IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ELITE OUTSOURCING GROUP, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:05CV00051
	)	
HEALTHSOUTH CORPORATION,	)	
	)	
Defendant.	)	

RECOMMENDATION AND ORDER OF MAGISTRATE JUDGE ELIASON

Facts

The dispute between the parties stems from disagreements over the meaning of certain sections of a settlement agreement that ended litigation between them in 2003. Defendant is a large healthcare provider, while plaintiff is in the business of billing and collection. Between 2000 and 2003, plaintiff serviced accounts for certain of defendant's facilities. Plaintiff started servicing accounts receivable in defendant's physical therapy facilities. Then, in 2001, the agreement was expanded to include collecting accounts more than 120 days old from defendant's diagnostic division. Finally, in 2002, the parties entered into a billing agreement where plaintiff performed collections for over 100 of defendant's diagnostic division facilities.

Most of the facilities covered by the 2002 agreement used a billing and operational software known as Dalcon[1]. Defendant decided to switch to a software known as SourceRad and sought

[1] This software is also referred to in the record as "Dal-Con" and "Dal-con."

plaintiff's help with the conversion. Plaintiff developed conversion software know as EliteMed. Defendant's facilities then began switching systems, with 44 of more than 100 eventually making the change.

When a facility switched from Dalcon to SourceRad software, all of its Dalcon-based accounts were sent in a one-time download into the EliteMed software. The facility would then switch software and all of its new accounts would be generated in SourceRad. The old accounts, known as "Converted Accounts," were administered through EliteMed and defendant could electronically access them only in that system through plaintiff. (Leonard Dep. pp. 250, 336; Douglass Aff. ¶¶ 10-13; McDaniel Aff. ¶¶ 7-10; Hermann Aff. ¶¶ 10-12; Nanos Aff. ¶¶ 6-8; Bridges Aff. ¶¶ 5-11; Douglass Dep. pp. 48-49)

Beginning in September of 2002, plaintiff began administering accounts from most of defendant's diagnostic facilities beginning on the day after a charge was posted. A few of these accounts were also Converted Accounts, but most were not and are known to the parties as "Non-Converted Accounts" or "Day 2 Accounts." For these accounts, plaintiff received a data download from either Dalcon or SourceRad (depending on which software a particular facility was using) and converted it into the EliteMed system which it then used to administer the accounts. Because the information for the Non-Converted Accounts was posted in Dalcon or SourceRad, the account information on EliteMed quickly became outdated and data downloads had to be performed frequently. In other words, for Non-Converted

Accounts, the information was under defendant's control on Dalcon or SourceRad software and plaintiff was required to access the information from defendant in order to work the accounts. For Converted Accounts, the plaintiff had control of the electronic data information after conversion. Id.

The end result of the system involving the Converted and Non-Converted Accounts was that defendant could electronically view the Converted Accounts only through and by using the EliteMed software controlled by plaintiff. Id. However, it could still view postings in the Non-Converted Accounts either from plaintiff by using EliteMed or on its own through the Dalcon and SourceRad software used in its diagnostic facilities.

In early 2003, problems developed in the relationship between plaintiff and defendant. In April of that year, defendant made a payment to plaintiff which First-Citizens Bank felt should have been sent to it. First-Citizens responded by suing defendant, who, in-turn, terminated its contracts with plaintiff and filed a third-party complaint against plaintiff. Plaintiff cut off defendant's access to the EliteMed system and filed counterclaims. Defendant also filed counterclaims against First-Citizens, which then sued plaintiff's owner and his wife.

In order to help extricate themselves from this tangled web of litigation, plaintiff and defendant began negotiating a settlement agreement. They began in the spring of 2004 and reached an agreement in early October of that year. The agreement was contingent on settling the remainder of the disputes with First-

Citizen. This was accomplished in principle at a mediation on October 6, 2004. All parties to the litigation then negotiated the details of a final settlement agreement (Settlement Agreement).

