UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY, *Plaintiff* v. GLOBAL TOWER, LLC, *Defendant*	)	Cause No. 3:20-cv-500-RLM
GLOBAL TOWER, LLC, and GTP INFRASTRUCTURE I, LLC, *Counter-plaintiffs* v. NORFOLK SOUTHERN RAILWAY COMPANY, *Counter-defendant*	)	

ORDER

Plaintiff Norfolk Southern Railway Company ("Norfolk") sued Defendant Global Tower, LLC ("Global")[1] for breach of contract claiming that it's entitled to revenue generated from renting the top of a cellphone tower owned by Global. Norfolk seeks a declaratory judgment that Global assumed a contract that

[1] Co-defendant and counter-plaintiff GTP Infastructure I, LLC is Global Tower's successor-in-interest. The parties refer to the two entities under one name in their briefs because their positions are the same. The two entities are referred to as "Global" in this order for simplicity.

entitles Norfolk to those rental revenues, and for back rent payments that Global never passed along to Norfolk. Global asserts a counterclaim seeking a declaratory judgment that it never assumed a contract that entitles Norfolk to those rental revenues, and for restitution of the rental revenues that it mistakenly did pass along to Norfolk.

Both parties have moved for summary judgment on the contract issue. Norfolk also moved for summary judgment on Global's claim for restitution, and Global moved to strike portions of declarations that Norfolk submitted in support of its summary judgment motion. For the following reasons, the court GRANTS Global's motion to strike [Doc. No. 60] and motion for summary judgment [Doc. No. 54]. The court GRANTS IN PART AND DENIES IN PART Norfolk's motion for summary judgment [Doc. No. 49].

I. BACKGROUND

Norfolk, a railroad operator, maintains communication towers on its properties that it uses to transmit information and operate its railroad business. As cell phones and wireless communications became popular, Norfolk began to profit from its towers by leasing space on them to parties that needed an elevated location from which to transmit signals. U.S. Cellular became one of those parties in 2003 and leased space from Norfolk on a tower ("the Norfolk Tower") located in Peru, Indiana.

In 2007, Norfolk entered into an agreement entitled the Definitive Marketing Agreement with nonparty CitySwitch under which CitySwitch would

manage collocation on Norfolk's communication towers and serve as Norfolk's agent in handling license agreements with third parties. Later in 2007, Norfolk and CitySwitch entered into a lease agreement ("the Peru Ground Lease") under which Norfolk leased property in Peru to CitySwitch so CitySwitch could build and operate its own communication tower ("The CitySwitch Tower").

A. The Norfolk-CitySwitch Memorandum of Agreement

CitySwitch needed to secure U.S. Cellular as a tenant to obtain permitting from local authorities to build the CitySwitch Tower. To facilitate U.S. Cellular's move, Norfolk and CitySwitch executed a Memorandum of Agreement under which Norfolk released U.S. Cellular from its lease on the Norfolk Tower so that it could relocate its equipment to the CitySwitch Tower and lease from CitySwitch. In exchange for facilitating the move, CitySwitch gave Norfolk the right to 91 percent of the net revenue received from renting the space at the top of the CitySwitch Tower ("the Revenue Share") and CitySwitch would keep the remaining 9 percent. This allocation of revenue percentages matches the terms of the Definitive Marketing Agreement. Norfolk remained entitled to the Revenue Share as long as a communications tower was located at the CitySwitch Tower site, regardless of what entity might occupy the top of the CitySwitch Tower. The Memorandum of Agreement specified that CitySwitch would pay the Revenue Share to Norfolk as if the top of the CitySwitch Tower was a lease that CitySwitch was managing for Norfolk under the Definitive Marketing Agreement.

B. The CitySwitch-Global Asset Purchase Agreement

In 2010, CitySwitch entered into an Asset Purchase Agreement with Global where CitySwitch conveyed to Global, among other things, the CitySwitch Tower, the Peru Ground Lease, and CitySwitch's rights under the Definitive Marketing Agreement. The Memorandum of Agreement isn't identified anywhere in the Asset Purchase Agreement, but Global has made $7 million of Revenue Share payments to Norfolk since 2010. The $7 million doesn't account for all the Revenue Share payments that would be owed to Norfolk to date if Global assumed the Memorandum of Agreement.

CitySwitch also assigned to Global all managed leases under the Definitive Marketing Agreement. The parties dispute whether U.S. Cellular's previously terminated lease from the Norfolk Tower or the more recent lease of the CitySwitch Tower was identified in that assignment. Global claims that the lease from the Norfolk Tower was identified; Norfolk says that the lease from the CitySwitch Tower was identified.

C. The Norfolk-Global Peru Easement Transaction

On November 16, 2015, Norfolk sold 29 easements to Global—including the site subject to the Peru Ground Lease—for $3,673,333 (equating to approximately $126,667 per site). During negotiations, the final agreed price

fluctuated in amounts of $126,667 as Global contemplated purchasing additional easements but ultimately decided not to. The final agreement provided that the purchase price was provided "as full and final compensation for conveying the Easements." The terms of the Peru Easement specifically provide that "[Global] has requested and [Norfolk] has agreed . . . to grant to [Global] certain easement rights with respect to the [CitySwitch Tower site] that will supersede [the Peru Ground Lease]." The Peru Easement doesn't contain a payment term and doesn't mention the Memorandum of Agreement.

D. The Parties' Respective Claims

Global made Revenue Share payments to Norfolk for 2010, 2011, 2013, and 2015 but stopped after that. In 2017, Norfolk notified Global that Global was obligated to make Revenue Share payments under the Memorandum of Agreement. Norfolk sued for breach of contract in 2020 seeking a declaration that Global assumed the Memorandum of Agreement and that the Memorandum of Agreement remains valid and binding, and to recover the unpaid Revenue Share payments. Global counterclaimed, seeking a declaration that it has no obligations to Norfolk under the Memorandum of Agreement. Global also seeks restitution for the Revenue Share payments that it says it wasn't obligated to pay, and for a portion of the money that it paid for the Peru Easement.

Norfolk now seeks summary judgment on its breach of contract claim and Global's counterclaim for restitution. Global moves for summary judgment on

Norfolk's breach of contract claim and its own breach of contract counterclaim, seeking a declaration that it didn't assume the Memorandum of Agreement.[2] Global also moves to strike portions of declarations that Norfolk submitted in support of its summary judgment motion. All the claims that the parties seek summary judgment on are essentially the same except for Norfolk's summary judgment motion on Global's counterclaim for restitution and Global's motion to strike. Norfolk's motion on Global's restitution claim is moot if Global assumed the Memorandum of Agreement.

II. STANDARD OF REVIEW

"Summary judgment . . . is proper only if the pleadings, discovery materials, disclosures, and affidavits demonstrate no genuine issue of material fact such that [the movant] is entitled to judgment as a matter of law." Protective Life Ins. Co. v. Hansen, 632 F.3d 388, 391-392 (7th Cir. 2011); Fed. R. Civ. P. 56(a). The court's function at the summary judgment stage isn't "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In making that determination, the court must construe the evidence, and all inferences that can reasonably be drawn from the evidence, in the light most favorable to the non-moving party. Id. at 249, 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the

[2] Global doesn't move for summary judgment on its restitution claim.

facts are jury functions . . . ."). The movant bears the burden of showing that there is no genuine issue of material fact, but the non-moving party "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. at 256. A fact is material if affects the outcome of the case. Monroe v. Indiana Dep't of Transportation, 871 F.3d 495, 503 (7th Cir. 2017). "A factual dispute is genuine only if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Alston v. City of Madison, 853 F.3d 901, 910–911 (7th Cir. 2017) (quoting Carroll v. Lynch, 698 F.3d 561, 564 (7th Cir. 2012)).

To defeat a summary judgment motion, "the nonmovant must present definite, competent evidence in rebuttal," Parent v. Home Depot U.S.A., Inc., 694 F.3d 919, 922 (7th Cir. 2012), and "must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial[,]" Hemsworth v. Quotesmith.com, Inc., 476 F.3d 487, 490 (7th Cir. 2007); *see also* Fed. R. Civ. P. 56(e)(2). Summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 859 (7th Cir. 2005).

In considering cross-motions for summary judgment, "[t]he court applies the procedural requirements of Rule 56 separately to each cross motion . . . ." Nucap Indus., Inc. v. Robert Bosch LLC, 273 F. Supp. 3d 986, 997 (N.D. Ill. 2017) (citing Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund, 778 F.3d 593, 603

(7th Cir. 2015)). "Regarding the parties' factual contentions, the court adopts 'a dual, "Janus-like" perspective' on cross motions aimed at the same claim or defense. On one motion, the court views the facts and inferences in the light most favorable to the nonmovant; but if summary judgment is not warranted, the court changes tack on the cross motion and gives the unsuccessful movant 'all of the favorable factual inferences that it has just given to the movant's opponent.'" Id. at 997-998 (citing Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund, 778 F.3d at 603).

III. DISCUSSION

Analysis begins with Global's motion to strike so the evidence in consideration is already established when the court resolves the parties' summary judgment motions.

A. Motion to Strike

Global moves to strike portions of the declarations of Timothy Blair and Howard McFadden, which Norfolk submitted in support of its summary judgment motion. Mr. Blair is employed by Norfolk and is responsible for aspects of Norfolk's involvement in the telecommunications industry. Mr. McFadden is a real estate attorney for Norfolk. Global seeks to strike eight statements from Mr. Blair's declaration and three from Mr. McFadden's. Global says five of the Blair statements should be struck because they aren't based on personal knowledge; the remaining three should be struck because they are legal conclusions. Global

says all three of the McFadden statements should be struck because they aren't based on personal knowledge, and alternatively, they contradict Mr. McFadden's prior testimony.

Federal Rule of Civil Procedure 56(c)(4) provides that a "declaration used to support . . . a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated." A court may strike portions of a declaration that don't comply with Rule 56(c)(4). Fed. R. Civ. P. 56(e)(4); O'Brien v. Diversified Transp., Inc., 2006 WL 3191560, at *1 (N.D. Ind. Nov. 1, 2006). "Motions to strike are generally disfavored, 'and usually only granted in circumstances where the contested evidence causes prejudice to the moving party[,]'" Fitzgerald v. Lincare Inc., 2021 WL 3408613, at *2 (N.D. Ind. Aug. 3, 2021) (quoting Smith v. Nexus RVs, LLC, 468 F. Supp. 3d 1012, 1029 (N.D. Ind. 2000).

Norfolk's summary judgment motion doesn't cite each statement that Global seeks to strike. But since the court may consider "other materials in the record" that aren't cited by a party in resolving a summary judgment motion, Fed. R. Civ. P 56(c)(3), the court addresses all the statements that Global seeks to strike.

The five Blair statements Global seeks to strike for lack of personal knowledge are the highlighted portions of the following statements:

> 1. This page of the Reconciliation Spreadsheet also states a variance of [REDACTED] which indicates that Global Tower believed that it

> owed Norfolk Southern this amount for underpayments of the Revenue Share. (Doc. No. 49, Ex. 11 ¶ 11).
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> 2. In sum, the Reconciliation Spreadsheet reflects that Global Tower understood that it had assumed the MOA; that it understood that Revenue Share payments were due and owing; that (at times) Global Tower made these Revenue Share payments; and that, as of October 2019, Global Tower understood that it continued to owe Norfolk Southern for underpayment of the Revenue Share. (Doc. No. 49, Ex. 11 ¶ 12.)
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> 3. Records reflect that Global Tower did in fact make Revenue Share payments to Norfolk Southern for years 2010, 2011, 2013, and 2015; that Global Tower understood that it was obligated to make Revenue Share payments; and that Global Tower knew that it had not paid the full amounts due. (Doc. No. 51 p. 7 (citing Doc. No. 49, Ex. 11 ¶¶ 11-12)).
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> 4. In 2019, Global Tower attempted to conduct a reconciliation of (among other things) the Revenue Share payments and confirmed to Norfolk Southern that Revenue Share payments were due and were (at times) made, and that Global Tower understood that, as of October 2019, it continued to owe Norfolk Southern for underpayment of the Revenue Share. (Doc. No. 51 p. 14 (citing Doc. No. 49, Ex. 10, Ex. 11 ¶¶ 10-12)).
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> 5. Global Tower knew of the existence and terms of the MOA and, each time Global Tower made a Revenue Share payment, Global Tower knew that such payment was being made pursuant to the MOA. (Doc. No. 51 p. 20 (citing Doc. No. 49, Ex. 11 ¶ 12)).

Norfolk's summary judgment motion cites only the third, fourth, and fifth statements.

The personal knowledge requirement of 56(c)(4) parallels the requirement of Federal Rule of Evidence 602, which provides: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." "[P]ersonal knowledge may include reasonable inferences, [but] those inferences must be 'grounded in observation or other first-hand personal experience. They must not be flights of

fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.'" Payne v. Pauley, 337 F.3d 767, 772 (7th Cir. 2003) (citing Visser v. Packer Eng'g Assoc., 924 F.2d 655, 659 (7th Cir. 1991) (en banc)); *see also* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (witness wouldn't be permitted to testify about his "gut feeling" regarding his former employer's motive for discharging plaintiff). Personal knowledge includes opinions, Visser v. Packer Eng'g Assoc., 924 F.2d at 659, but it doesn't include speculation of a separate entity's state of mind, Payne v. Pauley, 337 F.3d at 772 (citing cases); *see also* Silver State Solar Power S., LLC v. United States, 2020 WL 6139865, at *6 (Fed. Cl. Oct. 19, 2020) ("[D]eclarant cannot testify to the goals or thoughts of a company he was not employed by.").

Norfolk argues that Mr. Blair's statements are based on personal knowledge because they are reasonably inferred from his knowledge that Global made Revenue Share payments. The Memorandum of Agreement obligated Revenue Share payments, and if Global was making those payments, Norfolk says it's reasonable to infer that Global knew and understood that it assumed the Memorandum of Agreement. But Mr. Blair was never an employee of Global. His personal knowledge of Global's understanding of the Memorandum of Agreement is based only on his interpretation of what it meant when Global made Revenue Share payments. That's impermissible speculation on Global's state of mind; accordingly, the court strikes the statements. This benefits Global little when it comes to Norfolk's summary judgment motion, because the court must

draw all reasonable inferences against Norfolk as movant, including the inferences Mr. Blair can't put into evidence.

The other three Blair statements Global seeks to strike because they are legal conclusions are the highlighted portions of the following statements:

> 1. CitySwitch subsequently sold its assets to one or both of Defendant/Counter-plaintiffs Global Tower, LLC and GTP Infrastructure I, LLC (who, along with American Tower Company, are collectively referred to as "Global Tower"), and Global Tower assumed CitySwitch's obligations, including the MOA and the requirement to make Revenue Share payments to Norfolk Southern. However, Global Tower did not always make the Revenue Share payments as required. (Doc. No. 49, Ex. 11 ¶ 9).
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> 2. As part of this attempted reconciliation, Global Tower provided Norfolk Southern with a spreadsheet outlining payments of the Revenue Share under the MOA (the 'Reconciliation Spreadsheet'). (Doc. No. 49, Ex. 11 ¶ 10).
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> 3. The Reconciliation Spreadsheet was provided to Norfolk Southern by Global Tower as part of an attempted reconciliation performed by Global Tower in 2019, and outlines payments of the Revenue Share under the MOA along with rent payments under the Ground Lease. (Doc. No. 51 p. 7 n.3 (citing Doc. No. 49, Ex. 11 ¶ 10)).

Norfolk's summary judgment motion only cites the third statement.

Summary judgment declarations "are for stating facts, not legal conclusions." Greene v. Westfield Ins. Co., 963 F.3d 619, 627 (7th Cir. 2020) (citing Fed. R. Civ. P. 56(c)(4)). Legal arguments in a declaration may also be disregarded because they are "an expression of legal opinion and is not a recitation of a 'fact' . . . ." Pfeil v. Rogers, 757 F.2d 850, 862 (7th Cir. 1985).

All three statements conclude that Global assumed CitySwitch's obligations to make Revenue Share payments under the Memorandum of Agreement, one of the ultimate issues in the case. A statement isn't

"objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704. But statements on the outcome of an ultimate issue is closer to impermissible legal argumentation than a recitation of a fact. *See* id. advisory committee notes ("These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach . . . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed."). Other courts have struck statements on the outcome of an ultimate issue as impermissible legal arguments, conclusions, or opinions. *E.g.,* Duro Inc. v. Walton, 2021 WL 4453741, at *10 (N.D. Ind. Sept. 29, 2021) (striking plaintiff's statements that defendant conspired to conceal and destroy evidence, made false representations, made misrepresentations to the court, and misappropriated assets); Renee v. Neal, 483 F. Supp. 3d 606, 611 (N.D. Ind. 2020) (striking legal conclusions, personal opinions rather than facts, and matters on which declarant wouldn't be competent to testify as a lay person). Accordingly, the court strikes the three remaining Blair statements as legal arguments.

Finally, the three McFadden statements Global seeks to strike—because they contradict Mr. McFadden's earlier testimony and they aren't based on personal knowledge—are the highlighted portions of the following statements:

> 1. The purpose of the easement transaction sought and consummated by Global Tower was at all times understood to be a transaction to transform the nature of Global Tower's rights in the ground underlying its towers. (Doc. No. 49, Ex. 12 ¶ 7).
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> 2. At all times, the parties understood that the sole purpose of the Easement Agreement for the Peru, Indiana location (the "Peru Easement" identified and designated as Exhibit 9 to Norfolk Southern's Motion for Summary Judgment) was to replace the existing Lease Agreement for that same location (the "Ground Lease" identified and designated as Exhibit 2 to Norfolk Southern's Motion for Summary Judgment). (Doc. No. 49, Ex. 12 ¶ 8).
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> 3. This is because the purpose of the easement transaction was to transform the nature of Global Tower's rights in the ground underlying its towers, and the Peru Easement was to replace the Ground Lease. (Doc. No. 51 p. 9 (citing Doc. No. 49, Ex. 12 ¶¶ 7-9)).

Only the third statement is cited in Norfolk's summary judgment motion.

Regarding Mr. McFadden's prior testimony, "[t]he sham affidavit rule prevents a party from defeating summary judgment through a declaration or affidavit contradicting prior testimony." Servicios Especiales al Comercio Exterior v. Johnson Controls, Inc., 2011 WL 1498591, at *1 (E.D. Wis. Apr. 19, 2011) (citing Bank of Ill. v. Allied Signal Safety Restraint Sys., 75 F.3d 1162, 1168 (7th Cir. 1996)). A contradictory declaration is created "[w]hen a party [gives] clear answers to unambiguous questions [in prior testimony] which negate the existence of any genuine issue of material fact" and then contradicts that testimony without explanation in a later declaration. Bank of Ill. v. Allied Signal Safety Restraint Sys., 75 F.3d at 1170. "[I]n light of the jury's role in resolving questions of credibility," district courts should apply this rule "with great caution." Id. at 1169. Courts must determine "whether a subsequent statement so squarely contradicts an earlier one as to create only a sham issue

of fact." Id. at 1170; *accord* Szany v. Garcia, 2020 WL 2767356, at *8 (N.D. Ind. May 28, 2020), appeal dismissed, 2020 WL 7055390 (7th Cir. Sept. 28, 2020) ("[T]he question boils down to whether [the] declaration contradicts [the] deposition testimony, or is . . . more akin to a clarification that remains consistent with [the] deposition testimony[.]").

Global cites page 16, lines 16-25 of Mr. McFadden's deposition as prior contradictory testimony:

> Q. Did you understand that in acquiring the easements Global Tower was seeking to eliminate its ongoing expenses at the involved sites?
>
> A. I was not aware of that.
>
> Q. Did you understand that Norfolk Southern was seeking to obtain a lump sum payment in exchange for ongoing revenue steam at the involved sites?
>
> A. I was aware of that, yes.
>
> Q. And that was your understanding?
>
> A. Yes.

(Doc. No. 54, Ex. 23).

Before the Peru Easement transaction, Norfolk received ongoing revenue from Global pursuant to the Ground Lease and in the form of Revenue Share payments. Global argues that Mr. McFadden affirmed that Norfolk was seeking to obtain a lump sum payment in exchange for the ongoing revenue steam associated with the CitySwitch Tower site. To Global, "the ongoing revenue steam associated with the [CitySwitch] Tower site" means revenue from the Ground Lease *and* the Revenue Share payments. Mr. McFadden can't now say in his

declaration that the Peru Easement was to only replace the Ground Lease (or the revenue associated with the Ground Lease). Global says that to argue otherwise is to carve out one of the constituent parts of "revenue stream" and remove it, contradicting his earlier testimony.

Mr. McFadden's testimony was silent on the question of whether "ongoing revenue stream" referenced the Ground Lease, the Revenue Share payments, or both. Global's restrictive reading of Mr. McFadden's testimony is incongruent with the sham affidavit rule. Mr. McFadden is allowed to later clarify in a declaration that Norfolk sought to transform Global's property rights by obtaining a lump sum payment in exchange for the ongoing revenue steam *from the Ground Lease* at the CitySwitch Tower site. That statement doesn't contradict his earlier testimony, it's just more specific.

Regarding Mr. McFadden's personal knowledge, Norfolk argues that Global always referred to the easement transaction as a "ground lease buyout package" and that the only reasonable inference to draw is that Global understood that the sole purpose of the Peru Easement was to replace the Ground Lease. The same personal knowledge concerns apply to these statements that applied to the five Blair statements. Mr. McFadden was never an employee of Global, but he made statements about Global's understanding of the Peru Easement. Furthermore, Global argues that the lump sum payment for the Peru Easement was in exchange for Norfolk's surrender of all the ongoing revenue stream associated with the Peru Easement site, including the Revenue Share. So there

is more than one reasonable inference to draw from Global's reference of the easement transaction as a "ground lease buyout package." Accordingly, the court strikes the three McFadden statements because they aren't based on personal knowledge.

B. Cross-Motions for Summary Judgment

The relevant contracts were drafted with varying choice-of-law provisions. The Definitive Marketing Agreement indicates that it should be construed in accordance with Virginia law, the Asset Purchase Agreement with Delaware law, and many other contracts are silent (including the Memorandum of Agreement). The parties agree that Indiana law either directly applies to the contracts or generally aligns with any other state's contract law that is identified in a choice-of-law provision. To simplify matters, the parties agree that Indiana contract law should apply to all contracts and claims at issue.

Under Indiana law, "[t]he essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." McVay v. Store House Comp., 289 F. Supp. 3d 892, 896 (S.D. Ind. 2017) (citing McCalment v. Eli Lilly & Co., 860 N.E.2d 884, 894 (Ind. Ct. App. 2007)). The interpretation of a contract is primarily a question of law. USA Life One Ins. Co. of Indiana v. Nuckolls, 682 N.E.2d 534, 538 (Ind. 1997). The court's primary objective is "to give effect to the intentions of the parties as expressed in the four corners of the instrument." Allen v. Cedar Real Estate Group, LLP, 236 F.3d 374,

381 (7th Cir. 2001) (citing Fetz v. Phillips, 591 N.E.2d 644, 647 (Ind. Ct. App.1992)). "Courts may not construe clear and unambiguous provisions, nor may it add provisions not agreed upon by the parties." Oxford Fin. Grp., Ltd. v. Evans, 795 N.E.2d 1135, 1142 (Ind. Ct. App. 2003).

"The meaning of a contract is to be determined from an examination of all of its provisions, not from a consideration of individual words, phrases, or even paragraphs read alone." Art Country Squire, L.L.C. v. Inland Mortg. Corp., 745 N.E.2d 885, 889 (Ind. Ct. App. 2001). If the contract is "clear and unambiguous, then it should be given its plain and ordinary meaning." USA Life One Ins. Co. of Indiana v. Nuckolls, 682 N.E.2d 534, 538 (Ind. 1997). A "contract term is not ambiguous merely because the parties disagree about the term's meaning." Roy A. Miller & Sons, Inc. v. Industrial Hardwoods Corp., 775 N.E.2d 1168, 1173 (Ind. Ct. App. 2002). "An ambiguity exists only where reasonable people could come to different conclusions about the contract's meaning." Id.; *see also* Abbey Villas Dev. Corp. v. Site Contrs., Inc., 716 N.E.2d 91, 100 (Ind. Ct. App. 1999) ("A contract is ambiguous when it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning.").

If the contract contains language that is ambiguous, "then the court may apply the rules of construction in interpreting the language." Askren Hub States Pest Control Servs., Inc. v. Zurich Ins. Co., 721 N.E.2d 270, 275 (Ind. Ct. App. 1999) (citing Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985)). A patent ambiguity is an ambiguity that "is apparent on the face of the

instrument and arises from an inconsistency or inherent uncertainty of language used so that it either conveys no definite meaning or a confused meaning." Oxford Financial Group, Ltd. v. Evans, 795 N.E.2d at 1143. Extrinsic evidence isn't admissible to explain or remove a patent ambiguity, which presents a question of law. Id. A latent ambiguity is an "ambiguity that arises only upon attempting to implement the contract, and the meaning of which can only be determined by reference to extrinsic evidence." Id. at 1144. If the ambiguity can't be resolved without the aid of a factual determination, then "the trier of fact must ascertain the facts necessary to construe the contract." Arrotin Plastic Materials of Indiana v. Wilmington Paper Corp., 865 N.E.2d 1039, 1041 (Ind. Ct. App. 2007); *accord* Felker v. Sw. Emergency Med. Serv., Inc., 521 F. Supp. 2d 857, 867 (S.D. Ind. 2007) ("[T]he fact finder resolves latent ambiguity as a question of fact."). When there is ambiguity in a contract, it is construed against its drafter. MPACYT Const. Group, LLC v. Superior Concrete Constructors, Inc., 802 N.E.2d 901, 910 (Ind. 2004).

1. The Memorandum of Agreement

Norfolk's overall argument is that while the Memorandum of Agreement isn't identified in the "specific nomenclature" of any relevant contracts, the only reasonable interpretation of those contracts is that Global assumed the Memorandum of Agreement when it executed the Asset Purchase Agreement with CitySwitch. Norfolk makes three arguments in support.

First, Norfolk says that Section 2.2 of the Asset Purchase Agreement memorializes Global's intent to assume the "Related Contracts," a term the Asset Purchase Agreement's appendix defines as contracts that "relate to the Assets." The CitySwitch Tower is part of "the Assets" according to Section 2.1(a) of the Disclosure Schedule that the Asset Purchase Agreement references. The CitySwitch Tower is the subject of the Memorandum of Agreement, so Global assumed the Memorandum of Agreement.

Global responds that Section 2.1(n) of the Asset Purchase Agreement identifies Section 2.1(n) of the Disclosure Schedule as the document that sets forth the "Related Contracts" that Global assumed. But the Memorandum of Agreement isn't listed in Section 2.1(n) of the Disclosure Schedule. Moreover, Section 2.2 of the Asset Purchase Agreement provides that, except for the Related Contracts, Global didn't assume any contract made "by [CitySwitch] prior to the Closing in connection with the Assets or the operation thereof[.]" Because the Memorandum of Agreement was a contract CitySwitch made before the Asset Purchase Agreement, the Memorandum of Agreement is an "Excluded Obligation."

Global then says that even if the Memorandum of Agreement technically meets the definition of "Related Contracts" in the appendix, Section 2.2 can't mean that Global assumed *all* related contracts. Section 1.1 of the Asset Purchase Agreement provides that the appendix shall define all terms in the Asset Purchase Agreement "unless the context otherwise requires[.]" If "Related

Contracts" meant *all* contracts that related to the assets, it would render meaningless Section 2.2's language that excludes obligations that were made "prior to the Closing in connection with the Assets[,]" which the rules of contract interpretation prohibit. So, says Global, context requires an interpretation that "Related Contracts" doesn't mean all related contracts, but only the ones enumerated in Section 2.1(n) of the Disclosure Schedule.

At bottom, the issue is whether "Related Contracts" means all contracts that related to the assets, or only the contracts enumerated in Section 2.1(n) of the Disclosure Schedule. Reasonable people could disagree, making the term "Related Contracts" ambiguous. But the ambiguity "is apparent on the face of the instrument and arises from an inconsistency or inherent uncertainty of language used[,]" Oxford Financial Group, Ltd. v. Evans, 795 N.E.2d at 1143, so this is a patent ambiguity and therefore a question of law.

Global's argument is well-taken—a broad reading of Section 2.2's assignment of related contracts would render meaningless Section 2.2's later language concerning excluded obligations. Indiana law requires contracts to "be construed so as to not render any words, phrases, or terms ineffective or meaningless." Berg v. Berg, 170 N.E. 3d 224, 231 (Ind. 2021).

But that argument cuts both ways. A narrow reading of Section 2.2's assignment of related contracts restricted to only the related contracts identified in Section 2.1(n) of the Disclosure Schedule would mean that Section 2.2's assignment of related contracts language is just a less specific reiteration of

Section 2.1(n) of the Asset Purchase Agreement. That comes dangerously close to making the phrase ineffective. *See* id. Moreover, Global was a party to the Asset Purchase Agreement—not Norfolk—and ambiguities are construed against the drafter. MPACYT Const. Group, LLC v. Superior Concrete Constructors, Inc., 802 N.E.2d at 910.

But courts also examine contracts "as a whole and accept an interpretation of the contract that harmonizes all its provisions." Berg v. Berg, 170 N.E.3d at 231. While Global's interpretation of "Related Contracts" would severely corral the meaning of Section 2.2's assignment of related contracts, Norfolk's interpretation would render meaningless Section 2.2's later language concerning excluded obligations. Given the options, Global's interpretation is the lesser of the two evils. Norfolk's first argument is unpersuasive.

Norfolk's second argument is that Section 2.2 of the Asset Purchase Agreement memorializes Global's intent to "assume and agree to pay and perform those liabilities accruing . . . under . . . the Managed Tenant Leases . . . ." Section 4.5(a)(iii) of the Disclosure Schedule identifies U.S. Cellular at Peru as a managed lease with an annual rent of $17,194 ($1,547 (9% of $17,194) of which is retained by the management company). Norfolk points out that these payment terms match the terms of the Memorandum of Agreement, which was itself created in response to U.S. Cellular's lease on the CitySwitch Tower. Since these terms match, Norfolk reasons, the U.S. Cellular entry in Section 4.5(a)(iii) can only refer

to the Memorandum of Agreement, so Global assumed the Memorandum of Agreement.

Global says that the U.S. Cellular entry in Section 4.5(a)(iii) must reference U.S. Cellular's lease when it was originally on the Norfolk Tower and managed by CitySwitch under the Definitive Marketing Agreement—where the allocation of revenue percentages was also 91 percent to Norfolk and 9 percent to CitySwitch. It couldn't reference U.S. Cellular's lease on the CitySwitch Tower because that lease was with CitySwitch. Norfolk wasn't a party to U.S. Cellular's lease on the CitySwitch Tower—CitySwitch owned the Cityswitch Tower, not Norfolk. So, says Global, the later lease of the CitySwitch Tower couldn't have been a lease that Global managed for Norfolk. And if the later lease isn't what is referenced in Section 4.5(a)(iii), then the payment terms don't refer to the Memorandum of Agreement. So Global concludes that it didn't assume the Memorandum of Agreement.

Global also says that the U.S. Cellular entry in Section 4.5(a)(iii) doesn't reference the Memorandum of Agreement for an additional reason—the Memorandum of Agreement provided that Norfolk was entitled to 91% of all net revenues generated by the top of the CitySwitch Tower, not just the U.S. Cellular lease. But the U.S. Cellular entry in Section 4.5(a)(iii) only references U.S. Cellular, so it isn't a reference to the Memorandum of Agreement.

Norfolk briefly responds that it's "absurd" to think that the U.S. Cellular entry in Section 4.5(a)(iii) references U.S. Cellular's lease on the Norfolk Tower

because that lease was terminated years before Section 4.5(a)(iii) was created and the Asset Purchase Agreement was executed.

To credit Norfolk's interpretation would require the court to overlook several key facts. First, the allocation of revenue percentages that Norfolk cites as referencing the Memorandum of Agreement are the same percentages found in the Definitive Marketing Agreement. There's little support to say the percentages are a stronger reference to one contract over another. Second, Section 4.5(a)(iii) is a list of leases that CitySwitch managed for Norfolk. But U.S. Cellular's lease of the CitySwitch Tower was never a Norfolk lease; CitySwitch leased that space to U.S. Cellular on its own tower. So U.S. Cellular's lease of the CitySwitch Tower can't be what's referenced on the list of managed leases that Global assumed because it was never a managed lease in the first place. Third, the terms of the Memorandum of Agreement are materially different from the U.S. Cellular entry in Section 4.5(a)(iii). The Memorandum of Agreement imposed obligations "for so long as a communications tower is located at the [CitySwitch] Tower site." But Section 4.5(a)(iii) only associates payments with a U.S. Cellular lease.

On the other hand, crediting Global's interpretation risks making the U.S. Cellular entry in Section 4.5(a)(iii) meaningless, which the rules of contract interpretation prohibit. Berg v. Berg, 170 N.E. 3d at 231. If the U.S. Cellular entry in Section 4.5(a)(iii) references U.S. Cellular's lease of the Norfolk Tower, then it has no effect on the parties' rights or obligations under the Asset Purchase

Agreement because that lease was terminated years before the Asset Purchase Agreement was executed.

But just because a clause doesn't ultimately change the parties' rights or obligations doesn't necessarily make that clause meaningless. U.S. Cellular's lease of the Norfolk Tower was a managed lease at one point in time (just like all the other managed leases in Section 4.5(a)(iii)). Had that lease not be terminated, it would have been a managed lease that Global assumed. That developments having nothing to do with the Asset Purchase Agreement made it inoperative doesn't mean that it's meaningless.

The court credits Global's interpretation because it doesn't raise the internal inconsistencies that Norfolk's does. Norfolk's second argument is unavailing.

Norfolk's final argument is that Global made Revenue Share payments for years, demonstrating that Global knew it assumed the Memorandum of Agreement. Global responds that these payments were made by mistake and that the mistaken payments didn't create a legal obligation. Global argues that otherwise, a claim for restitution based on mistaken payment wouldn't be a cognizable cause of action in Indiana. *See* Time Warner Ent. Co., L.P. v. Whiteman, 802 N.E.2d 886, 890 (Ind. 2004).

Norfolk cites no legal authority to support its position that Global's payments establish that it assumed the Memorandum of Agreement. Norfolk agrees that the breach-of-contract claim can be resolved as a matter of law based

on a review of the Asset Purchase Agreement—so Global's actions after the Asset Purchase Agreement was executed would be irrelevant. This argument isn't persuasive.

* * *

The court GRANTS Global's summary judgment motion and DENIES Norfolk's to the extent that the motions seek a declaratory judgment regarding Global's obligations under the Memorandum of Agreement. The court finds that Global never assumed the Memorandum of Agreement by executing the Asset Purchase Agreement with CitySwitch. This ruling makes it unnecessary to address the Peru Easement.

2. Global's Claims for Restitution

Global's counterclaim asserts entitlement to restitution because (1) Global mistakenly paid Revenue Share payments that Global wasn't obligated to pay, and (2) Global mistakenly paid Norfolk far more for the Peru Easement than it otherwise would have based on the misunderstanding that it had to pay Norfolk Revenue Share payments and that purchasing the Peru Easement would eliminate that obligation.

Norfolk moves for summary judgment on both of Global's claims for restitution.

i. Restitution for Revenue Share Payments

Norfolk says that Global's restitution claim for Revenue Share payments is subject to a six-year statute of limitations. City of E. Chicago, Indiana v. E. Chicago Second Century, Inc., 908 N.E.2d 611, 619 (Ind. 2009). Global didn't seek restitution for any Revenue Share payments until it filed its counterclaims on August 6, 2020, so as Norfolk sees it, restitution for the 2010, 2011, and 2013 Revenue Share payments is time-barred.

Global agrees that a six-year limitations period applies to their claim, but "[u]nder Indiana's discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff knew or could have discovered an injury." King v. Terry, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004). Global says that it didn't discover its mistake about Global's obligations to pay Revenue Share payments to Norfolk until after Norfolk brought this lawsuit. Global cites "White Opp. Decl. ¶ 19" to support that statement, but Justin White's declaration doesn't have 19 paragraphs, so the court can't find where in the record Global's statement is supported. On the other side, Norfolk doesn't cite any evidence to support the argument that Global knew or discovered its mistake about its obligations to pay Norfolk Revenue Share payments any earlier than August 6, 2020.

Norfolk responds that, even if Global didn't know about their mistake until August 6, 2020, Global could have discovered it through ordinary diligence.

Norfolk is right—nothing happened on or after August 6, 2020, that put Global in a better position to discover its mistake about its obligations to pay Revenue Share payments. The contracts all existed then as they do now. Global's restitution claims for Revenue Payments made in 2010, 2011, and 2013 are time-barred.

ii. Overpayment for the Peru Easement

Global says it calculated the amount it agreed to pay Norfolk for the 29 easements that are the subject of the Peru Easement transaction based on the ongoing land costs associated with the sites individually. In evaluating the Ground Lease, Global says that it identified the annual land costs as $26,883, which included Revenue Share payment obligations. Based on this information, Global offered Norfolk $438,246 for the Peru easement, which Global says was $300,000 more than what Global allocated to the purchase of the easements at the other 28 sites. But since Global wasn't obligated to make Revenue Share payments in the first place, Global says it overpaid for the Peru Easement and so is owed restitution.

Norfolk says the undisputed facts are that Global negotiated for and agreed to the easement transaction (including a single payment term for the purchase of a collection of easements), Global paid the agreed-upon purchase, and Global received the bargained-for easements. The negotiations show that Global consistently communicated a flat, per-site valuation of $126,667. Norfolk says

that Global's claim now—that it mistakenly overvalued the Peru Easement internally and so is owed restitution—isn't a legally cognizable claim.

Global argues that summary judgment should be denied because genuine disputes of material fact exist as to what Global mistakenly understood when it entered the Peru Easement transaction. Global cites Century Building Partnership, L.P. v. SerVaas for the proposition that restitution is available "in the event of a [party's] mistaken overperformance of an undisputed obligation." 697 N.E.2d 971, 974 (Ind. Ct. App. 1998).

Restitution is available to "a party who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty . . . ." Id. But the duty at issue in those scenarios is typically the one directly contacted for (for example, a party mistakenly overpays its obligations as the guarantor of a lease and seeks restitution for the overpayments). *E.g.*, Id.; Best v. Best, 470 N.E.2d 84, 88 (Ind. Ct. App. 1984). It isn't a duty associated with a separate arrangement that a party mistakenly thought it had and wasn't mentioned in the contract. Global cites no caselaw showing that the law on restitution in Indiana includes such a scenario. *See* Restatement (First) of Restitution § 12 (1937) ("A person who confers a benefit upon another, manifesting that he does so as an offer of a bargain which the other accepts . . . is not entitled to restitution because of a mistake which the other does not share and the existence of which the other does not know or suspect.").

"[T]he general rule of freedom of contract includes the freedom to make a bad bargain." Ind. Bell Tel. Co. v. Mygrant, 471 N.E.2d 660, 664 (Ind.1984). Global says it overpaid for the Peru Easement because it miscalculated the easement's worth based on mistaken belief. That's not the same thing as mistaken overperformance of an undisputed obligation. Global negotiated for 29 easements in exchange for $3,673,333. Global then paid $3,673,333 and received 29 easements. If by some mistake Global had paid more than $3,673,333 for the easements, Global would have a claim for the money in excess of $3,673,333. But that's not what happened, Global, in its opinion, just didn't value the Peru Easement correctly when it factored the easement into its negotiations.

Norfolk is right that Global has no legally cognizable claim for restitution based on an overpayment for the Peru Easement and is therefore entitled to summary judgment on that claim.

IV. CONCLUSION

The court GRANTS Global's motion to strike [Doc. No. 60]. The court GRANTS Global's summary judgment motion to the extent that it seeks a declaration that Global didn't assume the Memorandum of Agreement by executing the Asset Purchase Agreement with CitySwitch. [Doc. No. 54]. The court GRANTS IN PART AND DENIES IN PART Norfolk's summary judgment motion. The court GRANTS Norfolk summary judgment on Global's restitution

claim regarding restitution for Revenue Share payments that were older than six years at the time Global asserted its counterclaim, but the court otherwise DENIES Norfolk's motion [Doc. No. 49].

The only remaining issue in the case is Global's restitution claim for mistakenly paid Revenue Share payments that aren't barred by the six-year statute of limitations. By separate order, the court will set a conference to schedule trial on that issue and other related events.

SO ORDERED.

ENTERED: August 9, 2022

/s/ Robert L. Miller, Jr.
Judge, United States District Court