

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**ASCELLAHEALTH, LLC,
Plaintiff/Counter-defendant,**

v.

**CRx HEALTH SERVICES, LLC,
Defendant/Counter-plaintiff.**

CIVIL ACTION

NO. 14-5949

MEMORANDUM OPINION

This is a dispute between CRx Health Services, LLC (“CRx”), a pharmacy benefit management company, and AscellaHealth LLC (“Ascella”), which CRx engaged to provide rebate management services in connection with CRx’s obligation to its prescription drug health benefit plans. Both parties agree that they entered into a written agreement. CRx contends—a contention rejected by Ascella—that the parties also had an oral agreement that covered a short time period before the written contract was in place. Ascella sued CRx on a number of theories. CRx counterclaimed for breach of oral contract, conversion, promissory estoppel, unjust enrichment, and breach of written contract. *See* Countercl. ¶¶ 20-46. Before the Court is Ascella’s motion to dismiss each of those counterclaims and CRx’s response in opposition thereto. For the reasons that follow, the motion to dismiss shall be denied in its entirety.

I. BACKGROUND

In or around November 2013, CRx began discussions with Ascella regarding engaging Ascella as its rebate management services provider. Am. Compl. ¶ 11; Answer ¶ 11. According to the Counterclaim, in or around December 2013, Ascella and CRx entered into an oral contract under which CRx agreed to provide claims data for the fourth quarter of 2013 to Ascella.

Countercl. ¶ 5. Under the oral contract, Ascella agreed to submit that data directly to drug manufacturers and to pay CRx 85% of all sums collected from the manufacturers for those claims. *Id.* ¶¶ 6-8. Pursuant to this alleged oral contract, CRx tendered the fourth quarter 2013 claims data to Ascella in January or early February 2014. *Id.* ¶ 9. Ascella, however, failed and refused to make payments to CRx arising out of these claims, even though drug manufacturers made payments from the submission of that claims data. *Id.* ¶¶ 10-12. Ascella and CRx entered into a written contract on or about February 21, 2014. *Id.* ¶ 13; *see also* Am. Compl. Ex. A. The written contract, styled as a Rebate Management Program Services Agreement, had an effective date of January 1, 2014, and a term of three years. *See* Am. Compl. Ex. A. at 1, 2 § 3.1.

Pursuant to the written contract, CRx submitted claims data for the first quarter of 2014 to Ascella in or around April 2014. Countercl. ¶ 14. On June 16, 2014, Ascella's CEO, Dea Belazi, provided CRx with an estimate of the amount CRx could expect to receive given that data; however, the estimate was far less than both what Ascella had promised and what Ascella was obligated to provide CRx pursuant to the written contract. *Id.* ¶¶ 15-16. CRx's principal, John Burns, contacted Belazi on June 16, 2014, and informed him that, based on Ascella's "woefully inadequate estimate," CRx would not accept payments from Ascella arising out of the first quarter 2014 claims data. *Id.* ¶ 17. Burns also informed Belazi that Ascella should reject such claims from manufacturers. *Id.* CRx then submitted the same claims data to its former rebate management services provider. *Id.* ¶ 18. Ascella received rebate checks for CRx's fourth quarter 2013 and first quarter 2014 claims data but has placed them in escrow. Am. Compl. ¶ 44.

Following the breakdown of the relationship between Ascella and CRx, Ascella filed suit on October 20, 2014, alleging claims for breach of contract; violation of the Pennsylvania Uniform Trade Secrets Act, 12 Pa. Cons. Stat. § 5302; conversion; unjust enrichment; and unfair

competition, and has sought imposition of a constructive trust and a permanent injunction.

Compl. ¶¶ 44-90. CRx answered Ascella's complaint and counterclaimed. Countercl. ¶¶ 20-46.

Ascella has moved to dismiss the counterclaim, contending: (1) the breach of oral contract claim fails because the parties' agreement was governed by an express, written agreement covering the same subject matter and containing an integration clause; (2) the conversion claim cannot survive because the alleged duty to pay the escrowed funds arose out of the parties contract, not tort; (3) the promissory estoppel claim fails because it is unreasonable, as a matter of law, to rely on precontractual promises before signing a written contract with an integration clause; (4) the unjust enrichment claim is untenable because of the existence of the written agreement; and (5) the breach of written contract claim is barred because CRx failed to satisfy the conditions precedent in the written contract and because it is inadequately pled. Pl.'s Mot. to Dismiss Countercl. at 2. CRx responds that Ascella's motion is largely premised on the argument that the prior oral agreement governing the fourth quarter 2013 claims data was integrated into the separate subsequent written agreement. Its view is that the oral contract is separate and distinct from the written contract and, accordingly, its claims should be permitted to proceed. Def.'s Opp'n at 1-2.

II. LEGAL STANDARD

Courts use the same standard in ruling on a motion to dismiss a counterclaim under Federal Rule of Civil Procedure 12(b)(6) as they do for dismissal of a complaint. *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 898 (E.D. Pa. 2011). Thus, to survive a motion to dismiss, CRx's counterclaim "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 556-57 (internal quotation marks omitted)). At bottom, the question is not whether the claimant “will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court’s threshold.” *Skinner v. Switzer*, 562 U.S. 521, —, 131 S. Ct. 1289, 1297 (2011).

III. DISCUSSION

A. Breach of Oral Contract

To state a claim for breach of contract under Pennsylvania law, a claimant must allege: (1) the existence of a contract, including its essential terms; (2) a breach of duty imposed by the contract; and (3) damages from the breach. *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (quoting *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)) (internal punctuation omitted). In its Counterclaim, CRx alleges that Ascella orally agreed to obtain payment on behalf of, and for the benefit of, CRx by submitting fourth quarter 2013 claims data directly to drug manufacturers and, pursuant to that agreement, to make payment to CRx from the sums it received from those manufacturers at a ratio of 85% to Ascella and 15% to CRx. Countercl. ¶¶ 5-8. CRx alleges that it tendered the fourth quarter 2013 claims data to Ascella in late January or early February 2014, but, despite CRx’s demands, Ascella refused to make payments to CRx arising out of the tendering of the fourth quarter 2013 claims data. *Id.* ¶¶ 9-11.

Ascella argues that the oral contract is merely a part of pre-contractual negotiations which were integrated into the written agreement through an integration clause. *See* Pl.’s Mot. to Dismiss Countercl. at 7-10. CRx counters that the oral contract for the fourth quarter 2013 claims data is a separate agreement that was breached by Ascella. Def.’s Opp’n at 2-4. A separate oral agreement may exist here only if it concerns a subject matter different than the written agreement. *Iron Worker’s Sav. & Loan Ass’n v. IWS, Inc.*, 622 A.2d 367, 373-74 (Pa. Super. Ct. 1993); *see also Cohn v. McGurk*, 479 A.2d 578, 582-83 (Pa. Super. Ct. 1984) (concluding that an alleged oral contract entered into prior to the execution of the written mortgage was an entirely separate agreement and admitting evidence regarding the oral contract). CRx has alleged that it tendered data from fourth quarter 2013 claims to Ascella in late January or early February 2014, which is prior to the signing of the written contract on February 21, 2014. Countercl. ¶¶ 9, 13. The term of the written contract was three years from the Effective Date of January 1, 2014. *See* Compl. Ex. A. at 1, 2 § 3.1. Furthermore, as CRx has argued, the 2014 Agreement does not contemplate “how data turnover, rebate collection, or payments from Ascella to CRx were to be handled for the distinct fourth quarter of 2013.” Def.’s Opp’n at 2-3. Drawing all reasonable inferences in favor of CRx, the nonmoving party, it has sufficiently alleged in its Counterclaim that the subject matter of the oral contract (the fourth quarter 2013 claims data) predates and is separate from the subject matter of the written contract (claims data during the three-year term of the written agreement effective January 1, 2014). The Court finds that CRx has stated facts to support the existence of this separate oral contract regarding this data and to plausibly state a claim that this oral contract was breached and that it suffered damages from that breach.

Ascella's argument that the breach of oral contract should be dismissed because of the written agreement's integration clause, *see* Pl.'s Mot. to Dismiss Countercl. at 7-10, is inapposite. The integration clause in the contract specifically states that the agreement "constitutes the entire understanding of the parties **with respect to the subject matter of this agreement.**" Compl. Ex. A. ¶ 6.9 (emphasis added). As discussed above, CRx has sufficiently stated that the subject matter of the oral contract (which predated both the effective date and the signing of the written contract) is separate from the subject matter of the written contract. As a result, the Court finds, for the purposes of this motion to dismiss, that the oral contract was not subsumed into the written contract via the written contract's integration clause.

B. Conversion

As to the conversion claim, the Court finds that it is premature at this stage of the proceedings to dismiss this claim based on the gist of the action doctrine as urged by Ascella.* In *M.H. Rydek Electronics, LLC v. Zober Industries, Inc.*, No. 07-3885, 2007 WL 3407130 (E.D. Pa. Nov. 15, 2007), the defendants moved to dismiss the plaintiff's tort claims under the gist of the action doctrine arguing that the substance of the action was in contract, not tort. The court denied the motion because the defendant had not admitted that a contract actually existed, and given the possibility that the defendant might deny the existence of the contract or present a defense to contract formation, determined not to dismiss the tort claims. *Id.* at *2-3. Here, Ascella has not admitted to the existence of the oral contract CRx has alleged, asserting instead that it is integrated into the 2014 written agreement. The court shall deny the motion to dismiss this count, while recognizing that, prior to trial, it may be required to rule definitively on the application of the gist of the action doctrine in this case. *See Kimberton Healthcare Consulting,*

* Ascella also seeks dismissal through application of the economic loss doctrine. This doctrine has no application here—a non-products liability case alleging both breach of contract and tort claims. *See Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 104 n.11 (3d Cir. 2001).

Inc. v. Primary PhysicianCare, Inc., No. 11-4568, 2011 WL 6046923, at *8 (E.D. Pa. Dec. 6, 2011). Accordingly, CRx shall be permitted to plead conversion as an alternative theory of liability against Ascella.

C. Promissory Estoppel

Ascella is correct that a claim for promissory estoppel can only be made in the absence of an express written contract on the same subject matter, *see Kia v. Imaging Sciences Int'l, Inc.*, 735 F. Supp. 2d 256, 266-67 (E.D. Pa. 2010), and that a claimant cannot rely on a pre-contractual promise made before signing a written contract with an integration clause. *See Schnell v. Bank of N.Y. Mellon*, 828 F. Supp. 2d 798, 808 (E.D. Pa. 2011). However, as explained in Section III.A, *supra*, CRx's allegations suffice to state a claim of breach of an oral contract—at least on a motion to dismiss. As the relationship between the parties under the alleged separate oral contract is not founded on an express written agreement, CRx shall be permitted to plead in the alternative, pursuant to Federal Rule of Civil Procedure 8(d)(2), a claim for promissory estoppel.

D. Unjust Enrichment

Ascella is also correct that a claim for unjust enrichment “is unavailable ‘when the relationship between the parties is founded on a written agreement or express contract.’” *Sköld v. Galderma Labs., L.P.*, No. 14-5280, 2015 WL 1283715, at *8 (E.D. Pa. Mar. 20, 2015) (quoting *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987)). However, as explained in Section III.A, *supra*, CRx's claim for breach of an oral contract withstands a motion to dismiss. As the relationship between the parties under the alleged separate oral contract is not founded on an express written agreement, CRx shall be permitted to plead in the alternative, pursuant to Federal Rule of Civil Procedure 8(d)(2), a claim for unjust enrichment.