The Settlement Agreement (Mot. to Dis. Ex. 1) contained a number of provisions dealing with the parties' various claims against each other. However, two provisions are particularly relevant to the present case. First, paragraph 6 states that "HealthSouth hereby places with Elite, for collecting purposes only, certain account receivables from patient services, which are due and unpaid and contained in the data stored at Edeltacomm in Atlanta and to which HealthSouth does not otherwise have access (the 'Accounts')." Second, paragraph 27 states that:

> If, after six (6) months, the parties determine that the amount of the receivables in the Accounts was less than $15,000,000.00 (in gross amount, without any reference to contractual write-offs or the collectibility of any account) at the time the Accounts were assigned to Elite pursuant to this Agreement, HealthSouth shall assign to Elite $5,000,000.00 in other accounts receivable for collection.

Defendant made certain payments to plaintiff and Edeltacomm to facilitate the startup of collections on "the Accounts" and restore its access to information on EliteMed. Plaintiff resumed collections on November 1, 2004. Shortly thereafter, one of plaintiff's employees contacted defendant to ask for data dumps that would allow plaintiff to collect on Non-Converted Accounts. (Stone Dep. pp. 79-82) Defendant apparently responded that the Non-Converted Accounts were not a part of "the Accounts" transferred under paragraph 6 of the Settlement Agreement and the present dispute surfaced.

Claims and Motions

Plaintiff's original complaint sought a declaratory judgment setting out which accounts were required by paragraph 6 of the Settlement Agreement to be placed with Elite for collection. It took the position that both the Converted and Non-Converted Accounts should have been placed with it. In the event that the Court determined that only the Converted Accounts were covered, plaintiff also sought an alternative declaratory judgment determining the value of those accounts under paragraph 27 of the Settlement Agreement. It took the position that the value was less than the required $15,000,000. Plaintiff also sought an accounting of all monies collected on both the Converted and Non-Converted Accounts following the date of the Settlement Agreement. In the event that the Court found that both types of accounts should have been transferred under the Settlement Agreement, it asked that the monies collected be considered part of a Court imposed constructive trust that was to be shared appropriately between the parties. If the Court determined that only the Converted Accounts were transferred, plaintiff sought to have the trust imposed on only monies that had been collected on the Non-Converted Accounts through its efforts. This is an apparent reference to the collection efforts it made on the Non-Converted Accounts prior to being told by defendant that those accounts were not covered by the settlement agreement. Plaintiff claimed that it should be paid at the standard commission in the collection industry on this money in

order to prevent defendant from being unjustly enriched by plaintiff's collection efforts on the Non-Converted accounts.

Following the filing of the original complaint, defendant answered and counterclaimed seeking a declaratory judgment essentially opposite of that sought by plaintiff. Discovery proceeded and concluded in the case, and defendant filed a motion for summary judgment. Plaintiff then filed an amended complaint adding a breach of contract claim based on essentially the same facts and contentions as its earlier claims for equitable relief. Finally, defendant did not answer the amended complaint, but instead filed a motion to dismiss the amended complaint for failure to state a claim on which relief can be granted.

Because of the peculiar posture of the case, with the complaint being amended after the filing of a summary judgment motion, both parties have suggested that the Court either treat the motion to dismiss as one for summary judgment or at least consider the well-developed record that has been submitted with the summary judgment motion. The Court accedes to these requests. To do otherwise, could result in a great deal of wasted, repetitive work for the parties. If the motion to dismiss were considered alone and denied, the parties would then needlessly resubmit their briefs and exhibits for yet another summary judgment motion. This would not be a wise use of the resources of either the Court or the parties, particularly where, as here, the essential facts of the

case are not in dispute and the parties merely need a legal ruling on the meaning of their settlement agreement.[2]

Discussion

The dispute between the parties in deciding these motions before the Court boils down to whether the two contested Settlement Agreement provisions are ambiguous so that either of the parties' reading of the passages could be viable, or whether the terms are unambiguous so that only defendant's reading can be correct. The parties submit North Carolina law as controlling the outcome of the issues surrounding the two contested paragraphs of the Settlement Agreement.

