IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01935-MSK-MEH

CYPRESS ADVISORS, INC., d/b/a The Cypress Group,

Plaintiff/Counter Defendant,

v.

KENT McCARTY DAVIS, a/k/a Carty Davis, d/b/a Cypress International, Inc.,

Defendant/Counter Claimant/Third-Party Plaintiff,

v.

DEAN ZUCCARELLO,

Third-Party Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Counter Defendant Cypress Advisors, Inc. and Third-Party Defendant Dean Zuccarello (collectively "Counter Defendants") seek partial dismissal of Counter Claimant/Third-Party Plaintiff Kent Davis' Amended Counterclaims. ECF No. 74. The Honorable Marcia S. Krieger referred Counter Defendants' motion to this Court for report and recommendation. ECF No. 75. The Court holds that Davis' first, third through tenth, and thirteenth claims are not subject to dismissal. However, dismissal of Davis' twelfth and fourteenth claims is proper. Accordingly, the Court recommends that Counter Defendants' motion be granted in part and denied in part.

BACKGROUND

I. Facts

The following are factual allegations (as opposed to legal conclusions, bare assertions, or

merely conclusory allegations) made by Davis in his Amended Counterclaims, which are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In 2000, Davis and Zuccarello began doing business together as "the Cypress Partnership." Am. Countercls. ¶¶ 31, 33, 36. The parties agreed that the partnership would provide financial advice and related services to the restaurant industry. *Id.* at ¶¶ 15, 48. Davis contributed $350,000 for a fifty percent ownership interest in the partnership. *Id.* at ¶ 33. Because Zuccarello contributed the goodwill of his pre-existing company, Cypress Advisors, he did not pay an initial capital contribution for his fifty percent ownership share. *Id.* at ¶ 35. The parties agreed that Davis would conduct business and solicit clients out of the company's North Carolina office, while Zuccarello would operate primarily through the company's Colorado office. *Id.* at ¶¶ 58–62. When one of the parties obtained a new client, the client would sign a financial advisory contract, which detailed the terms of the Cypress Partnership's agreement with the client. *Id.* at ¶ 216. Although both parties regularly solicited business for the partnership and had the ability to bind the partnership, Counter Defendants were primarily responsible for the company's banking, bookkeeping, and payroll functions. *Id.* at ¶¶ 51, 58.

The parties agreed to a specific mechanism for sharing expenses and revenues. *Id.* at ¶¶ 69–71. First, the company would use the gross revenues from a particular engagement to pay any associated expenses. *Id.* at ¶ 69. The division of the profit from an engagement depended on which party was responsible for securing the client. *Id.* at ¶¶ 69–71. If a party obtained a client solely through his own efforts, he was entitled to seventy-five percent of the profits from the engagement, while the other party received a twenty-five percent share. *Id.* at ¶¶ 70–71. If the parties jointly

obtained a client, they would split the profits evenly. *Id.* at ¶ 71. Additionally, the parties agreed to evenly split any costs not directly attributable to a client. *Id.* at ¶ 82. Although this constituted the default profit sharing formula, Davis and Zuccarello occasionally agreed to a different arrangement for a particular client. *Id.* at ¶ 73.

The parties' conduct conformed to this agreement until 2011, when they began to dispute various matters related to the finances and operations of the partnership. *Id.* at ¶ 100. After calculating the 2011 profit distributions, Zuccarello informed Davis that Davis had been overpaid more than one million dollars. *Id.* at ¶ 103. Zuccarello stated that he was entitled to a greater share of profits than he originally received from certain engagements. *Id.* at ¶ 104. From 2011 through at least 2015, Zuccarello reduced Davis' distributions to correct this imbalance. *Id.* Davis consistently maintained that the prior distributions were correct. *Id.* at ¶ 108.

During this same time period, Zuccarello also concealed clients that he obtained. *Id.* at ¶ 110. This permitted Counter Defendants to avoid sharing twenty-five percent of the profits from those engagements. *Id.* Additionally, from 2013 through at least 2016, Counter Defendants required Davis to pay a share of expenses that did not benefit the partnership. *Id.* at ¶¶ 129–39. For example, Counter Defendants charged Davis for their attorney fees incurred while attempting to renegotiate the partnership agreement, even though they would not reimburse Davis for his legal costs. *Id.* at ¶¶ 136–38.

Beginning in 2015, Counter Defendants began to publically assert that Davis was no longer a part owner of the Cypress Partnership. *Id.* at ¶ 143. On June 20, 2016, Davis informed Counter Defendants that he wished to discontinue the Cypress Partnership once the parties could negotiate the terms for Davis' departure. *Id.* at ¶ 153. Ten days later, Counter Defendants sent a letter to

Davis terminating the Cypress Partnership because of Davis' alleged solicitation of clients in his personal capacity. *Id.* at ¶¶ 157–58. At the time Counter Defendants sent this letter, Davis was involved in numerous client engagements that had not been completed. Counter Defendants have claimed they are entitled one-hundred percent of the profits for many of these engagements. *Id.* at ¶¶ 175, 184.

II. Procedural History

Based on these factual allegations, Davis filed a Complaint in North Carolina state court on July 28, 2016 alleging breach of partnership agreement, among other claims. *See* ECF Nos. 6, 34-1. Shortly thereafter, Counter Defendants filed the present case. ECF No. 1. In an Amended Complaint filed on October 28, 2016, Counter Defendants assert the following eight claims for relief: (1) declaratory judgment stating, *inter alia*, that Davis performed services as an independent contractor; (2) missaprorpriation of trade secrets; (3) civil theft of trade secrets; (4) civil theft; (5) conversion; (6) intentional interference with contractual relations; (7) breach of contract; and (8) unjust enrichment. Am. Compl. ¶¶ 77–120, ECF No. 28.

