2016 WL 631574
United States District Court,
W.D. Washington,
at Seattle.

DZ Bank AG Deutsche Zentral-Genossenschaftsbank, Plaintiff,
v.
Connect Insurance Agency, Inc., Defendant.

CASE NO. C14-5880JLR
|
Signed February 14, 2016.
|
Filed 02/16/2016

Attorneys and Law Firms

Allison E. Kahrnoff, David Alexander Darcy, Askounis & Darcy, PC, Chicago, IL, Michael W. Johns, Roberts Johns & Hemphill PLLC, Gig Harbor, WA, for Plaintiff.

Susan L. Fullmer, Marc S. Stern, Seattle, WA, for Defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

***1** Before the court are: (1) Plaintiff DZ Bank AG Deutsche Zentral-Genossenschaftsbank's ("DZ Bank") motion for summary judgment (DZ Mot. (Dkt. ## 64 (redacted), 66 (sealed)), and (2) Defendant Connect Insurance Agency, Inc.'s ("Connect's") motion for summary judgment (Con, Mot. (Dkt. ## 73 (redacted), 74 (sealed)). The court has considered the motions, all submissions filed in support thereof and opposition thereto, the balance of the record, and the applicable law. In addition, the court heard the argument of counsel on February 10, 2016. Being fully advised, the court GRANTS in part and DENIES in part DZ Bank's motion and DENIES Connect's motion as more fully described below.

II. BACKGROUND

DZ Bank is a bank registered under the laws of the Federal Republic of Germany, and it maintains a place of business in New York, New York. (Probst Aff. (Dkt. # 65) U 4.) Connect is a Texas corporation with its principal place of business in Texas and also a Florida corporation with its principal place of business in Florida. (Am. Ans. (Dkt. # 10) ¶ 65.) Connect is registered to do business in Washington. (DZ Mot Ex. A (Dkt. # 64-1).)[1] On November 11, 2014, DZ Bank sued Connect for conversion and unjust enrichment for allegedly taking collateral belonging to DZ Bank without DZ Bank's consent and without compensating DZ Bank. (See Compl. (Dkt. # 1).) The court details the complex financial background that lead to the current dispute below.

A. DZ Bank's Security Interest in Loans by BCC

On August 27, 2004, Brooke Credit Company ("BCC"), as seller, entered into a Sale and Servicing Agreement with Brooke Credit Funding, LLC ("BCF"), as buyer and issuer, and Textron Business Services, Inc., as initial servicer. (*See* Probst Aff. ¶ 10.) The Sale and Servicing Agreement provided for the transfer of various loans then payable to BCC by third parties ("the Sales Agreement"). (*See id.*) The Sale and Servicing Agreement also provided for the transfer of then-future loans from BCC to BCF upon the agreement of the two parties. (*Id.*) On the same day, BCF, as borrower, entered into a Credit and Security Agreement with BCC, as seller, and Brooke Corporation, as servicer and guarantor, Autobahn Funding Company, LLC ("Autobahn"), as lender, and DZ Bank, as agent for Autobahn. (*Id.*) The Credit and Security Agreement obligated Autobahn to finance BCF's acquisition of the various loans under the Sales Agreement. (*Id.*)

On August 29, 2006, BCF, as borrower, BCC, as seller, Brooke Corporation, as subservicer and guarantor, Autobahn, as lender, and DZ Bank, as agent for Autobahn, entered into an Amended and Restated Credit and Security Agreement ("the Amended Security Agreement"). (*Id.* ¶ 11, Ex, 1 (attaching the Amended Security Agreement); *see also* Con. Mot. at 2 (acknowledging this agreement in paragraph designated 2.4).) Under the Amended Security Agreement, Autobahn agreed to loan certain funds to BCF for BCF's purchase of various loans from BCC under the Sale Agreement.

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

(Probst Aff. ¶ 12, Ex. 112.04.)

***2** To secure BCF's obligations to Autobahn under the Amended Security Agreement, BCF granted DZ Bank, as Autobahn's agent, a security interest in: (1) all of its rights, title, and interest in and to various loans that BCF had already purchased from BCC under the Sale Agreement; (2) all of its rights, title, and interest in and to various loans that BCF would purchase from BCC in the then-future under the Sale Agreement; and (3) various other collateral. (*Id.* ¶ 13, Ex. 1 ¶¶ 2.12-. 13; *see also* Am. Ans. ¶ 78 ("Unbeknownst to the Franchisees, Brooke had pledged the notes as security for loans from DZ Bank, which funded the purchases of the franchises.").) DZ Bank perfected its security interest in the Amended Security Agreement by filing Uniform Commercial Code ("UCC") Financing Statements against BCC and BCF. (*Id.* ¶ 14, Ex. 2.)

B. BCC Finances Advantage Pacific's Purchase of an Insurance Agency

On February 26, 2008, Advantage Pacific Insurance, Inc. ("Advantage Pacific"), as purchaser, entered into an Agreement for Purchase of Agency Assets ("Advantage Purchase Agreement") with Insurance Express Services, Inc. and Robert Spruill, as sellers (collectively, "Seller"). (*Id.* ¶ 15, Ex. 3.) The Advantage Purchase Agreement obligated Seller to transfer substantially all of the Seller's assets for two Brooke Insurance franchises, including Seller's book of business, customer accounts, and all other intangible assets (the "Advantage Agency Assets"), in exchange for $235,346.00. (*Id.* ¶ 15, Ex. 3; *see also* Con. Mot. at 3 (acknowledging this agreement in the paragraph designated 2.9).)

On February 29, 2008, BCC, as lender, and Advantage Pacific, as borrower, entered into a Promissory Note known as Loan No. 6852 and an Agreement for Advancement of Loan (collectively, "Advantage Note"), in which BCC agreed to loan Advantage Pacific $230,287.00 toward Advantage Pacific's purchase of the Advantage Agency Assets under the Advantage Purchase Agreement. (*Id.* ¶ 16, Ex. *4; see also* Am. Ans. ¶ 75 ("In February 2008, Advantage Pacific paid $5,000 cash, pledged his existing book of business, which Brooke valued at approximately $160,000 and agreed to sign a note in the amount of 5230,287.00.").) David Coley guaranteed Advantage Pacific's obligation under the Advantage Note pursuant to a guaranty ("Advantage Guaranty").[2] (Probst Aff. ¶ 17, Ex. 5.)

To secure Advantage Pacific's obligations under the Advantage Pacific Note, Advantage Pacific granted BCC a blanket security interest in all of Advantage Pacific's personal property, including the Advantage Agency Assets, client accounts and rights to payment, and all proceeds therefrom (collectively, "Advantage Collateral"), pursuant to a commercial security agreement ("Advantage Security Agreement"). (*Id.* ¶ 18, Ex. 6.) The Advantage Collateral includes general intangibles, which includes client lists. (*Id.* Ex. 6 at 1.)

Pursuant to the loan documents executed by Advantage Pacific, BCC paid $230,287.00 to Seller toward Advantage Pacific's purchase of the Advantage Agency Assets. (*Id.* ¶ 19.) In accord with the Bill of Sale under the Advantage Purchase Agreement, and in exchange for the purchase price of $235,346.00, Seller transferred all of its right, title, and interest in and to the Advantage Agency Assets to Advantage Pacific. (*Id.*; *see also id.* ¶ 16, Ex. 4.) BCC perfected its security interest in the Advantage Collateral by filing a Uniform Commercial Code ("UCC") Financing Statement ("Advantage Financing Statement") with the Washington Secretary of State, (*Id.* ¶ 20, Ex. 7.)

On February 29, 2008, contemporaneously with BCC and Advantage Pacific's execution of the Advantage Note, BCF sent a Borrowing Base Certificate to DZ Bank. (*Id.* ¶ 21, Ex. 8.) In this Certificate, BCF requested that Autobahn advance funds to BCF under the Amended Security Agreement for BCF's purchase of the Advantage Note and various other loans. (*Id.*) Under the Amended Security Agreement, on or about February 29, 2008, Autobahn loaned BCF $230,287.00 to purchase the Advantage Note from BCC. (*Id.* ¶ 22.) In conjunction with this, BCC assigned the Advantage Note to BCF, and the Advantage Note, Advantage Guaranty, and Advantage Security Agreement became immediately subject to DZ Bank's lien under the Amended Security Agreement. (*Id.* ¶ 22, Ex. 1 ¶¶ 2.12-2.13.)

C. BCC Finances API's Purchase of an Insurance Agency

***3** On October 31, 2007, BCC, as lender, and CrullADD, Inc., as borrower, entered into a Promissory Note known as Loan No. 6486 and an Agreement for Advancement of Loan (collectively, "Note 6486"), in which BCC agreed to loan CrullADD $962,208.42 toward CrullADD's refinance of existing BCC debt. (*Id.* ¶ 23, Ex. 9.)

On October 31, 2007, contemporaneously with BCC and CrullADD entering into Note 6486, BCF sent a Borrowing Base Certificate to DZ Bank. (*Id.* ¶ 24, Ex. 10.) In this Certificate, BCC requested that Autobahn advance funds to BCF under the Amended Security

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

Agreement for BCF's purchase of Note 6486 and various other loans. (*Id.* ¶ 24, Ex. 10.) Under the Amended Security Agreement, on or about November 1, 2007, Autobahn loaned BCF $962,208.42 to purchase Note 6486 from BCC. (*Id.* ¶ 25.) BCC assigned Note 6486 to BCF, and Note 6486 became immediately subject to DZ Bank's lien under the Amended Security Agreement. (Id. ¶ 25, Ex. 1 ¶¶ 2.12-2.13.)

On June 27, 2008, API Vancouver Insurance, Inc. ("API"), as assignee, and BCC, as secured creditor and assignor, entered into a Bill of Sale and Instrument of Conveyance in Foreclosure ("API Bill of Sale")[3] for the transfer to API of all collateral secured by BCC pursuant to Note 6486 in exchange for the purchase price of $350,000.00.[4] (*Id.* ¶ 26, Ex. 11.) This collateral included substantially all of the assets of CrullADD doing business as Brooke Insurance Franchise No. 948, including the agency's book of business ("API Agency Assets"). (*Id.*) On the same day, BCC, as lender, and API, as borrower, entered into an Amendment to Promissory Note whereby API assumed all of CrullADD's obligations pursuant to Note 6486 by Assumption Agreement dated June 27, 2008, and wherein the principal loan balance was amended to $350,000.00 (collectively, "Amended Note 6486").[5] (*Id.* ¶ 27, Ex. 12.) Mr. Coley guaranteed API's obligations under Amended Note 6486 pursuant to a guaranty ("API Guaranty").[6] (*Id.* ¶ 28, Ex. 13.)

***4** To secure API's obligations under Amended Note 6486, API granted BCC a blanket security interest in all of API's personal property, including the API Agency Assets, client accounts and rights to payment, and all proceeds therefrom (collectively, "API Collateral"), pursuant to a commercial security agreement ("API Security Agreement"). (*Id.* ¶ 29, Ex. 14.) BCC, d/b/a Aleritas, perfected its security interest in the API Collateral by filing a UCC Financing Statement ("API Financing Statement") with the Washington Secretary of State. (*Id.* ¶ 30, Ex. 15.) Amended Note 6486, the API Guaranty, and the API Security Agreement became immediately subject to DZ Bank's lien under the Amended Security Agreement based upon DZ Bank's interest in Note 6486. (*Id.* ¶ 30, Ex. 1 ¶¶ 2.12-2.13.)

D. DZ Bank Forecloses on its Security Interest in the Advantage and CrullADD Notes and Security Agreements

In or about October 2008, BCF defaulted on its obligations to DZ Bank under the Amended Security Agreement. (*Id.* ¶ 32.) On October 30, 2008, DZ Bank, BCC, and BCF entered into a Surrender of Collateral, Consent to Strict Foreclosure, Release and Acknowledgement Agreement ("Surrender of Collateral"). (*Id.* ¶ 32, Ex. 16.) The Advantage Note and Amended Note 6486 (collectively, "Notes"), as well as the Advantage Security Agreement and API Security Agreement (collectively, "Security Agreements") are included in the Surrender of Collateral, (*Id.* ¶ 32, Ex. 17 ¶¶ B-C, 1.2; Ex. 16 (Annex 1).) Under Section 1.3.1. and other provisions of the Surrender of Collateral, DZ Bank has full ownership of the Notes and Security Agreements. (*Id.* ¶ 32, Ex. 16.) On October 31, 2008, DZ Bank and BCF entered into an Omnibus Assignment under which BCF further confirmed that DZ Bank has fall ownership of BCF's rights as BCC's assignee under the Notes and Security Agreements. (*Id.* ¶ 33, Ex. 17.)

In conjunction with the Surrender of Collateral and Omnibus Assignment, BCF executed an Allonge to Promissory Note, whereby BCF endorsed Promissory Note 6852 and made it payable to DZ Bank. (*Id.* ¶ 34, Ex. 4.) BCF then surrendered the original Notes, including Note 6486, and the original Security Agreements to DZ Bank, and DZ Bank remains in possession of the originals. (*Id.*) To further demonstrate DZ Bank's interest in the Advantage Note, BCC's Financing Statement was amended on April 14, 2008, to include DZ Bank as the secured party ("Amended Advantage Financing Statement"). (*Id.* ¶ 35, Ex. 18.) The court will refer collectively to the Advantage Financing Statement, the Amended Advantage Financing Statement, and the Advantage Security Agreement as the "Advantage Security Interest."

E. Connect Acquires the Advantage Collateral Secured by DZ Bank

Mr. Coley was the sole owner and operator of Advantage and API. (Coley Dep. at 17:3-9.) After opening Advantage Pacific and acquiring the Advantage Agency Assets through BCC, Mr. Coley formed API for the purpose of acquiring the API Agency Assets from BCC. (*Id.* at 11:11-22.)