E. Breach of Written Contract

Ascella argues, *inter alia*, that CRx has failed to state a claim for breach of the written contract because it has not complied with a condition precedent in the agreement and because it has not identified the specific factual provisions of the written agreement that Ascella allegedly breached. Ascella is wrong in both regards.

With respect to its condition precedent argument Ascella points to paragraph 3.2 of the agreement entitled “Termination for Material Breach” which provides that if either party materially defaults in the performance of the agreement “the non-defaulting party may terminate this Agreement upon ninety (90) days prior written notice; provided, however, that the defaulting party has not cured such default within ten (10) days prior to the end of such ninety (90) day period.” Compl. Ex. A ¶ 3.2 (emphasis added). It interprets this provision to mean that “in the event of a material breach, the non-defaulting party must provide the defaulting party with adequate notice and an opportunity to cure.” Pl.’s Mot. to Dismiss Countercl. at 14 (emphasis added). “May” is not “must” and, Ascella’s precatory proposal notwithstanding, this Court cannot make it otherwise. More specifically, it cannot premise a dismissal of CRx’s claim for breach of a written contract on this argument.

This Court also finds that Ascella’s allegations in support of its breach of contract claim are sufficient to survive a motion to dismiss. CRx’s alleges that Ascella “(1) fail[ed] to have a [Pharmacy and Therapeutics (‘P&T’) Committee] at the time of contracting, and (2) fail[ed] to maintain the confidential and proprietary information that CRx provided to Ascella.” Countercl. ¶ 45. Both of these requirements (a P&T Committee and maintenance of confidentiality) are found in the written contract attached to Ascella’s Complaint. Paragraph 1.1(a) concerns the P&T Committee and paragraph 5.1 concerns maintaining the confidentiality of certain

information. Ascella would have CRx include in its Counterclaim allegations addressing whether breach of these provisions constitute a material breach of the parties' agreement, when the breach occurred, the identity of Ascella personnel who breached any such provisions, the identity and form of CRx's "confidential and proprietary information" referenced in the Counterclaim, and how any such information was not "maintained" by Ascella. Pl.'s Mot. to Dismiss Countercl. ¶ 16. The particularity with which Ascella wants CRx to plead is not required by Rule 8, which mandates only that CRx include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. There is no dispute here that the written contract existed, as it has been attached to the Complaint and has been acknowledged by both parties. *See* Compl. Ex. A; Countercl. ¶ 13. CRx has alleged that Ascella failed to have a P&T (Pharmacy and Therapeutics) Committee at the time of contracting and failed to maintain its confidential and proprietary information, per paragraphs 1.1(a) and 5.1 of the contract. *Id.* ¶ 45. And CRx has alleged it suffered damages as a result of Ascella's alleged breach. Countercl. ¶¶ 15-18, 46. While the allegations are thin, they contain sufficient factual content to draw a reasonable inference that a claim is plausible and, thus, the Court finds that they pass muster at this stage of the proceedings. Accordingly, CRx will be allowed to proceed with its claim for breach of written contract.

An appropriate Order follows.

Dated: **April 9, 2015**

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

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ORDER

AND NOW, this 9th day of April, 2015, upon consideration of Plaintiff/Counter-defendant AscellaHealth, LLC's Motion to Dismiss Defendant's Counterclaim [ECF No. 22] and the Defendant/Counter-plaintiff's CRx Health Services, LLC's response in opposition thereto [ECF No. 23], and for the reasons provided in the Court's Memorandum Opinion of April 9, 2015 [ECF No. 28], **IT IS ORDERED** that the motion to dismiss is **DENIED**. The Plaintiff/Counter-defendant shall answer the Counterclaim within the time provided by the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ **Wendy Beetlestone**

WENDY BEETLESTONE, J.