationship that by virtue of his position at Aetna, Mr. Dunlop could damage PHS's business relationship with Aetna if PHS did not cooperate with him personally. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 41; Def.'s Reply Pls.' 56(a)(2) at ¶ 41.

In September 2008, PHS provided Empower Health with PHS' "Sales Handbook," which included an outline of PHS's sales philosophy, a model sales timeline, the lead acquisition process and pricing structure, and stated that leads should be followed to the conclusion of the relationship. See Def.'s 56(a)(1) at ¶ 34-35; Pls.' 56(a)(2) at ¶ 34-35.

As a result of Empower Health's efforts, Empower Health claims 210 companies as potential sources for commission. See Def.'s 56(a)(1) at ¶ 36; Pls.' 56(a)(2) at ¶ 36. The parties dispute whether 12 or 13 of the 210 companies eventually produced any revenue for PHS. See Def.'s 56(a)(1) at ¶ 37; Pls.' 56(a)(2) at ¶ 37. A document dated August 19, 2008, and entitled "Exhibit A, Finder/Commission New Business Agreement," listed the names of several companies along with contact names, and contains Mr. Kumar's initials. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 43; Def.'s Reply Pls.' 56(a)(2) at ¶ 43. The parties dispute whether the listings represent leads provided by Mr. Dunlop or a list of Partners, Clients and Customers for

PHS, and dispute the meaning of Mr. Kumar's initials. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 43; Def.'s Reply Pls.' 56(a)(2) at ¶ 43.

Mr. Dunlop, acting through Empower Health, promoted PHS to a company called TASC. The parties dispute exactly what Mr. Dunlop did to further the relationship between PHS and TASC, but they do agree that TASC eventually became a PHS customer. See Def.'s 56(a)(1) at ¶ 39; Pls.' 56(a)(2) at ¶ 39. PHS paid Empower Health a 10 percent commission pursuant to the Agreement based on the successful outcome of the TASC relationship. See Def.'s 56(a)(1) at ¶ 40; Pls.' 56(a)(2) at ¶ 40. PHS asserts that Mr. Dunlop's activities related to TASC included providing marketing materials to TASC, taking a company representative out to dinner, working on meetings, webinars, presentations, and contract negotiations, and concluding a negotiation for PHS with TASC. See Def.'s 56(a)(1) at ¶ 39. Mr. Dunlop asserts that he did not conclude the negotiation with TASC and that the development of the TASC relationship was "collaborative" as opposed to a unilateral conclusion of the business relationship. See Pls.' 56(a)(2) at ¶ 38, 39.

The parties also offer differing accounts of Mr. Dunlop and Empower Health's role in the development of business relationships with the other companies that eventually generated revenue for PHS. As to Blue Cross Blue Shield of Alabama, Mr. Dunlop did nothing to convert that company into a PHS customer. See Def.'s 56(a)(1) at ¶ 41; Pls.' 56(a)(2) at ¶ 41. Mr. Dunlop did no work for Kimberly Clark. See Def.'s 56(a)(1) at ¶ 44; Pls.' 56(a)(2) at ¶ 44. The parties dispute whether Mr. Dunlop had any contact with United Health Group and would only be entitled to commissions to the

extent that a third party, Travis Jackson, closed the business and received a commission. See Def.'s 56(a)(1) at ¶ 42; Pls.' 56(a)(2) at ¶ 42.

Empower Health, through Mr. Dunlop, introduced PHS to Mr. Jackson. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 55; Def.'s Reply Pls.' 56(a)(2) at ¶ 55. Mr. Jackson signed a Mutual Confidentialit Agreement with PHS on July 15, 2010. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 79; Def.'s Reply Pls.' 56(a)(2) at ¶ 79. On July 21, 2010, Mr. Kumar emailed a PHS executive and stated: "I just realized that we need to discuss the dan [sic] Dunlop issue with respect to Travis since dan [sic] made the intro and is 'claiming' Travis as an account. Also Travis and dan [sic] work together so Dan will know if we are doing biz with Travis. Not urgent but something to think about." See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 80; Def.'s Reply Pls.' 56(a)(2) at ¶ 80. Mr. Jackson never produced any revenue for PHS. See Def.'s 56(a)(1) at ¶ 62; Pls.' 56(a)(2) at ¶ 62. A PHS executive, in an email dated August 25, 2010, provided Mr. Jackson with the language for him to represent, among other things, that Mr. Dunlop had nothing to do with the business PHS and Mr. Jackson's company, My Expert Solution, were contemplating together. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 83; Def.'s Reply Pls.' 56(a)(2) at ¶ 83. Mr. Jackson, at PHS's request, signed a document stating that Mr. Dunlop and Empower Health had no role in referring, initiating, or closing any business or contractural relationship between PHS and Mr. Jackson's company. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 84; Def.'s Reply Pls.' 56(a)(2) at ¶ 84. On August 27, 2010, another PHS executive, on behalf of PHS, wrote an email to Mr. Jackson stating that Mr. Jackson would not "need to shave off any of [his] pennies

either" in connection with the document disclaiming the plaintiffs' role in referring Mr. Jackson's company to PHS. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 85; Def.'s Reply Pls.' 56(a)(2) at ¶ 85.

The parties also dispute whether Blue Cross Blue Shield of California was closed by a former PHS employee. See Def.'s 56(a)(1) at ¶ 43; Pls.' 56(a)(2) at ¶ 43. The parties also dispute whether Mr. Dunlop and Empower Health had any role in the closing of business for the remaining entities on Empower Health's leads list that generated revenue for PHS. See Def.'s 56(a)(1) at ¶ 45; Pls.' 56(a)(2) at ¶ 45.

Throughout the fall of 2008, PHS and Mr. Dunlop were engaged in discussions regarding modification of the Agreement and Mr. Dunlop becoming an employee at PHS. See Def.'s 56(a)(1) at ¶ 46; Pls.' 56(a)(2) at ¶ 45. In December 2008 PHS decided not to hire Mr. Dunlop. See Def.'s 56(a)(1) at ¶ 47; Pls.' 56(a)(2) at ¶ 47.