"A court's primary purpose in interpreting a contract is to ascertain the intention of the parties." Glover v. First Union Nat. Bank of North Carolina, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). Language in a contract is ambiguous if it is "fairly and reasonably susceptible to either of the constructions asserted by the parties." Id. (citing St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc., 322 N.C. 77, 366 S.E.2d 480

[2]Plaintiff states in its response brief that the Court should treat the motion as one for summary judgment and consider the record only as to the claims for declaratory judgment, constructive trust, and an accounting. It would seem that plaintiff would want the Court to treat the motion to dismiss as one for summary judgment as to these claims and one to dismiss as to the contract claim. It has not given a reason to do this and the Court cannot see one. The contract claim is based on the same documents and constructions of the documents as the other claims in the complaint. Plaintiff has not even suggested that different evidence or arguments could apply to it or that it would not stand or fall in unison with the other claims. Nor has plaintiff suggested that the Court should strike the motion for summary judgment as to the other claims, which the Court would do rather than attempt to decide the case piecemeal. For this reason, the Court will consider the record that has been developed as to all of the claims. Fed. R. Civ. P. 12(b)(6). Again, to do otherwise would result in needless expense for the parties.

(1988)). In making this determination, "'words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible.'" Anderson v. Anderson, 145 N.C. App. 453, 458, 550 S.E.2d 266, 269-270 (2001)(quoting Piedmont Bank and Trust Co. v. Stevenson, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52, aff'd, 317 N.C. 330, 344 S.E.2d 788 (1986)). Finally, "a contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each." Marcoin, Inc. v. McDaniel, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984)(citing State v. Corl, 58 N.C. App. 107, 293 S.E.2d 264 (1982); 4 S. Williston, A Treatise On The Law of Contracts, § 618(3) (3d ed. 1961)).

I.

As stated previously, the first disputed paragraph in the Settlement Agreement is paragraph 6 which reads: "HealthSouth hereby places with Elite, for collecting purposes only, certain account receivables from patient services, which are due and unpaid and contained in the data stored at Edeltacomm in Atlanta and to which HealthSouth does not otherwise have access (the 'Accounts')." Defendant reads this sentence as requiring it to give plaintiff accounts which meet four criteria: (1) they are due, (2) they are unpaid, (3) they are stored at Edeltacomm, and (4) defendant has no other access to the accounts. According to defendant, this criteria defines and can only define the Converted Accounts to which plaintiff controlled access. This construction is reasonable.

Plaintiff proposes a different reading. It claims that the statement requires defendant to assign "all of the accounts stored in the data." (Pl. Res. to Def. Summ. Judg. Mot. p. 5) Plaintiff's construction of the disputed provision is not a reasonable construction in light of the principles set out previously. The Settlement Agreement does not use the term "**all** account receivables," but explicitly and specifically uses the phrase "**certain** account receivables." To read the sentence to cover all accounts would take away or ignore the meaning of the term "certain."

Plaintiff recognizes the above problem and states that the use of the word "certain" was either to exclude direct bill accounts[3] or to differentiate between accounts stored in data at Edeltacomm and those stored by plaintiff in hard copy. With this construction, plaintiff attempts to convince the Court that the word "certain" does not refer to the four criteria following the words, but either has an independent meaning or only refers to one criterion. The mere statement of the argument forecasts its doom. First, nothing on the face of the language shows that the parties were concerned with making a distinction between direct bill versus non-direct bill accounts. If they were, they surely would have made the distinction by using that terminology in the latter portion of the sentence, but they did not. The Court cannot find

[3]Plaintiff fails to define or identify direct bill accounts and show that they are not accounts receivable stored in data at Edeltacomm and that defendant does not have access to them. Instead, it merely says that it was prohibited from collecting such accounts.

such a meaning without some indication that the meaning was intended. As for plaintiff's attempt to claim that the word "certain" was used to distinguish between hard copies held by plaintiff and electronic copies stored as data at Edeltacomm, the Court rejects it. That construction fails to recognize that the purpose of the sentence and the reference of the word "certain" is an attempt to distinguish between accounts, not the different formats in which accounts may be viewed or used.