After Counter Defendants removed the North Carolina state court case to the Middle District of North Carolina, ECF No. 34-3, Davis filed a motion to transfer the present case to North Carolina. ECF No. 34. On January 18, 2017, Judge Krieger denied Davis' motion, but stated that she would defer to the North Carolina court's ruling on Counter Defendants' motion to transfer. *Id.* at 5. The North Carolina court later granted Counter Defendants' motion, leaving this District with sole jurisdiction over the present dispute. Order, *Davis v. Cypress International, Inc.*, No. 16-cv-01086-TDS-JLW, (M.D.N.C. July 11, 2017), ECF No. 29.

On March 31, 2017, Davis filed his Amended Answer and Counterclaims. ECF No. 60.

Davis asserts the following fifteen causes of action: (1) breach of partnership agreement; (2) wrongful dissociation; (3) breach of joint venture agreements (in the alternative); (4) breach of fiduciary duty; (5) breach of contract (in the alternative); (6) promissory estoppel; (7) a declaratory judgment stating that Counter Defendants wrongfully terminated the Cypress Partnership; (8) constructive fraud; (9) wind-up and accounting of the Cypress Partnership; (10) judicial dissociation and dissolution; (11) receivership; (12) failure to pay wages in violation of the North Carolina and Colorado wage acts (in the alternative); (13) unjust enrichment (in the alternative); (14) quantum meruit (in the alternative); and (15) tortious interference with prospective economic advantage. *Id.* at 200–322.

On May 19, 2017, Counter Defendants timely filed the present Partial Motion to Dismiss Amended Counterclaims. ECF No. 74. Counter Defendants first assert that all claims based on the North Carolina Partnership Act should be dismissed, because Colorado law governs this dispute. *Id.* at 5–7. Next, Counter Defendants argue that Davis' third, fourth, fifth, seventh, and eighth claims are barred by the statute of frauds. *Id.* at 8–10. Third, Counter Defendants contend that eight of Davis' claims are barred by a three-year statute of limitations. *Id.* at 10–12. Fourth, according to Counter Defendants, the Court should dismiss Davis' quantum meruit claim as duplicative of Davis' unjust enrichment claim. *Id.* at 13. Finally, Counter Defendants argue that Davis' employee wage claim relies on impermissibly inconsistent allegations and otherwise fails to state a claim. *Id.* at 13–17. Accordingly, Counter Defendants seek dismissal of each of Davis' claims other than his second, eleventh, and fifteenth causes of action.

Davis filed his response to Counter Defendants' motion on June 16, 2017. ECF No. 79. Davis argues that the motion should be denied in its entirety. *Id.* Counter Defendants filed their

reply in support of their motion on June 30, 2017. ECF No. 83.

LEGAL STANDARDS

"To survive a motion to dismiss, a complaint 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)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* *Twombly* requires a two prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 679–80. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 680.

Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

ANALYSIS

The Court first finds that, at this stage of the proceeding, it need not determine whether North Carolina or Colorado law applies to Davis' counterclaims. Second, the Court holds that, as alleged, the statute of frauds does not bar Davis' causes of action. Third, the Court recommends dismissing Davis' quantum meruit claim as duplicative of his unjust enrichment claim. Regarding the statute of limitations, the Court holds that Davis timely asserted his breach of contract, promissory estoppel, and unjust enrichment claims. However, to the extent Davis bases his breach of fiduciary duty and constructive fraud claims on actions occurring after July 29, 2013, the Court holds that these claims are barred by the statute of limitations. Finally, the Court holds that Davis fails to state an employee wage claim, because Davis does not allege he was Counter Defendants' employee.

I. Choice of Law: North Carolina Partnership Act (Counts Seven, Nine, and Ten)

Counter Defendants argue the Court should dismiss Davis' claims for a declaratory judgment, partnership wind up and accounting, and judicial dissolution, because Davis brings these claims under the North Carolina Partnership Act. Mot. to Dismiss Countercls. 5–7. According to Counter Defendants, because Colorado's choice of law rules favor applying Colorado law, the North Carolina claims fail as a matter of law. *Id.* Davis contends the Court need not reach the choice of law issue at this time, and if it does, Colorado choice of law rules favor North Carolina. Resp. to Mot. to Dismiss Countercls. 5–9. Although it appears from Davis' allegations that Colorado law governs Davis' claims, the Court recommends finding that it is not necessary to finally determine this issue at this stage.