In January 2009, Mr. Dunlop sent separate emails to two individuals he had introduced to PHS informing them he was no longer doing business with PHS. See Def.'s 56(a)(1) at ¶ 48; Pls.' 56(a)(2) at ¶ 48. Mr. Weinberg and Mr. Kumar were copied on both emails. Id. Around January 2009, Mr. Dunlop also informed another Empower Health lead that Mr. Dunlop's relationship with PHS had "unwound." See Def.'s 56(a)(1) at ¶ 49; Pls.' 56(a)(2) at ¶ 49. Mr. Dunlop also began volunteering around that time for a "NAHU" wellness certification course. See Def.'s 56(a)(1) at ¶ 50; Pls.' 56(a)(2) at ¶ 50.

In February 2009, Mr. Dunlop corresponded with Mr. Weinberg and confirmed that the parties would not be moving forward with a new marketing agreement or an employment relationship and were defaulting to the Agreement. See Def.'s 56(a)(1) at

¶ 51; Pls.' 56(a)(2) at ¶ 51. Mr. Dunlop indicated in this correspondence that the relationship between Empower Health and PHS had been interrupted, but that there was potential for restoring the relationship at a later date. Id. The correspondence did not contemplate Empower Health's continuing to seek business for PHS. Id.

The parties dispute whether, from December 2008 to Spring 2009, Mr. Dunlop developed any business for PHS. PHS claims that no such business was developed, while Mr. Dunlop maintains that he was engaged in producing new business for TASC as well as providing promotional assistance to Mr. Kumar for the Aetna relationship. See Def.'s 56(a)(1) at ¶ 52; Pls.' 56(a)(2) at ¶ 52. On April 30, 2009, Mr. Weinberg wrote in an email to Mr. Kumar that it was "time to cancel the [Agreement] with [Mr. Dunlop] and move on." See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 66; Def.'s Reply Pls.' 56(a)(2) at ¶ 66.

In Spring 2009, PHS and Mr. Dunlop resumed attempts to negotiate a new marketing agreement. See Def.'s 56(a)(1) at ¶ 53; Pls.' 56(a)(2) at ¶ 53. This new marketing agreement involved PHS offering a "leads based" agreement that would have compensated Mr. Dunlop for leads generated for PHS. See Def.'s 56(a)(1) at ¶ 54; Pls.' 56(a)(2) at ¶ 54. The parties were unable to reach a new agreement. See Def.'s 56(a)(1) at ¶ 55; Pls.' 56(a)(1) at ¶ 55. However, the parties continued to attempt to do business together through 2009 and into early 2010. See Def.'s 56(a)(1) at ¶ 66; Pls.' 56(a)(2) at ¶ 66. On March 27, 2009, Mr. Dunlop, on behalf of Empower Health, provided to Mr. Kumar and Mr. Weinberg a nine page document entitled "Aetna Business Intelligence." See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 73; Def.'s Reply Pls.' 56(a)(2) at ¶ 73.

On April 26, 2009, Mr. Dunlop sent Mr. Kumar a letter that, in part, stated:

> The idea that I, personally, would have to 'close' a lead is nonsensical. You would not have the lead to close it if it weren't for my introduction and my ongoing intensive work to bring these relationships to signing an agreement. However, in each case so far, you have stepped in to take over the negotiations and finalize the transaction to the point of interfering with my ability to manage each relationship and all the leads. Under this scenario I have no ability to 'close' the lead. I am paid when the lead is closed.

See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 90; Def.'s Reply Pls.' 56(a)(2) at ¶ 90. The parties dispute whether the statements in the April 26, 2009 letter reflect their understanding of the Agreement. Id.

Mr. Kumar believed, as of December 22, 2009, that PHS never formally ended the Agreement with Empower Health. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 70; Def.'s Reply Pls.' 56(a)(2) at ¶ 70. On July 19, 2010, PHS, through its attorneys, sent a letter to Mr. Dunlop stating that the Agreement was terminated on or around February 2, 2009 and that Empower Health did not close any agreements with referenced clients on behalf of PHS. See Pls.' 56(a)(2) at Statement of Disputed Material Fact at ¶ 86; Def.'s Reply Pls.' 56(a)(2) at ¶ 86.

C. Facts Related To Counterclaims

The parties also submitted statements of material facts concerning plaintiffs' motion for summary judgment related to PHS's two counterclaims. Most of these facts were reflected in the statements of material facts relating to PHS's motion for summary judgment.

1. Mr. Weinberg and Mr. Kumar's Business Backgrounds

Mr. Weinberg has at least some prior business experience prior to starting PHS, including starting a company called Interactive Solutions in college that designed

websites. See Plaintiffs' Local Rule 56(c) Statement In Support of Cross Motion for Summary Judgment on Defendant's Counterclaims (Doc. No. 127) ("Pls.' 56(c) Statement") at ¶ 5; Defendant's Reply to Plaintiff's Local Rule 56(c) Statement in Support of Cross Motion for Summary Judgment on Defendant's Counterclaims (Doc. No. 145) ("Def.'s Reply 56(c) Statement") at ¶ 5. The parties dispute the extent and relevance of this experience. Mr. Weinberg's father is an attorney. Id. Mr. Kumar had access to legal counsel prior to starting PHS. See Pls.' 56(c) Statement at ¶ 8; Def.'s Reply 56(c) Statement at ¶ 8. Prior to starting PHS, Mr. Kumar had also started a 501(c)(3) nonprofit organization called "Adopt a Doctor" with a business partner who was a former state representative for Rhode Island. Id. Prior to the development of PHS's business relationship with Mr. Dunlop, Mr. Kumar and Mr. Weinberg had won $25,000 of "in-kind" legal services from several established law firms. Id.

IV. DISCUSSION

The plaintiffs brought this action against PHS alleging: breach of contract, violation of CUTPA, breach of the covenant of good faith and fair dealing, tortious interference with business expectations, and unjust enrichment. PHS also brings two counterclaims against the plaintiffs for violations of CUTPA and breach of the covenant of good faith and fair dealing. The court will address each of these claims in turn.

A. Choice of Law

As a preliminary matter, these diverse parties dispute whether this court should apply Connecticut or Rhode Island law in adjudicating claims stemming from the Agreement. Neither party contends that the Agreement contains an express choice of law provision for the application of Rhode Island law. Under the heading "Governing

Law," section 20 of the Agreement states, "This Agreement shall be governed by the laws of the State of Rhode Island without giving effect to applicable conflict of law provisions." See Def.'s Mot. Summ. J. at Ex. 3, Ex. A; Pls.' Memo. Supp. Mot. Summ. J. Counterclaims at 12; Def.'s Memo. Opp. Mot. Summ. J. Counterclaims at 7. The plaintiffs contend, however, that because PHS's Motion to Dismiss did not address issues of Rhode Island law, and because this court's ruling related to that motion to dismiss similarly relied on Connecticut law, PHS has waived application of Rhode Island law. See Pls.' Memo. Supp. Mot. Summ. J. Counterclaims at 12.

"The validity of a contractual choice-of-law clause is a threshold question that must be decided not under the law specified in the clause, but under the relevant forum's choice-of-law rules governing the effectiveness of such clauses." Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc., 414 F.3d 325, 332 (2d Cir. 2005). Here, the court is confident that Connecticut courts would recognize the parties' contract clause. See Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604, 608-09 (2d Cir. 1996) ("'Contract clauses which require the application of the laws of other states upon breach or dispute are recognized as proper in Connecticut.'") (quoting Syncsort v. Indata Servs., 541 A.2d 543, 545 (Conn. App. 1988)); see also Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001) ("Connecticut law 'give[s] effect to an express choice of law by the parties to a contract provided that it was made in good faith.'") (quoting Elgar v. Elgar, 238 Conn. 839, 848 (1996)).

The Second Circuit has recognized that failure to bring to the district court's attention the potential applicability of another state's law can constitute waiver of a choice of law clause. See Schwimmer v. Allstate Ins. Co., 176 F.3d 648, 650 (2d Cir.

1999); see also Cargill, Inc. v. Charles Kowsky Resources, Inc., 949 F.2d 51, 55 (2d Cir. 1991) ("[E]ven when the parties include a choice-of-law clause in their contract, their conduct during litigation may indicate assent to the application of another state's law.").

The court acknowledges the slightly unusual scenario presented here, in which PHS pressed its Motion to Dismiss under Connecticut law and the court issued its Ruling also utilizing Connecticut law, but PHS now insists on summary judgment that Rhode Island law applies. While the court is sympathetic to the plaintiffs' waiver argument, the court also recognizes that the issue was raised in opposition to the Motion to Dismiss, but not fully addressed at that motion to dismiss stage because plaintiffs subsequently amended their complaint and neither party advanced further argument on pleadings relevant to the withdrawn complaint. Rather than require parties to submit additional briefing, the court deemed the original Motion to Dismiss to be addressed to the Amended Complaint. See Ruling Mot. Dismiss at 2.

Given the clear language of the Agreement, the court will apply Rhode Island law because the court cannot say that PHS has completely failed to bring the issue to the court's attention.

However, the same cannot be said for plaintiff's claims, and PHS's counterclaims, that are not based on the construction of the contract itself but, rather, based on some other cause of action, such as a tort claim or both parties' CUTPA claims. This is because the choice-of-law provision of the Agreement states only that the Agreement itself, and not other, related causes of action, is subject to Rhode Island law. See Halo Technology Holdings, Inc. v. Cooper, No. 3:07-CV-489 (SRU), 2010 WL 1330770 (D. Conn. 2010); Country Club Assocs. v. Shaw's Supermarkets, 643

F.Supp.2d 243, 252 (D. Conn. 2009) (applying Connecticut law to a CUTPA claim despite a choice-of-law provision in the relevant contract because, "The choice of law provision does not explicitly encompass tort claims. Particularly given the legislative direction that CUTPA is to be construed broadly, the court concludes that allowing a non-specific choice of law clause of this sort to preclude the operation of CUTPA would violate the public policy of that state."); see also Blakeslee Arpaia Chapman, Inc. v. Helmsman Mgmt. Servs., Inc., No. 443753, 2002 WL 172670 at *2-3 (Conn. Super. Jan. 9, 2002) (finding that a choice of law provision that stated "The parties agree that this Agreement shall be construed under and governed by the law of the State of Massachusetts" was not sufficiently broad to apply to tort claims, including CUTPA claims.).

The court, therefore, will apply a mix of Rhode Island and Connecticut law; Rhode Island law will be applied to questions concerning construction of the Agreement itself and Connecticut law to the tort actions stemming from related events. See Leahy v. New England Motor Freight, Inc., No. CV-054010227S, 2008 WL 4683908, *6 (Conn. Super. Oct. 3, 2008) (collecting cases and finding that the principle of depecage -- the framework under which different issues in a single case may be decided according to the substantive law of different states -- applies in Connecticut) (citing Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co., 252 Conn. 774, 783 n. 5 (2000)).

B. Breach of Contract

PHS contents that summary judgment should be granted because it did not breach the Agreement. Specifically, PHS asserts that it was under no contractual obligation to pay Empower Health a commission based on the companies that

generated revenue for PHS, with the exception of TASC, because Empower Health did not "close" those accounts, and because none of Empower Health's partners received referral commission. As a result, PHS claims, plaintiffs cannot demonstrate any damages. See Baris v. Steinlage, No. C.A. 99-1302, 2003 WL 23195568, *6 (R.I. Super. 2003) ("To establish that a breach of contract occurred, plaintiff must prove, by a fair preponderance of the evidence, that he complied with his portion of the contract and that the defendant wrongfully breached the contract.") (citing Del Farno v. Aetna Casualty & Surety Co., 673 A.2d 71, 72 (R.I. 1996)).

In this court's Ruling on PHS' Motion to Dismiss, the court found ambiguous the meaning of the term "close" in the Agreement. See Ruling Mot. Dismiss at 9 ("Because the intent of the parties in utilizing the term 'close' is not clear and certain from the language of the Agreement, the court concludes that the contract is ambiguous."). For reasons more fully elaborated in that Ruling, the court observed that the Agreement never defines the term "close" and also contained a separate provision that provided that neither party had the authority to enter into contracts, make agreements, or create obligations on behalf of the other party, meaning that the Agreement could not possibly have intended a "closing" to require Empower Health to actually cause the execution of a contract on behalf of PHS. Id. at 7. The court went on to reason:

> In this Agreement, the term 'close' has a number of reasonable interpretations. For Empower Health to close a PHS product or program could mean that Empower Health has concluded negotiation about that product or program. . . . Under this interpretation, Empower Health would negotiate the sale of the PHS product, and PHS would formally complete the transaction with the customer. Alternatively, for Empower Health to close the sale of PHS product might simply mean that a 'Selected Customer' has purchased a PHS product after Empower Health promoted the product to that customer, presumably convincing the customer to purchase the product."

Id. at 8-9. These two examples were illustrative, not exhaustive.