Next, plaintiff tries unsuccessfully to explain the phrase "to which HealthSouth does not otherwise have access" as meaning if an account was stored electromagnetically as 'data," defendant did not have access to it so the phrase is just another way to describe electromagnetically stored data. Again, the argument is not reasonable and is even less so in face of defendant's contention that the phrase is meant to distinguish between Converted and Non-Converted Accounts. Plaintiff's various suggested constructions discussed above do not give effect to each clause and word in the contract and, therefore, are not consistent with the rules for contract construction in North Carolina.

For the reasons just stated, the Court finds that plaintiff's construction of the sentence is not a reasonable one and that defendant's construction of the sentence is the only proper construction for this unambiguous paragraph in the Settlement

Agreement. It is the only construction that gives meaning to all parts of the paragraph.[4]

In addition to the language based argument raised above, plaintiff also attempts to rely on extrinsic evidence to establish that its interpretation of the Settlement Agreement is correct. However, because the contested language is unambiguous on its face, the Court will not consider this extrinsic evidence. Extrinsic evidence cannot be used to call an unambiguous provision into question.[5] An ambiguity must first exist before resorting to

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[4]It is also the only construction that gives meaning to the other contested portion of the Settlement Agreement, paragraph 27. That paragraph mandates that defendant provide plaintiff with at least $15,000,000 in accounts for collection. While the parties differ over how the Converted Accounts should be valued to determine whether that figure is met, it is significant that, as will be seen, plaintiff argues that the accounts are worth approximately $12,500,000 and defendant argues that they are worth about $31,000,000. Both of these numbers for the possible value of the Converted Accounts are at least somewhat near to the $15,000,000 threshold amount set out in the contract. However, the Non-Converted Accounts are worth over $200,000,000--a number far in excess of the $15,000,000 requirement. (Nanos Aff. ¶ 8) If both the Converted and Non-Converted accounts had been included in paragraph 6, the threshold amount in paragraph 27 would be so ridiculously low as to be unneeded.

[5]Some of this evidence deals with plaintiff's subjective belief in signing the Settlement Agreement that it would get to collect on both the Converted and Non-Converted Accounts. However, "'[i]n the matter of mutual assent, the law is concerned with the [parties'] external manifestation rather than the[ir] undisclosed mental state.'" (Summ. Judg. Brf. p. 13)(quoting <u>King v. Oakwood Home, Inc.</u>, No. 1:99CV00549, 2000 WL 1229753, *3 (M.D.N.C. Aug. 3, 2000)(unpublished)). Plaintiff's beliefs cannot be used to contradict the unambiguous language of the Settlement Agreement. Much of plaintiff's evidence only goes to support an argument of unilateral mistake, but such a mistake would only serve to negate a contract and then only where there is also fraud, oppression, or undue influence or a defendant caused the mistake or knew of it. <u>Taylor v. Gore</u>, 161 N.C. App. 300, 304, 588 S.E.2d 51, 55 (2003)(other party caused or had reason to know of mistake); <u>Thompson v. First Citizens Bank & Trust Co.</u>, 151 N.C. App. 704, 710, 567 S.E.2d 184, 189 (2002)(fraud, oppression, undue influence). No evidence of such circumstances is present here. Finally, it is difficult to see how, given the $15,000,000 requirement in paragraph 27 of the Settlement Agreement, plaintiff could have reasonably, as opposed to mistakenly, thought that the contract covered accounts with a total value well over ten times

(continued...)

extrinsic evidence is appropriate. Holshouser v. Shaner Hotel Group Properties One Ltd. Partnership, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999).

Plaintiff also makes one additional argument about paragraph 6. It claims that even if defendant is correct that less than all accounts were to be assigned, there is still a dispute over which accounts were really included. It asserts that the term "access [to accounts]" is ambiguous because defendant did not have access to non-transactional data for the Non-Converted accounts and also because it did have access to the Converted accounts in hard copy or scanned form. Therefore, it states that defendant's argument about the Converted versus the Non-Converted accounts can only be accepted if "access" is read as "access to the electronic format of the transactional data in EliteMed." This suggested reading of the term "access" is actually a reasonable construction of the contract.