Davis' allegations seem to support applying Colorado law. "In making choice of law determinations, a federal court sitting in diversity must apply the choice of law provisions of the

forum state in which it is sitting." *Shearson Lehman Bros., Inc. v. M&L Invs.*, 10 F.3d 1510, 1514 (10th Cir. 1993). Therefore, Colorado's choice of law rules apply. In Colorado, the law of the jurisdiction under which a partnership is formed governs relations between partners. Colo. Rev. Stat. § 7-64-106 (2017). There is a presumption that a partnership is formed in the state where its chief executive office is located. *Id.* Here, the parties do not dispute that the Cypress Partnership's chief executive office is in Colorado. *See* Resp. to Mot. to Dismiss 6 (arguing that Davis can overcome the presumption). Furthermore, many of Davis' allegations support the notion that the partnership was formed in Colorado.[1] *See, e.g.*, Am. Countercls. ¶¶ 54–55, 58 (stating that Zuccarello, who operated out of the Colorado office, was the CEO and founding partner of the Cypress Partnership); *id.* at ¶ 58 ("Cypress Advisors and Zuccarello primarily handled the Cypress Partnership's banking, bookkeeping, and payroll functions out of The Cypress Group's Colorado office."); *id.* at ¶ 58 (stating that Davis traveled to Colorado approximately once per year). Because it appears as though the partnership was formed in Colorado, Colorado law likely applies to Davis' claims.

However, information obtained during discovery could change the Court's analysis, and the Court need not definitively resolve the issue at this stage. Indeed, neither party has demonstrated that Colorado and North Carolina law differ on any issue relevant to the present motion. Although Counter Defendants argue that Colorado, unlike North Carolina, has adopted the Uniform

[1] Davis argues his allegations support a finding that the parties formed the partnership in North Carolina. Resp. to Mot. to Dismiss Countercls. 7. According to Davis, that he conducted business exclusively from the partnership's North Carolina office demonstrates the parties' formation of the partnership there. *Id.* However, these allegations merely demonstrate that the parties' agreement permitted Davis to conduct partnership business in North Carolina, not that the parties intended to form the partnership there.

Partnership Act, Reply 3, ECF No. 83, Counter Defendants do not suggest that the Court must apply the provisions of the Uniform Partnership Act in deciding this motion. Thus, the Court finds that, "[f]inal resolution of the choice of law question is not necessary at this stage of the proceedings, because, . . . there is little meaningful distinction between Colorado and [North Carolina] law on the issues raised in [Counter Defendants'] Motion."[2] *Steinfield v. EmPG Int'l, LLC*, No. 15-cv-00610-JLK, 2015 WL 4624616, at *2 (D. Colo. Aug. 4, 2015); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321–22 (10th Cir. 1997) ("Because we believe there are no material discrepancies between Colorado law and federal common law on these matters, ... we find it unnecessary to decide this issue."); *Blixseth v. Cushman & Wakefield of Colo., Inc.*, No. 12-cv-00393-PAB-KLM, 2013 WL 5446791, at *7 n.9 (D. Colo. Sept. 30, 2013) ("For the purpose of resolving defendants' motions to dismiss, the parties appear to agree that the elements of plaintiff's state law claims are defined by either Montana or Colorado law and that the laws of those states define the elements similarly. Thus, the Court finds that a choice of law analysis is not necessary . . . .").

Counter Defendants cite to *Elvig v. Nintendo of Am., Inc.*, 696 F. Supp. 2d 1207 (D. Colo. 2010) for the proposition that the Court should determine the choice of law issue at the motion to dismiss stage. Reply 2. However, in that case, the plaintiffs did not assert their claims in the alternative. *Elvig*, 696 F. Supp. 2d at 1208–09. Instead, they pleaded their claims only under Washington law. *Id.* at 1208. Therefore, if Washington law did not apply, the claim was not supported by any law. Here, however, Davis pleads his claims under either Colorado or North

[2] The parties do not dispute that Colorado law applies to all issues other than those based on the formation and dissolution of the partnership. Indeed, Davis cites to Colorado law in rebutting Counter Defendants' arguments regarding the statute of frauds and statute of limitations. Resp. to Mot. to Dismiss Countercls. 9, 14. Therefore, the Court will apply Colorado law in analyzing Counter Defendants' statute of frauds and statute of limitations defenses.

Carolina law. Thus, if North Carolina law does not apply, the claim would still survive the motion to dismiss.

To be sure, if the determination of issues that arise later in this lawsuit would be different under Colorado and North Carolina law, the Court will definitively resolve the choice of law dispute at that time. However, because the choice of law analysis is not necessary to resolve the present motion, Davis should have the opportunity to engage in discovery relevant to where the parties formed the partnership. Accordingly, the Court recommends denying Counter Defendants' motion to the extent it seeks dismissal of claims seven, nine, and ten as improperly asserted under North Carolina law.

II. Statute of Frauds: Joint Venture and Contract Claims (Counts Three, Four, Five, Seven, and Eight)

Counter Defendants argue that the statute of frauds bars Davis' third, fourth, fifth, seventh, and eighth claims, which are based on a series of joint venture agreements, or alternatively, a contract. Mot. to Dismiss Countercls. 8–10. According to Counter Defendants, because Davis' allegations demonstrate that these agreements could not be performed within one year, they are not enforceable oral agreements. *Id.* Regarding the joint venture claims specifically, Davis claims the parties entered into a series of oral joint ventures, through which they agreed to provide financial services to clients, such as managing the sale of the clients' restaurants. Am. Countercls. ¶ 216; ECF No. 74-1. According to Counter Defendants, underlying engagement agreements that the parties entered into with their clients governed the scope of the joint ventures. Mot. to Dismiss Countercls. 8–9. These engagement contracts could not be performed within one year, because they contained indefinite confidentiality provisions and required clients to make payments more than one year after the parties entered into the agreement. *Id.* at 8–9. As for Davis' contract claim, Counter

Defendants argue it is barred by the statute of frauds, because Davis alleges the parties entered into a "years-long" oral contract. *Id.* at 9. The Court disagrees that the statute of frauds bars the joint venture and contract claims at this stage.

In Colorado, a contract that, "by [its] terms is not to be performed within one year after [its] making," is void unless its terms are contained in a signed writing. Colo. Rev. Stat. § 38-10-112 (2017). Colorado courts construe this provision narrowly to cover "only those agreements that exclude, by their very terms, the possibility of performance within one year. If the agreement 'could have been performed' within one year, the statute is inapplicable." *Prof'l Bull Riders, Inc. v. AutoZone, Inc.*, 113 P.3d 757, 761 (Colo. 2005) (quoting *Kuhlman v. McCormack*, 180 P.2d 863, 864 (Colo. 1947)) (internal citations omitted); *Vinton v. Adam Aircraft Indus., Inc.*, 232 F.R.D. 650, 658–59 (D. Colo. 2005) (holding that the statute of frauds did not bar a contract to employ the plaintiff "until retirement," because the parties did not dispute that the defendant could terminate the contract at any time for performance issues).

First, Davis' claims based on the alleged joint venture agreements are not subject to Rule 12(b)(6) dismissal for failure to comply with the statute of frauds. Even assuming the Court can properly consider the engagement contracts to demonstrate the terms of the joint venture agreements, nothing in the contracts prevents the parties from completing the joint ventures within one year.

Counter Defendants first contend the engagement agreements require the client to pay a success fee up to twelve months after the contract's termination. *Id.* at 8. According to Counter Defendants, this provision ensures the joint venture will not be complete until at least a year after its formation. *Id.* The engagement agreement states in relevant part:

> In the event the Company has not sold the Business as of expiration of the Engagement Period, within sixty days (60) days of the expiration of the Engagement Period, Cypress will provide the Company with a list of Registered Prospects that Cypress contacted during the Engagement Period. If within twelve (12) months from the expiration of the Engagement Period or the termination of this agreement, whichever is sooner, the Company effects a sale, merger, consolidation, or other type of transaction resulting in a change in control of the Business to a Registered Prospect or an individual or group controlling any of the Registered Prospects, . . . the Company agrees to pay Cypress the Success Fee provided for in this Agreement notwithstanding the expiration of the Engagement Period prior to the sale.

ECF No. 74-1, at 3–4.

The Court does not find that this provision makes the engagement contract, and by extension the joint venture agreement, incapable of being performed within one year. Critically, the success fee provision applies only if the client did not sell its business prior to the nine-month engagement period. Because the agreement does not limit when the client can sell its business, it is entirely possible that the client will have made a sale within the nine-month engagement period. If this is the case, the contract will terminate with no further payment obligations, and the purpose of the joint venture will be complete. Therefore, performance of the engagement agreement, and thus, the purpose of the joint venture, is possible within one year. *See Prof'l Bull Riders, Inc.*, 113 P.3d at 757 ("[A] promise of two or more performances, in the alternative, does not fall within the one-year provision if any one of the alternatives could be fully performed within one year.").

Counter Defendants also claim that the indefinite confidentiality provision in the engagement agreements require that the joint venture last longer than one year. The Court disagrees. Northing in the engagement agreement suggests that the confidentiality provision is indefinite. Therefore, the parties may well have intended the provision to terminate with the contract. As aptly stated by the court in *All West Pet Supply Co. v. Hill's Pet Products Division, Colgate-Palmolive Co.*, "The confidentiality provision upon which [the plaintiff] relies was one of several contract obligations of

[the defendant] . . . . The confidentiality provision did not include any additional language that could reasonably be construed as meaning that the confidentiality obligation was to extend beyond the term of the distributorship agreement itself." 840 F. Supp. 1433, 1439 (D. Kan. 1993).

Moreover, even assuming the confidentiality provision is indefinite, it does not follow that the provision prohibited the joint venture from existing for less than one year. Indeed, in a matter of months, the joint venture could have helped its client sell assets and distributed its profits. At this time, the joint venture would have performed its purpose of providing advice to clients for profit. *See* Am. Countercls. ¶ 216 ("Davis and Zuccarello/Cypress Advisors entered a series of oral joint ventures for the purpose of providing advice to clients who signed financial advisory contracts with The Cypress Group."). Counter Defendants contend each joint venture required performance of every engagement contract provision prior to termination, including the confidentiality provision. However, a joint venture's ability to complete its purpose and terminate does not hinge on the client's indefinite compliance with the confidentiality provision. Accepting Counter Defendants' argument would mean that the parties could never complete the purpose of the joint venture agreement and begin its dissolution. If the "indefinite" confidentiality provision made it impossible to dissolve the joint venture within one year, as Counter Defendants contend, the provision would prohibit the dissolution of the joint venture indefinitely. Therefore, the Court does not find that an indefinite confidentiality provision makes the joint venture agreement impossible to perform within one year. As such, Davis' claims based on the existence of joint ventures are not barred by the statute of frauds.

Second, the statute of frauds does not presently bar Davis' claim that the parties entered into a "years-long" contract. Nothing in the Amended Counterclaims suggests that either party was

prohibited from ending the contractual relationship within the first year. Counter Defendants contend the parties could not perform the contract within one year, because Davis labels it as a "years-long" contract. Mot. to Dismiss Countercls. 9. However, this allegation suggests only that the parties' contract actually lasted for many years. "That an agreement was not actually performed within one year of its making is . . . clearly of no consequence in determining the applicability of the statute of frauds." *Prof'l Bull Riders, Inc.*, 113 P.3d at 761. Because Davis does not allege that the parties were bound to the terms of the contract for more than one year, the statute of frauds does not require dismissal of his breach of contract claim.[3]

In sum, because the engagement contracts underlying the alleged joint ventures do not preclude the possibility of performance within one year, Davis' third, fourth, seventh, and eighth claims are not presently barred by the statute of frauds. Additionally, because Davis' allegations do not suggest that the parties were prohibited from terminating their contract prior to one year, the statute of frauds is not currently applicable to Davis' breach of contract claim.

III. Quantum Meruit Claim (Count Fourteen)

Counter Defendants argue that the Court should dismiss Davis' quantum meruit claim as duplicative of his unjust enrichment claim. Mot. to Dismiss Countercls. 13. Davis contends that a party can assert separate claims for unjust enrichment and quantum meruit, because unjust enrichment is one of two branches of quantum meruit. Resp. to Mot. to Dismiss Countercls. 22. The Court agrees with Counter Defendants.

Colorado precedent makes clear that quantum meruit is the same form of relief as unjust

[3] Of course, if Counter Defendants introduce evidence after discovery indicating that the parties agreed to operate the Cypress Partnership for more than one year, the statute of frauds may bar Davis' fifth claim for relief at that time.

enrichment. *Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, 293 P.3d 55, 64 (Colo. App. 2011) (Terry, J., dissenting) ("In Colorado, quantum meruit is synonymous with the doctrines of quasi-contract and unjust enrichment."). Indeed, the Colorado Supreme Court has stated that, "[a]pplication of the doctrine of quantum meruit, also termed quasi-contract or unjust enrichment, does not depend on the existence of a contract, either express of implied in fact." *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo. 2000). Because Davis' two claims assert the same cause of action, they are duplicative and subject to dismissal. *See Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011) ("District courts have discretion to control their dockets by dismissing duplicative cases.").

Davis argues that there are two distinct branches of quantum meruit—contract implied in fact and unjust enrichment. Resp. to Mot. to Dismiss Countercls. 22. Accordingly, Davis contends his quantum meruit claim asserts a distinct cause of action for contract implied in fact. *Id.* The Court disagrees that contract implied in fact is a form of quantum meruit. Although the Colorado Court of Appeals has recognized two branches of quantum meruit, *Portercare Adventist Health Sys. v. Lego*, 312 P.3d 201, 206 (Colo. App. 2010), this is contrary to Colorado Supreme Court precedent. As mentioned above, the Colorado Supreme Court has stated that "[a]pplication of the doctrine of quantum meruit, also termed quasi-contract or unjust enrichment, does not depend on the existence of a contract, either express *or implied in fact*." *Dudding*, 11 P.3d at 444 (emphasis added). Therefore, Colorado precedent distinguishes the application of quantum meruit and contract implied in fact.

Additionally, because Davis' quantum meruit allegations support a claim for unjust enrichment, the Court is unable to construe Davis' claim as for breach of an implied in fact contract.

Implied in fact contracts are actual contracts, the existence of which is shown by the parties' conduct, instead of the parties' words. *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192 (Colo. 2001). "There is little fundamental difference between an express contract and a contract implied in fact." *Id.* (quoting *Osband v. United Airlines, Inc.*, 981 P.2d 616, 621 (Colo. App. 1998)). Conversely, a quantum meruit claim does not depend on the existence of a contract. It is an equitable doctrine that ensures a party does not unjustly retain a benefit "in the absence of an actual agreement to pay for the services rendered." *Dudding*, 11 P.3d at 444. Here, Davis' fourteenth claim for relief does not allege the elements of an implied in fact contract claim. Davis pleads his claim in the alternative only "if no contract exists between the parties . . . ." Am. Countercls. ¶ 304. However, a claim for breach of an implied in fact contract requires the existence of an actual contract. *Agritrack, Inc.*, 25 P.3d at 1192. Moreover, Davis alleges he "conferred a benefit on Zuccarello." Am. Countercls. ¶ 305. Unlike quantum meruit claims, implied in fact contracts do not involve benefits conferred; they relate to the parties' conduct evidencing a mutual intention to enter into a contract. *Agritrack, Inc.*, 25 P.3d at 1192. Because Davis' fourteenth claim states the elements of an unjust enrichment claim, the Court will not construe it as one for breach of a contract implied in fact.

IV. Statute of Limitations: Breach of Contract, Breach of Fiduciary Duty, Promissory Estoppel, Constructive Fraud, and Unjust Enrichment Claims (Counts One, Three, Four, Five, Six, Eight, and Thirteen)

Counter Defendants argue that Davis' breach of contract, breach of fiduciary duty, promissory estoppel, constructive fraud, and unjust enrichment claims are barred by a three-year

statute of limitations.[4] Mot. to Dismiss Countercls. 10–12. According to Counter Defendants, because these claims all relate to their alleged unlawful withholding of funds in 2011, the statute of limitations expired in 2014—two years before Davis filed his complaint in North Carolina state court. *Id.* at 12. Davis contends that the breach of contract, promissory estoppel, and unjust enrichment causes of action are subject to a six-year limitations period for claims seeking a determinable amount of money. Resp. to Mot. to Dismiss Countercls. 15–18. Alternatively, he contends that even if the claims are subject to a three-year period, each claim is based on actions that occurred within the last three years. *Id.* at 14–22. Finally, although Davis does not dispute that the breach of fiduciary duty and constructive fraud claims are governed by a three-year period, he contends he did not know of the breaches prior to 2013. *Id.* at 18–20.

The Court will first address whether the breach of contract and promissory estoppel claims are subject to the three- or six-year limitations period. Then, the Court will analyze the extent to which the breach of fiduciary duty and constructive fraud claims are based on actions occurring after 2013. Finally, the Court will address the appropriate statute of limitations for Davis' unjust enrichment claim.

A. Breach of Contract and Promissory Estoppel Claims (Counts One, Three, Five, and Six)

"In general, contract actions are subject to a three-year statute of limitations." *Portercare Adventist Health Sys. v. Lego*, 286 P.3d 525, 528 (Colo. 2012) (citing Colo. Rev. Stat. § 13-80-101(1)(a) (2017)). However, "if a contract is for a 'liquidated debt' or for an 'unliquidated

[4] Counter Defendants also argue that Davis' quantum meruit claim is barred by the statute of limitations. However, because this Court recommends dismissing this claim as duplicative of Davis' unjust enrichment claim, the Court did not include the quantum meruit claim in its statute of limitations analysis.

determinable amount,'" it is subject to the six-year limitations period provided for in Section 13-80-103.5(1)(a). *Id.* An amount is determinable "if an agreement sets forth a method for determining the amount due, regardless of the need to refer to facts external to the agreement." *Interbank Invs., LLC v. Vail Valley Consol. Water Dist.*, 12 P.3d 1224, 1230 (Colo. App. 2000). In *Comfort Homes, Inc. v. Peterson*, the court held that the amount owed under a building contract was determinable, because the contract provided that the builder would receive "10 percent of the estimated cost of the house." 549 P.2d 1087, 1090 (Colo. App. 1976). Conversely, in *Neuromonitoring Associates v. Centura Health Corp.*, the court found that the six-year period did not apply, because the plaintiff sought damages for future lost profits, and the parties' agreement did not contain a liquidated damages provision. 351 P.3d 486, 489–90 (Colo. App. 2012).

Here, the Court holds that the amount Davis claims in his breach of contract and promissory estoppel claims is determinable. Davis seeks to recover his share of profits from particular engagements. Am. Countercls. ¶¶ 203, 241. According to Davis' allegations, the parties' agreement detailed specific percentages of profits that each party would receive. *Id.* at ¶¶ 69–71. If one of the parties obtained a client solely through his own efforts, that party would receive seventy-five percent of the profits. *Id.* at ¶ 70. When the parties jointly obtained a client, they would split the profits evenly. *Id.* at ¶ 71. Therefore, the amount Davis claims is a specific and agreed-upon percentage of a total amount. That Counter Defendants may contest which party was responsible for securing each client does not make the amount undeterminable. *See Fishburn v. City of Colorado Springs*, 919 P.2d 847, 849–50 (Colo. App. 1995) (holding that an amount due was determinable, notwithstanding that "the city may contest the merits of a claim or the number of hours for which compensation may be owing to each plaintiff . . . .").

Furthermore, contrary to Counter Defendants contention, that the parties sometimes deviated from the contractual percentages does not change the result. As alleged, a specific method for determining the amount owed to each party controlled unless the parties agreed otherwise. Am. Countercls.¶¶ 69–71. Because the parties do not presently agree to split the profits in a manner contrary to the contractual percentages, the default formula controls. As such, the amount Davis claims is determinable by reference to the parties' agreement.

Counter Defendants cite *Tafoya v. Perkins*, 932 P.2d 836 (Colo. App. 1996) as an example of a case where an amount due was not ascertainable by reference to a partnership agreement. Reply 11–12. However, in that case, the plaintiff sought an accounting during a partnership's dissolution. *Tafoya*, 932 P.2d at 838. The court held that the six-year statute of limitations did not apply, "[b]ecause the amount due from the accounting was not capable of ascertainment by reference to the partnership agreement or by a simple computation derived from the agreement . . . ." *Id.* Here, in contrast, Davis sues for breach of contract and promissory estoppel, not an accounting. The partnership agreement allegedly sets forth specific percentages to govern the parties' distributions from client engagements. It is Counter Defendants' failure to comply with these percentages that forms the basis of Davis' breach of contract and promissory estoppel claims. Therefore, the amount due under Davis' theories of relief are ascertainable by reference to the partnership agreement, and the six-year statute of limitations applies.[5]

B. Breach of Fiduciary Duty and Constructive Fraud Claims (Counts Four and Eight)

Counter Defendants argue that Davis' breach of fiduciary duty and constructive fraud claims

[5] After discovery, if Counter Defendants show that the parties did not specifically agree to a default payment scheme, and instead determined the amount due on a case-by-case basis, Counter Defendants may have a successful statute of limitations defense at that time.

are barred by the three-year statute of limitations provided by Section 13-80-101(1)(f). Mot. to Dismiss Countercls. 10–11. Davis does not dispute that this limitations period applies. *See* Resp. to Mot. to Dismiss Countercls. 18. However, Davis argues that the events giving rise to these claims occurred within the statutory period. *Id.* at 19. Davis bases his breach of fiduciary duty and constructive fraud claims on the following actions: (1) wrongfully reducing Davis' profit distributions from 2011 through 2015, Am. Countercls. ¶¶ 228, 257, 259; (2) concealing engagements that Counter Defendants secured in an effort to avoid paying Davis a share of the profits, *id.* at ¶ 229; (3) engaging in self-dealing by requiring that Davis pay more than his share of expenses, *id.* at ¶¶ 231, 261; and (4) excluding Davis from partnership email accounts. *Id.* at ¶ 233.

Under Colorado law, actions for breach of fiduciary duty and constructive fraud are subject to a three-year statute of limitations. Colo. Rev. Stat. § 13-80-101(1)(f) (2017). The statutory period begins to run when the breach "is discovered or should have been discovered by the exercise of reasonable diligence." Colo. Rev. Stat. § 13-80-108(6) (2017); *Anderson v. Somatogen, Inc.*, 940 P.2d 1079, 1083 (Colo. App. 1996).

The Court holds that to the extent Davis relies on Counter Defendants' actions occurring prior to July 29, 2013, the claim is barred by the statute of limitations. Davis' breach of fiduciary duty and constructive fraud claims are based, at least in part, on Counter Defendants' actions occurring prior to July 2013. For example, Davis alleges that Counter Defendants breached their fiduciary duties when they improperly withheld partnership distributions in 2011 and 2012. Am. Countercls. ¶ 228. Davis asserts that Zuccarello informed him of this conduct at the time it happened. *Id.* at ¶ 103. Additionally, Davis alleges he consistently disputed the accuracy of these distributions. *Id.* at ¶ 108. Because Davis knew of the improper 2011 and 2012 accountings at the

time they occurred, the statute of limitations ran on these claims in 2014 and 2015, respectively. Therefore, the Court recommends holding that these claims are time barred.

However, Davis also bases his claims on actions occurring within the statutory period. For example, Davis contends Counter Defendants continued to improperly calculate distributions each year through 2016, *id.* at ¶¶ 109, 114–23; concealed engagements to avoid paying Davis a share of the profits, *id.* at ¶¶ 126, 229, 260; and required that Davis pay Counter Defendants' personal expenses. *Id.* at ¶ 129. Because these actions allegedly occurred within three years of filing, Section 13-80-101(1)(f) does not prohibit them.

Counter Defendants argue that any actions occurring after 2011 "do not constitute separate breaches, but rather were merely the natural consequences of the 2011" allegedly improper accounting. Reply 12. In other words, Davis' real complaint is that the accounting in 2011 was incorrect, and this caused damages in future years. *Id.* The Court rejects Counter Defendants' argument. Davis alleges that Counter Defendants had an independent duty each year to provide correct distributions. Am. Countercls. ¶¶ 109, 112–19 (stating the exact amount of damages Counter Defendants wrongfully withheld in 2012, 2013, 2014, and 2015). Furthermore, each time Counter Defendants failed to report a new customer, they committed an independent breach of the partnership agreement. *Id.* at ¶ 229. Counter Defendants cite *Davidson v. Bank of Am. N.A.*, No. 14-cv-01578-CMA-KMT, 2016 U.S. Dist. LEXIS 31656, at *16–20 (D. Colo. Feb. 1, 2016) in support of their argument. Mot. to Dismiss Countercls. 12. In *Davidson*, the alleged misapplication of payments and lack of disclosure occurred outside of the limitations period, but damages resulting from those acts arose during the statutory period. 2016 U.S. Dist. LEXIS 31656, at *20. The court held that these reverberating damages did not save the plaintiff's claim from being time barred. *Id.*

Here, however, Davis does not contend only that the 2011 breach caused damages in the statutory period. Instead, he argues that Counter Defendants improperly withheld funds on at least six separate occasions, some of which were within the limitations period. Am. Countercls. ¶¶ 109, 114–23. When Counter Defendants allegedly did so, their separate actions caused distinct actionable damages.

Accordingly, the Court recommends holding that, to the extent Davis' breach of fiduciary duty and constructive fraud claims are based on Counter Defendants' actions occurring after July 29, 2013, Davis' claims are not barred by the statute of limitations.

C. Unjust Enrichment Claim (Count Thirteen)

The Court also recommends holding that Davis' unjust enrichment claim is not time-barred. This claim is "technically subject to an equitable laches rather than a legal statute of limitations analysis." *Interbank Invs., LLC*, 12 P.3d at 1230. "However, absent extraordinary circumstances, 'a court will usually grant or withhold relief by analogy to the statute of limitations relating to actions at law of like character.'" *Sterenbuch v. Goss*, 266 P.3d 428, 436 (Colo. App. 2011) (quoting *Interbank Invs., LLC*, 12 P.3d at 1230). Because neither party has argued that extraordinary circumstances exist here, the Court concludes that the unjust enrichment claim is subject to the same six-year period as the breach of contract claim, and is thus, not time barred. *See BMGI Corp. v. Kirzhner*, No. 11-cv-00599-LTB-MEH, 2011 WL 6258481, at *6 (D. Colo. Dec. 15, 2011) ("I likewise conclude that BMGI's unjust enrichment claim has a six-year statute of limitations."); *Robert W. Thomas & Anne McDonald Thomas Revocable Tr. v. Inland Pac. Co., LLC*, No. 11-cv-03333-WYD-KLM, 2012 WL 2190852, at *4 (D. Colo. June 14, 2012) ("I find for purposes of both the breach of contract and unjust enrichment claim that the amount is either liquidated or

determinable for purposes of the statute of limitations, and that the six-year limitations period applies.").

V. Wage Act Claim (Count Twelve)

Lastly, Counter Defendants argue that the Court should dismiss Davis' cause of action for failure to pay wages. Mot. to Dismiss Countercls. 13–17. First, Counter Defendants contend that the wage claim is inconsistent with Davis' allegations supporting the existence of a partnership. *Id.* at 13–15. Second, Counter Defendants argue that regardless of the inconsistency, the claim fails to allege that Zuccarello or Cypress Advisors was his "employer," as that term is used in the Colorado Wage Claim Act. *Id.* at 15–17. Davis contends that Federal Rule of Civil Procedure 8(d)(3) permits him to allege inconsistent theories and factual allegations supporting those theories. Resp. to Mot. to Dismiss Countercls. 23–27.

The Court agrees with Counter Defendants that dismissal of Davis' claim for wages is proper. Even assuming that Davis may plead inconsistent factual allegations, he fails to allege a violation of the Colorado Wage Claim Act.[6] To state a wage act violation, Davis must assert that he is an "employee," as that term is defined in Colo. Rev. Stat. § 8-4-101(5) (2017). *See Fang v. Showa Entetsu Co.*, 91 P.3d 419, 421 (Colo. App. 2003) ("An employer is liable under the [Colorado Wage Claim Act] if the employer does not pay an employee wages he or she earned . . . ."). An employee is an individual who performs "labor or services for the benefit of an employer in which

[6] The Court notes that Davis brings his claim under both Colorado and North Carolina law. Am. Countercls. ¶¶ 283–94. However, Davis relies only on Colorado law in contesting Counter Defendants' motion to dismiss. Resp. to Mot. to Dismiss Countercls. 26. Moreover, it does not appear that the Court's analysis would be different under North Carolina law. Indeed, both states define an "employee" as an individual whose employer exercises substantial control over the manner in which the individual performs his job. *See Horack v. S. Real Estate Co. of Charlotte, Inc.*, 563 S.E.2d 47, 51 (N.C. App. 2002); Colo. Rev. Stat. § 8-4-101(5) (2017).

the employer may command when, where, and how much labor or services shall be performed." Colo. Rev. Stat. § 8-4-101(5) (2017).

Here, Davis does not allege that Counter Defendants could command when, where, and how Davis performed his services. In fact, the allegations support a contrary finding. Am. Countercls. ¶ 60 (stating that Davis maintained a separate office from Counter Defendants); *id.* at ¶ 65 (asserting that Davis "serviced numerous client accounts in which neither Zuccarello nor Cypress Advisors had any direct involvement"); *id.* at ¶ 66 (stating that Davis "did not actively participate in any Colorado-based transactions" secured by Counter Defendants).

Davis contends the following allegations support a finding that he was Counter Defendants' employee: (1) Davis provided services on behalf of the Cypress Partnership for years, *id.* at ¶¶ 48, 50, 99; (2) Zuccarello was the CEO of the Cypress Partnership, *id.* at ¶ 55; (3) Zuccarello told the public that Davis' office was a Cypress Partnership office, not Davis' personal office, *id.* at ¶ 62; (4) expenses were paid out of the company's revenue, *id.* at ¶ 81; and (5) Davis was entitled to compensation for his services in the form of specified percentages of the company's profits. *Id.* at ¶¶ 69–71. However, at most, each of these allegations show that Davis was in business with Counter Defendants; they do not demonstrate that Counter Defendants controlled when, where, and how Davis performed his services.

Therefore, the only allegation that supports the existence of an employee/employer relationship is Davis' assertion that Counter Defendants were his employers. *See* Am. Countercls. ¶ 285. The Court cannot accept such conclusory allegations as well-pleaded facts. *See, e.g.*, *Iqbal*, 556 U.S. at 679–80. Because Davis does not allege that Counter Defendants determined where, when, and how he performed his work, the Court recommends holding that Davis' twelfth cause of

action fails to state a claim. *See Hyland v. Pikes Peak Capital Corp.*, 714 P.2d 914, 916 (Colo. App. 1985) (holding that an individual was not an employee, because "there was evidence that [the defendant] did not determine the time, place, or manner in which [the plaintiff] conducted his sales activities . . . ."); *Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421, 1426 (10th Cir. 1987) (finding that an individual was not an employee under the Colorado Wage Claim Act, because the individual "was free to solicit orders in any manner, at any time, [and] from anyone . . . .").

CONCLUSION

In sum, the Court finds that it is not currently necessary to decide the choice of law issue. Accordingly, the Court recommends denying Counter Defendants' motion to the extent it seeks to dismiss Davis' seventh, ninth, and tenth claims as being impermissibly based on North Carolina law. Next, the Court holds that the statute of frauds does not currently bar any of Davis' claims. Third, the Court recommends dismissing Davis' quantum meruit claim as duplicative of his unjust enrichment claim. Fourth, Davis timely asserts his breach of contract, promissory estoppel, and unjust enrichment claims. Regarding Davis' breach of fiduciary duty and constructive fraud claims, the Court recommends dismissing them to the extent they are barred on Counter Defendants' allegedly wrongful distributions occurring prior to July 29, 2013. Finally, the Court recommends dismissing Davis' employee wage cause of action for failure to state a claim. Accordingly, the Court recommends that Counter Defendants' Partial Motion to Dismiss Amended Counterclaims Pursuant to Fed. R. Civ. P. 12(b)(6) [filed May 19, 2017; ECF No. 74] be **granted in part and denied in part**.[7]

[7] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings

Entered and dated at Denver, Colorado, this 21st day of July, 2017.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

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or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676–83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).