While the court's interpretation of the Agreement in its Ruling relied on Connecticut law, its observations are unchanged when applying Rhode Island law. See Young v. Warwick Rollermagic Skating Ctr., 973 A.2d 553, 558 (R.I. 2009) ("Whether a particular contract is or is not ambiguous is a question of law."). "A contract is ambiguous when it is 'reasonably susceptible of different constructions.'" Id. at 558 n. 6. Like courts in Connecticut, courts in Rhode Island observe that resolution of the meaning of ambiguous contracts turns on factual findings. "This court has held that the construction of ambiguous contract terms is a question of fact." Rotelli v. Catanzaro, 686 A.2d 91, 95 (R.I. 1996) (citing Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill, 652 A.2d 440, 443 (R.I. 1994).

PHS contends that it has not breached the Agreement because extrinsic evidence produced on summary judgment establishes the meaning of "close" in the context of the Agreement, and that Empower Health has not "closed" any products or programs under any reasonable interpretation of the term under the Agreement. In Rhode Island, outside evidence can be introduced to clarify contractual ambiguities. See id. ("Parol evidence may be admitted to complete or clarify an instrument that is ambiguous on its face."); see also W.P. Assocs. v. Forcier, Inc., 673 A.2d 353 (R.I. 1994) ("If a document is susceptible to more than one interpretation, extrinsic evidence is admissible to aid in its interpretation.").

In support of this claim, PHS first highlights Rhode Island caselaw suggesting that, as a general matter, payment of sales commissions is required only after the salesperson's employer accepts the order in question. See Oken v. National Chain Co.,

424 A.2d 234, 235 (R.I. 1981) ("As a general rule a person employed on a commission basis to solicit sales orders earns or is entitled to his commission when the order is accepted by his employer.").

Next, PHS points to Mr. Dunlop's deposition testimony in which he stated that his expectation at the time Empower Health entered into the Agreement was that, "if [Empower Health] didn't sale [sic] a product, [it] didn't get paid on it, or if [Empower Health] didn't sell a program, [it] didn't get paid on it." See Defendant's Amended Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def.'s Am. Memo. Supp. Mot. Summ. J.") (Doc. No. 121) at 12; Def.'s 56(a)(1) at ¶ 29; Pls.' 56(a)(2) at ¶ 29. This statement is further explained by Mr. Dunlop, "I think that I wouldn't receive commissions if there was no significant effort placed, either by myself or my channel partners, in some form as part of the sales process, I wouldn't expect to receive a commission." Id.

PHS also asserts that the parties' performance under the Agreement itself demonstrates with sufficient clarity the meaning of the term "close" meant. PHS points in particular to its decision to pay Empower Health a commission on the TASC account as an understanding as to what was required for "closing" under the contract. In the case of TASC, PHS contends, Mr. Dunlop provided marketing materials, took a TASC representative out to dinner, and worked on meetings and presentations, thus earning the commission. See Def.'s Am. Memo. Supp. Mot. Summ. J. at 12.

Drawing all inferences and resolving all ambiguities in favor of the plaintiffs, as this court must on summary judgment by a defendant, the court cannot say there are no issues of material fact remaining concerning the plaintiffs' breach of contract claim. As

the court ruled earlier in this case, the contract terms relating to the term "close" are ambiguous, and cannot have meant for the plaintiffs to have actually sold programs or products, because other contractual terms prohibited them from doing just that. Further, nothing in the summary judgment record clarifies the remaining ambiguity. While it is clear that some form of sale was necessary, at some point in the process, for a commission to be generated, PHS's behavior in the context of the TASC account does little to answer the question of what, exactly, the plaintiffs had to do to earn that commission. It is unclear, for instance, if actions such as taking the client out to dinner were always required for a "closure," or, indeed, how close to an actual sale TASC was when the relationship was handed off to PHS. Plaintiffs dispute even these facts, arguing that the TASC relationship was far more collaborative, and the relationship less close to a final sale, than PHS asserts.

When coupled with the conflicting descriptions of, in particular, the plaintiffs' role in the Aetna account, and the dispute regarding whether or not Mr. Kumar actually told Mr. Dunlop that his work on the Aetna account merited a commission, this court is further convinced that disputed material facts remain as to the proper construction of the Agreement and whether or not PHS breached that contract. This dispute is more properly left to a jury. PHS argues that no reasonable jury could possibly conclude that Empower Health closed Aetna, both because Empower Health's actions with regard to Aetna were less involved than the actions taken with regard to TASC, and because those actions that did take place were of a "behind-the-scenes" nature helping PHS with its own promotional efforts with regard to Aetna. See Defendant's Reply Memorandum of Law in Support of Motion for Summary Judgment as to Plaintiffs' Claims ("Def.'s

Reply Supp. Mot. Summ. J.") (Doc. No 147) at 7, 7 n. 5. The parties however, dispute exactly what the plaintiffs did and the degree to which those efforts actually promoted the sale of PHS products to Aetna. While this court notes that, to the extent the plaintiffs' efforts consisted solely of indirect efforts to help PHS better position itself with regard to the Aetna account the more tenuous its connection to the ultimate sale, the definition of "close" in the Agreement is, as previously stated, sufficiently ambiguous to prevent this court from concluding as a matter of law that no contract breach occurred with regard to the Aetna account.

Because disputed issues of material fact remain as to the proper construction of the Agreement and disputed facts remain as to what the plaintiffs actually did regarding at least some of the other contested accounts that generated revenue for PHS but did not result in a commission for the plaintiffs, particularly the Aetna account, this court denies PHS's Motion for Summary Judgment as to the breach of contract count.

C. Good Faith and Fair Dealing

PHS next argues that no issues of material fact exist as to the plaintiffs' claim that PHS violated the covenant of good faith and fair dealing.

The court applies Rhode Island law to this claim. This is because, "When, as now, a duty of good faith and fair dealing is alleged to arise from a contractual relationship, a claim for breach of that duty sounds in contract rather than in tort." Crellin Technologies, Inc. v. Equiptmentlease Corp., 18 F.3d 1, 10 (1st Cir. 1994); see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F.Supp.2d 317, 329 (D. R.I. 1999) ("The Rhode Island Supreme Court, however, has held that a breach of the duty

of good faith and fair dealing gives rise only to a breach of contract claim, not to a tortious cause of action.").