Plaintiff has not advanced a reasonable alternate meaning of "access," other than its previously rejected attempt to essentially read the entire access provision out of the contract. Plaintiff argues that defendant actually had "access" to data from Converted Accounts because the information was originally generated in, downloaded from, and remained in defendant's Dalcon system. It further asserts that defendant had transactional data on Converted Accounts in hard copy or scanned form "and thus technically had

[5] (...continued)
that amount, rather than the Converted Accounts which are much closer to that value.

'access' to all data." (Pl.'s Br. at 17) These hyper-technical arguments are not reasonable because contract language construction does not take place in a vacuum, but in light of all provisions and the basic facts surrounding the contract.[6]

II.

The second disputed provision of the Settlement Agreement is paragraph 27. Again, it requires that the value of the accounts given to plaintiff for collection under the Settlement Agreement must be at least $15,000,000 at the time of the assignment of the accounts. It also specifies that the value is to be figured as a "gross amount, without reference to contractual write-offs or the collectibility of any account." The valuation process was to occur six months after the assignment of the accounts. As already stated, when the parties valued the accounts, plaintiff valued the accounts at about $12,500,000, while defendant valued them at about $31,000,000. The disagreements that produced these very different numbers are two-fold.

First, plaintiff reads the paragraph to mean that the write-offs exclusion only covered write-offs taken after the assignment, but that write-offs taken prior to assignment were not to be considered in valuing the accounts. Defendant reads the paragraph to mean that accounts were to be valued without regard to write-offs, with no exceptions.

[6]As for the evidence of hard copies, it does not appear that plaintiff would truly want defendant's access to hard copies and scanned copies to be considered as a possible meaning of "access" in the Settlement Agreement. If so, this would mean that not even the converted files should have been turned over.

Second, there is also a disagreement over the reference to "collectibility." Plaintiff believes that the term refers only to the age of the accounts and the chances that a particular customer will pay. It agrees that the value of the assigned accounts should not be adjusted for these factors. However, plaintiff's calculation does adjust the value of the assigned accounts by considering accounts that are uncollectible for other reasons, such as being inter-company accounts or accounts that are not particularized to a patient. In other words, it reads the contract to allow adjustments based on certain types of collectibility, but not others. Defendant apparently did not consider collectibility in any form when calculating its number.

The contract between the parties is clear that the value of the accounts assigned is to be figured without regard to write-offs. This term is not limited on its face in any way so that it possibly could be read to mean only write-offs that occurred only at a certain time. Additionally, the term "gross amount" would actually show just the opposite, i.e. that the term means exactly what it says and that no adjustment to the basic value of the accounts is to be made on the basis of any write-offs. The language of the contract is plain, unambiguous, and consistent only with defendant's valuation of the accounts.

Plaintiff may well have a stronger argument on collectibility. Unlike write-offs, where it appears that only one type or category of write-offs existed and that the only difference between the parties was whether the timing of the write-offs mattered, there

appear to be entirely different types of collectibility issues. Both parties agree that, if the accounts are of the type that plaintiff is both allowed to collect on and that it can theoretically collect on, then the value of those accounts should not be adjusted for age or any other fact that might make the theoretical possibility of collection less likely to become a reality. This is one possible type of "collectibility" issue. However, the parties agree that this type of collectibility is not to be considered under the Settlement Agreement.

The parties' only disagreement is over accounts where plaintiff is either not allowed to collect or, according to plaintiff, collection is an impossibility because the account is not linked to a specific patient. Defendant argues that the exclusion of "collectibility" considerations in Paragraph 27 is broad enough to encompass all types of accounts, while plaintiff claims it is narrower and refers only to not taking age and like factors into consideration.