Following the Surrender of Collateral and Omnibus Assignment, Brooke Corporation and Brooke Capital Corporation filed for Chapter 11 bankruptcy on October 28, 2008, in the Bankruptcy Court for the District of Kansas, Case No. 08-22789. (*See* Am. Ans. ¶ 94 ("[I]n October 2008, Brooke Corporation and Brooke Capital declared Chapter 11 bankruptcy and suspended most of their operations.").) Although Brooke no longer served as franchisor, Advantage Pacific and API remained in the insurance business. (Coley Dep. at 15:18-16:17; 17:19-18:11, Exs. 3-5, 7-9.)

In 2008, Alicia Pool formed Connect while her husband, Jeremy Pool, the Chief Executive Officer ("CEO") and a partial owner of Connect, was a Brooke franchisee. (DZ Mot. Ex. D ("Pool Dep.") at 6:19-24; 8:1-7; 11:11-18; 12:13-13:7.) Mr. Pool was on Brooke's franchise council, representing Brooke agents throughout the country as the "voice for the agents on the franchise side." (*Id.* at 17:14-24; J. Pool Decl. (Dkt. ## 93 (unsigned with exhibits), 107 (signed without exhibits)) ¶ 6.)[7] Beginning in 2008, Mr. Pool had contact with Mr. Coley over many months regarding their shared experiences and concerns over Brooke's failure, Mr. Coley's work with DZ Bank regarding the Notes, and whether Mr. Coley should fight DZ Bank. (Pool Dep. at 16:12-17:2; 18:7-19:20.) Mr. Pool knew that Advantage Pacific was a former Brooke franchisee. (Am. Ans. at 2 (¶ 1).) Additionally, pursuant to his role on Brooke's franchise council, Mr. Pool spoke directly with representatives from DZ Bank during Brooke's bankruptcy, and he testified that DZ Bank was the primary bank for the Brooke transaction. (Pool Dep. at 88:1-88:19; 134:1-17.)

***5** Connect subsequently purchased Advantage Pacific 's book of business, including all of its client accounts. (*See* Probst Aff. Ex. 19.) The sale is reflected in a letter, dated April 1,2010, from Mr. Coley to Connect. (*See id.*) The letter states that Advantage Pacific is selling all of its assets to Connect, including but not limited to its "[c]lient list at the date of sale" and its "goodwill... and all other business intangibles." (*Id.*) Indeed, Connect has admitted in its Amended Answer that it purchased Advantage Pacific. (Am. Ans. ¶¶ 32 ("Defendant admits that Advantage and Connect entered into a Buy Sell Agreement-Bill of Sale ..."), 47 ("In answer to paragraph 93 of the Complaint, Connect admits that Connect purchased certain Advantage Pacific assets ..."), 97 ("Advantage Pacific ultimately failed and was forced to sell its remaining accounts to ... Connect.").)

To effectuate the transfer of Advantage Pacific's book of business to Connect, Connect and Advantage Pacific wrote a series of letters to insurance carriers directing the carriers to transfer Advantage Pacific's producer codes to Connect's ownership and directing the carriers to pay all commissions to Connect. (*See* Pool Dep. at 47:3-56:17, 75:6-80:2, 136:10-25; *id.* Exs. 4-5 (Dkt. ## 64-18, 64-19); *see also* DZ Mot. Ex. E.) As a result, the carriers began to pay all commissions to Connect directly. (*See id*; *see* Pool Dep. at 36:23-24 ("Correct. The carriers pay us [Connect], and then we [Connect] pay the agents their percentages."); *see also* Probst Aff. Ex. 19 ("April 2010 Sales Letter") ("Commissions earned on premiums received ... prior to 4-1-2010 will be paid to Advantage Pacific .... Commissions earned on premiums received ... after 8-1-2010 will be paid to Connect.....").)

On January 1, 2011, Connect and Advantage Pacific also entered into a Producer Agreement. (*See* Pool Dep. at 27:14-29:12, Ex. 2 (Dkt. # 68-1) ("Producer Agreement"); DZ Mot. Ex. B.10. (Dkt. ## 64-9 (redacted) 67-1 (sealed)) ("Producer Agreement"); Fuller Decl. Ex. M (Dkt. # 78) ("Producer Agreement").) Mr. Pool testified that this agreement allowed Connect to transfer Advantage Pacific's book of business to Connect. (Pool Dep. at 28:21-24 ("This is what allows us to transfer the book of business and all the other stuff. ... [T]his is what gives us the contractual obligations of each party ....").) The Producer Agreement states: "Connect and Producer [Advantage Pacific] agree that Connect shall maintain a 100% undivided ownership interest in Producer's book of business." (Producer Agreement ¶¶ A(10), C(3).) Mr. Pool testified that the Producer Agreement has never been terminated of assigned and remains in effect. (Pool Dep. 36:17-19, 43:23-44:4.) The Producer Agreement also states that the Producer, which is Advantage Pacific, "shall receive the remaining ninety percent (90%) of the monthly commissions following the deduction of Connect's ten percent (10%) override that Connect receives under its contracts."[8] (Producer Agreement ¶ C(3).) Indeed, under the agreement, Connect receives all of the commissions derived from Advantage Pacific's book of business "at its home office." (*Id.* ¶ A(3).) Only after it has received all of the commissions does Connect "distribute Producer's [Advantage Pacific's] share of all commissions and/or bonuses in accordance with the terms stated in the Producer Agreement." (*Id.*)

***6** Connect did not conduct any due diligence prior to entering into its transactions with Advantage Pacific. (Pool Dep. at 30:21-31:5.) DZ Bank did not consent to the transfer of the Advantage Collateral or the API Collateral to Connect. (Probst Aff. ¶ 40.) Connect did not pay DZ Bank for the Advantage Collateral or the API Collateral. (*Id.* ¶ 41; *see also* Am. Ans. ¶ 39 ("[Connect] admits it did not make payments to DZ Bank....").) Connect collected hundreds of thousands of dollars in commissions related to its acquisition of Advantage Pacific. (*See* Pool Dep. 56:21-58:4; 60:18-61:12; 65:16-66:16; 74:7-15; 136:10-25.)

F. The API Collateral and Connect's Transaction with Advantage Pacific

DZ Bank asserts that the API Collateral was transferred to Connect as part of Connect's transaction with Advantage Pacific. In support of its position, DZ Bank notes that Mr. Coley testified that he managed API and Advantage Pacific as one company with a single bank account in the

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

name of Advantage Pacific. (Coley Dep. at 14:11-15:17.) However, he apparently continued to file separate tax returns for the two companies. (Fullmer Decl.[9] Ex. Q.) DZ Bank also points to the overlap between the client list maintained in Brooke's computerized insurance management system for API, which was designated as Brooke Franchise No. 948 (Probst Aft. ¶ 43, Exs. 21 (identifying API as No. 948), 22 ("API Client List")),[10] and Connect's annual commission reports for the Advantage Pacific book of business from January 2011 through My 2015 (DZ Mot. Ex. G ("Connect Client List"'); *see also* 11/19/15 Pool Decl. (Dkt. # 55) ¶ 7 ("I have examined the annual Commissions Reports produced to DZ Bank in discovery, which contain client lists.")). (*See* DZ Mot. at 11-12.) DZ Bank points out that Connect's annual commission reports include hundreds of customers whose names are also listed as clients for API in Brooke's computerized insurance management system. (*Id.* at 12 (citing Goa Aff. (Dkt. # 64-23); Annex A (Dkt. ## 69-70) (containing Ms. Goa's marked comparison of the API Client List to the Connect Client List).)

G. Advantage Pacific and API Default under the Notes and DZ Bank Obtains a Default Judgment

Advantage Pacific and API made their last payments on the Notes in March 2011 and April 2011, respectively. (Probst Aff. ¶ 36.) Under the Notes, non-payment is an event of default. (*Id.* ¶ 37, Exs. 4,12.) Accordingly, both Advantage Pacific and API defaulted on their respective Notes, and Mr. Coley defaulted under his respective guaranties as well. (*Id.* ¶ 36.)

DZ Bank filed a complaint against Advantage Pacific, API, and Mr. Coley in the United States District Court for the Western District of Washington for their breach of the Notes and guarantees ("Advantage/API Case"). *See DZ Bank v. Advantage Pacific Insurance, Inc., et al,* No. CI 1-5879BHS (W.D. Wash.), Dkt. # 1. On May 24, 2012, the court in the Advantage/API Case granted a default judgment in favor of DZ Bank and against Advantage Pacific in the amount of $214,678.38 and against API in the amount of $327,689.21 ("Advantage Judgment"). *See id.,* Dkt. # 24.

***7** On September 4, 2012, Advantage Pacific and API administratively dissolved. (DZ Mot. Ex. C (Dkt. # 64-15).) DZ Bank asserts that it learned about the transfer of the Advantage Collateral to Connect on February 28, 2013, during DZ Bank's post-judgment proceedings against Advantage Pacific. (Probst Aff. ¶ 39.) Specifically, during the course of a deposition on September 4, 2012, Mr. Coley produced a document dated April 1, 2010, reflecting the sale of Advantage Pacific's assets to Connect ("April 2010 Sale Letter").[11] (*Id.* Ex. 19.)

On May 31,2013, DZ Bank sent a letter to Connect demanding that Connect pay DZ Bank for the collateral that was transferred pursuant to the April 2010 Sale Letter. (*Id.* ¶ 42, Ex. 20.) Neither Connect nor Advantage Pacific nor any other third-party has paid DZ Bank for the Collateral or pursuant to the Advantage Judgment. (*Id.* ¶ 41.) On November 5, 2014, DZ Bank sued Connect for conversion of the Advantage Collateral and API Collateral and for unjust enrichment.[12] (*See generally* Compl.)

On December 8, 2015, DZ Bank filed a motion for summary judgment on both of its claims. (*See generally* DZ Mot.) On December 9, 2015, Connect filed a cross-motion for summary judgment on DZ Bank's tort claims and raised numerous affirmative defenses, both in its response to DZ Bank's motion for summary judgment and in its own motion.[13] (*See generally* Con. Mot.; Con. Resp.) The court now addresses those motions.

III. ANALYSIS

***8** DZ Bank has moved for summary judgment on its claims for conversion and unjust enrichment against Connect and for an award of damages. (DZ Mot at 15-24.) DZ Bank also argues that Connect's affirmative defenses lack merit. (*Id.* at 24-29.) Connect opposes DZ Bank's Motion. (Con. Resp.) Connect also moves for summary judgment on DZ Bank's claims and on its affirmative defenses. (Con. Mot. at 11-25.) DZ Bank opposes Connects motion. (DZ Resp. (Dkt. ## 88 (redacted), 89 (sealed).) The court now considers these motions.

A. Choice of Law

A federal district court exercising diversity jurisdiction applies the choice of law rules of the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941); *389 Orange St. Partners v. Arnold,* 179 F.3d 656, 661 (9th Cir. 1999). "When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis." *Erwin v. Cotter Health Ctrs,* 167 P.3d 1112, 1120 (Wash. 2007) (quoting *Seizer v. Sessions,* 940 P.2d 261, 264 (Wash. 1997)). DZ Bank urges the court to apply Washington law, where Connect is registered to do business and where both DZ Bank and

Connect contracted with Advantage Pacfic, (DZ Mot. at 14-15; Con. Mot. at 11.) Connect acknowledges that, absent a conflict, Washington law applies. (Con. Mot. at 11.) Neither party asserts any relevant conflict between Washington law and the law of Texas, where Connect is incorporated and maintains a principal place of business (*id.* at 10), New York, where DZ Bank maintains a place of business (DZ Mot. at 2 (citing Probst Aff. ¶ 4)), or Florida, where Connect also maintains a principal place of business (Con. Mot. at 10), or Washington (where Connect is registered to do business and where both DZ Bank and Connect contracted with Advantage Pacific).[14] (*See* DZ Mot. at 14-15; Con. Mot. at 11.) Accordingly, the court applies Washington law to DZ Bank's claims and Connect's affirmative defenses.[15]

B. Standards

***9** Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates "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); *see* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cty. of L.A., 477* F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-moving party "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial" in order to withstand summary judgment. *Galen*, 477 F.3d at 658. The court is "required to view the facts and draw reasonable inferences in the light most favorable to the [non-moving] party." *Scott v. Harris,* 550 U.S. 372, 378 (2007).

"[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Tulalip Tribes of Wash. v. Washington,* 783 F.3d 1151, 1156 (9th Cir. 2015) (quoting *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two,* 249 F.3d 1132, 1134 (9th Cir. 2001)). The court "rule[s] on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Id.* (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2720 (3d ed. 1998)); *see also* *ACLU of Nev. v. City of Las Vegas,* 466 F.3d 784, 790-91 (9th Cir. 2006) ("We evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." (citations and internal quotation marks omitted)).

C. DZ Bank's Claim for Conversion

Conversion is the unjustified interference with a chattel which deprives a person entitled to the property of possession. *Potter v. Wash, State Patrol,* 196 P.3d 691, 696-97 (Wash. 2008). DZ Bank argues that Connect converted DZ Bank's collateral by taking the Advantage Collateral and API Collateral pledged to DZ Bank without DZ Bank's consent and without compensating DZ Bank. When a debtor transfers collateral subject to a perfected security interest, the secured party may commence an action against the purchaser for conversion. *In re Courson,* 409 B.R. 516, 530 (Bankr. E.D. Wash. 2009) (citing *Wash, State Bank v. Medalia Healthcare, LLC,* 984 P.2d 1041, 1043-45 (Wash. Ct. App. 1999)). To prevail on its claim for conversion, DZ Bank must prove three elements: (1) that Connect intentionally interfered with DZ Bank's property, (2) by taking the property or retaining it unlawfully, and (3) that Connect thereby deprived DZ Bank, the rightful owner, of possession. *See* *Aldaheff v. Meridian on Bainbridge Island, LLC,* 220 P.3d 1214, 1223 (Wash. 2009).