Under Rhode Island law, "it is well settled that there is an implied covenant of good faith and fair dealing between parties so that the contractual objectives may be achieved." Now Courier, LLC v. Better Carrier Corp., 965 A.2d 429 (R.I. 2009). "The applicable standard in determining whether one has breached the implied covenant of good faith and fair dealing is whether or not the actions in question are free from arbitrary or unreasonable conduct." Ross-Simons, 66 F.Supp.2d at 329. "If the particular actions were contemplated by the parties when the contract was formed, there is no breach of the covenant of good faith and fair dealing. Consequently, 'a party's actions must be viewed against the backdrop of contractual objectives in order to determine whether those actions were done in good faith.'" Lifespan/Physicians Prof'l Servs. Org., Inc. v. Combined Life Ins. Co. of Am., 345 F.Supp.2d 214, 225 (D.R.I. 2004).

PHS contends that no reasonable jury could find any of its actions examples of arbitrary or unreasonable conduct, akin to bad faith. The plaintiffs point to several facts that a reasonable jury could find constituted a violation of the covenant of good faith and fair dealing.[4] First, plaintiffs assert that Mr. Kumar "hijack[ed]" the Aetna account from

[4] The court notes that in some jurisdictions, such as New York, claims for violation of the covenant of good faith and fair dealing based on the same factual predicate as a breach of contract claim are redundant and cannot sustain a separate cause of action. See Roy v. Gen. Elec. Co., 544 F.Supp.2d 103-109-110 (D.R.I. 2008). It does not appear that Rhode Island courts have addressed this issue directly, but one district court to examine the question found no basis to dismiss such a cause of action under Rhode Island law. See Barkan v. Dunkin' Donuts, Inc., No. 05-050L, 2009 WL 2957852, *13 (D.R.I. 2009); see also Hord Corp. v. Polymer research Corp. of Am., 275 F.Supp.2d 229, 237 (D.R.I. 2003) ("While every breach of the covenant of good faith and fair dealing implicates a breach of contract, not every breach of contract necessarily involves a breach of the covenant."). As a result, the court sees

Empower Health by taking over the lead in promoting PHS's products to them, presumably to avoid payment of commissions to the plaintiffs, signed marketing agreements with Empower Health's partners and then tell Mr. Dunlop they have no intention of marketing the partner's product, leading Mr. Dunlop to believe that PHS was planning on extending him an offer of employment so that PHS could enjoy the benefits of the plaintiffs' promotional efforts before reversing course, and sending emails indicating that PHS was considering "formally" cancelling the Agreement long after PHS initially claimed that the Agreement had been terminated.

While most of plaintiffs' claims are irrelevant to the underlying contract breach, a dispute over material facts remains, among other things, over whether PHS continued to represent to Mr. Dunlop that his actions regarding the Aetna account were sufficient to eventually obtain a commission while PHS assumed a leading role in eventually securing the Aetna account. Most notably, plaintiffs claim that PHS executives told Mr. Dunlop directly that his efforts were sufficient to receive commission payment, something PHS vigorously disputes. Additionally, a disputed issue of material fact exists as to whether PHS's encouragement of Mr. Jackson to disclaim connection to the plaintiffs for purposes of a budding business relationship between Mr. Jackson's company and PHS constituted an arbitrary or unreasonable action. Whether plaintiffs can prove the bad faith of such actions at trial is a question for the jury. At this point, the court cannot say that no reasonable jury could find evidence of arbitrary or unreasonable actions on the part of PHS in contravention of the goals of the

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no reason to preclude the plaintiff's claim merely based on the fact that the plaintiffs have also alleged breach of contract.

Agreement. Accordingly, the court denies PHS's Motion for Summary Judgment as to this count.

D. Limitation of Liability and Economic Loss Doctrine

As to the plaintiff's remaining claims, which sound in tort, PHS argues that they are barred under the liability limitation provision of the Agreement. The Agreement states, "for any loss of profits, loss of business, loss of use or data, interruption of business, or for indirect special, incidental, exemplary, multiple, punitive or consequential damages of any kind, whether based on contract, tort (including, without limitation, negligence), warranty, guarantee or any other legal or equitable grounds. . . ." See Def.'s 56(a)(1) at ¶ 28; Pls.' 56(a)(2) at ¶ 28.

The plaintiffs argue, essentially, that this provision is unenforceable and unconscionable in that it appears to insulate PHS from liability in contract or tort for even earned commissions. PHS does not appear to claim that this provision applies to contractual losses and economic damages, but does assert that the liability clause should apply to all other causes of action, namely those sounding in tort.

While hardly a model of clarity and precise drafting, the liability limitation clause was freely entered into. Generally speaking, parties are permitted to enter into a contract even when the terms of that contract are far from ideal for one party or the other. "[I]t is a basic tenet of contract law that the contracting parties can make as good a deal or as bad a deal as they see fit." See Pearson v. Pearson, 11 A.3d 103, 110 (R.I. 2011). However, neither party here appears to have intended the liability limitation clause to extend to recovery based on breach of contract for payment of owed commission payments. As the terms "loss of profits" and "loss of business" are not

defined, the court will construe the contract as not prohibiting a basic claim for breach of contract. "We have long held that when a contract provision is capable of two separate constructions, a court should adopt that construction which is most equitable and which will not give to one party an unconscionable advantage over the other." DiPaola v. DiPaola, 16 A.3d 571, 578 (R.I. 2011).

However, the limitation on punitive and consequential damages arising out of both contractual and tort claims does not seem to admit other reasonable constructions. Limitations on tort liability have been upheld as enforceable in Rhode Island courts. See Rhode Island Hosp. Trust Nat. Bank v. Dudly Serv. Corp., 605 A.2d 1325, 1328 (R.I. 1992) ("The exculpatory provisions in the contract are clear and unambiguous expressions of the parties' intent that Dudley must accept full responsibility for any loss that occurred, even if caused by the negligence of Stor-More's employees. In the circumstances of this case we conclude that the limitation-of-liability provisions contained in the lease agreement are not violative of public policy and are enforceable as written.").

The plaintiffs, however, claim an exception to the general principle of enforcing such clauses because disputed material facts exist as to whether PHS acted in bad faith. In support, plaintiffs cite two cases in the Second Circuit. See Int'l Connectors Indus. Ltd. v. Litton Sys., No. B-88-505 (JAC), 1995 WL 253089 (D. Conn. 1995) ("Because genuine issues of fact exist as to the defendant's performance and 'good faith' therein, the court cannot now conclude, as a matter of law, that the plaintiff's claim for consequential damages must fail. At trial, however, consequential damages stemming from dealings in connection with the distributor agreement will only be

available upon a factual finding of bad faith."); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F.Supp. 1442, 1458 (S.D.N.Y. 1986) ("A defendant may be estopped from asserting a contractual limitation of consequential damages if the defendant has acted in bad faith."). Neither party supplied relevant Rhode Island law on the subject, and PHS did not address this issue in its Reply. The court has not been able to find relevant Rhode Island law on the question.

Accordingly, the court sees no reason to depart from its Ruling on PHS's Motion to Dismiss, which held that the Amended Complaint stated a claim for breach of contract in bad faith, rendering the Limitation of Liability clause potentially unenforceable. See Ruling Mot. Dismiss at 21; see also Town of New Hartford v. Connecticut Resources Recovery Auth., 42 Conn. L. Rptr. 101, 2006 WL 2730965, *3 (Conn. Super. Sept. 11, 2006) ("A party may contract to limit liability in damages for nonperformance of promises. . . . Such a provision is not effective, however, if that party acts fraudulently or in bad faith.") (internal quotations omitted). As disputed issues of material fact as to PHS's bad faith remain, the court cannot say that plaintiffs' tort claims are barred by the limitation of liability clause. Their application, however, depends on a factual finding of bad faith at trial.

Even if a "bad faith" exception to the limitation on consequential damages were allowed, PHS argues that because the plaintiffs have not offered facts to show damages other than purely economic damages under the Agreement, their tort claims are barred by the economic loss doctrine. As this issue relates to the plaintiffs' tort claims, the court will apply Connecticut law.

"The economic loss doctrine is a judicially created doctrine which bars recovery in tort where the relationship between the parties is contractual and the only loses alleged are economic." Smith Craft Real Estate Corp. v. Handex of Conn., Inc., No. CV030082188S, 2004 WL 1615896, at *3 (Conn. Super. 2004) (citation omitted); see also Flagg Energy Dev. Corp. v. Gen. Motors Corp., 244 Conn. 126, 154-55 (Conn. 1998) (outlining the doctrine). Courts are divided over when and how to apply the doctrine. See Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F.Supp.2d 159, 168 (D. Conn. 2010) (explaining the history of the doctrine, collecting cases, and holding that the economic loss doctrine prevented both a breach of contract claim and a negligence claim when purely economic losses are alleged) ("Aliki is correct that the elements it would have to prove for a negligence claim are different from that of a breach of contract claim, and that the former could succeed even where the latter fails. But this is hardly a reason for concluding that the economic loss doctrine does not apply. If anything, this argument highlights the doctrine's necessity by illustrating one of the incentives for a party to attempt to circumvent its contractual obligations."); but see Factory Mut. Ins. Co. v. Pike Co., Inc., No. 3:08-CV-01775 (VLB), 2009 WL 1939799 (D. Conn. 2009) (declining to base its decision on the economic loss doctrine because of a lack of binding Connecticut authority but observing, "[T]he Court applies the general rule that a plaintiff may pursue contract and tort claims simultaneously as long as the plaintiff has alleged sufficient facts and damages to maintain separate contract and tort causes of action.").

While the court acknowledges that the Connecticut caselaw is far from clear on the reach of the economic loss doctrine, it relies on the thoughtful analysis in Aliki

particularly where, as here, the plaintiffs are explicit that their tortious interference violations solely relate to economic losses. See Pls.' Memo. Supp. Mot. Summ. J. at 22 ("Empower [Health] should be allowed to prove at trial that it suffered an actual loss, that [PHS]'s tortious interference caused it to lose out on the commissions under the [Agreement].")

The same, however, cannot be said for the plaintiffs' CUTPA claim. CUTPA is a "remedial statute" and if there is "any plausible doubt about the conduct that the statute makes actionable, the remedial purpose of the statute persuades us that such doubts should be set aside to permit recovery by the plaintiff." Johnson Electric Co. v. Salce Contracting Assocs., 72 Conn. App. 342, 344 (Conn. App. 2002). Courts that have directly examined the applicability of the economic loss doctrine to CUTPA claims arising out of the original breach of contract issue are, unsurprisingly, split. See Flagg Energy, 244 Conn. at 154 (striking a CUTPA count in a product liability case in the context of explaining the economic loss doctrine and finding authorities on which it relied "particularly persuasive in the circumstances of this case, in which the misrepresentation and CUTPA claims depend upon allegations of fact that are identical to those asserted in their [breach of warranty and breach of contract] claims"); Dart Chart Sys. v. Kettle Brook Care Ctr., No. CV095025871S, 2009 WL 1959487 (Conn. Super. 2009) (finding that the economic loss doctrine barred a claim under CUTPA); Heibeck v. Chrysler, LLC, No. CV075006908, 2008 WL 4633696 (Conn. Super. 2008) (holding that the economic loss rule did not bar a CUTPA claim because at least some of the alleged misrepresentations were distinct from the breach of contract claim); ODP, LLC v. Shelterlogic, LLC, No. X09CV064020086, 2009 WL 2783692 (Conn. Super.

2009) (unpublished) ("[A] CUTPA claim is not a tort claim. So, the economic loss doctrine simply does not apply.") (internal citations omitted);

The court declines to apply the economic loss rule to plaintiffs' CUTPA claims. First, plaintiffs' CUTPA claim rests, at least in part, on representations made by PHS that were not directly related to the breach of contract claim. Second, simple breach of contract is not sufficient to establish a violation of CUTPA, but must instead be accompanied by "[s]ignificant aggravating circumstances." Halo Tech. Holdings, Inc. v. Cooper, No. 3:07-CV-489 (SRU), 2010 WL 1330770, *6-*7 (D. Conn. 2010). While it is true that the plaintiffs' CUTPA claim rests chiefly on the breach of contract claim, it does not do so exclusively, and given the decidedly unsettled state of the law on this issue, the court declines to preclude such a claim here.

E. Tortious Interference With Business Expectations

Even if plaintiffs' tortious interference with business expectations claims were not barred under the economic loss doctrine, it fails on summary judgment on other grounds. "'It is well established that the elements of a claim for tortious interference with business expectancies are: (1) a business relationship between the plaintiff and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss." Am. Diamond Exch., Inc. v. Alpert, 302 Conn. 494, 510 (Conn. 2011) (quoting Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 27 (Conn. 2000).