The Court agrees that two possible definitions for the term "collectibility" exist and that plaintiff's is at least a plausible, if not the better, reading of the term. However, a ruling to this effect does plaintiff no good because of the earlier decision that no write-offs were to be taken into account. Plaintiff's expert began with an account value of about $18 million. This figure did not take prior write-offs into account by adding them back. (Bowman Dep. p. 94) He then adjusted the figure for unidentified accounts, intercompany accounts, certain later

write-offs, and accounts with a positive balance to arrive at a final figure of about $12.5 million. (Pl. Exp. Supp. Statement Ex. G.) Therefore, the value of all plaintiff's "collectibility" adjustments is some amount less than the $5.5 million in total adjustments made by plaintiff's expert.

Tara Vail, the person who figured the value of the accounts for defendant, agreed in her deposition that the starting value for the accounts, if prior write-offs were not added back, was about $18 million--the same approximate value used as a starting point by plaintiff's expert. She disagreed that further downward adjustments should then be made. Of more importance, however, she stated that if the accounts were adjusted to add in the prior write-offs, the starting value was over $30 million. (Vail Dep. p. 30) This places the value of the contractual write-offs at around $12 million. The Court has already determined that the value of the write-offs is to be left in when figuring the value of the accounts under the Settlement Agreement. Thus, when the $12 million in write-offs is added back in with plaintiff's proposed value of $12.5 million, the total value is $24.5 million--well over the $15 million requirement in the Settlement Agreement. The Settlement Agreement threshold of $15 million is easily satisfied even if plaintiff's $5.5 million in proposed additional adjustments is considered. It is the $12 million in write-offs that makes the difference in the case. The question over the definition of

"collectibility" is irrelevant and the existence of a dispute over that term alone does not preclude a decision in defendant's favor.[7]

In addition to its specific arguments about the construction of the language in paragraphs 6 and 27, plaintiff contends that if those provisions are to be read as defendant believes they should be, then no settlement agreement exists because there was never a meeting of the minds between the parties. It claims that the Court must resolve whether there was such a meeting of the minds and, if so, what the terms of the agreement are. In support of this argument, it cites two Fourth Circuit cases and one case from this Court. See Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991); Stewart v. Coyne Textile Services, 96 Fed. Appx. 887 (4th Cir. 2004); Martin v. Senn Dunn LLC, No. 1:05CV00063, 1:05CV00462, 2005 WL 2994424 (M.D.N.C. Nov. 7, 2005). However, all of those cases involved situations where, unlike the case at bar, there was no final written agreement signed by both parties. Here, such an agreement does exist, the Court has already determined that it is unambiguous, and plaintiff cannot use extrinsic evidence of its unexpressed subjective intent to contradict this fact. "If the plain language of the contract is clear and unambiguous, the intention of the parties is inferred from the words of the contract, and no extrinsic evidence is required." Senn Dunn, 2005

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[7]There is some theoretical possibility that certain "direct bill" accounts were mistakenly included in defendant's $31,000,000 figure. (Vail Dep. p. 49) Vail conceded that, if so, those types of accounts should likely not have been included. (Id.) However, plaintiff has not shown either that this type of account actually was included or even suggested that the value of these accounts could be so high that subtracting them could reduce defendant's number below $15,000,000.

WL 2994424 at *3)(citing Southern Furniture Co. of Conover, Inc. v. Department of Transp., 133 N.C. App. 400, 403, 516 S.E.2d 383, 386 (1999), and First-Citizens Bank & Trust Co. v. 4325 Park Rd. Assocs., 133 N.C. App. 153, 156, 515 S.E.2d 51, 54 (1999)). Plaintiff's final argument is rejected and defendant's motion should be granted as to plaintiff's claims for declaratory judgment and breach of contract.

III.

There is one remaining matter to be disposed of in the case. While the heart of plaintiff's claims appears to be its declaratory judgment and breach of contract claims, it also seeks an accounting and one of two alternative constructive trusts. The accounting sought is an accounting of all monies collected on both the Non-Converted and Converted Accounts since the date of the Settlement Agreement. The first possible constructive trust sought is on monies collected on the Non-Converted and Converted Accounts that have not been disbursed to plaintiff under the Settlement Agreement (Amended Compl. ¶ 56) The second is requested only in the event that the Court does not agree that the Non-Converted Accounts should have been placed with plaintiff for collection. If this occurs, and it has, plaintiff asks that the Court impose a constructive trust on only the portion of monies collected by plaintiff's efforts on the Non-Converted Accounts that equals the standard commission in the collection industry. Plaintiff apparently reasons that, even if it was not supposed to collect the money under the Settlement Agreement, it would be unfair to allow

defendant to profit from plaintiff's efforts without paying the standard commission.

Plaintiff agrees in its response to the original motion for summary judgment that the claims for an accounting and constructive trust should remain only "unless and until the disputed provisions are resolved in HealthSouth's favor." (Resp. to Summ. Judg. Mot. p. 20) However, it is not clear whether this concession is aimed only at its initial request for a constructive trust on all of the accounts in the event that the Court agreed with its proposed interpretation of the Settlement Agreement or whether plaintiff actually intends to abandon its entire claim for an accounting and constructive trust. The Court will assume that the statement is nothing more than a concession to the reality already expressed in the complaint that, if the Court found that the Non-Converted Accounts were not to be placed with plaintiff for collection, plaintiff would not be entitled to a constructive trust on all collected monies. It will not construe the statement as abandoning the claim entirely, but will consider plaintiff's alternative request for a more limited constructive trust.

Defendant argues that no constructive trust is appropriate because plaintiff had no right to collect on the Non-Converted Accounts and constructive trusts ordinarily arise in situations where a party obtains property by fraud or in violation of a duty owed to another. This statement is true as far as it goes. See, e.g., Patterson v. Strickland, 133 N.C. App. 510, 521, 515 S.E.2d 915, 922 (1999). However, while this is **ordinarily** the case, it is

not clear that North Carolina law imposes the strict limits on the application of constructive trusts as defendant suggests. See Roper v. Edwards, 323 N.C. 461, 465-66, 373 S.E.2d 423, 425-26 (1988)(constructive trusts are equitable devices that can be used whenever a party acquires and holds property against equity and good conscience or to prevent unjust enrichment.) Therefore, such a trust might be an appropriate remedy on a claim such as unjust enrichment or quantum meruit. Also, even where a constructive trust is not an available remedy, other equitable remedies such as disgorgement or payment of the reasonable value of goods and services inequitably accepted can be used to prevent unjust enrichment. See Graham v. Martin, 149 N.C. App. 831, 561 S.E.2d 583 (2002).

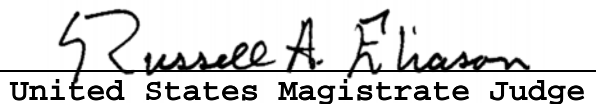
The parties have not delved deeply into these issues, nor have they discussed the possible amounts in question. In these circumstances, the Court finds that the best approach is to deny summary judgment on plaintiff’s request for an accounting and equitable relief as to its assertion that defendant was unjustly enriched because of efforts plaintiff made to collect on the Non-Converted Accounts. This will mean that a trial on the matter will be necessary. However, the Court notes that it is also the type of claim that can often be readily settled by the parties and that neither plaintiff nor defendant may actually wish to pursue the matter to trial in any event. For these reasons, counsel for the parties should promptly discuss the matter to see if a resolution can be reached and advise the Court within five days of the entry

of an order on the Recommendation as to whether a trial on the issue will be necessary.

IT IS THEREFORE RECOMMENDED that defendant's original motion for summary judgment (docket no. 24) and defendant's motion to dismiss (docket no. 40), which is being considered as a motion for summary judgment based on the evidence and arguments in defendant's original summary judgment motion, be granted as to all claims except the portion of plaintiff's claim for an accounting and constructive trust described above.

IT IS FURTHER RECOMMENDED that the parties advise the Court as to whether a trial on the remaining portion of the claim is necessary within five days of the entry of an order on the Recommendation.

IT IS ORDERED that objections to the Recommendation are due by May 18, 2006 and responses to objections are due on or before May 30, 2006.



United States Magistrate Judge

May 5, 2006