Setting aside the API Collateral for the moment, DZ Bank presents substantial evidence that Connect converted the Advantage Collateral. The sale of Advantage Pacific is reflected in an April 1, 2010, letter from Mr. Coley to Connect (Probst Aff. Ex. 19), numerous letters from Connect and Advantage Pacific to various insurance carriers directing the carriers to transfer Advantage Pacific's producer codes to Connect's ownership and pay all commissions to Connect (*see* Pool Dep. at 47:3-56:17,75:6-80:21, 136:10-25, Exs. 4-5; *see also* DZ Mot. Ex. E), and the Producer Agreement between Connect and Advantage Pacific which twice recites that "Connect shall maintain a 100% undivided ownership interest in [Advantage Pacific's] book of business" (Producer Agreement ¶¶ A(10), C(3)). In addition to this evidence, DZ Bank points to Connect's admissions in its Amended Answer that it purchased Advantage Pacific's assets. (Am, Ans. ¶¶ 32, 47, 97.) Connect also admits that it never paid DZ Bank. (Am. Ans. ¶ 39 ("Defendant admits that it not make payments to DZ Bank.").) These undisputed facts establish the necessary elements that Connect converted DZ Bank's Advantage Collateral.[16] Nevertheless, Comiect raises numerous arguments as to why, despite the foregoing undisputed facts, the court should not enter summary judgment in DZ Bank's favor on its claim for conversion. The court addresses those arguments below.

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

1. The Producer Agreement

***10** Despite the forgoing facts, Connect argues that it did not exercise sufficient dominion or control over DZ Bank's property to be liable for conversion. Connect bases this argument on its commitment in the Producer Agreement to remit 90% of the commissions that it derives from Advantage's book of business back to Advantage Pacific. (*See* Con. Mot. at 12-16. (§§ 5.1.1-5.1.3); Con. Resp. at 10-13; *see also* Producer Agreement ¶ C(3) ("Producer shall receive the remaining ninety percent (90%) of the monthly commissions following the deduction of Connect's ten percent (10%) override that Connect receives under its contracts.").) The court, however, is not persuaded that Connect's execution of and participation in the Producer Agreement with Advantage Pacific provides any basis for denying summary judgment to DZ Bank on its claims.[17]

First, Connect ignores the fact that it agreed to purchase all of Advantage Pacific's assets prior to entering into the Producer Agreement. (*See* Probst Aff. Ex. 19.) Indeed, the Producer Agreement recites that Connect "shall maintain a 100% undivided ownership interest in [Advantage Pacific's] book of business." (Producer Agreement ¶¶ A(10), C(3).) Thus, the Producer Agreement reaffirms Connect's complete ownership of Advantage Pacific's book of business.

Second, under the terms of the Producer Agreement, it is Connect, not Advantage Pacific, that receives all of the commissions from the insurance companies and direct their disposition—remitting 90% to Advantage Pacific "following the deduction of Connect's ten percent." (*Id.* ¶ C(3).) Thus, the Producer Agreement demonstrates Connect's control over the assets because it allows Connect to direct the income stream produced by the assets in question. The court agrees with DZ Bank: that the only reasonable interpretation of the Producer Agreement is that Connect owns the assets or book of business and has contractually agreed to split the revenue stream generated by those assets, with Advantage Pacific receiving 90% and Connect receiving 10%. Rather than undermining DZ Bank's claim for conversion, the Producer Agreement reinforces it by demonstrating Connect's control over the Advantage Collateral.

2. Admissions in Connect's Amended Answer

Connect also asserts that it is not bound by the admissions it made in its amended answer, which confirm that it purchased Advantage Pacific's assets. (Con. Resp. at 13-18.) "A statement in a complaint, answer or pretrial order is a judicial admission." *Am. Title Ins. Co. v. Lacelaw Corp.,* 861 F.2d 224, 226 (9th Cir. 1988). Nevertheless, "[w]here ... the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." *Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848, 859-60 (9th Cir. 1995). Thus, the court considers the weight due to Connect's explanation for retracting the admissions in its amended answer.

Connect purports to withdraw the admissions in its Amended Answer on the basis of its late discovery of the Producer Agreement and its argument that discovery of the Producer Agreement altered its understanding of its own relationship with Advantage Pacific. (See Con. Resp. at 14-15 (citing Con. Mot. to Extend Expert Discovery (Dkt. # 33) at 2).) First, as noted above, the Producer Agreement specifically recites, not once but twice, that Connect "maintain[s] a 100% undivided ownership interest in [Advantage Pacific's] book of business." (Producer Agreement ¶¶ A(10), C(3).) Thus, the Producer Agreement is consistent with the admissions in Connect's amended answer and Connect's "discovery" of it cannot serve as a justification for Connect's withdrawal of those admissions. Second, Connect and Advantage Pacific entered into the Producer Agreement on January 1, 2011, and Connect admits that the Producer Agreement has never been terminated. (See Pool Dep. 36:17-19, 43:23~44:4.) Thus, the Producer Agreement was in effect on January 7, 2015, when Connect filed its amended answer and admitted that it had purchased Advantage Pacific's assets. (See Am. Ans.) The court is at a loss to understand how an agreement that was in effect when Connect filed its operative answer could subsequently alter Connect's understanding of its own relationship with Advantage Pacific.

***11** When a party fails to provide a credible explanation for the error, the court need not permit the party to withdraw its admission. *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.,* 995 F. Supp. 1060, 1065-66 (D. Ariz. 1997); *see also* *Bauer v. Tacey Goss, P.S.,* No. C 12-00876 JSW, 2012 WL 2838834, at * 3 (N.D. Cal. My 10,2012) ("Because Plaintiffs have not offered a credible explanation for their contradiction, the Court need not accept their amended allegations as true.") (citing *O'Connor v. Boeing N. Am., Inc.,* 92 F. Supp. 2d 1026, 1040 (CD. Cal. 2000)). Based on the foregoing, the court concludes that Connect's explanation for its "error" in admitting that it purchased Advantage Pacific is not credible. *See* *Valdiviezo,* 995 F. Supp, at 1065-66 (determining that plaintiffs assertion of mistake in arguing that the employment handbook was an enforceable

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

contract was not credible considering she had the handbook since her commencement of employment and did not change her belief for over a year "and only after Defendants moved to enforce the arbitration clause in that Handbook"); *Patriot Rail Corp. v. Sierra R.R. Co.,* No. 2:09-CV-0009-TLN-AC, 2015 WL 4662707, at *5 (E.D. Cal. Aug. 5, 2015) ("[The law] does not allow a party to contradict binding admissions to avoid an unwanted outcome."). Accordingly, the court declines to allow Connect to withdraw the admissions in its amended answer.

3. Connect's Good Faith and the Soto Agreement

In its motion, Connect refers to another agreement between itself and DZ Bank, which the parties refer to as the "Soto Agreement." (Con. Mot. at 6-7, 16-17; Fullmer Decl. Ex. J; *see* Probst Dep. (Dkt. ## 75-1 (redacted), 79 (sealed)) at 287:24-296:19.) In the Soto Agreement, DZ Bank and Connect agreed that with respect to a former Brooke franchisee, Janice Soto, Connect could remit payments to DZ Bank, and DZ Bank would credit them to Ms. Soto's debt to DZ Bank. (Fullmer Decl. Ex. J; Probst Dep. at 289:25-290:14.) Connect argues that it "believed in good faith that if DZ Bank has rights to the collateral [at issue here], DZ Bank would act as it had in the Soto transaction." (Con, Mot. at 17.) In other words. Connect asserts that if DZ Bank had requested, Connect would have agreed to add Advantage Pacific to the Soto Agreement and remit to DZ Bank the commissions that Advantage Pacific was receiving based on the Producer Agreement. (*See id.*) Connect, therefore, argues that its possession of DZ Bank's collateral was "in good faith." (*See id.*)

First, Connect's "good faith" in depriving DZ Bank of its collateral is irrelevant to DZ Bank's claim for conversion. Wrongful intent is not an element of conversion, and good faith is not a defense. *Paris Am. Corp. v. McCausland,* 759 P.2d 1210, 1215 (Wash. App. 1988). "Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action [in conversion]." *In re Marriage,* 106 P.3d at 216 (quoting *Judkins v. Sadler-MacNeil,* 376 P.2d 837, 838 (Wash. 1962)). Second, although the agreement provides that additional "Agents can be added... at any time by Connect with DZ Bank's prior consent and approval" (Fullmer Decl. Ex. J), no other agents, including Advantage Pacific and API, were ever added to the Soto Agreement. (Probst Dep. at 295:2-9; *see also* Fullmer Decl. Ex. J at 3 (Schedule A (naming only "Janice Soto").) DZ Bank negotiated an agreement with Connect concerning a different Brooke agent, but that does not mean that DZ Bank was obligated to so agree with respect to any other Brooke agent or with respect to any other DZ Bank collateral that was in the hands of Connect. The court concludes that neither Connect's asserted "good faith" nor the Soto Agreement are relevant to DZ Bank's claim for conversion or raise any material factual issues that would prevent summary judgment in DZ Bank's favor.

4. The June 2008 Amendment to the 2006 Amended Security Agreement

Connect also asserts that it did not interfere with DZ Bank's collateral based on Connect's interpretation of a purported amendment to the Amended Security Agreement. Rather, Connect argues that it was simply providing the "market access services" through the Producer Agreement that Advantage Pacific had a right to receive from DZ Bank. (Con. Mot. at 17.) In a convoluted argument, Connect asserts DZ Bank acquired these obligations to Advantage Pacific from Brooke Agency Services Company, LLC ("BASC") as a result of a June 2008 amendment to the Amended Security Agreement. (*Id.* at 5-6, 17.) Connect argues that when BCF defaulted on its obligations to DZ Bank under the Amended Security Agreement and DZ Bank foreclosed on those obligations, DZ Bank not only acquired an interest in the loans covered by the Amended Security Agreement but also inherited BASC's obligations to the various franchisees, including Advantage Pacific, under the Brooke franchise agreements. (*Id.*) Thus, by providing "market access services" to Advantage Pacific through the Producer Agreement, Connect asserts that it was not exercising dominion over or interfering with DZ Bank's assets but simply providing services to Advantage Pacific that DZ Bank was obligated to provide but was not providing. (*Id.*)

***12** In support of this argument, Connect submits a copy of a form that Aleritas purportedly filed with the Securities and Exchange Commission ("SEC").[18] (*Id.* at 5 (citing Fullmer Decl. Ex. I).) Connect argues that the document represents a June 19, 2008, amendment to the Amended Security Agreement ("June 2008 Amendment"), which DZ Bank did not disclose in this action. (*Id.*) Connect asserts that the June 2008 Amendment terminated the Amended Security Agreement. (*Id.*) Connect also asserts that the June 2008 Amendment (1) granted DZ Bank a security interest in "all Brooke Franchise Agreements" in which BASC had an interest, and (2) included those Brooke Franchise Agreements as a part of DZ Bank's collateral. (*Id.*) Connect argues that when DZ Bank entered into the Surrender of Collateral and the Omnibus Assignment, DZ Bank acquired not just the Notes and Security

Agreements included in the Surrender of Collateral, but also "all, right, title and interest" in the Brooke Franchise Agreements. (*Id.*) Connect apparently interprets this phrase to mean that the transfer to DZ Bank under the June 2008 Amendment included not just BASC's interests or rights in the Brooke Franchise Agreements, but all of BASC's obligations under the Brooke Franchise Agreements too. (*See id.* at 5-6, 17.)

The court rejects Connect's argument and its interpretation of the June 2008 Amendment. Connect misconstrues the contracts at issue and cites no law to support its novel position. (*See id.*) Further, the plain language of the June 2008 Amendment belies Connect's argument. First, the June 2008 Amendment does not purport to terminate the Amended Security Agreement Instead, it amends the definition of "Termination Date" in Section 1.1 of the Amended Security Agreement to include June 19, 2008. (*See* Fullmer Decl. Ex. I § 1.9, at 8.) Second, the document states that BCC grants DZ Bank "a security interest" in the "Brooke Franchise Agreements" including "all right, title and interest of [BCC] in, to and under all Brooke Franchise Agreements... including, without limitation, all moneys due and to become due under or in connection with any such Brooke Franchise Agreement (whether in respect of Sales Commissions, fees, expenses, indemnities or otherwise)." (*Id.* at 27, 42, 57.) The document does not convey to DZ bank the obligations of any Brooke entity under the Franchise Agreements.

