

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

INDIVIDUAL HEALTHCARE  
SPECIALISTS INC.,

Plaintiff,

VS.

BLUECROSS BLUESHIELD OF  
TENNESSEE, INC.,

Defendant.

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NO. 16-137-BC

DAVIDSON COUNTY CHANCERY COURT  
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**MEMORANDUM AND ORDER: (1) DENYING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, STAY;  
(2) DENYING DEFENDANT'S OBJECTION TO ACCOUNTING;  
AND (3) SETTING 8/30/16 DEADLINE FOR SCHEDULING  
SECOND RULE 16 CONFERENCE**

This lawsuit was filed by a corporation who operated a General Agency program selling individual healthcare policies for the Defendant. The Plaintiff seeks to recover commissions Defendant allegedly underpaid for the years 2013-2015, punitive damages and attorneys fees.

This lawsuit is the second one between the parties. In a previous lawsuit in this Court (the "First Action") the Plaintiff recovered \$2.1 million and other relief based upon the same contracts in issue in this case. That decision is being appealed by the Defendant.

The First Action, the Defendant asserts, bars this lawsuit based upon *res judicata* or prior suit pending. Alternatively, the Defendant seeks a stay in this litigation during the

appeal of the First Action, asserting that the determination by the appellate court will greatly narrow the issues in this case.

The Plaintiff disputes that this lawsuit is barred, arguing that the contracts in issue are divisible. Under the Tennessee successive action statute, Tennessee Code Annotated section 20-6-201, successive actions may be maintained on the same contract as installments become due. The commission scheme, in issue in this case and in the First Action, the Plaintiff asserts, qualifies as a divisible contract on which successive actions may be maintained. As well, the Plaintiff disputes that an appellate decision in the First Action favorable to the Defendant will eliminate most of the claims in this case.

These issues of law are before the Court on Defendant's *Motion for Summary Judgment Or, in the Alternative, Motion to Stay*. Also pending is the Defendant's opposition to Plaintiff's claim in Count I of its February 10, 2016 Complaint for an accounting.

After considering the record, the argument of Counsel and the law, the Court denies the Defendant's motion for summary judgment, for a stay and Defendant's opposition to an accounting based upon the following reasoning and authorities. When used below, the "First Action" refers to the case of *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, filed in the Chancery Court of Davidson County, Case No. 11-1042-III in which a final judgment was entered on January 8, 2016, and which is presently on appeal.

### **Res judicata**

The Court concludes from the following authorities cited by the Plaintiff, that the law in Tennessee is that a case is not final for *res judicata* purposes while an appeal is pending. *Creech v. Addington*, 281 S.W.3d 363, 377 fn. 17 (Tenn. 2009); *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 913 (Tenn. 2000); *McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991); *In re Rainee M.*, 2015 WL 9584865 \*4 (Tenn. Ct. App. Dec. 30, 2015), *appeal denied* (Mar. 16, 2016); *Robinson v. Okpor*, 2015 WL 138170, \*6 fn. 5 9Tenn. Ct. App. Jan. 9, 2015) *appeal denied* (June 11, 2015); *Wilkerson v. Leath*, 2012 WL 2361972, \*6 (Tenn. Ct. App. June 22, 2012); *In re Shyronne D.H.*, 2011 WL 2651097, \*6 (Tenn. Ct. App. July 7, 2011); *Comcast of S. v. Elec. Power Bd. of Chattanooga*, 2009 WL 1328336, \*6 (Tenn. Ct. App. May 13, 2009).

Applying this principle, the Court concludes that because the First Action is being appealed, it is not final. Therefore, the requirement of a final judgment is not present in the First Action for it to serve as *res judicata*. Accordingly, the First Action does not bar this lawsuit under *res judicata*, and that part of Defendant's motion for summary judgment is denied.

### **Prior Suit Pending**

The First Action also does not bar this lawsuit under the prior suit pending doctrine. One of the essential elements of that doctrine is that the First Action must have the same

subject matter as this subsequent case. *See West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618, 623 (Tenn. 2008). This lawsuit does not have the same subject matter as the First Action because this lawsuit fits within the divisible contract exception to claims splitting and the Tennessee successive action statute, Tennessee Code Annotated section 20-6-201.

Those exceptions provide that successive actions may be maintained on the same contract for each installment when it becomes due. *Barnes v. Blue Diamond Coal Co.*, 47 S.W. 498 (Tenn. 1898); *McGhee v. Shelby Cty. Gov't*, 2012 WL 2087188, \*6 (Tenn. Ct. App. June 11, 2012).

In applying these authorities to this case, the Court adopts the Plaintiff's analysis of *Barnes* that installment contracts are but one species of divisible contract, and it is the latter divisible contract, that Tennessee's successive action statute applies to. Thus, the Court concludes that the contracts in this and the First Action are for periodic payment of royalties on commissions, and that constitutes a divisible contract. In so concluding, the Court has taken into account the explanation of an installment contract as a kind of divisible contract, quoted as follows, and the authorities, cited at pages 10-11 of Plaintiff's July 28, 2016 *Response*, that contracts requiring periodic payment of royalties on commissions constitute divisible contracts:

Each installment under a contract constitutes a different cause of action on which an action can be brought even though all are provided for in the same contract. A contract to pay money in installments is divisible, and so each

default in the payment of an installment may be the subject of an independent action provided it is brought before the next installment becomes due.

1 AM. JUR. 2D *Actions* § 106.

In addition to this case fitting within the divisible contracts doctrine and Tennessee's successive action statute, there is another basis for Plaintiff's claims asserted herein: the recurrent wrongs exception to claims splitting as adopted in RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(f) and cited in *Creech*, 281 S.W.3d at 381-82. Quoting the RESTATEMENT, this exception provides that, "For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of the suit, and chooses the latter course."

The pleadings in this case, beginning at paragraph 26, allege a wrong (underpayment of commissions) which has continued to occur subsequent to the wrongs claimed in the First Action. These recurrent wrongs are the harm on which this lawsuit is based. These allegations state a claim under the recurrent wrongs exception to claims splitting.

In opposition to application of the recurrent wrongs exception, the Defendant asserts that there was a repudiation of the contracts in issue in the First Action and in this case, and, therefore, no recurrence of wrong can occur. As the Defendant explains in its June 20, 2016 *Memorandum* at pages 22-23, citing Comment G to the RESTATEMENT, "If a party breaches and repudiates a contract, and the plaintiff subsequently commences an action for damages,

the law obligates that plaintiff to claim all his contract-related damages, 'prospective as well as past' and judgment in the action precludes any subsequent action for contract-related damages."

Such repudiation occurred, the Defendant asserts, by virtue of this Court's ruling in the First Action as to breach. In that ruling, the Court found that Defendant's November 2, 2011 notice to the Plaintiff, that Defendant would directly pay subagents, constituted a breach of the parties' contract. The Defendant's argument is the Court's finding of breach is the equivalent of a repudiation which bars application of the recurrent wrongs exception. For the following reasons, this analysis is not adopted by the Court.

First, Plaintiff's analysis and authorities at pages 14-15 of its July 28, 2016 *Response*, that a good faith erroneous contract interpretation is not the equivalent of repudiation, applies here. Secondly, the Defendant's Tennessee law definition of repudiation is, "the words and conduct of the contracting party . . . amount to a total and unqualified refusal to perform . . . ." *Smith v. Music City Homes, LLC*, No. 2:12-CV-0681, 2015 WL 752011, at \*12 (M.D. Tenn. Feb. 23, 2015). Examining Defendant's claim of repudiation based on the exhibits in the summary judgment record, the Court concludes as a matter of law the November 22, 2011 letter was not clear and unequivocal as required for repudiation. Thus, there is no repudiation as a matter of law which precludes application of the recurrent wrongs exception.

In sum, then, summary judgment based upon prior suit pending is denied because this lawsuit: (1) involves a divisible contract, (2) fits within the Tennessee successive action statute, and (3) fits within the recurrent wrongs exception to claims splitting. These grounds provide a clear and ample basis for denial of summary judgment. It is, therefore, not necessary to analyze and decide the further defenses to application of the prior suit pending doctrine, asserted by Plaintiff, of full performance, agreement to claims splitting implicit in the parties' contract, acquiescence and estoppel.

### **Stay of This Case During Appeal of First Action**

The Defendant's basis for a stay of this case is the premise that if the Defendant is successful on appeal of reversing the decision in the First Action on the direct payment issue that will eliminate most of the claims and damages in this case. Holding off, particularly on the time and expense of an accounting and use of experts in this case, for that pivotal appellate decision in the First Action justifies a stay, the Defendant asserts. The Court's analysis leads it to a different conclusion.

Paragraphs 33, 35, and 36-38 of the Complaint all contain claims by the Plaintiff for Defendant's failure to pay commissions to the Plaintiff, in addition to Plaintiff's claims on the direct payment issue. The pleadings, thus, assert more claims than just the direct payment issue. Further, in the trial of the First Action, there were different damages categories on the direct payment issue versus payments owed to the Plaintiff for its inhouse agents. For these

reasons, the Court concludes that a reversal on appeal will not so greatly eliminate claims or damages as to justify delay in proceeding with this case. Lastly, as proposed by Plaintiff, efficiency can be achieved by preparing a separate analysis for different categories of damages to mirror the issues on appeal. Then, if there is a reversal, the categories of damages reversed can be eliminated from this case.

Accordingly, the Defendant's motion for a stay is denied.

### **Plaintiff's Accounting Claim**

The same reasons on which the Court denied Defendant's motion for a stay are also reasons the Court overrules the Defendant's objection that the Plaintiff is not entitled to an accounting and the accounting sought by the Plaintiff is unnecessary.

The Defendant's objection to the accounting is also denied because under the law discussed above, of divisible contracts and the Tennessee successive action statute, this lawsuit is a new, independent cause of action. Arguments by the Defendant against the accounting which amount to estoppel do not apply. With a successive action on a divisible contract, a party is permitted to use its knowledge from the previous lawsuit and build on or modify that.



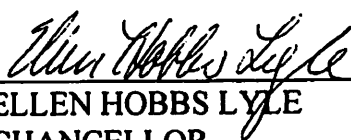
It is therefore ORDERED that Defendant's motion for summary judgment or, alternatively, for a stay is denied, and the Defendant's claim that the Plaintiff is not entitled to an accounting is denied. All issues on the scope of the accounting are reserved.

It is further ORDERED that by August 30, 2016, Counsel shall notify the Docket Clerk, Mrs. Smith (615-862-5719) of their availability on the following dates and times for a second Rule 16 Conference to set deadlines for the completion of this case.

September 15, 2016, 9:00 a.m.

September 16, 2016, 9:00 a.m.

September 28, 2016, 1:00 p.m.

  
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ELLEN HOBBS LYLE  
CHANCELLOR  
TENNESSEE BUSINESS COURT  
PILOT PROJECT

cc: Jay S. Bowen  
Will Parsons  
John E. Williams  
E. Todd Presnell  
Joel D. Eckert  
Junaid A. Odubeko

 **MAILED** + faxed  
3/22/16