UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
NC & VA WARRANTY COMPANY, INC.	)	CASE NO.15-80016
dba 1ST CHOICE MECHANICAL	)	CHAPTER 7
BREAKDOWN COVERAGE,	)	
	)	
Debtor.	)	
	)	
SARA A. CONTI, Trustee for	)	
NC & VA WARRANTY COMPANY, INC.	)	
dba 1ST CHOICE MECHANICAL	)	
BREAKDOWN COVERAGE,	)	
	)	
Plaintiff,	)	
	)	ADV. PROC. NO. A-15-9032
v.	)	
	)	
THE FIDELITY BANK and	)	
DEALERS ASSURANCE COMPANY,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION DENYING MOTIONS TO DISMISS

THIS ADVERSARY PROCEEDING came before the Court for hearing on September 7, 2016, on three matters: (1) the Motion for Order Taking Judicial Notice of Factual Allegations Contained in Prior

Pleadings [Doc. #97] (the "Motion for Judicial Notice") filed by The Fidelity Bank ("Fidelity") on July 27, 2016; (2) the Motion to Dismiss Adversary Proceeding [Doc. #98] (the "Fidelity Motion to Dismiss") filed by Fidelity on July 27, 2016; and (3) the Motion to Dismiss Adversary Proceeding [Doc. #105] (the "Dealers Motion to Dismiss") filed by Dealers Assurance Company ("Dealers") on August 4, 2016. Appearing at the hearing were Sara A. Conti (the "Trustee" or "Plaintiff") and J. Alexander S. Barrett on behalf of NC & VA Warranty Company, Inc. ("NCVA"). D. Wesley Newhouse and Holmes P. Harden on behalf of The Fidelity Bank. And John Paul H. Cournoyer on behalf of Dealers Assurance Company. Dealers and Fidelity both ask this Court to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) the claims set forth against them respectively in the Amended Complaint [Doc. #88] (the "Amended Complaint") filed by the Trustee on July 13, 2016. For the reasons set forth herein, the Dealers Motion to Dismiss will be denied, the Fidelity Motion for Judicial Notice will be denied, and the Fidelity Motion to Dismiss will be denied.

PROCEDURAL BACKGROUND

This adversary proceeding was commenced by the filing of a Complaint [Doc. #1] by the Trustee against Fidelity on August 3, 2015. Fidelity filed its Answer and Counterclaim [Doc. #5] on September 3, 2015. At that time, Fidelity also filed a Third-

Party Complaint [Doc. #6] against Dealers Assurance Company seeking indemnity, compensatory damages, punitive damages, and the amounts to be trebled under Chapter 75; or, in the alternative, contribution by Dealers as a joint tortfeasor. Trustee filed an Answer to Counterclaim of The Fidelity Bank [Doc. #33] on October 15, 2015.[1] On November 2, 2015, Fidelity filed a Notice of Voluntary Dismissal [Doc. #36] in which it dismissed its Third-Party Complaint against Dealers with prejudice. On November 30, 2015, the Court entered its Scheduling Order, providing, inter alia, that any defense for failure to state a claim upon which relief may be granted would be deemed waived unless Fidelity filed a supporting brief or legal memorandum within thirty (30) days. See Scheduling Order [Doc. #40], ¶ 4.

On December 15, 2015, the Trustee filed a Motion to Amend Complaint [Doc. #42] (the "First Motion to Amend"), seeking to add Dealers and U.S. Bank National Association as defendants, and attaching a proposed amended complaint that incorporated by reference the allegations in the original complaint. Dealers and US Bank objected to the First Motion to Amend, and the Court conducted a hearing on the motion on January 27, 2016. At the hearing, the Court observed that Dealers had raised significant

[1] The gap in time is due to the need for a determination on the applicability of the automatic stay of 11 U.S.C. § 362 to certain separate proceedings that had been commenced in Ohio.

issues of futility regarding the proposed amended complaint because the proposed complaint grouped conclusory allegations against the proposed parties, rather than allegations of specific facts as to specific defendants. Therefore, the Court granted the Trustee thirty (30) days to file an amended proposed complaint [Doc. #57]. As a result of the proposed amendments, the parties jointly moved for a stay of the scheduling order deadlines in this case, which the Court granted on February 16, 2016 [Doc. #60].

On February 26, 2016, the Trustee filed an Amended Motion to Amend Complaint [Doc. #63] (the "Amended Motion to Amend"). The Amended Motion to Amend attached a modified proposed amended complaint, which again lumped allegations against US Bank and Dealers and purported to incorporate by reference the allegations in the original complaint. Thereafter, the Trustee withdrew any portion of the Amended Motion to Amend with respect to U.S. Bank National Association [Doc. #67], leaving Dealers as the only potential defendant proposed to be added to this adversary proceeding. On March 28, 2016, Dealers objected to the Amended Motion to Amend as futile, arguing that the proposed amended complaint failed to state a claim upon which relief could be granted. Dealers further requested that the Court take judicial notice of the Complaint and briefs filed in Ronnie E. Thomas and N.C. & VA. Warranty Inc. v. Tracy Lee Thomas, et al.,

Case No. 13-cv-1130, United States District Court for the Middle District of North Carolina (the "District Court Action"), and argued that the Trustee was judicially estopped by the allegations made in that action. Fidelity did not object to the Amended Motion to Amend on futility grounds or otherwise.

On April 4, 2016 and after Plaintiff filed the Amended Motion to Amend, the Court entered its Stipulated Order, pursuant to which Fidelity and the Trustee consented "that Defendant The Fidelity Bank may address its defenses pursuant to Civil Rule 12(b)(6) in a motion for summary judgment to be filed pursuant to a revised scheduling order approved by the Court." See Stipulated Order [Doc. #71] ("Stipulation Regarding 12(b)(6) Defenses), p. 2.

On June 29, 2016, the Court entered its Memorandum Opinion Granting in Part and Denying in Part Motion to Amend [Doc. #84] (the "Court's Prior Opinion") and Order [Doc. #85] granting in part the Amended Motion to Amend, and allowing Dealers to be added as a defendant but only in regard to the claim of breach of contract. The Court specifically found that the proposed amended complaint stated a claim for breach of contract against Dealers. See Court's Prior Opinion, pp. 21-22. The Court further granted Dealers' request that the Court take judicial notice of the Complaint filed in the District Court Action, but held that the Trustee was not judicially estopped by the

allegations in that Complaint for purposes of Rules 12(b)(6) and 15.

Consistent with the Court's Prior Opinion, the Trustee filed an Amended Complaint [Doc. #88] (the "Amended Complaint") on July 13, 2016, which brought all claims against both Fidelity and Dealers in a single, consolidated complaint. The Amended Complaint did not contain any allegations or claims other than those previously set forth in the original complaint and the previous proposed complaint filed on February 26, 2016, each of which were filed with the Court and served upon Fidelity prior to the Stipulation Regarding 12(b)(6) Defenses. After allowing the Plaintiff to amend the complaint, and pursuant to Rule 15(a)(3), the Court granted Fidelity fourteen (14) days after service of the Amended Complaint to respond [Doc. #91]. Despite having had the opportunity to review all the allegations in the Amended Complaint before executing the Stipulation Regarding 12(b)(6) Defenses, Fidelity filed its Motion to Dismiss the Amended Complaint for failure to state a claim upon which relief may be granted on July 27, 2016, and contemporaneously filed the Motion for Judicial Notice, requesting that the Court take judicial notice of factual allegations contained in certain complaints, amended complaints, memoranda, and responses filed by the Debtor pre-petition in the following actions: (1) District Court Action; (2) N.C. & VA. [sic] Warranty, Inc. v.

Interactive Brokers Group, Inc., et al., Case No. 14-CVS-309, North Carolina General Court of Justice, Superior Court Division, Person County (the "State Court Action").[2] Neither the Motion to Dismiss, nor the Motion for Judicial Notice asserts that the Trustee or the estate is judicially estopped by any of the allegations in the Complaint. Dealers similarly filed its Motion to Dismiss the Amended Complaint for failure to state a claim upon which relief may be granted on August 4, 2016.

JURISDICTION

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Dealers filed a proof of claim in this case, asserting claims pursuant to the contract upon which the remaining claim by the Trustee is based. The Trustee and Fidelity have consented to this Court entering final judgment on all claims [Doc. #37]. This Court has constitutional authority to enter final judgment.

FACTUAL BACKGROUND

Plaintiff Sara A. Conti is the Chapter 7 Trustee of NCVA. NCVA is a corporation formed and existing under the laws of the

[2] The Trustee intervened in the District Court Action, but was not a party to the State Court Action.

State of North Carolina. NCVA was engaged in the business of providing vehicle service contracts and warranty programs for motor vehicles (the "Contracts"). Amended Compl., ¶ 1. These Contracts were sold to consumers and others primarily through car dealerships in order to protect the customers against loss in the event of mechanical breakdown. Id. NCVA was responsible for paying any claims directly to the customers who had purchased these Contracts. Id. Dealers Assurance is a corporation formed and existing under the laws of the State of Ohio. Id. at ¶ 2. Dealers insured the Contracts of NCVA and was responsible for their payment in the event that NCVA could not fulfill its obligations. See id. Fidelity Bank is a corporation formed and existing under the laws of the State of North Carolina with its principal place of business in Fuquay-Varina, North Carolina. Amended Compl., ¶ 3.

On August 9, 2001, NCVA and Dealers entered into an Agreement [Amended Compl., Exhibit A] (the "Insurance Agreement"), under which NCVA agreed to maintain a trust account (the "Trust Account") into which reserves and deposits were made in order to secure the obligation of Dealers to pay NCVA's Contract warranty claims in the event that NCVA failed to do so. See Insurance Agreement, ¶ 6(b). As compensation for this arrangement, NCVA was required to pay Dealers a premium based on the number of Contracts issued plus applicable taxes. Insurance

Agreement, ¶ 5. The amount of the premium payments as well as the required reserve amounts to be held in the Trust Account were to be determined by Dealers based on provisions in the Insurance Agreement. See Insurance Agreement, ¶ 9. NCVA alleges that it complied with its duties and obligations under the Insurance Agreement at all relevant times and made all required deposits into the Trust Account. Amended Compl., ¶ 11. The funds placed in the Trust Account were only to be withdrawn in order to pay losses suffered by Dealers on claims from auto warranties underwritten by Dealers. Amended Compl., ¶ 13.

On November 15, 2005, NCVA, Dealers, and U.S. Bank entered into a trust agreement [Amended Compl., Exhibit B] (the "U.S. Bank Trust Agreement"),[3] under which NCVA was the grantor, Dealers was the beneficiary, and U.S. Bank was the trustee. U.S. Bank Trust Agreement, p. 1. NCVA entered into the U.S. Bank Trust Agreement to place funds in trust based on their obligations under the Insurance Agreement. Amended Compl., ¶ 15. The U.S. Bank Trust Agreement provides that the "Trust Account shall be maintained all times separate and distinct from other assets of the Trustee [U.S. Bank] or any other person or

[3] The Trust Agreement attached to the Amended Complaint is executed by Wachovia Bank as trustee. In her original proposed amended complaint attached to her Motion to Amend Complaint [Doc. # 42] ("Original Motion to Amend"), the Trustee asserts that U.S. Bank was the successor to Wachovia Bank as trustee. See Original Motion to Amend, Ex. A ¶ 4. This allegation presumably was inadvertently removed from the Amended Complaint because the Trustee withdrew her motion to add U.S. Bank as a party.

entity at an office or branch of the Trustee in the United States. U.S. Bank Trust Agreement, Section 1(a), p. 1. Section 2 of the U.S. Bank Trust Agreement deals with the procedure for withdrawing assets from the Trust Account and provides that the Beneficiary [Dealers] may withdraw assets upon written notice to the Trustee [U.S. Bank]. No other entity besides Dealers is given the authority to withdraw assets from the Trust Account. See U.S. Bank Trust Agreement, Section 2, p. 2. Pursuant to this trust agreement, deposits were made between December 15, 2005 and September 1, 2006, in an amount of at least $4,493,490.00 (the "Trust Funds"). Upon expiration of Dealers' liability for NCVA's Contract claims, the trustee was required to return all remaining funds in the Trust Account to NCVA. See U.S. Bank Trust Agreement, Amended Compl., Ex. B, Section 10, p. 7; Fidelity Trust Agreement, Amended Compl. Ex. E, Section 10, p. 7.

The Amended Complaint alleges that, beginning in December of 2005, Dealers transferred "millions of dollars of NCVA Trust Funds from the Trust Account at U.S. Bank to an account at Interactive Brokers in the name of Marbury Advisors which account was owned by Tray Thomas, who is the son of Ronnie Thomas, deceased, who was the sole shareholder of NCVA. Amended Compl., ¶ 18. Dealers Assurance made these transfers upon the request and at the direction of Tray Thomas. Id. NCVA

further alleges that Tray Thomas was acting for himself and contrary to the interest of NCVA during these events and that Dealers knew or should have known that this was the case. Id. Beginning in December of 2005, Rhonda Holland, acting upon the direction of Robin Ratchford, the then president of Dealers, gave permission on behalf of Dealers to U.S. Bank to transfer the Trust Funds outside the control of U.S. Bank and into an account at Interactive Brokers. Amended Compl., ¶ 19. In May of 2009, Kirk Borchardt, the then CEO of Dealers, knew that the Trust Funds were not in an account with U.S. Bank and had been transferred to Interactive Brokers in an account in the name of Marbury Advisors, controlled by Tray Thomas. Amended Compl., ¶ 20 (citing Amended Compl., Exhibit C). At no time did Dealers notify NCVA that the Trust Funds had been transferred out of the Trust Account or take any actions to recover those funds. Amended Compl., ¶ 21. NCVA at all times believed that the Trust Funds were on actual deposit at U.S. Bank pursuant to the terms of the U.S. Bank Trust Agreement. Amended Compl., ¶ 23.

On November 30, 2009, NCVA, Dealers, and The Fidelity Bank entered into a new trust agreement to have Fidelity replace U.S. Bank as trustee for the Trust Funds [Amended Compl., Exhibit E] (the "Fidelity Trust Agreement"). Under the Fidelity Trust Agreement, NCVA remained the grantor, Dealers remained the beneficiary, and Fidelity became the new trustee in place of

U.S. Bank. See Fidelity Trust Agreement, p. 1. Pursuant to the Fidelity Trust Agreement, Fidelity agreed to hold the Trust Funds in trust in the Trust Account. Id. Fidelity accepted the representations of Tray Thomas as true that the Trust Funds totaling $3,985,000.00 were held in trust in Fidelity's name by Interactive Brokers. Amended Compl., ¶ 34. At that time Dealers executed the Fidelity Trust Agreement, see id. Ex. E, Dealers was aware that the trust funds had been removed from the U.S. Bank Trust Account. Id. ¶¶ 18-20. Plaintiff alleges that NCVA was still not aware that the funds had been removed from the Trust Account by Tray Thomas and placed in the account at Interactive Brokers. Id. ¶¶ 18-20 and 34. By letter dated April 15, 2010, Fidelity falsely represented to NCVA that the sum of $3,984,948.15 was then on deposit in the Trust Account. See Amended Compl., Exhibit F. At the time of this letter, none of the Trust Funds were on deposit in the Trust Account. Amended Compl., ¶ 37. Again, on March 14, 2011, Fidelity falsely represented to NCVA that the Trust Funds, in the amount of $3,825,319.14, were on deposit in the Trust Account. See Amended Compl., Exhibit G. At the time of this representation, none of the Trust Funds were on deposit in the Trust Account. Amended Compl., ¶ 39. Another letter from Fidelity on March 6, 2012, falsely represented that the Trust Funds in the amount of $4,327,974.21 were on deposit in the Trust Account. See Amended

Compl., Exhibit H. At the time of this representation, no Trust Funds were on deposit in the Trust Account with Fidelity Bank. Amended Compl., ¶ 41. At no time did Fidelity ever independently verify that the Trust Funds were in the Trust Account or were being held by Interactive Brokers. Amended Compl., ¶ 42. In August of 2011, Fidelity's auditors began to express concern over the status of the Trust Funds and the bank therefore began corresponding with Tray Thomas in an attempt to verify the status of the funds. See Amended Compl., ¶ 43-44; Amended Compl., Exhibit I. Fidelity did not notify NCVA of its concerns over the status of the Trust Funds or that the Trust Funds were not on deposit with it. Amended Compl., ¶ 44.

In October of 2011, Fidelity informed Tray Thomas that it would have to resign as corporate trustee because it could not independently verify that the Trust Funds were actually on deposit where Tray Thomas represented they were. Amended Compl., ¶ 45 and Ex. I. In January of 2012, Fidelity had still not resigned as trustee, but marked all NCVA accounts "pending closed" in order to avoid regulatory scrutiny by the FDIC. Amended Compl., ¶ 46; see also Amended Compl., Exhibit K. Even though Fidelity intended to resign and marked the accounts "pending closed," in March of 2012, Fidelity again confirmed to NCVA that over $4 million was on deposit in the trust account. Amended Compl., ¶ 48; see also Amended Compl., Exhibit H. The

Plaintiff alleges that no Trust Funds ever were held in the Trust Account with Fidelity and the funds that were to have been deposited there were actually stolen by Tray Thomas, unbeknownst to NCVA or its sole shareholder Ronnie Thomas. Amended Compl., ¶ 49. NCVA further alleges that the acts and omissions of Fidelity caused NCVA to be unaware that its funds were not on deposit with Fidelity pursuant to the Fidelity Trust Agreement and therefore prevented any acts by NCVA to prevent the theft by Tray Thomas or to recover the funds after they had been stolen. Amended Compl., ¶ 50.

STANDARD OF REVIEW

Under Rule 12(b)(6), "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although a plaintiff need only plead a short and plain statement of the claim establishing that he or she is entitled to relief, Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Thus, each claim asserted by NCVA will survive a motion to dismiss only if the Amended Complaint contains

"sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" Iqbal, 556 U.S. at 678, 129 S.Ct. 1937 (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). The United States Supreme Court set forth this plausibility standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (citations omitted).

To determine plausibility, all facts set forth in the Amended Complaint are taken as true. However, "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement" will not constitute well-pled facts necessary to withstand a motion to dismiss. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009).

In analyzing the claims alleged in the Amended Complaint, the Court will determine if the Plaintiff has "nudged their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570, 127 S.Ct. 1955. "Although '[a]ll allegations of material fact are taken as true and construed in the light

most favorable to the nonmoving party,' a 'court need not [] accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.'" Anderson v. Kimberly-Clark Corp., 570 Fed.Appx. 927, 931 (Fed. Cir. 2014) (quoting Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)); see also S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 182 (4th Cir. 2013) ("In the event of conflict between the bare allegations of the complaint and any exhibit attached to the complaint, the exhibit prevails.") (internal quotation marks, alterations, and ellipsis omitted); GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997) ("[F]actual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true.").

Under Fed. R. Evid. 201(b)(2), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Fourth Circuit has "note[d] that '[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.'" Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) (citing 21 C. Wright & K. Graham, Federal Practice and Procedure; Evidence § 5106 at 505 (1977)).

An affirmative defense, such as the statute of limitations, only may be reached on a motion to dismiss "if all facts necessary to the affirmative defense 'clearly appear[ ] on the face of the complaint.'" Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007) (quoting Richmond, Fredericksburg & Potomac R.R. v. Forst, 4 F.3d 244, 250 (4th Cir.1993)); see also Dean v. Pilgrim's Pride Corp., 395 F.3d 471, 474 (4th Cir. 2005) ("The raising of the statute of limitations as a bar to plaintiffs' cause of action constitutes an affirmative defense and may be raised by motion pursuant to Fed.R.Civ.P. 12(b)(6), if the time bar is apparent on the face of the complaint.").

ANALYSIS

A. Applicable Law

A bankruptcy court must make the same conflicts-of-law decisions as would the forum state in deciding which state's law will control. See In re Merritt Dredging Co., Inc., 839 F.2d 203, 206 (4th Cir. 1988); see also Biegler v. Heep, 172 F.3d 43, n.1 (4th Cir. 1999). As a court sitting in North Carolina, therefore, this Court must apply North Carolina's conflicts-of-law rules.

The Supreme Court of North Carolina has held, "that where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." Tanglewood

Land Co. v. Byrd, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). The Trust Agreement in this case provides that "[t]his Agreement shall be subject to and governed by the laws of the State of Ohio." See Trust Agreement, p. 8, Section 12. This is a valid choice-of-law provision, and Ohio law will govern the contract claims in this case. Nevertheless, this provision does not necessarily govern the non-contractual tort claims asserted against Fidelity.

In determining which state's laws to apply to any putative tort claims, North Carolina generally employs the rule of lex loci. This rule provides that the law of the state in which the injury occurred will control. See Boudreau v. Baughman, 322 N.C. 331, 335, 368 S.E.2d 849, 853 (1988). Nevertheless, if language in a choice-of-law provision is sufficiently broad, the choice-of-law provision in the contract may be applied to any tort claims that are related to or arise out of the contract. See Hitachi Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 624 and 628 (4th Cir. 1999) (applying Virginia law to a fraud in the inducement claim where the contract provided that Virginia law would apply to "[t]his Agreement and the rights and obligations of the parties hereunder ... including all matters of construction, validity and performance"); see also In re Inter-Act Elecs., Inc., No. 02-11557C-7G, 2004 WL 1052961, at *4 (Bankr. M.D.N.C. Mar. 30, 2004) (applying Illinois law to a

fraudulent inducement claim where the contract contained the following provision: "[t]he validity and construction of this Agreement shall be governed by the laws of the state of Illinois applicable to agreement made and performed wholly therein, conflicts of law notwithstanding;" and concluding that such a clause is controlling as to claims involving construction of the contract as well as contract related tort claims such as fraudulent inducement or promissory fraud").

In Inter-Act Elecs. and Hitachi, the courts considered the applicable law for a claim of fraud in the inducement of the very contract that contained the choice of law provision. Therefore, the fraud in the inducement claim in those cases directly affected the validity of the agreements and came within the specific terms of the choice of law provisions. In this case, the choice of law provision is not as broad, and neither the choice of law provision, nor the asserted tort claims bear such a direct nexus. Therefore, the Court finds that the tort claims will be controlled by North Carolina's general lex loci rules.

Having determined that the location of the injury will be determinative of the substantive law applicable to any tort claims, the Court must determine where the injury in this case occurred. "In cases involving financial injuries, the North Carolina courts have considered the injury to be sustained

'where the economic loss was felt.'" Synovus Bank v. Coleman, 887 F. Supp. 2d 659, 669 (W.D.N.C. 2012) (citing Clifford v. Am. Int'l Specialty Lines Ins. Co., No. 1:04CV486, 2005 WL 2313907, at *8 (M.D.N.C. Sep. 21, 2005)). "While the economic loss may be suffered in the state of the plaintiff's residence or principal place of business, courts routinely have rejected applying a bright line rule in determining the situs of the injury." Id. (citing Harco Nat'l Ins. Co. v. Grant Thornton LLP, 206 N.C. App. 687, 697, 698 S.E.2d 719, 725–26 (2010) ("[A] significant number of cases exist where a plaintiff has clearly suffered its pecuniary loss in a particular state, irrespective of that plaintiff's residence or principal place of business. In those cases, the lex loci test requires application of the law of the state where the plaintiff has actually suffered harm."); United Dominion Indus. v. Overhead Door Corp., 762 F.Supp. 126, 130 (W.D.N.C. 1991) (noting that in commercial actions, "determining the place that the injury occurred is not especially self-evident")). Even though courts in North Carolina have rejected a bright-line rule, "[t]he location of a plaintiff's residence or place of business may be useful for determining the place of a plaintiff's injury in those rare cases where, even after a rigorous analysis, the place of injury is difficult or impossible to discern." Harco Nat. Ins. Co. v.

Grant Thornton LLP, 206 N.C. App. 687, 697, 698 S.E.2d 719, 726 (2010).

The record indicates several potentially different locations of any financial injuries resulting from the alleged tortious conduct asserted against Fidelity in this case. The Debtor was a North Carolina corporation, see U.S. Bank Trust Agreement, p. 1, with its principal place of business located in Roxboro, North Carolina. The Trustee alleges that Dealers is an Ohio corporation, see Amended Compl. ¶ 2, and that it removed millions of dollars of NCVA's funds from the Trust Account at U.S. Bank. See Amended Compl. ¶ 8. The exhibits attached to the Amended Complaint reflect uncertainty surrounding from which trust account the funds were removed, see Amended Compl., Ex. C, and the location of the Trust Account is unclear. Fidelity is a North Carolina Corporation, with its principal place of business in Fuquay-Varina, North Carolina. Id. ¶ 3. Although the Amended Complaint does not list the location of Marbury Advisors or Interactive Brokers, the Trustee alleges that some of the money was removed from Marbury Advisors to an account in the Cayman Islands. Id. at ¶ 8. With this uncertainty, a more developed record would assist the Court in determining the location of the financial injury in this case, and the Court will defer determination of this issue until summary judgment.

Regardless of the applicable substantive law, the statute of limitations is a procedural matter which will be governed by the laws of North Carolina. "The Court must make the same choice of law that a North Carolina state court would make about the statute of limitations." Bardes v. Massachusetts Mut. Life Ins. Co., 932 F. Supp. 2d 636, 642 (M.D.N.C. 2013) (citing Guar. Trust Co. v. York, 326 U.S. 99, 108–12, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); Goad v. Celotex Corp., 831 F.2d 508, 510 (4th Cir. 1987)). "According to North Carolina's choice of law rules, as traditionally applied, North Carolina law controls procedural matters such as determining the statute of limitations." Id. (citing Boudreau v. Baughman, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988); Stetser v. TAP Pharm. Prods., Inc., 165 N.C.App. 1, 15-16, 598 S.E.2d 570, 580-81 (2004); MedCap Corp. v. Betsy Johnson Health Care Sys., Inc., 16 Fed.Appx. 180, 182 (4th Cir. 2001); Wener v. Perrone & Cramer Realty, Inc., 137 N.C.App. 362, 365, 528 S.E.2d 65, 67 (2000)). The choice-of-law provision in the Trust Agreement only applies to the substantive law in this matter and has no effect on procedural matters such as the statute of limitations. See MedCap, 16 F. App'x at 183, n. 2 ("The agreement contains a choice of law provision providing that the law of Indiana governs its construction. However, this in no way influences the application of North Carolina's statute of limitations.").

B. Motion for Judicial Notice

Fidelity asks this Court, pursuant to Fed. R. Evid. 201(b)(2), "for an order taking judicial notice of factual allegations contained in the pleadings and motions filed by Plaintiff N.C. & Va. Warranty, Inc. and its President, Ronnie Thomas in an action against Tray Thomas in the U.S. District Court for the Middle District of North Carolina, Case No. 13-CV-1130, and in an action pending in Person County North Carolina Superior Court brought by Plaintiff N.C. & Va. Warranty, Inc. against Interactive Brokers LLC, Auto Protection Plus, Inc., Car City of Whiteville, Inc., and Marbury Advisors. Inc., Case No. 14-CvS-309." Motion for Judicial Notice [Doc. #97], p. 1-2. As the Court previously ruled in Court's Prior Opinion, the Court may take judicial notice of the complaints filed by the Trustee in other courts. See Court's Prior Opinion, pp. 13-17. Although the Court may take judicial notice of the existence of these pleadings and the *existence* of the allegations in them, judicial notice does not go as far as Fidelity attempts to take it. Although the Court may take notice that certain allegations were made in the pleadings in related matters, judicial notice does not permit the Court to take notice of the truth of those allegations. Id.

At the hearing on these motions, Fidelity conceded that it does not contend that the Trustee is judicially estopped by the

allegations in the related matters. Instead, Fidelity seeks to have the Court accept the allegations made in the related proceedings as allegations of fact in this proceeding to undercut, supplement, or contradict the factual allegations in this case. For the reasons set forth in the Court's Prior Opinion, this is an improper use of judicial estoppel. Therefore, the Court will not take notice of the truth of any of the allegations made in those proceedings, and the Motion to Take Judicial Notice will be denied.

C. Dealers' Motion to Dismiss

The sole remaining claim by the Trustee against Dealers is a claim for breach of contract. The Court previously has ruled that the Amended Complaint states a claim for breach of contract against Dealers in this case. See Court's Prior Opinion, pp. 21-22. Nevertheless, Dealers now contends that the claim should be dismissed for failure to state a claim because the face of the Amended Complaint reveals that the claim is barred by the applicable statute of limitations.

There is no grounds to reconsider the Court's prior ruling that the Amended Complaint states a claim for relief against Dealers for breach of contract.

The Court previously considered and ruled that the breach of contract claim against Dealers Assurance stated a claim for relief for purposes of Rule 12(b)(6). Id. Therefore, the Court will consider the motion to dismiss for failure to state a claim

under the statute of limitations as a motion to reconsider the Court's prior interlocutory order.

As an interlocutory order, the proper Federal Rule of Civil Procedure to move for reconsideration of the entry of an order granting a motion to amend is under Fed. R. Civ. P. 54(b).[4] See Saint Annes Dev. Co. v. Trabich, 443 F. App'x 829, 832 (4th Cir. 2011). The court in TomTom, Inc. v. AOT Sys. GmbH, 17 F. Supp. 3d 545, 546 (E.D. Va. 2014), summarized the standards for reconsideration under Rule 54(b) as follows:

> Under this rule, a district court "retains the power to reconsider and modify its interlocutory orders ... at any time prior to final judgment." Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514–15 (4th Cir. 2003). The resolution of motions to reconsider pursuant to Rule 54(b) is "committed to the discretion of the district court," which may be exercised "as justice requires." Id. at 515. The Fourth Circuit has made clear that the standards governing reconsideration of final judgments are not determinative of a Rule 54(b) motion, but some courts have appropriately considered those factors in guiding the exercise of their discretion under Rule 54(b). Thus, these courts generally do not depart from a previous ruling unless "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." Am. Canoe Ass'n, 326 F.3d at 515 (quoting Sejman v. Warner–Lambert Co., Inc., 845 F.2d 66, 69 (4th Cir. 1988)). Such problems "rarely arise and the motion to reconsider should be equally rare." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). Motions to reconsider asking a court to "rethink what the Court had already

[4] Rule 54 of the Federal Rules of Civil Procedure is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7054.

> thought through—rightly or wrongly" should not be granted. Id.

TomTom, Inc., 17 F. Supp. 3d at 546 (footnotes omitted). Even though guided by these factors, the Court has broad discretion in deciding whether to reconsider an interlocutory order, and the task is to reach the proper judgment under the law. See Am. Canoe Ass'n, 326 F.3d at 514–15.

Dealers does not argue that there has been a subsequent trial that has produced substantially different evidence, or that controlling authority has changed. Instead, Dealers merely raises an additional argument under Rule 12(b)(6) that could have been raised in response to the Amended Motion to Amend. Therefore, the only remaining factor for the Court to consider is whether its prior ruling amounts to a clear error of law that would work a manifest injustice. It does not.

Despite raising other arguments of futility under Rule 12(b)(6), Dealers did not raise the statute of limitations defense as part of its argument for futility in its objection to the Trustee's Motion to Amend with respect to the claim for breach of contract. See Response of Dealers Assurance Company In Opposition to Plaintiff's Amended Motion to Amend Complaint to Bring Claims of Debtor Against Dealers Assurance Company and

U.S. Bank National Association, Filed Feburary 26, 2016 [Doc. #68] ("Dealers' Response to Motion to Amend").[5]

A motion to reconsider does not result in a manifest injustice merely because the moving party failed to raise the issue before. Reconsideration of orders may not be used to raise arguments that could have been made prior to the original order. See Zakit v. Global Linguist Solutions, LLC, 204 WL 4161981, *2 (E.D. Va. August 19, 2014) (citing Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Because Dealers previously could have argued that the contract claim failed to state a claim upon which relief may be granted due to the statute of limitations but did not, there is no manifest injustice. The Court also has considered the time this case has been pending, along with the previous opportunity to raise this issue. More fundamentally, however, for the reasons set forth below, the Trustee has sufficiently raised the issue of estoppel for purposes of Rule 12(b)(6), and the prior ruling therefore not only is not clearly erroneous, but correct. Therefore, the Court will deny the Motion to Dismiss with respect to the argument that the contract claim against Dealers fails to state a claim due to the statute of limitations. Nothing herein shall be construed as a finding that Dealers has

[5] Dealers did, however, argue that the claim under Chapter 75 of the North Carolina General Statutes was time barred. Id. at pp. 18-19. The Court dismissed that claim on other grounds. See Court's Prior Opinion, pp. 31-35.

waived the statute of limitations defense in this case. The Court merely rules that it will not reconsider its ruling that the Amended Complaint states a claim for relief for purposes of the defense of failure to state a claim under Rule 12(b)(6).

Even if the statute of limitations previously had been raised, the Trustee has sufficiently raised the issue of estoppel to prevent dismissal at this stage of the proceedings.

As explained above, the applicable statute of limitations is a procedural matter which is governed by the law of the forum state. "Under North Carolina law, a plaintiff must bring an action for breach of contract within three years of the date of the breach." Strategic Outsourcing, Inc. v. Cont'l Cas. Co., 274 F. App'x 228, 232 (4th Cir. 2008) (citing N.C. Gen. Stat. § 1-52(1) (2007); and Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51, 62 (1985)). "For state contract . . ., 'the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed.'" Housecalls Home Health Care, Inc. v. State, Dep't of Health & Human Servs., 200 N.C. App. 66, 70, 682 S.E.2d 741, 744 (2009), writ denied, review denied, 363 N.C. 802, 690 S.E.2d 697 (2010) (quoting Shepard v. Ocwen Fed. Bank, FSB, 172 N.C.App. 475, 478, 617 S.E.2d 61, 63 (2005)).

The breach of contract at issue is the allowance by Dealers for the Trust Funds to be transferred out of the Trust Account and out of the control of the Trustee, specifically U.S. Bank.[6] According to the Amended Complaint, this breach began in December of 2005, see Amended Compl., ¶ 19, but since the Trustee alleges that this breach occurred prior to Fidelity Bank becoming Trustee, see Amended Compl., ¶ 49 ("Upon information and belief, no NCVA money was ever in the Trust Account at Fidelity, and the funds that were to have been deposited there by Fidelity were actually stolen by Tray Thomas unbeknownst to NCVA or its sole shareholder Ronnie Thomas."), the very latest that this breach could have accrued would have been November of 2009. The Trustee filed her Motion to Amend the Complaint to add Dealers on February 26, 2016, which is more than three years after that time.

Although the claim accrued more than three years prior to the filing of the motion to amend the complaint, the Trustee argues that Dealers should be estopped from asserting the

[6] While the Plaintiff has stated a claim for breach of contract, the Trustee further alleges that Dealers breached the agreements by failing to return the funds. Dealers simply had no duty under any contract to return the Trust Funds to NCVA. Certainly any funds returned would mitigate NCVA's damages that resulted from any breach for the removal of those funds, but the failure to return funds that were removed in breach of a contract does not itself amount to an independent breach. In fact, the obligation to return funds at the maturity of any warranties is specifically imposed upon U.S. Bank and Fidelity in their respective Trust Agreements. Section 10(c) of both Trust Agreements states, "[o]n the Termination Date, upon receipt of written approval of [Dealers], the Trustee shall transfer to the Grantor any Assets remaining in the Trust Account . . . ." U.S. Bank Trust Agreement, Section 10(c), p. 7 (emphasis added).

statute of limitations because Dealers concealed its breaches from NCVA. "'[A] defendant may properly rely on a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from its own conduct which induced a plaintiff to delay filing suit.'" Leciejewski v. S. Entm't Corp., No. 1:09-CV-995, 2011 WL 1458505, at *4 (M.D.N.C. Apr. 15, 2011) (quoting Friedland v. Gales, 509 S.E.2d 793, 796 (N.C. Ct. App. 1998)).

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially

Id. (quoting Gore v. Myrtle/Mueller, 362 N.C. 27, 34, 653 S.E.2d 400, 405 (2007)) (internal quotation marks omitted).[7]

[7] Equitable estoppel should not be confused with fraudulent concealment. Fraudulent concealment tolls the statute of limitations for the time during which the fraud continues, and the misrepresentation that results in tolling can occur prior to the accrual of the claim for relief. See Wilkerson v. Christian, Case No. 1:06CV00871, 2008 WL 483445, *11-12 (M.D.N.C. February

To invoke equitable estoppel, it does not matter whether Dealers had a pre-existing legal duty to disclose the removal of the funds from the trust account. As explained by the court in Friedland:

> To invoke the doctrine of equitable estoppel, it is not necessary to show a pre-existing duty to disclose a material fact. [citations omitted]. Thus even in the absence of a pre-existing legal duty, a defendant may still be barred from asserting a statute of limitations defense by the doctrine of equitable estoppel. Under the doctrine of equitable estoppel, 'the fraud consists in the inconsistent position subsequently taken, rather than in the original conduct that operates to the injury of the other party. [citations omitted].

Friedland, 131 N.C. App. at 807, 509 S.E.2d at 797.

In Leciejewski, the defendant Southern Entertainment Corp. ("SEC") entered into an agreement in which it agreed to produce the advertising and promotional announcements of Semora Broadcasting, Inc. for use in radio. Semora thereafter assigned its right to payment under the agreement to the plaintiffs, the Leciejewskis. After failing to make the first installment payment in 1997, SEC wrote the Leciejewskis and stated that the effective date of the agreement would not occur until SEC had final approval from the FCC on a related matter. SEC stated that it would meet all its contractual obligations upon final

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19, 2008). Equitable esoppel, in contrast, only arises from actions undertaken by a defendant after a cause of action accrues, and "authorizes courts to preclude a defendant's pleading of the statute of limitations . . . ." Id.

approval by the FCC, which did not occur until 2005. The Leciejewskis brought their case against SEC in 2006 and SEC contended that the breach of contract claim was time-barred based on the applicable three-year statute of limitations. The District Court for the Middle District of North Carolina found that, drawing all factual inferences in the plaintiffs' favor as required when considering a motion to dismiss under Rule 12(b)(6), the alleged facts, if proven, would support the application of equitable estoppel and that the question of whether this can be proven is a question for later proceedings. Id. at *5. The court therefore denied the motion to dismiss despite the accrual of the cause of action more than three years prior to the filing of the complaint.

In this case, the facts alleged by the Trustee, taken as true and construed in a light most favorable to her, similarly are sufficient to survive a motion to dismiss. Dealers itself transferred the funds out of the Trust Account. See Amended Compl., ¶ 18. Dealers further knew that there were no funds remaining in the account for Fidelity to take possession. Id. ¶ 19. The Amended Complaint further alleges that Dealers knew or should have known that Tray Thomas was acting contrary to the interests of NCVA. Id. ¶ 18. Dealers knew that these actions resulted in a risk to the Trust Funds. See id., Exhibit C (internal email from Dealers' CEO expressing concern about the

transfer of funds out of the Trust Account with U.S. Bank). Despite this knowledge, Dealers executed the new Fidelity Trust Agreement that required transfer of the funds to Fidelity at a time when it knew that there were no remaining funds in the account to transfer. Id. Ex. E. Thereafter, both Dealers and NCVA received statements from Fidelity showing that it held the trust funds which Dealers knew had been otherwise removed. At no time did Dealers ever disclose the removal of the funds despite signing the new trust agreement. See id. at ¶ 26.

Based on these facts alleged by the Trustee and the exhibits attached to the Amended Complaint, each of which must be taken as true and construed in a light most favorable to the non-moving party, the Trustee has sufficiently raised the issue of equitable estoppel to survive this stage of the proceedings. The affirmative defense by Dealers of the statute of limitations is therefore denied without prejudice to it being raised at a later stage of the proceeding. The Dealers Motion to Dismiss is therefore denied.

Fidelity Motion to Dismiss

The Amended Complaint alleges eight claims for relief against The Fidelity Bank: (1) conspiracy; (2) breach of contract; (3) breach of fiduciary duty; (4) negligence; (5) actual and constructive fraud; (6) unfair and deceptive trade practices; (7) aiding and abetting conversion; and (8) unjust

enrichment.[8] Pursuant to Fed. R. Civ. P. 12(i),[9] the Court in its discretion will defer ruling on these claims until summary judgment.

"Rule 12(i) of the Federal Rules of Civil Procedure grants a district court discretion to defer ruling on a motion under Rule 12(b)(6) until the time of trial." Design Res., Inc. v. Leather Indus. of Am., 900 F. Supp.2d 612, 621 (M.D.N.C. 2012) (citing Fed. R. Civ. P. 12(i); Duke Univ. v. Massey Energy Co., No. 1:08CV591, 2009 WL 4823361, at *2 (M.D.N.C. 2009)). Typically, courts will defer rulings under Rule 12(i), "[w]here the Court determines that further factual development is necessary in order to make an accurate determination of whether claims are to be dismissed . . . ." Walker v. Serv. Corp. Int'l, No. 4:10CV00048, 2011 WL 1370575, at *3 (W.D. Va. Apr. 12, 2011) (citing Flue–Cured Tobacco Co-op. Stabilization Corp. v. U.S. E.P.A., 857 F.Supp. 1137, 1145 (M.D.N.C. 1994); Evello Investments, N.V. v. Printed Media Services, Inc., 158 F.R.D. 172, 173 (D. Kan. 1994)).

Having considered the claims in the Amended Complaint, the Motion for Judicial Notice, and the defenses asserted by

[8] The claim for unjust enrichment has been voluntarily dismissed by the Plaintiff. See Notice of Voluntary Dismissal [Doc. #116].

[9] Rule 12(i) is made applicable to this adversary proceeding through Fed. R. Bankr. P. 7012. The text of Rule 12(i) states: "Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial."

Fidelity, the Court finds in its discretion that further factual development would allow the Court to more accurately adjudicate this matter. Furthermore, deferral and further factual development is appropriate due to the complex choice of law issues and potential lex loci issue in determining the appropriate state's law to apply for the claims in tort. See Design Res., Inc. v. Leather Indus. of Am., 900 F. Supp. at 621-622 (deferring ruling under Rule 12(i), in part, due to choice of law issues).

The Court also finds that deferring the ruling on these claims is proper based on the prior stipulation of the parties. Prior to the filing of the Motion to Amend to add Dealers as a party, Fidelity and the Trustee had agreed "that Defendant The Fidelity Bank may address its defenses pursuant to Civil Rule 12(b)(6) in a motion for summary judgment to be filed pursuant to a revised scheduling order approved by the Court." See Stipulation Regarding 12(b)(6) Defenses, p. 2. Fidelity's underlying Motion [Doc. #47] requested leave from the Court "to address the defense of failure to state a claim in a motion for summary judgment to be filed after the close of discovery." The Stipulation Regarding 12(b)(6) Defenses allowed Fidelity to preserve these defenses until a later stage since Fidelity believed that a more complete factual record was necessary for the success of its 12(b)(6) defenses. See Motion of Fidelity

Bank in Respect to the Defense of Failure to State a Claim Pursuant to Rule 12(b)(6), Memorandum in Support, p. 3 ("Because a motion to dismiss focuses only upon the allegations of a pleading, and because it is necessary to present factual materials to establish the defense in this case, Defendant Fidelity Bank respectfully requests that the Court permit it to fully develop this defense in discovery so that it may be presented as part of a motion for summary judgment.").

Despite the prior stipulation and due to the potential procedural opportunity afforded by the amendment, Fidelity now seeks to raise these issues at this stage of the proceeding. The Court, however, will defer any defenses for failure to state a claim for relief until summary judgment as previously agreed. The Amended Complaint asserts no new claims against Fidelity. The only effect that the Amended Complaint had was to add Dealers as a party to this adversary proceeding. Fidelity is in essentially the same position that it was in when the Stipulation Regarding 12(b)(6) Defenses was entered. Under the circumstances of this case, the Court will exercise its discretion to defer ruling upon any defenses under Rule 12(b)(6) for the reasons set forth above and consistent with the parties' stipulation.[10]

[10] If Fidelity fails to properly raise any defenses under Rule 12(b)(6) at summary judgment then any such defenses shall be deemed waived.

CONCLUSION

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Dealers Motion to Dismiss is denied;

2. The Motion for Judicial Notice is denied;

3. The Fidelity Motion to Dismiss is denied without prejudice, with a ruling on these claims to be made at summary judgment;

4. Any defenses by Fidelity for failure to state a claim upon which relief may be granted shall be properly raised at summary judgment, or such defenses are waived;

5. The parties shall meet and confer pursuant to Rule 26(f) and submit a proposed revised joint scheduling memorandum and discovery plan on or before October 7, 2016.

[End of Document]

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