In any event, the October 2008 Surrender of Collateral, which foreclosed DZ Bank's interest in the Notes and Security Interests, references the Amended Security Agreement "(as amended or otherwise modified prior to the date hereof)." (Probst Aff. ¶ 32, Ex. 16.) In addition, the Surrender of Collateral was made by BCC and BCF to DZ Bank. (*See id.*) Neither the Surrender of Collateral nor the Omnibus Assignment included any of the Brooke Franchise Companies. (*See id. ¶* 33, Ex. 17.) The court concludes that the 2008 June Amendment is unambiguous. It does not transfer to DZ Bank any Brooke entity's obligations to the Franchisees, and it does not create a genuine issue of fact preventing summary judgment in favor of DZ Bank on its claim for conversion.[19]

5. The Validity of DZ Bank's Security Interest

Connect asserts that DZ Bank cannot prove conversion because DZ Bank's perfection in its security interest has lapsed. (Con. Mot. at 21-24.) Under Washington law, an equitable lien in property is insufficient to support an action for conversion; the creditor must have a perfected security interest to support a claim for conversion. *See In re Conrson,* 409 B.R. at 530. DZ Bank perfected its security interests in the Advantage Collateral and the API Collateral by filing the Advantage Financing Statement, the Amended Advantage Financing Statement, and the API Financing Statement with the Washington Secretary of State. (*See* Probst Aff. ¶¶ 20, 30,35, Exs. 7, 15, 18); *supra* §§ H.D., HE., II.F. Connect asserts that the location of the intangible Advantage Collateral and API Collateral changed from Washington to Florida and/or Texas when it acquired the Collateral because Connect's primary places of business are in those two states. (*See* Con. Mot. at 21-24.) Connect further argues that the perfection of DZ Bank's security interest in the Advantage Collateral and API Collateral was impaired when DZ Bank failed to re-file its Financing Statements in either Florida or Texas after Connect acquired the Advantage Collateral and the API Collateral. (Con. Mot. at 21-24.) Connect bases this argument on provisions from the UCC as adopted in Washington, *see* RCW 62A.9A-316,[20] and a decision out of the Louisiana Supreme Court, *First Nat. Bank of Picayune v. Pearl River Fabricators, Inc.,* 2006-2195 (La. 11/16/07), 971 So. 2d 302, 310-17. (*See* Con. Mot. at 21-24.) As discussed below, Connect's interpretation of these statutory provisions and the decision out of Louisiana are incorrect.

***13** According to Connect, under RCW 62A.9A-316, once the Advantage Collateral and API Collateral were moved to Texas and/or Florida as a result of Connect's acquisition, DZ Bank was required to re-file its various Financing Statements in Texas and/or Florida, and when it failed to do so DZ Bank lost its security interests. (*See* Con. Mot. at 22 ("[A] secured creditor's failure to file a new financing statement in the new jurisdiction results in the loss of the security interest.").) The court found no Washington law interpreting this provision of Washington's UCC, and the parties have cited none. Thus, the court resorts to well-reasoned decisions from other jurisdictions interpreting similar provisions of the UCC and commentators for guidance.

Connect's interpretation of this statute is problematic because it is contrary to the statute's purpose and the case law of other states regarding the unique situation facing the court. Properly interpreted, the statute applies to a purchase or other transfer that occurs in the destination state, after collateral has been moved there. The statute does not apply to purchasers, like Connect, who purchase in the original state. According to a leading UCC treatise, "[t]he purpose of the ... re-filing requirement is to protect third persons in the removal state" who purchase after removal. 8A *Lawrence's Anderson on the Uniform Commercial Code* § 9-103:100 (3d. ed. 2006). Thus, if a

creditor does not timely re-file in the destination state, "perfection is lost as to a person who becomes a 'purchaser' after the goods were removed to the other state." *Id.* On the other hand, "[w]hen collateral subject to a perfected security interest is sold to a buyer within the state in which the security interest is created and perfected, and thereafter the collateral is removed to another state, the secured creditor is not required to re-perfect ... in order to preserve the perfection." *Id.*

The reason for the foregoing conclusion is straightforward. Purchasers like Connect, which acquire collateral in the original state, where the security interest is a matter of public record, can discover the security interest by checking the public records where the collateral is located. Such persons or entities do not need the protection of being re-notified in the destination state after the collateral has been removed. On the other hand, those who may acquire the collateral in the destination or removal state need the protection of re-filing in that state. They cannot be expected to know from what jurisdiction the collateral came and have no practical way to apprise themselves of any security interest that may exist elsewhere.

Case law from other jurisdictions supports this view. In *Alpine Paper Co. v. Lontz,* 856 S.W.2d 940, 941 (Mo. Ct. App. 1993), the Missouri Court of Appeals considered whether a creditor who perfected its security interest in Iowa became "unperfected" as against purchasers who purchased the collateral in Iowa but later moved the collateral to Missouri. Similar to Connect here, the purchasers in *Lontz* claimed that they acquired superior rights to the collateral when the creditor failed to timely re-perfect its security interest in Missouri after the purchasers moved the collateral there. *Id.* The creditor argued that "because the [purchasers] purchased the collateral before it was removed to Missouri[,] they took it subject to the security interest perfected in Iowa and the security interest did not have to be re-perfected in Missouri to be effective against these [purchasers]." *Id.*

The creditor in *Lontz* prevailed. *Id.* at 943. The *Lontz* court noted that "[i]nterpretation of the U.C.C. must be made with an eye toward promoting the underlying purposes and policies of the statute." *Id.* In light of those purposes and policies, the court held that the third-parties could not benefit from the creditor's failure to re-file in the destination or removal state:

> ***14** The [re-filing rule] was designed to protect creditors from absconding debtors. It also protects third persons in the second state where it would be impractical to charge them with notice of a filing in the first state.... It is not intended to protect a third party who was not an innocent party and was involved before the removal....
>
> [The purchasers] admitted mat they knew the [collateral] was located in Iowa at the time of purchase. They knew that the proper place to look for any encumbrances on the property would be in Iowa. Therefore, we find no reason not to impute knowledge of [the creditor's] security interest in the property to [the purchasers]. This is not a situation where the [re-filing] rule was meant to apply. There was no absconding debtor and the purchaser was not innocent and unknowing. When the sale itself results in an interstate transfer of collateral, the secured party does not need to refile. Otherwise, any out-of-state purchaser would be able to defeat a valid and perfected security interest.

Id. (internal quotation marks and citations omitted).

The Third Circuit reached a similar result in *General Electric Credit Corp. v. Nardulli & Sons, Inc.,* 836 F.2d 184 (3d Cir. 1988). *In Nardulli,* a debtor moved equipment in which a creditor had a perfected security interest from Pennsylvania to Indiana. *Id.* at 186, 189. After moving the equipment, the debtor leased it to a third-party. *Id.* at 186. The creditor failed to re-perfect its security interest in Indiana after the debtor moved the equipment there. *Id.* Nevertheless, the Third Circuit held that, as between the debtor and the creditor, the failure to re-file in Indiana did not impair the creditor's security interests. *Id.* at 190-91. This was so because the re-filing requirement was intended to protect persons in the destination or removal state who acquire rights in the collateral after it has been removed:

> The purpose of the ... [re] filing requirement is to protect subsequent creditors and/or purchasers of the collateral who otherwise cannot determine whether the collateral is subject to the interests of a third party .....
>
> Because ... [the debtor] ... had knowledge of the liens held by [the creditors] ..., they may not avoid them simply because those creditors did not file financing statements. The filing requirements were not enacted to protect [the debtor]; they were enacted to protect future creditors or purchasers ....
>
> *********
>
> Therefore, despite [the creditor's] failure to file in [Indiana] a copy of its previously filed financing

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

statements, it maintains a valid security interest in the [collateral] as between it and [the debtor].

Id. at 191 (internal citations omitted).

The First Circuit concurs with the foregoing authorities. *In re Halmar Distributors, Inc.,* 968 F.2d 121 (1st Cir. 1992), involved a priority dispute between senior and junior secured creditors arising after the collateral was moved from one state to another. *See id.* at 122. Although the senior creditor failed to timely re-perfect its security interest in the new jurisdiction, the court declined to give priority to the junior creditor. *Id.* at 126. The dispositive fact was the junior creditor's knowledge of the senior creditor's lien when it acquired its junior lien. *Id.* Because the junior creditor had this knowledge, re-perfection as to the junior creditor was not necessary:

> ***15** Additional notice to the [junior creditor] in the form of refiling ... was as unnecessary and useless an act as can be imagined. Refiling is intended to protect parties in entirely different circumstances. We see no need to apply the rule here when to do so would give an unjustified advantage to a party. Such a construction of the Code would hardly be liberal, nor would it promote the Code's underlying purposes and policies.

Id. at 126 (footnote omitted). The common thread in the above cases is the re-filing rule must not be applied blindly but rather with an eye toward the UCC's underlying purposes and policies. *See* RCW 62A.1-103(a) ("This title must be liberally construed and applied to promote its underlying purposes and policies ....").

Finally, *First National Bank of Picayune v. Pearl River Fabricators, Inc.,* the authority that Connect relies upon, is not to the contrary. In *Pearl River,* a Mississippi debtor gave a security interest in collateral located in Mississippi to a Mississippi bank, which the bank perfected by filing a financing statement in Mississippi. 971 So. 2d at 304. The Mississippi debtor then sold the collateral to an Indiana purchaser, who never took possession of the collateral. *Id.* at 304-05, The Indiana purchaser then resold the collateral to a Louisiana purchaser. *Id.* at 305. Despite the fact that the collateral remained in Mississippi, the *Pearl River* court held that the Louisiana purchaser actually purchased the collateral from Indiana because the title to the collateral was located there. *Id.* at 311. The bank failed to timely refile its financing statement in Louisiana. *Id.* Thus, in *Pearl River,* the court applied the provisions of the UCC to protect a subsequent buyer (twice removed from the original debtor), who purchased the collateral from a state in which there was no financing statement on file. This is not the position in which Connect finds itself. Connect purchased the collateral at issue from Advantage Pacific, the original debtor, in Washington, where DZ Bank had filed the requisite financing statements. (*See* Probst Aff. ¶¶ 20, 30, 35, Exs. 7, 15, 18); *see supra* §§ II.D., II.E., II.F. Thus, a narrow application of *Pearl River* does not support Connect's position.[21] Based on the foregoing, the court concludes that Connect has not raised a genuine issue of material fact concerning the perfection of DZ Bank's security interest in the Advantage or API Collateral.[22]

6. API's Assets

***16** DZ Bank argues that although the April 2010 Sales Letter and the Producer Agreement were between Connect and Advantage Pacific, the transfer of assets to Connect included the assets of both Advantage Pacific and API. (DZ Mot. at 11-12; DZ Reply at 10-12.) DZ Bank rests its argument on Mr. Coley's testimony that he merged API with Advantage Pacific (Coley Dep. at 14:11-15:17) and on DZ Bank's comparison of the API Client List (*see* Prost Decl. ¶ 43, Exs. 21, 22) and the Connect Client List (DZ Mot. Ex. G), which shows an overlap of hundreds of names. (*See generally* Goa Decl.)

Connect responds that there is a disputed issue of fact, whether Mr. Coley's merger of the two companies because he kept separate books for the two companies and filed separate tax returns.[23] (Con. Resp. at 19.) In addition, Connect objects that the API Customer list is both "factually flawed" and that DZ Bank's evidence on this issue is inadmissible. (*Id.* at 19-20.)

Specifically, Connect objects that Exhibit 21 (Dkt. # 65-21) and Exhibit 22 (Dkt. # 65-22) of Mr. Probst's affidavit (collectively, the "BMS Exhibits") are inadmissible as hearsay. (Con. Resp. at 1-3.) DZ Bank retrieved these documents from Brooke Management System ("BMS"). Exhibit 21 lists Brooke franchises, including Advantage Pacific and API, by specific franchise numbers, and Exhibit 22 contains the API Client List. (*See* Probst Aff. ¶ 43.) DZ Bank argues that the BMS Exhibits are admissible under the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). DZ Bank bears the burden of establishing that the records fall within the business records exception. *See Bourjaily v. United States,* 483 U.S. 171, 175(1987); *United States v. Catabran,* 836 F.2d 453, 457 (9th Cir. 1988) ("The proponent of the business records must satisfy the foundational requirements of the business records exception.").

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

Under the business records exception to the hearsay rule, the proponent of the evidence must provide testimony from the custodian of the document or another "qualified witness" that satisfies three requirements: (1) "the record was made at or near the time by—or from information transmitted by—someone with knowledge"; (2) "the record was kept in the course of a regularly conducted activity of a business"; and (3) "making the record was a regular practice of that activity." Fed. R. Evid. 803(6)(A)-(D). In this circuit, however, records that a business "receives from others are admissible under Federal Rule of Evidence 803(6)" when three conditions are met: (1) the records are received directly from the other parly and are kept by the recipient in the regular course of its business, (2) the records are relied upon by the recipient business, and (3) the recipient business has a substantial interest in the accuracy of the records. *See, e.g.*, *MRT Constr., Inc. v. Hardrives, Inc.,* 158 F.3d 478, 483 (9th Cir. 1998) (citing *United States v. Childs,* 5 F.3d 1328, 1333-34 n.3 (9th Cir. 1993)); *see also Davis v. CACH, LLC,* No. 14-CV-03892-BLF, 2015 WL 913392, at *5 (N.D. Cal. Mar. 2,2015) (applying *Hardrives* in the context of the defendant's attempt to collect on a debt). DZ Bank argues that Exhibits 21 and 22 are admissible based on *Hardrives,* and this may ultimately be correct. However, Mr. Probst has not laid a sufficient foundation to qualify the two exhibits. Mr. Probst testifies that "DZ Bank has possession of the client list maintained in Brooke's computerized insurance management system for API" and that "DZ Bank retrieved from Brooke's computerized insurance management system the respective list of clients for each of the Brooke franchisees whose property was secured by DZ Bank." (Probst Aff. ¶ 43.) This testimony does not satisfy the three elements set for the in *Hardrives,* which are required for the documents to qualify under the business records exception to the hearsay rule.

***17** In addition, the records are only admissible if the party opposing admission "does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(E). Based on an email chain that is itself hearsay, Connect argues that the information contained in the client list is not trustworthy. (Con. Resp. at 2-3.) In the email chain, an employee of DZ Bank notes, in relation to a client list for an entirely different franchise, that "DZ Bank cannot confirm the accuracy of all of the policies" because "the data is from [BMS] ... (around September 2008)." (1/5/16 Fullmer Decl. (Dkt. ## 96-98) Ex. BB.) This evidence is alone is likely insufficient to demonstrate the untrustworthiness of the BMS Exhibits at issue here.

Nevertheless, the court concludes that DZ Bank has failed to lay a sufficient foundation to qualify the BMS Exhibits under the business records exception to the hearsay rule. Although the court will not consider these records on summary judgment, DZ Bank will have an opportunity to lay a proper foundation under the business records exception to the hearsay rule at trial, In addition, Connect may present evidence that the records "indicate a lack of trustworthiness." *See* Fed. R. Evid. 803(6)(E). The court reserves its ultimate ruling on the admissibility of these records for trial. However, because the court cannot consider this evidence in support of DZ Bank's motion, a question of material fact remains concerning whether and to what extent Advantage Pacific or Mr. Coley transferred the API Collateral to Connect. The court, therefore, denies this portion of DZ Bank's motion for summary judgment and reserves this issue for trial.

7. DZ Bank's Damages

DZ Bank seeks monetary damages for conversion. (DZ Mot. at 19.) In an action for conversion, the measure of damages depends upon whether the conversion was unintentional or willful. *Glaspey v. Prelusky,* 219 P.2d 585, 587 (Wash. 1950) ("The courts have recognized a difference between what may be termed an ordinary conversion and a willful conversion with respect to the measure of damages.")

> Absent willful misconduct, the measure of damages for conversion is the fair market value of the property at the time and place of conversion. ... Fair market value is the value for which the property could have been sold in the course of a voluntary sale between a willing buyer and a willing seller, taking into account the use to which the property is adapted or could reasonably be adapted.

Potter, 196 P.3d at 697 (internal citation and quotation marks omitted). Alternatively, if the conversion was willful, "the measure of damages is the highest market value of the property within a reasonable time after the conversion, or, as sometimes stated, the highest price shown between the time of conversion and the institution of the suit." *Glaspey*, 219 P.2d at 587.

Based on the report of its expert witnesses, DZ Bank asserts that the fair market value of Advantage Pacific's

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

book of business was between $275,000.00 and $350,000.00 and the fair market value for API's book of business was between $60,000.00 and $100,000.00. (DZ Mot. Ex. F (attaching the expert witness report).) Thus, DZ Bank asserts that it is entitled to damages in the amount of $335,000.00 ($275,000.00 + $60,000.00) for ordinary conversion and $450,000.00 ($350,000.00 + $100,000.00) if the court finds that Connect's conversion was willful.[24] (*Id.* at 20-21 (citing Ex. F).) Connect did not designate a rebuttal expert witness, and accordingly, DZ Bank asserts that these values are uncontested. (*Id.* at 21.) Despite its failure to designate a rebuttal expert, Connect challenges DZ Bank's damages calculation on three grounds: (1) the 2010 tax returns which serve as the basis for the report are inadmissible because they are unsigned, (2) DZ Bank's experts did not consider the "distressed" nature of the sale, (3) DZ Bank's experts amended their report regarding API. (Con. Resp. at 21-23.)

***18** First, the court concludes that the tax returns for Advantage Pacific and API are admissible.[25] DZ Bank laid a proper foundation for the admission of these tax returns when it deposed Mr. Coley, who was the sole owner and officer of both Advantage Pacific and API. (Coley Dep. at 17:3-9.) Mr. Coley produced the unsigned tax returns to DZ Bank in response to subpoenas DZ Bank issued requesting copies of Advantage Pacific's and API's tax returns during the Advantage/API Case. (*See* Con. Mot. at 10 ¶ 2.47.) During the course of Mr. Coley's deposition in this matter, DZ Bank presented copies of these tax returns to Mr. Coley, and he acknowledged them. (*See* Coley Dep. at 13:20-25 (identifying the 2010 Advantage Pacific tax return and acknowledging that "[i]t appears to be" a copy of the return filed for Advantage Pacific in 2010); 17:21-18:4 (identifying the 2010 API tax return and acknowledging that "[i]t appears to be" a copy of the return filed for API in 2010).) Finally, at oral argument, Connect's counsel conceded that Mr. Coley produced the tax returns at issue and acknowledged that they were his in his deposition. Based on these facts, the court concludes that the lack of signature on the returns does not preclude their admission into evidence. *See, e.g.*, *United States v. Osarenkhoe,* 439 F. App'x 66, 69 (2d Cir. 2011) (relying on Fed. R. Evid. 901(b)(4) and affirming admission of an unsigned tax return "[b]ecause the tax return appeared to be [the defendant's] personal federal tax return on its face and it was located in her possessions among other financial documents, including her tax returns from other years that she did not dispute were hers"). The court overrules Connect's objection.

Connect also argues that summary judgment is inappropriate with respect to the amount of DZ Bank's damages because DZ Bank's experts did not consider the "distressed" nature of the sale of Advantage Pacific and API. In support of its position, Connect states without citation to the record[26] that Mr. Coley testified that he was losing appointments for both Advantage Pacific and API and that this was "the very reason he sought substitute market access services from Connect." (Con Resp. at 23.) Connect, however, has not cited any specific evidence to support a reduced valuation of the businesses or to establish the amount of any such reduction. (*See id.*) Connect cannot defeat DZ Bank's motion for summary judgment with mere conjecture and without evidence that raises a triable issue of fact. *See Anderson*, 477 U.S. at 249-50.

Finally, Connect asserts that it should be allowed to cross-examine DZ Bank's expert witnesses at trial because DZ Bank produced an amended expert damages report on the last day of discovery with a different conclusion than the original. (Con. Mot. at 22 (citing DZ Mot. Group Ex. F (Dkt. # 64-21) at 4, 23).) Connect argues that the first opinion concluded that API had no insurance assets, but only real property assets. The second opinion concluded that API had insurance assets and purportedly valued them. The basis for both opinions was API's 2010 tax return. Connect argues that the contradictory conclusions of the two reports create an issue of fact. The court agrees. Ordinarily, "[n]either a desire to cross-examine [an] affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment, unless other evidence about an affiant's credibility raises a genuine issue of material fact." *Frederick S. Wyle Prof'l Corp. v. Texaco, Inc.,* 764 F.2d 604, 608 (9th Cir. 1985). Here, Connect has pointed to evidence about DZ Bank's experts' opinion—two contradictory expert reports—sufficient to raise a genuine issue of material fact. Further, the second amended report was produced on the last day of the discovery period, and therefore, Connect did not have an opportunity to ask DZ Bank's experts about the discrepancy through deposition or other means of discovery. Accordingly, the court concludes that Connect's counsel should have an opportunity to cross examine DZ Bank's expert witness at trial. The court denies the portion of DZ Bank's motion for summary judgment related to the amount of its damages.

D. Unjust Enrichment

***19** Based on the same facts that underlie its claim for conversion, DZ Bank also brought a claim against Connect for unjust enrichment. (*See* Compl. ¶¶ 113-16.) "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

require it." *Young v. Young,* 191 P.3d 1258, 1262 (Wash. 2008); *see Bailie Comm'ns, Ltd. v. Trend Bus. Sys., Inc.,* 810 P.2d 12, 18 (Wash. Ct. App. 1991) ("Unjust enrichment occurs when one retains money or benefits which injustice and equity belong to another."). The elements of an unjust enrichment claim are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiffs expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young,* 191 P.3d at 1262.

DZ Bank argues that, just as it is entitled to damages for Connect's conversion of its collateral, it is also entitled to the same damages under a theory of unjust enrichment. (DZ Mot. at 23-24.) DZ Bank argues that Connect received the benefit of Advantage Pacific's book of business at DZ Bank's expense because the transfer to Connect of Advantage Pacific's book of business, which also represented DZ Bank's collateral, contravened DZ Bank's lien rights. (DZ Mot. at 24.) DZ Bank concludes that the circumstances make it unjust for Connect to retain this benefit without paying DZ Bank because the accounts and rights to the payment of commissions on those accounts belong to DZ Bank pursuant to the Advantage Security Interest. (*See id.*)

Connect asserts that it was not unjustly enriched by "its dealings with Mr. Coley" because, under the Producer Agreement, Connect "does not have dominion over the collateral" and has a "duty to pay Advantage/A Plus ... 90% of commissions." (Con. Mot. at 19.) Connect also argues that it was not unjustly enriched by its acquisition of the Advantage Collateral because upon termination of the Producer Agreement, Connect must pay $159,897.00 to Mr. Coley if Connect wants to keep Advantage Pacific's book of business. (*Id.* at 19-20.) The court addressed these arguments in its analysis of DZ Bank's claim for conversion. *See supra* § III.C. 1. Contrary to Connect's argument, the Producer Agreement demonstrates Connects control over the Advantage Collateral. The Advantage Collateral represents a benefit to Connect. Connect may have made a poor bargain for itself in the Producer Agreement after it acquired the Advantage Collateral, but this does not vitiate DZ Bank's claim for unjust enrichment.

Connect also argues, without any citation to the record, that any enrichment it received was not unjust because the 10% portion of the commissions it received under the Producer Agreement was a reasonable fee for the services it rendered, which "enhanced the value of the collateral," (Con. Mot. at 21.) First, under the Producer Agreement, any "services" that Connect performed were for the benefit of Advantage Pacific, not DZ Bank. Thus, any "fee" that Connect received for those services is irrelevant to DZ Bank's claim for unjust enrichment. DZ Bank's claim relates to the collateral itself and the commissions derived from that collateral. Connect has admitted that it took possession of the collateral by purchasing Advantage Pacific's book of business, and the Producer Agreement itself demonstrates that Connect has the authority to direct the disposition of any commissions arising from Advantage Pacific's book of business. *See supra* § III.C. 1. In any event, Connect cites no evidence in support of its assertion that its "services" under the Producer Agreement "enhanced the value of the collateral." (*See* Con. Mot. at 21.) Unsupported assertions by legal counsel in briefs are insufficient to create an issue of fact for trial. *Stanley v. Univ. of S. Cal.,* 178 F.3d 1069, 1076 (9th Cir. 1999).

***20** Finally, Connect asserts that "DZ Bank knew of Connect's involvement with Advantage [Pacific] in April 2012, but failed to take action," and thus "silently acquiesced" to Connect's "market access services." (Con. Mot. at 21.) Connect argues that DZ Bank "now seeks to benefit from [those services] without paying." (*Id.*) Again, Connect provides no evidence for its assertion that DZ Bank knew of Connect's acquisition of the Advantage Collateral by April 2012. Further, as DZ Bank points out, Connects "silent acquiescence" argument is not support by the law. The case Connect cites refers to the act of "silent acquiescence" as supporting a finding of unjust enrichment, where the party being unjustly enriched—here, Connect—was the party who "silently acquiesced" to the event or services that allegedly enriched that party. (*See* Con. Mot. at 21 (citing *Norton Builders, LLC v. GMP Homes VG, LLC,* 254 P.3d 835, 846 (Wash. Ct.App. 2011)).)

Based on the foregoing, as well as the undisputed facts discussed above regarding DZ Bank's claim for conversion, the court grants DZ Bank summary judgment against Connect as to liability on its unjust enrichment claim regarding the Advantage Collateral. However, just as there are genuine issues of material fact with respect to the transfer of the API Collateral and the amount of DZ Bank's damages, *see supra* §§ III.C.6., III.C.7., those same issues of fact remain as to DZ Bank's claim for unjust enrichment. Those two issues remain for trial.

E. Connect's Affirmative Defenses

In its motion for summary judgment and its response to DZ Bank's motion, Cormect asserts a number of the affirmative defenses that it pleaded in its amended answer.[27] (Con. Mot. at 24-25; Con. Resp. at 24-29.) In addition, Connect asserts a number of affirmative

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

defenses in its memoranda on summary judgment that it had not previously pleaded. The court addresses those affirmative defenses, both pleaded and impleaded, below. The court concludes that none of the affirmative defenses raised by Connect in any of its memoranda entitle Connect to summary judgment on DZ Bank's claims or prohibit the entry of partial summary judgment in DZ Bank's favor, as described above.

The burden is on Connect to establish its affirmative defenses. *See Jones v. Tuber,* 648 F.2d 1201, 1203 (9th Cir. 1981) ("Of course, the burden is always on the party advancing an affirmative defense to establish its validity."). Because Connect bears the burden of proof on its affirmative defenses, DZ Bank can meet its summary judgment burden by "pointing out... that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325.

1. Connect Lacks Standing to Assert Six of Its Affirmative Defenses

On June 17, 2015, the court dismissed Connect's counterclaims for lack of standing. (6/17/15 Order (Dkt. # 28) at 8-12.) In its counterclaims, Connect attempted to assert claims that Advantage Pacific or API could have brought against one or more of the Brooke entities or others. The court concluded that Connect had no standing to assert these claims and dismissed them pursuant to Federal Rule of Civil Procedure 12(b)(1). (*Id.*) DZ Bank had also moved to dismiss several of Connect's affirmative defenses on essentially the same grounds. (*See id.* at 17-18.) However, because the parties had provided insufficient briefing on whether the standing doctrine applies in the context of affirmative defenses, the court declined to rule on the issue at that time. (*Id.* at 17.) The parties have now provided sufficient briefing, and the court considers the issue on summary judgment.

Just as it did in its now-dismissed counterclaims, Connect seeks to enforce through several affirmative defenses Advantage Pacific's or API's rights, as if Connect were a party to the original contracts with BCC or one of the other Brooke entities. (*See* Am. Ans. at 9-12 (Aff. Def. No. 3 ("Duress/Undue Influence"); Aff. Def. No. 4 ("Failure of Consideration"); Aff. Def. No. 5 ("Lack of Consideration"); Aff. Def. No. 6 ("Fraud, Deceit, or Misrepresentation by Plaintiff"); Aff. Def. No. 12 ("No Breach by Defendant") (which is premised on no breach by Advantage Pacific or API); Aff. Def, No. 14 ("Unconscionability/Public Policy") (collectively "Brooke Affirmative Defenses")).)

***21** If Connect was an assignee of Advantage Pacific or API with respect to the Notes or Security Interests that Advantage Pacific or API entered into with BCC or other Brooke entities, then Connect would likely have standing to assert Advantage Pacific's or API's rights under those contracts. *See Sprint Commc'ns Co., LP v. APCC Servs., Inc.,* 554 U.S. 269, 285-86 (2008); *Misic v. Bldg. Serv. Emps. Health & Welfare Tr.,* 789 F,2d 1374, 1378 (9th Cir. 1986) ("Many cases reflect the premise that a valid assignment confers upon the assignee standing to sue in place of the assignor."). Connect, however, has not alleged that it is an assignee of the contract rights of either Advantage Pacific or API. (*See generally* Am. Ans.) Instead, Connect asserts a convoluted argument that if "DZ Bank asserts that Connect's control and dominion is extensive enough to support conversion," then it should be sufficient "to support Connect's affirmative defenses, some of which are based on Advantage [Pacific's] rights." (Con. Resp. at 26.) Connect repeatedly argues that by attempting to enforce its security interests in the Advantage Collateral and API Collateral, DZ Bank has somehow assumed the obligations of certain Brooke entities as a franchisor, that Connect has become a "new debtor" vis-a-vis DZ Bank, and that as a result Connect has standing to assert Advantage Pacific's or API's rights under those entities' franchise agreements or other contracts with various Brooke entities. (*Id.*) Just as it did with respect to its counterclaims, Connect confuses its purchase, taking, or securing of assets, on the one hand, with an assumption of all rights and obligations, on the other. (*See id.*) Connect cites no authority for its novel argument, and the court rejects it.

In any event, contrary to Connect's assertion, DZ Bank does not claim that Connect is liable as "a new debtor" under either the API Security Agreement or the Advantage Security Agreement (*see id.*), but rather as a tortfeasor that converted property in which DZ Bank had a security interest—the API Collateral and the Advantage Collateral (*see generally* Corapl). As a non-party to the Xotes and Security Interests, wliich was never assigned any of the rights therein, Connect has no standing to assert Advantage Pacific's or API's rights under those contracts. *See Lorber Indus, of Cal. v. L.A. Printworks Corp.,* 803 F.2d 523, 524-25 (9th Cir. 1986) (ruling that corporation that is neither a party to nor agent nor beneficiary of contract lacks standing to compel contractual arbitration); *E.E.O.C. v. Goodyear Aerospace Corp.,* 813 F.2d 1539,1543 n.2 (9th Cir. 1987) (ruling that an entity that was not a party to a settlement agreement lacked standing to challenge the rights of a party to the agreement) (citing *Von Brimer v. Whirlpool Corp.,* 536 F.2d 838, 841 n.l (9th Cir. 1976) (assessing standing to assert rights of others by considering "whether the person who brings the suit is a person harmed by the alleged

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

wrong")). Indeed, the court previously ruled that Connect does not have standing to contest those agreements or to assert Advantage Pacific's or API's rights under those contracts. (*See* 6/17/15 Order at 8-12.)

Further, it does not matter whether Connect is attempting to assert the contractual rights of Advantage Pacific or API in the form of a counterclaim or an affirmative defense. In either instance, Connect must demonstrate standing. *See United States v. Hugs,* 109 F.3d 1375, 1378 (9th Cir. 1997) (ruling that defendants lacked standing to assert affirmative defense based on an as-applied First Amendment challenge to agency regulations); *United States v. Dunifer,* 997 F. Supp. 1235, 1239-40 (N.D. Cal. 1998) (concluding that the defendant was required to demonstrate standing because "[w]here the defendant asserts an affirmative defense requiring the litigation of issues not encompassed in the plaintiff's case-in-chief, the defendant is in a similar situation on those issues to a plaintiff who is invoking the jurisdiction of the court") (citing *FDIC v. Main Hurdman,* 655 F. Supp. 259, 268 (E.D. Cal. 1987) (concluding that defendant must have Article III standing to pursue an affirmative defense)); *United States v. Thirty Eight (38) Golden Eagles or Eagle Parts,* 649 F. Supp. 269, 274, 276 (D. Nev. 1986), *aff'd,* 829 F.2d 41 (9th Cir. 1987) (ruling that the defendant lacked standing to bring affirmative defense based on First Amendment as-applied challenge to agency regulations); *see also United States v. Neset,* 10 F. Supp. 2d 1113, 1116 (D. N.D. 1998) ("In raising an affirmative defense, a defendant is seeking the jurisdiction of the court to hear claims as much as a plaintiff and, therefore, standing becomes an issue for the defendant as well.") As noted above, the court previously ruled that Connect does not have standing to pursue Advantage Pacific's or API's contractual rights. (*See* 6/17/15 Order at 8-12.) Connect has failed to provide any valid basis for the court to conclude otherwise with respect to its Brooke Affirmative Defenses. (*See* Con. Resp. at 24-26.) Accordingly, the court grants DZ Bank's motion for summary judgment on Connect's Brooke Affirmative Defenses.

2. Connect Waived Its Abandonment Affirmative Defense

***22** Connect asserts in its motion for summary judgment that DZ Bank abandoned the API Collateral and the Advantage Collateral by failing to sue A Plus, by failing to add Connect and A Plus to the Advantage/API Case, by failing to seek an agreement with Connect like the Soto Agreement, and by failing to take any action in Mr. Coley's personal bankruptcy proceeding. (*See* Con. Mot. at 18-19.) Abandonment is a complete defense to conversion. *See Jones v. Jacobson,* 273 P.3d 979, 980 (Wash. 1954).

Connect raises this defense for the first time in its motion for summary judgment. Connect did not assert abandonment as an affirmative defense. (*See* Am. Ans. 8-12.) With limited exceptions, a party "is required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived." *Morrison v. Mahoney,* 399 F.3d 1042, 1046 (9th Cir. 2005). The court "has discretion to permit a defendant to raise an affirmative defense for the first time in a motion for summary judgment 'only if the delay does not prejudice the plaintiff.'" *Hernandez v. Creative Concepts, Inc.,* 295 F.R.D. 500, 504 (D. Nev. 2013) (quoting *Magana v. Commonwealth of the N. Mariana Islands,* 107 F.3d 1436, 1446 (9th Cir. 1997)). Further, because Connect seeks to raise this affirmative defense after the scheduling order's cutoff for amended pleadings, Connect must meet not just the liberal standard for amended pleadings in Federal Rule of Civil Procedure 15(a), but the stricter "good cause" standard under Federal Rule of Civil Procedure 16(b). *See AmerisourceBergen Corp. v. Dialysist West, Inc.,* 465 F.3d 946, 952 (9th Cir. 2006); *Sadid v. Vailas,* 943 F. Supp. 2d 1125, 1140 (D. Idaho 2013) ("The Court concludes that if a defendant seeks to assert new affirmative defenses in a motion for summary judgment after the scheduling-order deadline for amending pleadings has passed, then Rule 16(b)'s good-cause standard applies."); *Hernandez,* 295 F.R.D. at 504-05; *see also Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 607-08 (9th Cir. 1992) (noting once a. district court files a pretrial scheduling order under Federal Rule of Civil Procedure 16 establishing a timetable for amending pleadings, that rule's standards control).

Unlike Rule 15(a)'s liberal amendment policy, which focuses on undue delay and prejudice to the other party, Rule 16(b)'s "good cause" standard centers on the moving party's diligence. *Johnson,* 975 F.2d at 609. A "district court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Id.* (quoting Fed. R. Civ. P. 16 advisory committee's note (1983 amendment)). "If that party was not diligent, the inquiry should end." *Id.* "[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.*

Only if the moving party is able to satisfy the good cause standard under Rule 16 should the court then examine whether amendment is proper under Rule 15(a). *Id.* at 607-08. Under Rule 15(a) "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments

previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given."' *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Roman v. Davis,* 371 U.S. 178, 182 (1962)). However, "not all of the factors merit equal weight... [I]t is the consideration of prejudice to the opposing party that carries the greatest weight," *Id.* at 1052.

***23** In response to DZ Bank's argument that it waived its abandonment affinnative defense, Connect offers no excuse for its failure to raise this defense prior to summary judgment. (*See* Con. Reply at 4-5.) Connect does not assert that the evidence upon which it bases this new defense was not previously available. (*See id.*) In the absence of any excuse or justification by Connect regarding its late assertion of this defense, the court must conclude that Connect was not diligent in raising its abandonment affirmative defense. This alone is a sufficient ground to deny Connect's attempt to assert a new affirmative defense at the summary judgment stage. *Id.* at 609.

In addition to Connect's lack of diligence, however, the court also declines to permit Connect to assert the affirmative defense of abandonment at this late day in the litigation because it will prejudice DZ Bank or cause undue delay under Rule 15(a). Discovery is closed. (*See* Sched. Ord. at 1.) Trial is less than a month away. (*Id.*) It would be unfair to require DZ Bank to oppose Connect's abandonment defense without an opportunity for discovery. The only way to avoid this prejudice would be to reopen discovery and reschedule the trial date. In addition to undermining the court's interest in managing its docket, setting a new trial date at this juncture ignores the prejudice to DZ Bank inherent in any significant change in the trial schedule. *See Solomon v. N. Am. Life & Cos. Ins. Co.,* 151 F.3d 1132, 1139 (9th Cir. 1998) (affiiming the denial of a motion to amend made "on the eve of the discovery deadline" based, *inter alia,* on the prejudice resulting from "re-opening discovery, thus delaying the proceedings"); *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794,798-99 (9th Cir. 1991) (holding that, although the motion to amend was fded more than four months before trial, the motion was properly denied because discovery had closed and, as a result, defendant would be "unreasonably prejudiced" by the addition of new claims); *cf. DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 187-88 (9th Cir. 1987) (holding that a new party named in an amended complaint was not prejudiced where the case was "still at the discovery stage with no trial date pending, nor ha[d] a pretrial conference been scheduled"). Based on the foregoing, the court denies Connect's motion for summary judgment based on an abandonment affirmative defense and grants DZ Bank's motion with respect to waiver of Connect's abandonment affirmative defense.

3. Failure to Mitigate

Connect argues that DZ Bank failed to mitigate its damages. (*See* Con. Resp, at 27-28.) Under Washington law, a plaintiff has no duty to mitigate damages in cases of intentional tort. *Desimone v. Mat. Materials Co.,* 162 P.2d 808, 884 (Wash. 1945); *Champa v. Wash. Compressed Gas Co.,* 262 P. 228, 231 (Wash. 1927); *Wilson v. Walla Walla,* 528 P.2d 1006, 1007 (Wash. Ct. App. 1974). "Conversion is an intentional tort." *King v. Rice,* 191 P.3d 946,955 (Wash. Ct. App. 2008). Thus, Connect cannot assert DZ Bank's failure to mitigate damages as an affirmative defense in response to DZ Bank's action for conversion.

DZ Bank, however, also asserts a claim for unjust enrichment. Connect bears the burden of proof on its affirmative defense that DZ Bank failed to mitigate its damages. *Cox v. Keg Rests. U.S., Inc.,* 935 P.2d 1377, 1380 (Wash. Ct. App. 1997) (citing *Young v. Whidbey Island Bd. of Realtors,* 638 P.2d 1235, 1238 (Wash. 1982)). Connect asserts that DZ Bank failed to mitigate its damages because DZ Bank "was responsible for creating the forms that led to the integrated transactions for Advantage and API, and that all the forms were required by DZ Bank." (Con. Resp. at 27.) The fact that DZ Bank drafted the underlying contracts with Advantage and API is not evidence that DZ Bank failed to mitigate its damages with respect to Connect's unjust enrichment through its acquisition of the Advantage Collateral and/or API Collateral. Connect also argues that DZ Bank failed to mitigate its damages because "it failed to adhere to its own requirement for bi-annual due diligence visits."' (*Id.*) DZ Bank's Rule 30(b)(6) deponent testified that DZ Bank performed biannual due diligence trips to review Brooke borrowers and their operations. (Probst Dep. at 225:5-226:17.) However, in the Advantage/API Case, DZ Bank produced only two such reports for a two-or three-year period, (*Id.* at 226:18-231:4.) Again, this evidence does not demonstrate that DZ Bank failed to mitigate its damages with respect to Connect's unjust enrichment though its acquisition of the Advantage Pacific Collateral and/or API Collateral, Whether DZ Bank conducted due diligence reviews of the underlying transactions is irrelevant to Connect's acquisition of the Advantage Collateral and/or API Collateral and its unjust enrichment thereby. The evidence Connect relies upon for its failure to mitigate affirmative defense' does not raise a genuine issue of material fact with respect to DZ Bank's

unjust enrichment claim.

4. Laches

***24** Connect asserts that DZ Bank's claims are barred by the doctrine of laches, (Con. Mot. at 24; Con. Reply (Dkt. ## 104 (redacted), 106 (sealed)) at 5-8.) "Laches is an extraordinary remedy to prevent injustice and hardship and should not be employed as 'a mere artificial excuse for denying to a litigant that which ... he is fairly entitled to receive, when the assertion of the claim, though tardy, is within the time limited by statute and the rights of no one have been prejudiced by the delay."' *Brost v. L.A.N.D., Inc.,* 680 P.2d 453, 456 (Wash. Ct. App. 1984) (quoting *Crodle v. Dodge,* 168 P. 986, 990 (Wash. 1917) (italics in original omitted). To prevail on its laches argument, Connect must establish that (1) DZ Bank had knowledge of the facts constituting its causes of action or a reasonable opportunity to discover such facts; (2) there was an unreasonable delay in commencing the action; and (3) the delay damaged Connect. *See In re Marriage of Barber,* 23 P.3d 1106, 1110-11 (Wash. Ct App. 2001). "The main component of the doctrine is not so much the period of delay in bringing the action, hut the resulting prejudice and damage to others." *Cotton v. City of Elma,* 998 P.2d 339, 346 (Wash. Ct. App. 2000) (alterations omitted) (quoting *Clark Cty. Pub. Utility Dist. No. 1 v. Wilkinson,* 991 P.2d 1161, 1166 (Wash. 2000)). The burden of proof is on the party asserting laches as a defense. *Rutter v. Butter's Estate,* 370 P.2d 862, 865 (Wash. 1962).

Connect bases its laches argument on an alleged lack of access to evidence on which to build its defense that Connect asserts has been caused by DZ Bank. (Am. Ans. at 10 ("[Defendant's ability to defend this lawsuit has been severely prejudiced due to [DZ Bank's] unreasonable delay by denying [Connect] access to documents or other physical evidence; witnesses; and a reasonably fresh recollection of the events giving rise to this lawsuit."); Con. Mot. at 24; Con. Reply at 5-7.) Connect is essentially trying to turn a discovery dispute into a laches defense. Even assuming that this was an appropriate basis for alleging laches, Connect's argument fails. Connect failed to timely serve discovery requests upon DZ Bank, and the court accordingly granted DZ Bank's motion for a protective order. (*See* Dkt. ## 47, 50, 53.) "Generally speaking, where the parties are equally at fault, neither can successfully assert laches against the other." *Rutter*, 370 P.2d at 865.

Connect also tries to build a laches defense on allegations that (1) DZ Bank "acquiesced" to Connect remaining Advantage Pacific's "agent of record," and (2) DZ Bank knew of Brooke's fraud in 2008 "before Advantage Pacific had been damaged by Brooke's failure to pay commissions" and "had it done acted then [sic], there would be no collateral." (Con. Mot. at 24.) These, assertions, even if true, do not establish the main component of laches—namely, prejudice to Connect. *See Cotton,* 998 P.2d at 346. The mere fact that DZ Bank acquiesced to Connect remaining an agent of record, even if true, does not establish that Connect was prejudiced thereby. The fact that DZ Bank knew of Brooke's fraud before Advantage Pacific was injured, even if true, might establish prejudice with respect to Advantage Pacific but not with respect to Connect. Essentially, Connect is arguing that if DZ Bank had acted sooner on its purported knowledge concerning the Brooke entities, DZ Bank would not have entered into the various loan and security agreements with Advantage Pacific and API, and Connect would not have acquired the Advantage Collateral and/or the API Collateral because neither Collateral would have existed. This line of reasoning is too attenuated to support a laches defense.

5. Connect's Affirmative Defenses Based on Washington's Franchise Statute

In a confusing passage in its response to DZ Bank's motion for summary judgment, Connect argues that Washington's franchise statute, RCW 19.100.030, provides the underpinning for its affirmative defenses of unclean hands, unconscionability, duress/undue influence, failure of consideration, lack of consideration, and illegality. (Con. Resp. at 28-29.) The court has already ruled that Connect lacks standing to assert several of these affirmative defenses. *See supra* § III.E.l. To the extent this argument is also premised on the notion that Connect has the right to enforce Advantage Pacific's or API's rights under their franchise agreements with BCC or some other Brooke entity, the court rejects it for the same reasons stated above. *See id.*

***25** In any event, Connect fails to provide any evidentiary basis for its arguments concerning Washington's franchise statute and its various affirmative defenses. Without citation to the record or any evidence, Connect asserts:

> It is undisputed that DZ Bank, acting as Brooke's attorney-in-fact, refused to transfer the franchise rights, i.e. the right to be master agent, to Advantage and API unless Advantage/API reaffirmed the full value of the related Notes and released all claims against Brooke. They did so at a time when they knew of Brooke's fraud, and knew that neither Brooke or DZ bank would ever provide franchise services.

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

> It is undisputed that. Brooke foiled to pay commissions from July 2008 onward. But for DZ Bank's unlawful acts in withholding transfer, Advantage would not have expeiienced the loss of commissions from 2008-2010, and would not have sought replacement market access services from Connect.

(Con. Resp. at 28-29.)

DZ Bank does not concede these facts. (DZ Reply at 13 n.10.) Connects counsel's assertions of the foregoing "facts," without citation to evidence in the record, does not suffice at this stage of the proceedings. *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir. 1978) ("[L]egal memoranda and oral argument arc not evidence, and they cannot themselves create a factual dispute sufficient to defeat summary judgment."); *Smith v. Mack Trucks, Inc.,* 505 F.2d 1248, 1249 (9th Cir. 1974) ("Legal memoranda and oral argument, in the summary-judgment context, are not evidence, and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment."); *Kim Seng Co. v. J&A Importers, Inc.,* 810 F. Supp. 2d 1046, 1059 (CD. Cal. 2011) ("[M]ere attorney argument does not defeat a properly supported summary judgment motion."); *see also* *Carmen v. S.F. Unified Sch. Dist.,* 237 F.3d 1026, 1029 (9th Cir. 2001) ("[A] district court is not required to comb the record to find some reason to deny a motion for summary judgment.") (quotation marks omitted). The court concludes that Connect is neither entitled to summary judgment on these affirmative defenses, nor do they create issues of fact that would alter the court's decision granting partial summary judgment to DZ Bank.

6. Connect's Remaining Undeveloped Affirmative Defenses

In addition to the foregoing affirmative defenses, Connect also raises several others in a truncated and conclusory manner. In a single sentence in a footnote and without citation to the record, Connect asserts that the statute of limitations on DZ Bank's tort claims has passed. (Con. Mot. at 24, n.29.) In three sentences and without citation to the record or any authority other than Federal Rule of Civil Procedure 19., Connect asserts DZ Bank failed to join A Plus Insurance and First State Bank as necessary parties. (*Id.* at 25.) In two sentences, Connect asserts that DZ Bank's claims are barred by res judicata. (Con. Resp. at 29.) Again, Connect provides no citation to the record. (*Id.*)

A party waives or abandons an argument at the summary judgment stage by failing to provide more than a passing remark in support of its position. *See* *John-Charles v. California,* 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (holding that a party "failed to develop any argument on this front, and thus has waived it"); *Moreno Roofing Co., Inc. v. Nagle,* 99 F.3d 340, 343 (9th Cir. 1996) (ruling that counsel's passing remarks on an issue in opposition to summary judgment were insufficient to avoid waiver); *United States v. Kimble,* 107 F.3d712, 715 n.2 (9th Cir. 1997) (deeming an argument "to have been abandoned" where the party fails to "coherently develop[ ]" it in his briefs); *see also* *United States v. George,* 291 F. App'x 803, 805 (9th Cir. 2008) (holding that a party's "failure to adequately develop ... arguments in his brief operates as a waiver"). Connect has waived its affirmative defenses of expiration of the statute of limitations, failure to join a necessary or indispensable party, and res judicata by failing to provide sufficient development in its briefing.

F. Summary of the Court's Rulings

***26** In sum, the court concludes that DZ Bank is entitled to partial summary judgment as follows: DZ Bank is entitled to summary judgment against Connect on liability for its claims for conversion and unjust enrichment with respect to the Advantage Collateral. However, genuine issues of material fact remain with respect to the extent of the transfer, if any, of the API Collateral to Connect. In addition, genuine issues of material fact remain with respect to DZ Bank's damages, and Connect will be permitted an opportunity to cross-examine DZ Bank's damages expert(s) at trial. The court, therefore, denies DZ Bank's motion for summary judgment with respect to these two issues and reserves them for trial.

Based on the evidence cited and the analysis above, the court also concludes that Connect is not entitled to summary judgment on any portion of DZ Bank's claims for conversion or unjust enrichment. In its motion and response to DZ Bank's motion, Connect asserted a number of affirmative defenses. The court concludes that none of the affirmative defenses Connect raises in the course of its briefing on the parties' cross-motions entitle Connect to summary judgment with respect to DZ Bank's claims or prevent the court from entering partial summary judgment in DZ Bank's favor, as described above.

IV. CONCLUSION

Based on the foregoing, the court GRANTS in part and DENIES in part DZ Bank's motion for summary judgment (Dkt. ## 64, 66) and DENIES Connect's motion for summary judgment (Dkt. ## 73, 74).

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

Dated this 14th day of February, 2016.

All Citations

Slip Copy, 2016 WL 631574, 88 UCC Rep.Serv.2d 1143

Footnotes

1 DZ Bank requests that the court take judicial notice of filings with Washington State's Secretary of State, which DZ Bank attaches to its motion as Group Ex. A. (DZ Mot. at 2 n.2.) The court agrees that it may take judicial notice of these documents. See Grassmueck v. Barnett, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003) (holding that the court may take judicial notice of public records kept by the Secretary of State).

2 While Advantage Pacific was operating, Mr. Coley was its sole owner and officer. (Fullmer Decl. (Dkt ## 75-79) Ex. F ("Coley Dep.") at 17:3-9.)

3 Connect objects to the admission of the API Bill of Sale. (Con. Resp. (Dkt ## 91 (redacted), 94 (sealed)) at 3.) Connect argues that the exhibit should be excluded because DZ Bank's Federal Rule of Civil Procedure 30(b)(6) witness, Mr. Probst, testified that he "could not recall ever seeing an agreement to purchase agency assets" for the API transaction, and Connect relied on this testimony to conclude that no such, document existed. (*Id.* (citing 12/9/15 Fullmer Decl, (Dkt. # 75) Ex. A ("Probst Dep.") at 325:8-326:17).) Connect argues that DZ Bank may not now introduce evidence contrary to its Rule 30(b)(6) deponent's statement. (*Id.*) However, as DZ Bank points out, Mr. Probst's testimony was accurate. (*See* DZ Reply (Dkt. ## 101 (redacted), 102 (sealed)) at 5.) Connect's counsel asked whether Mr. Probst had seen an "agreement to purchase agency assets" between CrullADD and API like the one "between Mr. Spruill, Insurance Express, and Advantage Pacific." (Probst Dep. at 325:5-326:10.) The API Bill of Sale was between BCC and API and it had a different title than the "Agreement for Purchase of Agency Assets" for Advantage Pacific. (*Compare* Probst Aff. ¶ 26, Ex. 11 (titled: "Bill of Sale and Instrument of Conveyance in Foreclosure") *with id.* ¶ 15, Ex. 3 (titled: "Agreement for Purchase of Agency Assets"),) Thus, Connect's reliance on Mr. Probst's testimony to conclude that no API Bill of Sale existed is misplaced. Further, Connect's reliance "on the absence of any such document in the record" is also misplaced. Connect failed to timely serve its requests for written discovery, and the court granted DZ Bank's motion for a protective order. (*See* Min. Entry (Dkt. # 53).) Thus, Connect cannot "rely" upon DZ Bank's failure to produce the document when the court precluded Connect's discovery due to its untimeliness. The court, therefore, overrules Connect's objection to the admission of the API Bill of Sale.

4 Connect asserts that Mr. Coley "did not complete the transaction" to purchase the API Agency Assets. (Con. Mot. at 4 (citing Coley Dep. at 11:19-12:4).) In his deposition, Mr. Coley testified as follows:

> Q: And then you had a second company named API Vancouver Insurance?
> A: Yes.
> Q: Okay, And what did that do?
> A: Brooke Insurance informed me I had to form a second corporation in order to purchase another agency they offered me. And I think it was July of 2008. And then we began the process. It drag on for a long time. It never really completed because we filed bankruptcy in October so we never really got there.
> Q: And-in October of 2008?
> A: Yeah. That's when I found out they had gone out of business, because there was actually nothing-they were selling just paper, basically.

(Coley Dep. at 11:15-12:4.) Although this testimony is equivocal, Connect provides no evidence to the court that Mr. Coley denies executing the API Bill of Sale, the personal guarantee, or the API Security Agreement.

5 Connect argues that the doctrine of judicial estoppel precludes DZ Bank from asserting "that the CrullADD/API sale was a foreclosure sale," because in the litigation DZ Bank filed against Advantage Pacific, API, and Mr. Coley in the United States District Court for the Western District of Washington, No. CI 1-5879BHS ("Advantage/ API Case"), DZ Bank "alleged that it was a holder in due course and made no mention of this foreclosure sale." (Con. Resp, at 3.) However, the court finds no inconsistency between DZ Bank's position in the previous litigation and its position here. API's acquisition of the API Agency Assets formerly owned by CrullADD never altered the continuity of the pledge of Note 6486 to DZ Bank, where API assumed Note 6486 by the Assumption Agreement, and Amended Note 6486 was automatically subject to DZ Bank's lien under the Amended Security Agreement based upon DZ Bank's interest in Note 6486. (*See* Probst Aff. ¶¶ 23-31.)

6 While API was operating, Mr. Coley was the sole owner and officer of the company. (Coley Dep. at 17:3-9.)

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

7 DZ Bank objects to the admission of the declarations of Jeremy Pool (J. Pool Decl.) and the declaration of Alica Pool (A. Pool Decl. (Dkt. ## 32 (unsigned with exhibits), # 108 (signed without exhibits))) because neither declaration was signed by the declaraant when originally filed. (DZ Reply (Dkt. ## 101 (redacted), 102 (sealed)) at 2-3.) Subsequent to DZ Bank's objection, Connect filed signed copies of the two declarations. Accordingly, the court overrules DZ Bank's objection to the declarations based on their lack of signature. DZ Bank also objects to certain parts of both declarations on other substantive grounds. The court addresses portions of these declarations in subsequent sections of this order, but need not strictly resolve the evidentiary issues at this time because the court did not rely on this testimony in denying portions of DZ Bank's motion, and admission of the testimony would not alter the court's ruling denying Connect's motion for summary judgment.

8 Connect asserts that Advantage Pacific subsequently assigned its rights in the Producer Agreement to an entity known as A Plus Insurance, Inc., and that Connect ratified the assignment. (Con. Resp. at 50 3.3).) Connect bases this argument upon the declaration of Alicia Pool and an email string, dated in August 2012, (A. Pool Decl. ¶ 8, Ex. 1.) In her declaration, Ms. Pool states that, in the email string, Mr. Coley "specifically request[s] that he assign Advantage's right, title, and interest in the Producer Agreement to A Plus Insurance, Inc. ('A Plus')." (*Id.* ¶ 8.) DZ Bank has objected to this portion of Ms. Pool's declaration arguing that it contains "argument and opinion" rather than facts because the term "assign" does not appear in the emails at all. (DZ Reply at 2.) The court has examined the email string and there is no specific reference to an assignment of "Advantage's right, title, and interest in the Producer Agreement to A Plus" to be found in it. (*See* A. Pool Decl. Ex. 1.) Even if, however, Mr. Coley or Advantage Pacific had assigned Advantage Pacific's rights in the Producer Agreement to A Plus, this fact is immaterial to the court's decision here because the alleged assignment occurred after Connect had already acquired Advantage Pacific's Assets (*see* Probst Aff. Ex. 19) and "a 100% undivided ownership interest in [Advantage Pacific's] book of business," pursuant to the Producer Agreement (*see* Producer Agreement ¶¶ A(10), C(3)). All of the commissions from Advantage Pacific's book of business would still run through Connect prior to distribution by Connect to itself and either Advantage Pacific or A Plus. (*See id.* ¶ A(3) ("Connect shall receive all commissions and/or bonuses derived through said contracts at its home office. Thereafter, Connect shall distribute Producer's [Advantage Pacific's] share of all commissions and/or bonuses in accordance with the terms stated in this Producer Agreement.").)

9 DZ Bank objects to exhibits C, J, K, O, R, S, and paragraph 13 of Ms. Fullmer's declaration. (DZ Resp. at 1-5.) The court need not resolve these evidentiary issues at this juncture because, even if admitted, the court would have still denied Ms. Fullmer's motion for summary judgment, and the exhibits had no bearing on the court's rulings with respect to DZ Bank's motion.

10 Connect objects that Exhibit 21 and Exhibit 22 of Mr. Probst's affidavit are inadmissible as hearsay. (Con. Resp, at 1-3,) The court agrees that at this point DZ Bank has failed to lay a proper foundation for these records to be accepted into evidence on the basis of the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). The court addresses this issue in detail in the section of this order related to API's assets. *See infra* § III.C.6.

11 Instead of February 28, 2013, Connect asserts that DZ Bank learned of Connect's involvement no later than April 12, 2012, when Mr. Coley filed for bankruptcy and allegedly disclosed facts concerning Connect's involvement on his bankruptcy schedules. (Con. Resp. at 5; 1/5/16 Fullmer Decl. (Dkt. # 96) ¶ 5, Ex. Z.) Even if true, this discrepancy regarding dates is immaterial. Both dates are after Connect's 2010/2011 acquisition of the Collateral and fall within the three-year statute of limitations for conversion from the date DZ Bank filed suit on November 5, 2014. (*See* Compl.); *see also* RCW 4.16.080(2); *Crisman v. Crisman,* 931 P.2d 163,167 (Wash. Ct. App. 1997) (applying discovery rule to three-year statute of limitations for conversion). In addition, the court addresses Connect's affirmative defense of laches later in this order and does not find that Connect has asserted a valid affirmative defense on this basis. *See infra* § III.E.4.

12 This background section does not provide an exhaustive account of the evidence the parties have submitted. The court addresses additional facts discussed or asserted by the parties and whether those facts are material to the court's disposition in the sections of the court's analysis to which those additional facts pertain.

13 Under the court's scheduling order, the parties' motions for summary judgment were due no later than December 8, 2015. (Sched. Ord. (Did. # 20) at 1; *see also* 12/7/15 Order (Dkt. # 61) at 2.) Because Connect filed its motion for summary judgment in an untimely manner and did not seek leave from the court to do so under Federal Rule of Civil Procedure 6(b), the court issued an order to show cause why the court should not strike Connects motion. (OSC (Dkt. # 81).) Connects counsel filed her response to the courts order on December 11, 2015. (OSC Resp. (Dkt. # 82).) Connects counsel explained that the delay was due to "unforeseen personal crises, combined with technical difficulties." (*Id.* at 4-6.) Because the court does not wish to penalize Connect for its counsel's delay during the critical summary judgment phase of this litigation, and because the court finds Connects failure to adhere to the dispositive motions deadline by one day caused little prejudice to DZ Bank, the court accepts Connects response to I its order to

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

show cause and considers Connects motion for summary judgment.

14 DZ Bank acknowledges that the elements of unjust enrichment are uniform in Texas., New York, Florida, and Washington. (DZ Mot. at 15 n.9.) The only distinction between Washington law and the law of New York, Texas, and Florida with respect to DZ Bank's conversion claim is that Washington does not allow punitive damages whereas the other three states do. However, DZ Bank does not seek punitive damages in this proceeding and asks the court to apply Washington law. Accordingly, the court does not find this distinction to be material to its choice of law analysis.

15 Citing RCW 62A.9A-301, Connect argues that when considering disputes involving the UCC, the court should apply Texas law to issues involving Connect and Washington law to issues involving Advantage Pacific or API. (Con. Mot. at 11.) This provision states in relevant part that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection." RCW 62A.9A-301(1). Connect is not "a debtor" in the sense that word is used in RCW 62A.9A-301(1). Indeed, Connect is not a party to any of the notes or security agreements cited herein. Rather, Connect is alleged to have converted DZ Bank's collateral. To the extent that any provision of the UCC applies to determine choice of law in this proceeding, It is RCW 62A.I-301(b), which provides in pertinent part: "In the absence of an agreement [between the parties to a transaction], this title applies to transactions bearing an appropriate relation to this state." RCW 62A. 1-301 (b). Because Connect does not assert that there are any conflicts between the UCC laws of Texas and Washington, the court will apply Washington law to the extent that the application of any provision of the UCC is necessary to resolve the issues presented.

16 The collateral at issue, although it consists of intangible property in the form of client lists, is chattel that is subject to conversion under Washington law. *See, e.g.*, *In re Marriage of Lanham & Kolde,* 106 P.3d 212, 218 (Wash. 2005) (ruling that intangible stock options are chattel subject to conversion); RCW 62A.9A-102(42) (client lists are general intangibles). Further, DZ Bank's security interest in the collateral is a sufficient interest in the property to maintain a conversion action. *See In re Marriage,* 106 P.3d at 219 ("We hold that some property interest in the allegedly converted goods is all that is needed to support an action in conversion."); *Meyers WayDev. Ltd. P'ship v. Univ. Sav. Bank,* 910 P.2d 1308, 1320 (Wash. Ct. App. 1996) (holding that a bank's security interest was a sufficient interest in the property to maintain an action for conversion).

17 "When the contract provisions at issue are unambiguous, the court's interpretation of the contract is a question of law which may be decided on summary judgment." *Truck Ctr. Corp. v. Gen. Motors Corp.,* 837 P.2d 631, 634 (Wash. Ct. App. 1992). Here, both parties have placed the Producer Agreement before the court and asked the court to construe it on summary judgment. (*See* Con. Mot. at 12-13; Con. Resp. at 11-12; DZ Mot. at 18-19; DZ Resp. at 6-9, 13; DZ Reply at 7.) Although Connect and DZ Bank argue for different interpretations of the Producer Agreement, neither has asserted that the contract is ambiguous. (*See id.*) The court agrees that the terms of the Producer Agreement are unambiguous and that the court may construe those terms as a matter of law with respect to the parties' cross motions for summary judgment.

18 DZ Bank objects to the authenticity of this document. (DZ Resp. at 5.) The court need not decide this issue because, even assuming it is authentic, the document does not create an issue of fact or otherwise defeat DZ Bank's motion for summary judgment on its claim for conversion.

19 *See Dice v. City of Montesano,* 128 P.3d 1253,1257 (Wash. Ct. App. 2006). ("Interpretation of an unambiguous contract is a question of law, thus summary judgment is appropriate.").

20 Relevant portions of RCW 62A.9A-316 provide as follows:

(a) General rule: Effect on perfection of change in governing law. A security interest perfected pursuant to the law of the jurisdiction designated in RCW 62A.9A-301(1) [where the security interest is perfected] or 62A.9A-305(c) [where the debtor is located] remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of four months after a change of the debtor's location to another jurisdiction; or

(3) The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) Security interest perfected or unperfected under law of new jurisdiction. If a security interest described in subsection (a) of this section becomes perfected under the law of the other jurisdiction before the earliest time or event described in subsection (a) of this section, it remains perfected thereafter. If the security Interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

****

(i) Effect of change in governing law on financing statement filed against original debtor. If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in RCW

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

62A.9A-301(1) [where the security interest is located] or 62A.9A-305(c) [where the debtor is located] and the new debtor is located in another jurisdiction, the following rules apply:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under RCW 62A.9A-203(d), if the financing statement would have been effective to perfect a security interest in the collateral had the collateral been acquired by the original debtor.

(2) A security interest perfected by the financing statement and which becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in RCW 62A.9A-301(1) [where the security interest is located] or 62A.9A-305(c) [where the debtor is located] or the expiration of the four-month period remains perfected thereafter. A security interest that is perfected by the financing statement but which does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

RCW62A.9A-316.

21 To the extent *Pearl River* could be interpreted to require DZ Bank to re-file its financing statements in Texas and/or Florida, the court would reject it as unpersuasive.

22 Connect makes an additional, similar argument pursuant to RCW 62A.9A-508(b). This provision of Washington's UCC requires a secured party to re-file its financing statement in some circumstances following a name change of the debtor that renders the filed financing statement "seriously misleading." RCW 62A.9A-508(b). Connect asserts without citation to the record that "Advantage Pacific changed its name to A Plus on August 1, 2011," but that "DZ Bank failed to file a new financing statement." (Con, Mot. at 24-25.) Connect asserts earlier in its motion, however, that Mr. "Coley registered A Plus Insurance as a *new* entity with the Washington Secretary of State," not that he changed the name of Advantage Plus to A Plus Insurance. (*Id.* at 8 (italics added) (citing Fullmer Decl. Ex. O).) Exhibit O consists of photocopies of checks written by Connect in some instances to Advantage Pacific and in other instances to A Plus Insurance. (Fullmer Decl. Ex. O.) This evidence alone does not establish either of Connect's assertions—that Advantage Pacific changed its name to A Plus or that Mr. Coley created an entirely new entity.

But interpreting the evidence in the light most favorable to Connect, and thus assuming that Advantage Pacific did change its name to A Plus Insurance on August 1, 2011, the court cannot conclude that RCW 62A.9A-508(b) would alter the outcome on the parties' cross-motions for summary judgment in any way. The Producer Agreement, which was effective on January 1, 2011, recites that "Connect and [Advantage Pacific] agree that Connect shall maintain a 100% undivided ownership interest in [Advantage Pacific's] book of business." (*See* Producer Agreement at 1, §§ A(10), C(3).) Thus, any change in Advantage Pacific's name occurred after Connect had already acquired Advantage Pacific's book of business. Accordingly, the court concludes that RCW 62A9A-508(b) was not applicable to Connect's acquisition of the Advantage Collateral and/or the API Collateral from Advantage Pacific.

23 DZ Bank argues that this issue is not material "because the evidence reflects ... that hundreds of API customers appeared in both the API Client List from 2008 and the Connect Client List." (DZ Reply at 10.) If DZ Bank can lay a proper foundation for the API Client List at trial and then demonstrate this type of overlap, the court is inclined to agree. However, because the trial is to the court without a jury (*see* Stip. Order (Dkt. # 113) (withdrawing jury demand)), the court will permit Connect some leeway in presenting this evidence and demonstrating its materiality.

24 Because the court has held that summary judgment is not appropriate with respect to DZ Bank's claim for conversion of API's hook of business, the court cannot enter summary judgment on DZ Bank's request for damages on that claim. *See supra* § III.C.6. The court can, however, consider DZ Bank's motion for summary judgment with respect to DZ Bank's claim for conversion of Advantage Pacific's book of business.

25 Although all of the tax returns for Advantage Pacific and API from 2008, 2009, 2010, and 2011 are unsigned, Connect only objects to the 2010 tax returns that underpin DZ Bank's expert's report. (*See* Con. Mot. at 4.) Connect relies upon the other unsigned tax returns. (*See* Fullmer Decl. Ex. Q; Con. Mot, at 9, 16; Con. Resp. at 19-20.)

26 "It behooves litigants, particularly in a case with a record of this magnitude, to resist the temptation to treat judges as if they were pigs sniffing for truffles." *In re Oracle Corp. Sec. Litig.,* 627 F.3d 376, 386 (9th Cir. 2010) (citing *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003, 1007 n.l (9th Cir. 2000); *United States v. Dunket,* 927 F.2d 955, 956 (7th Cir. 1991)).

27 Connect asserts 20 affirmative defenses in its amended answer. (Am. Ans. at 8-12.) In its briefing, Connect withdrew its second affirmative defense of accord and satisfaction. (Con, Resp. at 29.)

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.