Here, plaintiffs' only examples of interfered-with business relationships involve those of Mr. Jackson and Scott Leavitt, with whom the plaintiffs claim a relationship under the Agreement. However, plaintiffs have come forward with no evidence upon

which a reasonable jury could base a finding of an actual loss resulting from any possible disruption of those relationships. Neither of those parties received commissions from PHS, meaning that Empower Health could not arguably be entitled to any damages. As there is no evidence of other instances of interfered-with business relationships, the court grants PHS's Motion for Summary Judgment as to the tortious interference with business relationships count.

F. CUTPA

PHS next challenges the plaintiffs' CUTPA claim. In deciding whether a practice is unfair in violation of CUTPA, the Connecticut Supreme Court has adopted -- and continues to adhere to -- the criteria set out in the "cigarette rule" articulated by the Federal Trade Commission:

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established b statues, the common law, or otherwise-in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors or other businesspersons.

Harris v. Bradley Memorial Hospital and Health Ctr., Inc., 296 Conn. 315, 350 (2010). Further, "[a]ll three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." Id. at 350-51.

Simple breach of contract is not sufficient to establish a violation of CUTPA, "particularly where the count alleging [violation of] CUTPA simply incorporates by reference the breach of contract claim and does not set forth how or in what respect the defendant's activities are either immoral, unethical, unscrupulous or offensive to public policy." Boulevard Assocs. v. Sovereign, 72 F.3d 1029, 1038-39 (2d Cir. 1995). For a

breach of contract to constitute a CUTPA violation, the breach must be accompanied by "[s]ignificant aggravating circumstances." Halo Tech. Holdings, 2010 WL 1330770, at *7. The Connecticut Supreme Court has held that a party's refusal to perform under a valid contract while retaining the benefits of that contract constitutes a breach accompanied by significant aggravating circumstances. Saturn Const. Co., Inc. v. Premier Roofing Co., 238 Conn. 293, 310 (1996) (defendant validly stated a CUTPA violation where "defendant contended that the plaintiff had refused to pay money due under the contract without foundation and had asserted a frivolous counterclaim.").

Plaintiffs argue that a genuine issue of material fact exists as to their CUTPA claim based on the same evidence used to justify their claims related to violation of the covenant of good faith and fair dealing and tortious interference, namely, the "hijacking" of the Aetna relationship while assuring Mr. Dunlop that he would receive a commission for his work, and the interference with Mr. Jackson's relationship with the plaintiffs. They also contend that PHS's attempts to renegotiate an agreement with Empower Health and to release PHS from outstanding claims for commissions violated Connecticut public policy. Plaintiffs assert that these facts are the type of aggravating circumstances contemplated by Connecticut courts.

Connecticut courts have found allegations of bad faith conduct sufficient to sustain a finding of a violation of CUTPA. See Landmark Investment Group, LLC v. Chung Family Realty Partnership, LLC, 125 Conn.App. 678, 707 (Conn. 2010) (highlighting nine aggravating factors found by the trial court and holding "The court's findings reveal that the defendant engaged in a pattern of bad faith conduct, seeking to escape its contractual obligations unfairly while negotiating a more favorable offer with

Calco, a third party. Given the wrongful termination and the aggravating circumstances, there is ample support for the trial court's conclusion that the defendant's actions violated CUTPA.").

The court does note that the type of disputed facts surrounding bad faith at issue here -- and found earlier to preclude summary judgment on the good faith and fair dealing claim -- are not as clear as those expressed in Landmark. Most obviously, the disputed motivations surrounding interaction with Mr. Jackson, for instance, relate to partner organizations that did not actually generate referral commissions, and thus were not breaches of the contract in and of themselves. However, the court believes that these issues, combined with the disputed facts surrounding whether PHS misled Mr. Dunlop by telling him his actions were sufficient to sustain receipt of a commission, are enough to survive summary judgment. Accordingly, the court denies PHS's Motion for Summary Judgment as to this count.

G. Unjust Enrichment

Finally, PHS asserts that, because no issue of material fact exists as to the validity and enforceability of the Agreement, their summary judgment motion should be granted as to the plaintiffs claim for unjust enrichment. The court disagrees.

"Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." Local 84, Theatrical Stage Employees, Moving Picture Technicians, Artists & Allied Crafts v. Francis, 138 Conn.App. 77, *5 (Conn. App. 2012) (citing New Hartford v. Connecticut Res. Recovery Auth., 291 Conn. 433, 451–52, (Conn. 2009).

PHS is certainly correct that "[a]n enforceable contract precludes recovery under a theory of unjust enrichment." ALV Events Int'l v. Johnson, 821 F.Supp.2d 489, 494 (D. Conn. 2010) (citing Polverari v. Peatt, 29 Conn.App. 191, 199 (Conn. App. 1992). The parties do not dispute that they entered into a written contract. However, "[p]arties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so they are entitled only to a single measure of damages arising out of these alternative claims . . . Under this typical belt and suspenders approach, the equitable claim is brought as an alternative count to ensure that the plaintiff receives some recovery in the event that the contract claim fails." Stein v. Horton, 99 Conn.App. 477, 485 (Conn.App. 2007) (citations and internal quotation marks omitted). As other courts have observed, "[T]he existence of a contract, in itself, does not preclude equitable relief which is not inconsistent with the contract." Fuller v. Fuller, 119 Conn.App. 105, 119 (Conn. App. 2010). It is "the lack of a remedy under a contract [that] is a precondition to recovery based on unjust enrichment or quantum meruit." United Coastal Indus. v. Clearheart Constr. Co., Inc., 71 Conn.App. 506, 513 (Conn. App. 2002) (emphasis added). Accordingly, the court denies PHS's Motion for Summary Judgment as to this count.

H. PHS's Counterclaims

PHS also brings two counterclaims against the plaintiffs, alleging violation of CUTPA and violation of the implied covenant of good faith and fair dealing. Plaintiffs have moved for summary judgment on these counterclaims.

1. CUTPA

The plaintiffs contend on summary judgment that no disputed issues of material fact exist as to PHS's CUTPA claim, and that this claim fails as a matter of law because none of its actions could be described as unfair or deceptive. As discussed earlier, the court applies Connecticut law to PHS's CUTPA claims. See supra, IV-A at 16-17. The general law surrounding CUTPA claims was also discussed earlier.

PHS asserts that a disputed issue of material fact exists as to whether or not Mr. Dunlop threatened to disrupt Providence's relationship with Aetna unless PHS signed the Agreement with Mr. Dunlop and Empower, and that a disputed issue of material fact exists as to whether Mr. Dunlop used confidential information obtained from PHS to attempt a takeover of PHS. See Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment as to Counterclaims ("Def.'s Memo. Opp. Mot. Summ. J. Counterclaims") (Doc. No. 142) at 6-7.

PHS's sole evidence of Mr. Dunlop's alleged threat is an excerpt from Mr. Kumar's deposition transcript. See Def.'s Reply 56(c) Statement at ¶ 1. In the deposition, Mr. Kumar answered "Yes" to the question, "Did [Mr. Dunlop] ever tell you that he could damage Shape Up the Nation's attempts to become an Aetna vendor?" Id. at Ex. B at Transcript Page 87. However, upon further questioning, Mr. Kumar elaborated on the nature of Mr. Dunlop's comment. Mr. Kumar said, in describing Mr. Dunlop's comment, "I can't recall his exact words. He said something to the effect of: I am operating without a contract here. We need to get this replaced. And I am still at Aetna. Let's get this thing signed." Id. at Ex B at Transcript Page 89. Mr. Kumar continued, "I felt we were being pressured to sign this agreement or we would

potentially lose the opportunity to do business with Aetna." Id. at Ex B at Transcript Page 91.

PHS argues that this "threat" "constituted an unfair attempt to usurp business that was rightfully PHS's in favor of Empower [Health]" and cites a single case, Ostrowski v. Avery, 243 Conn. 355, 379 (1997), for that general proposition. See Def.'s Memo. Opp. Mot. Summ. J. Counterclaims at 6. This argument strains credulity under the facts as offered by PHS. The court is convinced that no reasonable jury could find that the sentence "I am still at Aetna" could somehow constitute an unfair usurpation of business that PHS did not actually have yet, and certainly did not "rightfully" belong to PHS.

PHS next attempts to justify its CUTPA claim by presenting facts that purport to show that plaintiffs promised they would assist PHS with selling the company while their actual motivation was to use confidential information to attempt a takeover of PHS. The basis for this allegation is, again, less convincing than PHS argues. In support of the proffered fact that "Dunlop used the proprietary information he obtained to hatch a scheme with his brother and another preexisting contact to takeover [PHS]," PHS cites the deposition transcript of Mr. Weinberg, who stated:

> I think we got a lot of materials in discovery that showed both [Mr. Dunlop's brother] and [Mr. Dunlop] were really out to take over our company or had this really odd view of what they thought their relationship was with us, and the fact that [Mr. Dunlop's brother] thought he had a relationship with us, and was going to come and join and take over the company with [Mr. Dunlop] when we had never even met in person. Let alone, they had done nothing to help out business, albeit had actually damaged it. And in that sense, if he's unscrupulous, I think the discovery documents make me very worried about doing any, having any business interactions with him, even if it was through [Mr. Dunlop].

Def.'s Reply 56(c) Statement at ¶ 6, Ex. A at Transcript Page 101-102. Mr. Weinberg elaborated, answering the question "What makes you think [Mr. Dunlop's brother]

wanted to take over [PHS]?" by stating, "I think there were references in the emails to them taking over our company." Id. The court is convinced that no reasonable jury could find, based on this evidence, that the plaintiffs violated CUTPA. Indeed, the evidence merely states that discovery evidence (not produced here) shows that Mr. Dunlop and his brother wanted to take over PHS. There is no evidence the plaintiffs actually did anything, let alone violate CUPTA. Accordingly, the court grants the plaintiffs' Motion for Summary Judgment as to PHS's CUTPA claim.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiffs argue that PHS has offered no facts sufficient to support its claim that the plaintiffs violated the implied covenant of good faith and fair dealing. As discussed earlier, as this claim implicates the Agreement itself, the court will apply Rhode Island law, the basic tenets of which the court has already described. See supra, IV-A at 14-16.

PHS contends that a disputed issue of fact exists as to whether plaintiffs, instead of actively pursuing customers on behalf of PHS, purchased artificial leads over the internet and then deceptively claimed to be owed commissions if PHS happened to follow up with, and close business with, a company that appeared on one of the plaintiffs' computer-generated lists. See Def.'s Memo. Opp. Mot. Summ. J. Counterclaims at 10. This contention is based on Mr. Kumar's deposition testimony that emails produced in discovery show that Mr. Dunlop's brother purchased leads on an internet site that were given to Mr. Dunlop and represented to Mr. Kumar as though those leads represented genuine personal contacts of Mr. Dunlop. See Def.'s Reply 56(c) Statement at ¶ 6, Ex. B at Transcript Page 145-46.

The plaintiffs do not directly dispute that leads were purchased over the internet, but assert that it is disingenuous of PHS to assert that such actions constituted bad faith when Mr. Kumar enthusiastically sent an un-vetted list of leads to Mr. Dunlop with expectations that Mr. Dunlop would act upon those leads. See Plaintiffs' Reply Memorandum of Law in Further Support of Motion for Summary Judgment on Defendant's Counterclaims ("Pls.' Reply Memo Supp. Summ. J. Counterclaims") at 2, Ex. A. While Mr. Kumar's sending of un-vetted leads perhaps casts doubt on whether he believed plaintiffs were untrustworthy partners at the time, the court is not convinced it can find that no material issues of fact exist as to whether plaintiffs violated the implied covenant of good faith and fair dealing. If true, Mr. Kumar's testimony about the falsity of Mr. Dunlop's leads does suggest that Mr. Dunlop was attempting to subvert the operation of the contract by claiming introductory relationships with business entities that might yield commissions despite the plaintiffs' lack of effort to actually perform on their obligations under the contract. While this evidence may not be enough to convince a jury, it is not so clear that summary judgment should be granted. Accordingly, the court denies plaintiffs' Motion for Summary Judgment as to this count.

V. CONCLUSION

For the foregoing reasons, the court grants in part and denies in part defendant's Motion for Summary Judgment (Doc. No. 118) and grants in part and denies in part plaintiffs' Motion for Summary Judgment as to defendant's counterclaims (Doc. No. 126). Plaintiffs may proceed with their breach of contract, violation of the implied covenant of good faith and fair dealing, CUTPA, and unjust enrichment claims.

Defendant may proceed with its violation of the covenant of good faith and fair dealing claim.

SO ORDERED.

Dated at Bridgeport, Connecticut this 24th day of September, 2012.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge