

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EMC NATIONAL LIFE COMPANY,

Plaintiff,

vs.

EMPLOYEE BENEFIT SYSTEMS, INC., and
WILLIAM B. LOWETH,

Defendants.

No. 4:10-cv-00143 – JEG

O R D E R

EMPLOYEE BENEFIT SYSTEMS, INC.,

Counterclaim Plaintiff,

vs.

EMC NATIONAL LIFE COMPANY,

Counterclaim Defendant.

Now before the Court are Motions for Summary Judgment brought by Plaintiff/Counterclaim Defendant EMC National Life Company (EMCNL) and Defendant/Counterclaim Plaintiff Employee Benefit Systems, Inc. (EBS). A hearing was held on December 5, 2012, with EMCNL represented by Todd Strother and Bradley Beaman, EBS represented by Joseph Graham and Arnold Vickery, and William B. Loweth (Loweth) represented by Thomas Foley. The matter is now fully submitted and ready for disposition.

I. BACKGROUND¹

A. Factual Background

1. The Parties

EMCNL,² an Iowa corporation with its principal place of business in Des Moines, Iowa, is an insurance carrier that sells, in relevant part, health and life insurance. EBS, a Texas

¹ Because the parties have filed cross motions, the Court does not construe facts in favor of either party, but rather notes when a dispute arises.

² EMCNL is a successor entity to National Traveler's Life Insurance Company, which entered into some of the agreements at issue in this case. "EMCNL" refers to both entities without distinction.

corporation formed in 1997 with its principal place of business in Houston, Texas, sells work-site benefits such as health and life insurance to union workers throughout the country. Loweth, a resident of Texas, was hired as president of EBS in 1997 and remained with the company until EBS terminated his employment in 2009. During that time, Loweth was also a member of the EBS board of directors and maintained part ownership in the company – although the parties dispute whether EMCNL was aware that Loweth lacked full or majority ownership. Despite Loweth’s active role in the company, there was no formal employment contract between Loweth and EBS; instead, the only written documentation of the employment agreement was in letters exchanged between Loweth and Weldon Granger (Granger), the majority owner of EBS.

2. The Agreements

In 1999, EBS entered into an agent contract with EMCNL that authorized EBS to sell insurance policies issued by EMCNL. Prior to entering into the agent contract, EBS presented EMCNL with a resolution it had adopted indicating that Loweth had authority and discretion to enter into contracts on behalf of EBS. The resolution was signed by Loweth, as president of EBS, and James Hudgins (Hudgins), as secretary of EBS. EBS then presented EMCNL with a document entitled Assignment to Corporation, also signed by Loweth and Hudgins, which stated that Loweth was assigning his rights in his agent contract to EBS, “except for any amounts due under the Contract which Agent elects to defer under an Agent’s Retirement Income Agreement, including any additional amounts payable from Company as a result of such deferrals.” Assignment to Corporation, EMCNL’s App. 112, ECF No. 80-2.

On February 15, 2001, Loweth entered into an Agent’s Deferred Income Agreement with EMCNL, which provided that EBS could defer part of the commissions owed to it by EMCNL from sales of insurance policies into a deferred income account for Loweth. The agreement further provided for matching contributions from EMCNL based on Loweth’s earned commissions and contributions. After signing this contract, Loweth began deferring commissions

from EMCNL into a retirement account in his name. At no time was EMCNL told that Loweth did not have the authority to defer the commissions nor that any agreement existed between Loweth and EBS explicitly prohibiting such activity.

On July 1, 2003, EBS presented EMCNL with another resolution signed by Loweth as both president and secretary of EBS that indicated Loweth's authority to act on behalf of EBS. Contrary to Loweth's indication, Loweth was not then secretary of EBS. Loweth also executed two agency agreements, one between EBS and EMCNL and one between himself and EMCNL. The agency contracts contained a forum selection clause indicating that any suit "growing out of any transaction arising from, based on, or in any way connected with" the parties' agreements must be brought in Polk County, Iowa. Agency Agreement § I, Pt. B, ¶ 9, EMCNL's App. 125, ECF No. 80-2. They further provided a choice of law clause indicating that Iowa law governed the agreements.

On February 18, 2005, EBS and Loweth entered into an agreement with EMCNL called Corporate, Partnership or LLC Participating Agency Non-Qualified Deferred Compensation Plan for Agents of EMCNL. This agreement provided that EBS could defer part of the commissions owed to it by EMCNL from sales of insurance policies into a deferred compensation plan for the benefit of Loweth and provided for matching contributions by EMCNL. Despite his lack of authority to do so, Loweth signed the deferred compensation agreement on behalf of EBS as its president. Loweth then began deferring commissions without disclosing to EMCNL that he lacked authority to do so and had an agreement with EBS that explicitly prohibited him from doing so.

In 2005, Loweth asked EMCNL to establish a bonus plan based on the amount of insurance he was selling, a plan similar to one he already maintained with another large carrier and common for EMCNL to provide to its high producing agents. From 2006 to 2007, EMCNL

entered into agreements with Loweth pursuant to which EMCNL agreed to and did provide bonus monies to Loweth based on the established bonus plan. Loweth failed to disclose to EMCNL that he lacked authority to enter into the bonus agreement and, moreover, that under his agreements with EBS, he was explicitly prohibited from entering into such agreements.

3. The Commission Statements & Summaries

Throughout the time Loweth worked for EBS, EMCNL sent commission statements to EBS at its office on a bi-weekly basis. These commission statements, which were sent in uniform fashion to all agents, contained a summary page that indicated the amount of commissions being deferred into the deferred compensation accounts. Additionally, EMCNL prepared a one-page summary every two weeks that was emailed to EBS employees including Sonia Suarez (Suarez). The summaries were drafted in compliance with Suarez and Loweth's specifications and, beginning in 2004, contained the amount being deferred into the retirement accounts. This practice was ended in November of 2006 when Loweth requested that the summary list the deferment as a "miscellaneous adjustment" to prevent other employees at EBS from being aware of, and allegedly jealous of, his retirement plan. When accommodating this request, Julie Hanson (Hanson), an EMCNL employee, contacted Suarez and informed her of the change. This alteration, however, occurred only on the summary page and did not affect the commission statement and attached summary otherwise being sent to EBS. At Loweth's request, Rick Berg (Berg), the vice president of EMCNL, sent some mail concerning Loweth's bonus plan to Loweth's residence – although the parties dispute the motivation behind this request.

EBS agreed in the agency agreement with EMCNL that the information provided in the regular commission statements was final and controlling if not objected to in sixty days. EBS had employees "dissect" these statements, yet EBS never objected to the statements.

4. The Payments

Under these agreements, Loweth received diverted commission and matching funds totaling approximately \$600,000 and \$146,000, respectively. Additionally, Loweth received approximately \$52,000 in bonuses.

5. EBS confronts Loweth

In 2009, Loweth was confronted with and admitted his wrongdoings. Specifically, Loweth admitted knowing that his acts were wrongful since their conception but denied that EMCNL had such knowledge. EBS counters that EMCNL members, including Berg, were aware of the impropriety of such payments.

In November of 2009, Loweth entered into a written Termination Agreement with EBS. The Termination Agreement provided that Loweth would repay EBS \$144,000, assign EBS all monies in the deferred compensation accounts, and transfer his 10 percent of EBS stock back to EBS. From the deferred compensation account, EBS received \$572,019.17. Loweth further agreed in the Termination Agreement that he would cooperate with EBS in a lawsuit against EMCNL; in return, EBS agreed not to file suit against Loweth for his wrongful acts.

B. Procedural Background

On February 2, 2010, EBS filed a Complaint against EMCNL in the United States District Court for the Southern District of Texas (Texas action). EMCNL then filed its Complaint before this Court on April 1, 2010. EBS filed its Answer in this action on July 16, 2010, which included counterclaims alleging the same claims asserted by EBS in the Texas action. On July 13, 2010, EBS agreed to transfer the Texas action to this Court, which occurred on September 22, 2010; the suits were consolidated on October 21, 2010. EMCNL then moved to dismiss EBS' claims and counterclaims. At the hearing held on December 2, 2010, EBS agreed to

dismiss some of its claims. On March 15, 2011, this Court entered an order (March 15 Order) dismissing those claims withdrawn by EBS at the hearing and dismissing EBS' Amended Complaint as redundant of its counterclaims. The Court denied EMCNL's motions without prejudice with regard to EBS' remaining counterclaims.

Now before the Court are Motions for Summary Judgment brought by EBS and EMCNL. EMCNL seeks summary judgment on EBS' remaining counterclaims: (1) fraud and conspiracy, (2) Racketeer Influenced and Corrupt Organizations Act (RICO), (3) tortious interference with an existing employment contract, and (4) aiding and abetting breach of fiduciary duty. EBS requests summary judgment on its RICO counterclaim³ and EMCNL's claims of conversion, unjust enrichment, and fraud. EBS seeks actual damages of no less than \$975,409.70, which it contends represents the highest total amount contained in Loweth's retirement accounts plus the amount that Loweth received in bonuses.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must support its contention by pointing to "the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" to demonstrate that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c)(1)(A). The evidence must be "viewed in the light most favorable to the nonmoving party

³ In its Motion for Summary Judgment, EBS requests that the Court "grant summary judgment for EBS on this entire case – both on EMC's claims against EBS and on the RICO counterclaim." EBS Mot. 8, ECF No. 81. While claiming its motion encompasses the "entire case," EBS provides no argument beyond its RICO claim, electing, at this time, to solely pursue recovering under that claim. Id.

only if there is a ‘genuine’ dispute as to those facts.” Scott v. Harris, 550 U.S. 372, 380 (2007) (quoting Fed. R. Civ. P. 56(c)).

The initial burden falls on the movant to “inform[] the district court of the basis for its motion and identify[] those portions of the record which show a lack of a genuine issue.” Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992). However, it is the nonmovant’s burden to “produce sufficient evidence to support a verdict in [its] favor based on more than speculation, conjecture, or fantasy.” Doe v. Dep’t of Veterans Affairs of U.S., 519 F.3d 456, 460 (8th Cir. 2008) (internal quotation marks and citation omitted). “A party cannot defeat a summary judgment motion by asserting ‘the mere existence of *some* alleged factual dispute between the parties’; the party must assert that there is a ‘*genuine issue of material fact*.’” Quinn v. St. Louis Cnty., 653 F.3d 745, 751 (8th Cir. 2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)). The fact must be material so that it “might affect the outcome of the suit under the governing law.” Anderson, 477 U.S. at 248. The grant of summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” In re Baycol Prods. Litig., 596 F.3d 884, 888-89 (8th Cir. 2010) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). “In sum, the evidence must be ‘such that a reasonable jury could return a verdict for the nonmoving party.’” Reed v. City of St. Charles, Mo., 561 F.3d 788, 791 (8th Cir. 2009) (quoting Anderson, 477 U.S. at 248).

B. Cross Motions for Summary Judgment on the RICO Claim⁴

1. RICO Law Generally

Section 1962 of the RICO Act makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of

⁴ At the hearing, the parties conceded their claims are governed respectively by Iowa law and Eighth Circuit precedent.

such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Nitro Distrib., Inc. v. Alticor, Inc., 565 F.3d 417, 428 (8th Cir. 2009) (quoting 18 U.S.C. § 1962(c)). "RICO provides a private right of action for any person 'injured in his business or property by reason of a violation of' its substantive prohibitions." Dahlgren v. First Nat'l Bank of Holdrege, 533 F.3d 681, 689 (8th Cir. 2008) (quoting 18 U.S.C. § 1964(c)). However, RICO "does not cover all instances of wrongdoing. Rather, it is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity." Gamboa v. Velez, 457 F.3d 703, 705 (7th Cir. 2006)). "A violation of § 1962(c) requires [a claimant] to show '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" Nitro Distrib., 565 F.3d at 428 (quoting Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (footnote omitted)).

Crest Const. II, Inc. v. Doe, 660 F.3d 346, 353 (8th Cir. 2011). In the Court's analysis of this record, the case primarily turns on the fourth element – racketeering activity. However, the Court also finds the claims wanting on the first two elements.

2. Conduct and Enterprise Elements

EBS fails to define with specificity what it claims the enterprise to be, presumably relying upon this Court's finding in the March 15 Order that EBS' pleadings alleged "an enterprise wherein EBS sells EMCNL's insurance policies to union workers, either through Loweth or not." March 15 Order, ECF No. 46. EBS then alleges conduct or participation based on EMCNL's diversion of funds and concealment of these diversions. See Handeen v. Lemaire, 112 F.3d 1339, 1347 (8th Cir. 1997) ("Liability under § 1962(c) extends only to those persons associated with or employed by an enterprise who 'conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" (quoting 18 U.S.C. § 1982(c))). The conduct requirement "authorize[s] recovery only against individuals who 'participate in the operation or management of the enterprise itself.'" Id. (quoting Reves v. Ernst & Young, 507 U.S. 170, 185 (1993)); see also Dahlgren, 533 F.3d at 689. Thus, EBS must show that EMCNL took some part in directing the affairs of the enterprise. Reves, 507 U.S. at 179. Rather than meet this burden, EBS raises arguments inapplicable for the purposes of demonstrating conduct. The alleged diversion of funds, while pertinent for other factors, fails to

support EMCNL's operation or management of the enterprise. To the contrary, EMCNL's actions were dictated by the agreements entered into by the parties. In compliance with the resolutions provided by EBS that established Loweth's agency authority and the Assignment to Corporation that preserved Loweth's right to defer monies pursuant to a retirement income agreement, each signed by both Loweth and Hudgins, EMCNL compensated Loweth under an authorized Agent's Deferred Income Agreement. EBS touts the use of one signature on the deferred compensation agreement as somehow suspect; yet, this contention is wholly irrelevant for the purpose of establishing conduct. Even were it relevant, as outlined above, EMCNL had already received authorization to enter into this agreement with Loweth. Moreover, EMCNL avers without essential contradiction in the record that the document signed by Loweth was the same standard agreement signed by other agents participating in the same or similar programs. Further, these payments conformed with those Loweth received from another life insurance company, another assertion EBS does not dispute. Beyond its own speculation, EBS has provided nothing to suggest usage of the agreement is suspect.

EBS next depends upon EMCNL's alleged knowledge of EBS' ownership structure to demonstrate the conduct element yet fails to establish that is a material fact. That Charlie Brooks (Brooks), the managing general agent, knew Granger owned EBS is immaterial both for the conduct element and the general resolution of this dispute – even were that knowledge imputed to EMCNL – as the gravamen of this dispute is Loweth's actions as an agent, not owner, of EBS and the conflict arising between those actions and Loweth's private arrangement with EBS. Similarly, EBS relies on Loweth's statement that Berg "skirted" an issue; yet, Loweth's testimony establishes only that the inappropriateness of the deferred compensation was never broached by the parties. Again, this inaction fails to demonstrate the requisite conduct. EBS further relies on the sending of mail to Loweth's home and the changing of the description of the retirement payments in a summary page sent to EBS; yet, the payments had been and remained

disclosed to EBS in other documents regularly sent to EBS. Further, both changes were made pursuant to Loweth's request, and the alteration of the description was disclosed to EBS prior to implementation. Moreover, insofar as EBS' claim relies on these actions, other courts have found acts of concealment insufficient to satisfy the "operation and management" test for conduct. See Dahlgren, 533 F.3d at 690 (discussing Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 346-48 (S.D.N.Y. 1998), abrogated on other grounds by Pavlov v. Bank of New York Co., 25 F. App'x 70 (2d Cir. 2002), in which the court found the approval of overdrafts on 500 occasions, the misrepresentation of the status of accounts to investors, and the concealment of its customers' fraudulent scheme did not satisfy the operation and management test).

While EBS addresses the separate elements of a RICO claim fluidly in its briefing, it appears EBS relies on the holding in Young v. Wells Fargo & Co., 671 F. Supp. 2d 1006 (S.D. Iowa 2009), to support its assertion that EMCNL participated in the operation or management of the alleged unlawful enterprise. In Young, when considering a claim under RICO, the court found it could infer reckless disregard on the part of the defendant based on "the manner in which the fees were communicated" by the defendant which "tended to conceal the nature of the fees." Id. at 1039. Thus, EBS concludes concealment can constitute conduct. However, EBS' argument is misplaced. First, Judge Pratt in Young was considering the element of intent to defraud for a mail or wire fraud claim, not the conduct element of a RICO claim. Id. at 1037-39. Moreover, the court supported its finding by noting that the defendant had reason to know the statements were materially false – a situation inapposite to EMCNL's unknowing involvement in Loweth's breach of his agreement with EBS. Additionally, the plaintiffs in Young showed the defendant had motive – another element undeveloped in the present case.

Further, insofar as EMCNL is not directly part of the alleged enterprise, the Court finds the reasoning in Dahlgren v. First National Bank of Holdrege, 533 F.3d 681 (8th Cir. 2008), instructive. In Dahlgren, the Eighth Circuit Court of Appeals considered whether "the [defendant]

Bank exercised some degree of control over the operation or management of [the enterprise's] affairs." Id. at 690. In its opinion, the court cautioned that courts "must carefully distinguish between the bank conducting its own affairs as creditor, and the bank taking additional steps as an outsider to direct the operation or management of its customer, the RICO enterprise." Id.; see also Handeen, 112 F.3d at 1348 ("[Section] 1962(c) cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." (quoting Reves, 507 U.S. at 185)). The court found the Bank did not meet the conduct requirement as "[w]ith one possible exception, all of the Bank's actions that plaintiffs cite as evidence of the Bank's control of [the enterprise] fall into the category of a creditor conducting its own affairs." Dahlgren, 533 F.3d at 690. Here, insofar as an enterprise might exist, the only conduct alleged falls within the regular conduct of EMCNL operating its own affairs, namely, paying commissions, matching contributions, and providing bonuses for high performing agents. Just as "[b]ankers do not become racketeers by acting like bankers," id. (quoting Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank, 934 F.2d 976, 981 (8th Cir. 1991)), neither does EMCNL become a racketeer by acting like an insurance company.

Finally, at the hearing, EBS alleged generally that the agreements entered into by EBS, Loweth, and EMCNL that allowed Loweth to separately establish a deferred compensation agreement and bonus plan, and the arrangements that resulted from these agreements, somehow inherently conflict with basic corporate law principles. EBS provides no statute or case law to bolster this generic argument and fails to generate a material issue of fact that EMCNL had knowledge of this legal conflict; again, this fails to support the element of conduct. Self-dealing is, unarguably, a violation of an employee's duties to his employer; here, however, the record provides contracts legitimizing the actions of EMCNL. Ultimately, EBS has failed to adequately allege facts to survive summary judgment as there can be no genuine issue of material fact when

the party bearing the burden has failed to offer proof concerning an essential element of its claim. See Celotex, 477 U.S. at 323.

3. Racketeering Activity Element

a. Racketeering Activity Standard

Assuming *arguendo* EBS could demonstrate both the conduct and enterprise factors, EBS still would need to show EMCNL engaged in racketeering activity, a burden EBS cannot meet. “[T]o prevail under RICO, a plaintiff must demonstrate that a defendant committed acts of racketeering activity, also known as predicate offenses.” Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 990 (8th Cir. 1989). EBS relies on mail fraud, wire fraud, and/or bribery as the predicate offenses giving rise to its RICO claim. EMCNL argues that no such predicate offenses are supported or inferred by the evidence.

“When pled as RICO predicate acts, mail and wire fraud require a showing of: (1) a plan or scheme to defraud, (2) intent to defraud, (3) reasonable foreseeability that the mail or wires will be used, and (4) actual use of the mail or wires to further the scheme.” Wisdom v. First Midwest Bank, of Poplar Bluff, 167 F.3d 402, 406 (8th Cir. 1999).

Under Iowa law, commercial bribery occurs when

a person [] offer[s] or deliver[s] directly or indirectly for the personal benefit of an employee acting on behalf of the employee’s employer in a business transaction or course of transactions with the person a gratuity in consideration of the act or omission which the person has reason to know is in conflict with the employment relation and duties of the employee to the employer.

Iowa Code § 722.10(2).

b. Analysis

EBS has proffered no evidence of a scheme or plan to defraud. “[A] scheme to defraud . . . ‘must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.’” United States v. Goodman, 984

F.2d 235, 237 (8th Cir. 1993) (quoting Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415 (3d Cir. 1991)); see also Schoedinger v. United Healthcare of Midwest, Inc., 557 F.3d 872, 878-79 (8th Cir. 2009). Here, EMCNL entered into contracts with EBS' agent and acted according to those agreements. Loweth admits he never informed EMCNL that the arrangements violated his private understanding with EBS. Although EMCNL deferred compensation into a retirement account for Loweth, these deferments were always disclosed in some manner to EBS. The record establishes that for the first few years of this arrangement, the payments were disclosed in three forms: in two separate summaries – identified respectively as “agent retirement” and “deferred compensations” – and in the commission statements sent bi-weekly to EBS. While the commission statements were lengthy, EBS does not contest EMCNL's assertion they were provided in the standard format employed by EMCNL for all of its commission statements. Despite these continued disclosures, and EBS' alleged dissection of these statements, EBS never objected to the payments. After approximately three years of using this labeling, Hanson, at Loweth's request, changed the wording to “miscellaneous adjustment” on one of the two summaries. See Hanson Dep. 32:13-16, EMCNL's App. 60, ECF No. 86-1. This action fails to establish a scheme, as there is no evidence Hanson acted based on anything other than Loweth's concern that the payments would cause jealousy in the workplace, informed EBS employees before making the change, and only altered one of the three forms of disclosure. Similarly, Berg, pursuant to Loweth's request, had mail pertaining to Loweth's bonus plan sent to Loweth's residence. While Berg testified that this mailing likely resulted in the concealment of this information from EBS employees, he spoke only in regard to the result, not his intent. To the contrary, Berg asserted that he made this change only after Loweth complained about EBS' mail system and his failure to receive other documents due to its deficiencies and voiced his concern of jealousy in the workplace. Regardless, as Berg was not privy to the agreement that made

these bonus payments wrongful, this is insufficient to create a factual inference of a scheme or plan to defraud.

Addressing next the intent required for mail or wire fraud, the Court must find EBS has failed to generate a fact issue that EMCNL knew the diversion of funds was wrongful. Having provided no evidence to support that EMCNL was aware of the agreement between EBS and Loweth, EBS cannot now claim EMCNL knew Loweth's requests contravened this private agreement. At the hearing, EBS vaguely eluded that the actions of EMCNL were wrongful under general business and corporate principles; yet, EBS has failed to elucidate how or cite any law in support. While self-dealing conduct by an employee may be actionable, EMCNL is not an employee and acted pursuant to contract. Though Loweth's acts were admittedly wrongful, EMCNL was not privy to this at the time of its involvement.

EBS next seeks to establish intent based on EMCNL's awareness that Loweth was not the majority owner of EBS, again relying upon Brooks' knowledge of EBS' ownership structure. However, this contention is immaterial; knowledge of the ownership does not impute to EMCNL knowledge of the private agreement between EBS and Loweth that made the payment of bonuses and deferment compensation wrongful. Further, that Loweth does not own EBS does not preclude EMCNL from entering into agreements with Loweth in his agency capacity. At all times relevant to the Court's consideration, Loweth had apparent, if not actual, authority to enter into the agreements and take action under their terms. On this record, EMCNL's actions were consistent with this authority and the resulting agreements. Further, in Brooks' deposition, when asked whether the money paid to Loweth actually belong to EBS, Brooks answers in the affirmative. EBS points to this statement as conclusive evidence that EMCNL knew the payments were wrongful. This concession, however, reflects only Brooks' knowledge at the time of his deposition; at no point does Brooks aver he was privy to the agreement between EBS and Loweth nor does he state that EMCNL was aware the payments were wrongful at the time they were made.

Finally, EBS relies on the acts of EMCNL's employees that altered the disclosure of these payments, alleging these acts are sufficient to prove intent. The record does not indicate that EMCNL intended to conceal these payments; the material evidence is to the contrary. As addressed above, the deferments were at all times disclosed in at least two regularly sent documents, and EMCNL's employees performed these actions pursuant to Loweth's request without any knowledge he was party to an agreement that forbade him from doing so.

EBS' use of bribery⁵ as a predicate act is equally flawed. In the March 15 Order, this Court noted that the governing bribery statute, contrary to its predecessor, does not encompass the mere offering of a gratuity. See March 15 Order 19, ECF No. 46; see also State v. Fisher, No. 00-1844, 2002 WL 180826, at *1 (Iowa Ct. App. Feb. 6, 2002)). This Court further noted that

[t]he counterclaim states that EBS was formed to sell insurance products offered by various insurance providers and entered into an agreement with EMCNL to sell EMCNL's products. Based on the counterclaims, then, Loweth was fulfilling his duty to his employer by selling EMCNL's products, which, like the conduct in Fisher, does not implicate the integrity of the employer/employee relationship. Thus, EBS has not alleged facts that state a claim for commercial bribery that would satisfy RICO's racketeering activity requirement.

March 15 Order 20, ECF No. 48. As then, EBS has failed to allege or provide facts generating a factual issue either that EMCNL knew that Loweth was acting contrary to his obligations to EBS or that the receipt of the monies caused Loweth to do anything other than his duty to sell insurance policies. EBS has failed to argue or demonstrate that these payments were made to prompt Loweth to improperly sell policies, and thus the only alleged wrong is the diversion of the funds themselves. Without knowing that the diversion of the funds was wrongful, EMCNL

⁵ This Court has previously noted that "[t]heft of honest services under 18 U.S.C. § 1346 only includes bribery and kickback schemes." March 15 Order 20, ECF No. 46 (citing Skilling v. United States, 130 S. Ct. 2896, 2933 (2010)). Thus, the Court need only consider whether EBS' claim can lie on the alleged basis of bribery.

could not have known that it was compensating Loweth for acting inconsistent with his obligations to EBS.

Finally, EBS generally alleges that the admissions of EMCNL's in-house counsel, Jennifer Mercer-Klimowski (Mercer-Klimowski), in her deposition testimony establish EMCNL's involvement in the requisite predicate acts. This is a bold exaggeration of any fair reading of that testimony. Mercer-Klimowski states in her deposition only the legal requirements for EBS' claims and that Loweth has committed acts sufficient to satisfy these elements, not that EMCNL was complicit in their happening.

As EBS has failed to set out the necessary elements for its RICO claim, it cannot survive EMCNL's summary judgment motion.⁶

C. Cross Motions on the Conspiracy to Violate RICO

For the aforementioned reasons, this claim is subject to summary judgment as a civil RICO conspiracy claim requires EBS to have been injured by an overt act in furtherance of the conspiracy that is a RICO predicate act, *see Hamm v. Rhone-Poulenc Rover Pharm., Inc.*, 187 F.3d 941, 954 (8th Cir. 1999) (quoting *Bowman v. W. Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993)), yet no RICO predicate act has been shown. Further, EBS has failed to allege or demonstrate an express agreement between EMCNL and Loweth to violate RICO. *See Atlas Pile Driving*, 886 F.2d at 996-97 ("RICO conspiracy law requires only that each defendant agree to join the conspiracy" (alteration omitted)); *see also Handeen*, 112 F.3d at 1354. Moreover, EBS has failed to demonstrate EMCNL knew of the wrongfulness of the diversion; thus, the Court finds as a matter of law EMCNL could not have conspired to violate RICO.

⁶ In the absence of racketeering activity, the Court does not address the pattern element of a RICO claim.

D. EMCNL's Summary Judgment Motion on EBS' Alternative Claims

1. EBS' Counterclaim of Fraud & Conspiracy to Commit Fraud

Under Iowa law, “[f]raud requires clear-and-convincing evidence of (1) materiality, (2) falsity, (3) representation, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury and damage.” Clark v. McDaniel, 546 N.W.2d 590, 592 (Iowa 1996). “A representation need not be an affirmative misstatement; the concealment of or failure to disclose a material fact can constitute fraud.” Id.

As EMCNL avers, EBS has not shown that EMCNL made a material misrepresentation. EBS does not deny that the diversions were initially disclosed by EMCNL in the reports it received; EBS does not deny that the change in wording made by Hanson first was disclosed to an EBS employee; and EBS does not deny that the payments were still disclosed in other reports provided to EBS even after the change was made. Further, as this Court noted in its March 15 Order, EBS has not alleged nor demonstrated why EMCNL was required to disclose to EBS the payments made to Loweth. March 15 Order 22, ECF No. 46. While EBS has demonstrated that it was entitled to the deferred compensation, it has not created a factual issue that EMCNL was aware of that fact. Nothing provided by EBS even indicates that EMCNL had reason to believe that the payments were wrongful. Even assuming EMCNL did have a duty to disclose, EBS has failed to establish justifiable reliance, as the diversion was initially disclosed, the change was disclosed, and the information was continually communicated in a larger summary.

Accordingly, EMCNL is entitled to summary judgment on this claim.

A conspiracy to commit fraud under Iowa law is established by showing that two or more people combined to carry out a fraud with a common purpose and knowledge of an intent to defraud. See Adam v. Mt. Pleasant Bank & Trust Co., 387 N.W.2d 771, 773 (Iowa 1986).

“Civil conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy that give rise to the action.” Wright v. Brooke Group Ltd., 652

N.W.2d 159, 172 (Iowa 2002) (alteration and citation omitted). As mentioned above, without knowledge of the wrongfulness of its actions, EMCNL could not have intended to defraud EBS. Thus, while no dispute of fact remains, EBS has not shown that it is entitled to judgment as a matter of law.

2. EBS' Counterclaim of Tortious Interference with an Existing Employment Contract

Under Iowa law, to establish a claim for tortious interference with an existing contract, the claimant must show that “(1) plaintiff had a contract with a third-party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the contract; (4) the interference caused the third-party not to perform, or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted.” Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 243 (Iowa 2006) (quoting Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 399 (Iowa 2001)).

Based on the above elements, EMCNL is entitled to summary judgment on this claim. While EBS relies upon the alleged concessions by EMCNL's in-house counsel, the record shows that Mercer-Klimowski admitted only the elements of a legal claim and the basic legal principle that employees owe employers honest services, not that EMCNL had committed such an offense. EBS has failed to allege or demonstrate that EMCNL knew of the agreement that prohibited Loweth from entering into the retirement and bonus plan agreements. Instead, EMCNL took action in compliance with those agreements to which it was party, agreements that allowed deferrals. Thus, EMCNL could not have intentionally interfered with the contract, as is required under Iowa law.

3. EBS' Aiding and Abetting Breach of Fiduciary Duty Counterclaim

“Under Iowa law, a claim for aiding and abetting another's wrongful act can be maintained if a person ‘knows that the other's conduct constitutes a breach of duty and gives substantial

assistance or encouragement to the other so to conduct himself.’’ PFS Distrib. Co. v. Raduechel, 574 F.3d 580, 595 (8th Cir. 2009) (quoting Reilly v. Anderson, 727 N.W.2d 102, 107 (Iowa 2006)) (denying plaintiffs’ appeal of the district court’s denial of a motion for new trial, finding the evidence provided a reasonable basis for the jury to conclude that the defendant lacked the knowledge to know that the third-parties’ actions were improper, and thus did not aid and abet the third parties’ breach of fiduciary duty). Here, EBS has not provided a factual basis upon which to infer EMCNL was aware that Loweth’s actions were a breach of his fiduciary duty to EBS. Without knowledge of the agreement between EBS and Loweth, EMCNL could not have knowingly aided Loweth’s breach of his duties. EBS does not address this shortcoming, nor provide a factual dispute, but solely points to Mercer-Klimowski’s deposition in which she merely provides a lawyer’s answers to questions about the elements of the claim, not facts supporting them. Thus, summary judgment is mandated as EBS has failed to show an essential element of its claim. See In re Baycol Prods., 596 F.3d at 884.

E. EBS’ Summary Judgment Motion on EMCNL’s Claims

EBS raises two arguments in support of its motion for summary judgment on each of EMCNL’s claims. First, EBS contends that EMCNL has failed to provide competent legal evidence demonstrating Loweth presented himself as the majority owner of EBS, thus defeating the reliance element of EMCNL’s fraud claim. EBS next argues that EMCNL’s claims cannot survive summary judgment as there is no evidence of damages relating to any of the claims. EBS points to Berg’s deposition testimony to demonstrate that the incentive money provided Loweth would have been paid by EMCNL to any person or entity that Loweth specified; thus, all monies are properly payable to and retained by EBS.

Based on these averments and the existence of a genuine issue of material fact, little analysis is required for the Court to conclude it cannot decide these issues as a matter of law. Regarding EBS’ first contention, the Court does not discern a legal requirement that Loweth be

majority shareholder; rather, as argued by EMCNL, the issue is Loweth's authority – whether actual or apparent – and EMCNL's justified reliance upon that authority. See March 15 Order 21, ECF No. 46 (“Under Iowa . . . law fraud consists of (1) a fraudulent misrepresentation (2) made knowingly (3) with the intent to deceive the other party, and (4) justifiable reliance by the other party (5) resulting in damages.” (citing Clark, 546 N.W.2d at 592)). As the burden is upon the movant at this stage, EBS has failed to demonstrate that it is entitled to summary judgment on the fraud claim. EBS has similarly failed to demonstrate that there are no damages at issue. In his deposition, Berg was asked in hypothetical whether he and EMCNL would have deferred the monies to EBS had Loweth so requested. In response, Berg noted that EMCNL's policy prohibited payment to non-persons, but, were Loweth to so request and policy allow, he would have encouraged the company to try to accommodate the request. This response, at best, raises an issue of fact but does not conclusively indicate that EBS was entitled to the disputed monies. Thus, this Court cannot find there is no genuine issue of fact and therefore must deny EBS' summary judgment motion as well on the conversion and unjust enrichment claims.

III. CONCLUSION

For the reasons stated, this Court finds EBS' Motion for Summary Judgment (ECF No. 81) must be **denied**, and EMCNL's Motion for Summary Judgment (ECF No. 80) must be **granted**.

IT IS SO ORDERED.

Dated this 1st day of March, 2013.



JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT