STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 5236

RYAN ANDREWS; SCOTT CRAWFORD; and MARK PERRY,

Plaintiffs,

v.

CHRISTOPHER ADAM DAUGHTRY,

Defendant.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Coe W. Ramsey
N.C. Bar No. 25482
E-mail: cramsey@brookspierce.com
Charles E. Coble
N.C. Bar No. 25342
E-mail: ccoble@brookspierce.com
Andrew L. Rodenbough
N.C. Bar No. 46364
E-mail: arodenbough@brookspierce.com
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
P.O. Box 1800
Raleigh, NC 27602
Telephone: 919-839-0300
Facsimile: 919-839-0304

Attorneys for Plaintiffs

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INTRODUCTION

Defendant in his opening brief recounted a litany of facts, some disputed and some not, that simply are not material to the elements of Plaintiffs' five claims for relief in this action. Those claims—for constructive fraud based on breaches of fiduciary duty, statutory accounting, equitable accounting, violation of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), and unjust enrichment—center upon four key factual questions, all of which turn on the parties' intent and their conduct. Those questions are: (1) did the parties form a partnership when they came together to make music and money together in a rock band; (2) if so, were the songs at issue—or proceeds from those songs—assets of the partnership; (3) who authored the songs at issue; and (4) did Defendant account to Plaintiffs for the benefits he derived from his use of the songs at issue, and did he otherwise harm Plaintiffs through his misconduct. As explained below, the facts in the record—viewed, as they must, in the light most favorable to Plaintiffs—establish genuine issues for trial with respect to each of these key questions. These substantive disputes of fact, both individually and taken together, preclude entry of summary judgment in Defendant's favor as to any of Plaintiffs' claims. Accordingly, Defendant's motion for summary judgment should be denied.

STATEMENT OF DISPUTED MATERIAL FACTS

I. Facts showing that Absent Element was a partnership.

The first key factual question in this case is whether the parties formed an express or implied partnership. Although Defendant denies the existence of a partnership, a range of facts in the record—including Defendant's own testimony—supports the proposition that the parties indeed formed and operated as a partnership. These facts, detailed below, are sufficient to create a genuine issue on the question of the existence of a partnership.

There is no dispute that the four parties to this lawsuit agreed to combine their resources, talents, and efforts to form a rock band called Absent Element in or around late 2003. Deposition of Ryan Andrews ("Andrews Dep.") 166:15–21; Deposition of Scott Crawford ("Crawford Dep.") 36:3–4; Deposition of Mark Perry ("Perry Dep.") 13:1–3; Affidavit of Ryan Andrews ("Andrews Aff.") Ex. A. Their activities included writing, rehearsing, performing, and recording original music so as to achieve success in the music industry and to make money from live performances, "battle of the bands" contests, and sales of recordings of their music and band merchandise. Andrews Aff. ¶ 4. Indeed, the record is clear that the parties intended that Absent Element be profitable and successful. Deposition of Christopher Daughtry ("Daughtry Dep.") 88:18–89:12; Andrews Aff. ¶ 4.

The parties' respective musical roles in Absent Element were as follows: Andrews played the electric bass, Crawford played the drums, Perry played lead guitar and contributed vocals, and Defendant played guitar and was the primary vocalist. Daughtry Dep. 58:25–59:6. In addition to their musical roles, the parties held other roles in Absent Element. Andrews was responsible for Absent Element's finances. Andrews Dep. 174:14–22. In that role, he identified and paid vendors and other parties to whom Absent Element owed money in the course of its activities. Andrews Dep. 202:21–204:8. These included the following:

- Disc Factory (for the production of Absent Element CDs)
- United States Postal Service and stamps.com (for the payment of postage to mail Absent Element CDs and/or merchandise to purchasers)
- A&M Tape and Packaging, 123stickers.com, PS Print, Planet Label, and Online Label (for packaging materials, labels for Absent Element CDs, bumper stickers, and mailing address labels)
- CD baby (for sales of Absent Element music)
- Scott Crawford's father (for production of Absent Element merchandise)

- Ray's Self-Storage (for payment of rent for Absent Element rehearsal and storage space)
- Click Industries (for payment of fees associated with copyright registration)
- Office Depot and OfficeMax (for various supplies needed in connection with mailing Absent Element CDs and/or merchandise to purchasers)
- GoDaddy.com (for purchasing and renewing the domain names for the Absent Element website)

Andrews Aff. ¶¶ 11-12. Absent Element also purchased certain musical equipment for its members to use, such as a wireless mic system and a wireless guitar system. Andrews Aff. ¶ 5.

Although there was not a separate Absent Element bank account, Andrews kept detailed, written records of Absent Element's income and expenses. Andrews Dep. 167:13–168:11; 170:21–22; 175:5–14; Crawford Dep. 70:15–72:10. In 2006, Andrews explained in writing to a government agency that although these moneys flowed through his personal account, the moneys "were not my funds, but in fact were being held as a 'Trust Fund' between the company 'Absent Element' and its vendors." Andrews Dep. Ex. 4; Andrews Dep. 177:18–178:2; 179:13–15. Andrews went on to explain that $35,708.62 "was distributed to the vendors of 'Absent Element'" in May 2006 and $12,091.57 "was distributed to the vendors of 'Absent Element'" in June 2006. Andrews Dep. Ex. 4.

Andrews maintained an accounting record of Absent Element income and expenses that was available for each of the parties to access at any time by logging on to a password-protected administrator page on the Absent Element website. Andrews Dep. 167:6–168:11; 175:5–14; Crawford Dep. 70:15–72:10. Andrews organized this financial information as journal entries, with separate columns for each of the parties, positive entries for income, and negative entries for distributions to the parties and expenses. Andrews Dep. 167:6–168:11, 175:5–14; Crawford

Dep. 71:8–24; Daughtry Dep. 128:19–25. Based on the accounting record, Andrews periodically distributed profits to the other members of Absent Element. Andrews Dep. 215:20–216:8.

From the earliest discussions between the parties to form Absent Element, they expressly agreed to share equally in the profits and losses of the enterprise. Andrews Dep. 166:15–210, 179:4–18; 315:6–316:5; Crawford Dep. 51:15–21; 53:20–54:10. Defendant, for his part, does not dispute that Absent Element profits and expenses were shared equally by the parties. Daughtry Dep. 56:23–58:10; 84:15–85:14; 86:2–87:2. Revenues to be share equally included revenue from the band's public performances, revenue from merchandise sales, and revenue from Absent Element songs and records. *Id.*; Andrews Dep. 313:7–11; 314:2–7; Crawford Dep. 51:15–21; 260:22–25; Perry Dep. 120:11–25. Defendant testified that "it was always an understanding of whatever merchandise was sold, we split equally. . . . The sales of T-shirts, stickers, and CDs with the name Absent Element on it, we split the profits equally." Daughtry Dep. 57:23–25; 58:8–10. Defendant confirmed that the parties' agreement to share equally in all proceeds never changed. Daughtry Dep. 93:16–94:8.

The evidence in the record shows that the band did, in fact, evenly split revenues and expenses in accordance with their agreement. Daughtry Dep. 130:10–25. For example, in or around June 2006, Defendant accepted a $9,613.00 check from Andrews, which represented his equal share of the Absent Element profits that had accumulated since the last distribution. Daughtry Dep. Ex. 2. Prior to that, Andrews had provided distributions to Defendant's spouse. Daughtry Dep. 55:16–56:14; Andrews Dep. 215:20–24. Other members of Absent Element also testified that they received distributions of their equal share of profits. Crawford Dep. 185:20–22. Significantly, at no point did Defendant contend to Plaintiffs that he was entitled to a greater share of Absent Element income, including that from song proceeds, than were Plaintiffs. Daughtry Dep. 130:21–25; 160:17–24.

Over time, as Absent Element's activities and expenses grew, Andrews created a capital account for Absent Element. Andrews Dep. 167:1–11; 179:5–18. This account was reflected as a fifth column in the accounting record Andrews maintained and was funded by Absent Element splitting profits five ways, with an equal 20% share contributed to the capital account. *Id.* Once funded, Andrews used the money in this account to pay Absent Element expenses. *Id.* Defendant was aware of this account and how it was used. Daughtry Dep. 131:1–23.

Although Andrews was primarily responsible for maintaining Absent Element's website (initially www.absent-element.com and later www.absentelement.com), each of the parties posted content to the site. Andrews Dep. 234:12–235:23; Crawford Dep. 175:13–21; Daughtry Dep. 108:13–23; Perry Dep. 144:8–18. Among other information, the website contained a schedule of Absent Element's performances, news about releases of its recordings and "battle of the bands" competitions, and a forum on which Absent Element fans could post content. *See* Andrews Aff. Exs. A-G. The website also contained an order form and information for those interested in purchasing Absent Element music or merchandise—a purchaser would print off and complete an order form, then send it with payment to Andrews, who would fulfill the order. Andrews Dep. 181:16–183:15. As the popularity of the band increased, fulfilling orders became a substantial undertaking. Andrews Aff. ¶ 8. For example, sales of "Uprooted" increased significantly in the spring of 2006, and Andrews estimates that approximately 20,000 CDs were sold altogether. Andrews Dep. 213:20–214:4.25. Records produced by Plaintiffs indicate that the level of sales reached as high as 4,000 orders (including both CDs and merchandise) in a week, and Andrews alone (not to mention the others assisting him) was spending 40-60 hours per week fulfilling orders. Andrews Aff. ¶¶ 9-10. Sales of "Uprooted" continue to this day. Crawford Dep. 184:4-6.

Each of the parties was authorized to act on Absent Element's behalf, including to obligate the band (and all its members) to play at public performances. Daughtry Dep. 92:17–93:15. In fact, the parties (including Defendant) had and used business cards that described them as agents of Absent Element. *See, e.g.*, Daughtry Dep. Ex. 7; Daughtry Dep. 227:10–25; PLTF_244. The parties also had Absent Element email addresses, and all actively participated in the management of Absent Element by booking live performances, preparing CDs and/or merchandise for sale, and marketing the band. Andrews Aff. ¶¶ 13-14. Significant decisions were made jointly. Andrews Dep. 159:21-25; 194:18-23; 195:7-13; Crawford Dep. 198:12-19; 199:5-11; Daughtry Dep. 88:5-12.

In the spring of 2004, Absent Element—at Defendant's suggestion—engaged Dustin Ginther to serve as its manager. Deposition of Dustin Ginther ("Ginther Dep.") 21:25–22:8; 24:12–16. Ginther posted content to the Absent Element website, describing himself as "Absent Element Manager" and providing the email address "manager@absentelement.com." *See* Andrews Aff. Ex. F. Ginther's role included making sure that the venues where Absent Element performed were properly set up, and he did design work for Absent Element's website and promotional materials. Ginther Dep. 20:3–19; Daughtry Dep. 91:15-25. Ginther also attended all rehearsal sessions while he was manager. Ginther Dep. 21:12–19.

II. Facts showing that the songs at issue and proceeds from those songs are partnership assets.

A second key factual question in this case is whether the Absent Element songs at issue—*Breakdown*, *Conviction*, *Sinking*, and *Home*—are assets of the partnership and, relatedly, whether the parties hold interests in the proceeds from those songs as partners. As with the initial factual question concerning the existence of the partnership, this question turns on the agreement and conduct of the parties. The facts outlined below, which are drawn from deposition testimony and discovery materials, are more than sufficient to create a genuine issue on this second factual question.

There is no dispute that *Breakdown*, *Conviction*, *Sinking*, and *Home* were written before Absent Element's final performance in June 2006. In addition, each of these songs was played at an Absent Element performance. *Breakdown* and *Conviction* were written sometime in 2004. Daughtry Dep. 162:22–25; 170:5–10. In March 2005, Absent Element self-released its second album, "Uprooted," which included seven songs: *Breakdown*, *Conviction*, *Weaker Side*, *So I Lie Awake*, *Seven4*, *Let Me In*, and *Keep Me Close*. Daughtry Dep. Ex. 4; Perry Dep. 28:19–24; Andrews Aff. Ex. G. Absent Element recorded the first five songs with Daniel Whitt of In The Can Studios, and it recorded the two bonus tracks at Fly Trap Studios using studio time that Absent Element won in two band competitions. Daughtry Dep. Ex. 4; Andrews Dep. 297:1–14.

Sinking was written and completed sometime in 2005 after "Uprooted" was recorded. Daughtry Dep. 187:19–20. Although Absent Element did not record that song for release, Absent Element rehearsed the song and performed it at live performances, and there are multiple recordings of Absent Element playing the song. *See, e.g.*, Andrews Dep. 143:18–22; Daughtry Dep. 181:16–182:3; 183:15–19; 185:9–12; PLTF_311. Like *Sinking*, *Home* was written after "Uprooted" was recorded. Daughtry Dep. Exs. 3, 4; Andrews Dep. 90:14–21. It was written over 2005 and 2006, rehearsed by Absent Element, and first performed as a new song at an Absent Element show on June 3, 2006. Andrews Dep. 83:5–17; 90:14–21; 117:22–118:2; Crawford Dep. 126:17–127:1; 159:21–24; 166:25–167:6; Daughtry Dep. 146:9–14. In promoting the show at which *Home* was played, Absent Element stated on its website that it "would be playing some new songs." Daughtry Dep. Ex. 5. Because of Defendant's participation in the American Idol competition and his subsequent formation of the band "Daughtry," Absent Element did not have an opportunity to record *Home* for release. Andrews Dep. 90:14–21.

Significantly, the parties expressly agreed to equal ownership of all Absent Element songs, regardless of the relative extent of their contributions to the writing of a particular song. Andrews Dep. 387:12–18; Crawford Dep. 51:15–21; Perry Dep. 210:17-22. Under this agreement, as Perry testified, "we all wrote songs and they became assets to the band." Perry Dep. 272:11–12. The parties' agreement extended to any song that resulted from one of them bringing a song, potential song, or idea for a song to the others at rehearsal—often referred to as songs "brought to the band"—or that emerged from a jam session at a rehearsal. Andrews Dep. 387:12–18; Perry Dep. 241:20–24. Plaintiffs have testified—and independent testimony from Absent Element's former manager has corroborated—that all Absent Element songs, including the songs at issue, were written in this collaborative way. Andrews Dep. 82:22–83:4; 135:16–136:9; 387:19–388:3; Crawford Dep. 6:20–22; 21:14–21; 26:1–5; 37:23–38:1; 48:11–25; Ginther Dep. 32:23–33:4; 35:11–22; 44:22–45:6; Perry Dep. 35:22–36:2; 36:11–20; 37:22–38:4.

The parties' agreement to equal song ownership was evidenced in a number of ways. *First*, as explained above, it is undisputed that the parties shared all song proceeds equally up to Defendant's conduct giving rise to this lawsuit. And, as also previously noted, Defendant never contended that he was entitled to a greater share of song proceeds, whether because he contended he was the author of Absent Element songs or otherwise. Daughtry Dep. 130:21–25; 160:17–24.

Second, Absent Element's first EP was entitled "Motionless," and it was released in early 2004. *See* Andrews Aff. Ex. A. The notation on the CD label states as follows: "All images and music copyright Absent Element." Daughtry Dep. Ex. 3. Although "Motionless" includes songs that Daughtry now contends he alone wrote, he was aware of the copyright notation that provides otherwise and had no objection to it. Daughtry Dep. 117:2–17.

Third, at some point in 2004, Plaintiffs became aware that Defendant was posting lyrics to Absent Element songs on the Absent Element website and indicating that he was the author of certain lyrics. Daughtry Dep. 111:23–112:25; 115:9–16. In what Defendant described as an "intervention," Plaintiffs registered their objection to what Defendant had done, "saying that they did not agree that I should have my name only on those particular songs." *Id.*, 112:15–16. As a result of the parties' discussion on this issue, Andrews changed the website to state: "All music and lyrics by Absent Element." *Id.*, 113:18–22. Defendant was aware of the change Andrews made, and he did not stand in the way of Andrews doing so, nor did he make any attempt to reverse that change. *Id.*, 113:13–114:24. Andrews explained that the change was made to reflect "[t]he resolution [that] we would all share equally in the song – in the songs and that the lyrics would be updated to reflect that." Andrews Dep. 390:24–391:1.

Fourth, on December 27, 2004, Absent Element's manager prompted the parties to have a specific discussion about song ownership and songwriting credit. Ginther Dep. 15:12–16:5; 51:25–52:12. He did so because the parties had had individual conversations with him about song ownership, and he wanted "to get all four of them in a room, put all the issues out on the table, and then let them duke it out." *Id.* He specifically recalls the term "copyright" being used by the parties during the ensuing discussion. *Id.*, 73:5-8. Although the parties initially disagreed on this point, with Defendant then taking the position that the songs were not equally owned, they resolved the dispute by agreeing to treat song ownership and songwriting credit in the same fashion as they had been treating song proceeds. Andrews Dep. 387:12–14; Perry Dep. 210:11–23.

Their agreement in this regard was not limited to the songs on "Uprooted," but rather extended to all Absent Element songs, including all the songs at issue. Andrews Dep. 264:12–23; 387:15–388:3. The agreement was evidenced by the copyright notation on the "Uprooted" CD label, which states: "All songs written, produced, and performed by Absent Element © 2005." Daughtry Dep. Ex. 4; Andrews Dep. 388:4–389:5. Daughtry was aware of the notation, which came after the parties' discussion, and he neither disputed it nor made any suggestion that it was incorrect or ought to be revised. Daughtry Dep. 159:4–160:7. Daughtry testified that he has signed copies of the "Uprooted" CD. *Id.*, 157:20–158:3; Daughtry Dep. Ex. 4.

Fifth, in 2006, Absent Element submitted a copyright registration for the songs on "Uprooted," which listed the four members of Absent Element as co-authors and co-owners. Daughtry Dep. Ex. 8. Plaintiffs have testified that the copyright registration reflected the parties' agreement that song ownership was to be shared equally. Andrews Dep. 188:15–189:4. At the time, the parties made no distinction between registering the copyright in their individual names and—as reflected in the copyright notations on "Motionless" and "Uprooted"—registering the copyright in the name of the partnership. Andrews Dep. 389:6–17.

Plaintiffs testified that Defendant was fully aware of, and agreed to, the copyright registration being filed in this manner. Andrews Dep. 192:24–193:3; 195:7–13; Perry Dep. 330:24–331:4. Andrews submitted the necessary paperwork to a vendor, which handled filing the registration, and he testified that Defendant signed materials relating to the submission and that the parties discussed the status of the copyright filing when Plaintiffs visited Defendant in

Los Angeles in April 2006. Andrews Dep. 98:8–18; 190:9–15; 191:1–10; 192:4–16; 198:18–199:19. Perry testified that he informed Defendant that he needed to speak with Andrews so that Andrews could get information from Defendant needed for the copyright submission, and Andrews indeed spoke to Defendant and secured that information. Perry Dep. 330:24–332:16; Andrews Dep. 393:14–394:2.

Record evidence also shows that each of the songs at issue fell within the ambit of the parties' agreement to equal ownership because each song was brought to the band. Crawford testified that *Breakdown* originated from a jam session that he and Andrews worked on and then brought to Perry and Defendant as a song idea. Crawford Dep. 21:14–21; 27:4–28:22. From there, the parties worked together to write and complete the song. *Id.*; Andrews Dep. 135:16–21; 154:1–5; 384:16–23. Even though Defendant claims he alone wrote *Breakdown*, he agrees that he brought the song to the group at rehearsal so that Absent Element would perform it. Daughtry Dep. 164:11–165:1.

Plaintiffs testified that both *Conviction* and *Sinking* resulted from song ideas that were brought to the band and that the entire group worked together to develop into completed songs. Andrews Dep. 387:22–388:2; Perry Dep. 44:12–14. Defendant, while minimizing Plaintiffs' contributions to these songs, confirmed in his testimony this basic approach to songwriting. With respect to *Sinking*, for example, he testified as follows:

> I – like most of the songs I write, I wrote it on acoustic guitar at home and brought it to band practice one day and started playing it, and everybody starts kind of noodling around and learning the song until everybody was comfortable with it, and then we started performing it. . . . I mean, I felt like there was a new song every week, so it's hard to remember exactly. We did the – the same thing. I would play the song a few times, and the guys would – would chime in and start playing their parts or coming up with their parts in respect to the song, and we would – we would – once everybody was comfortable with it, we'd add it to the set list.

Daughtry Dep. 183:20–25; 184:20–185:2. Defendant also confirmed that *Sinking* was brought to the band with the intention that Absent Element perform it. *Id.*, 185:6–25. As explained more fully in Section III below, Plaintiffs testified that they made specific contributions to *Breakdown*, *Conviction*, and *Sinking*, as well as participated in the collaborative songwriting process.

Plaintiffs explained that the songwriting process for *Home* differed because of Defendant's participation on American Idol. Defendant initially brought the song idea to the group at a rehearsal, sometime before Defendant began the televised portion of the competition. Andrews 82:1–19; 90:22–25. Perry testified as follows: "Mr. Daughtry came to me at a rehearsal and said, Here is a song that I've been working on. What do you think?" Perry Dep. 50:10–12. After Defendant finished playing, Perry suggested changing the chord structure of the song. *Id.* 50:12–17. Crawford remarked at the time that what Defendant played sounded like the Absent Element song *Keep Me Close*, which appears on both "Motionless" and "Uprooted," and he corroborated that Perry suggested changes to the basic structure of the song. Crawford Dep. 167:22–168:8. Thereafter, while Defendant was in Los Angeles for the taping of American Idol, the development of the song continued with Defendant sending recordings to the group for them to work on and comment on. Andrews Dep. 96:2–97:8. In this way, even though the band was not rehearsing together after Defendant went to Los Angeles in the spring of 2006, the writing of *Home* still was a "group effort." Andrews Dep. 72:16–18; Crawford Dep. 14:2; 15:12–13; 34:2–4.

III. <u>Evidence showing that Plaintiffs co-authored the songs at issue.</u>

Defendant himself testified that "I believe a song was co-written when a member would bring an idea that started something." Daughtry Dep. 125:9–10. As detailed in the previous section, evidence in the record shows that *Breakdown*, *Conviction*, *Sinking*, and *Home* were all written in just this way—Plaintiffs testified that each song was the product of a collaborative songwriting process that began with a song idea that was brought to the group. Andrews Dep. 135:16–136:9; 387:19–388:3; Crawford Dep. 6:20–22; 21:14–21; 26:1–5; Perry Dep. 35:22–36:2; 37:22–38:4. The band's former manager independently confirmed this songwriting approach, testifying that after someone offered a song idea "the whole band would pull it all together and make it their song." Ginther Dep. 33:3–4. He testified further:

> Mark may doodle around with it while he was introducing it the first time. Scott [sic] would play his bass lines on top of it, just trying to get a feel for it as it goes. They make a decision on if this is an Absent Element song, should we go further with it. And as they do, they begin thinking, okay, maybe this part should be rearranged here, this should do this, this should do that. And then from there, the lyrics start getting added or arranged. . . . Well, with this song, and with any of the other songs that they worked on, he would begin playing a part, just noodling along with what was being presented the same way as everyone else. And as they decide and begin to work on a song, the contributions are coming from every direction of, stop here, add this here. You know, we should stop – we should – we should change this into a bridge. And that – that's how the collaborative process worked on all the songs.

Ginther Dep. 35:11–22; 44:22–45:6. In addition, he specifically confirmed Perry's musical contributions to all Absent Element songs, testifying that "musically, he was the one contributing most of the music." Ginter Dep. 60:23–24.

In addition to the group effort embodied in each song, Plaintiffs also testified to specific contributions they made to the songs. As to *Breakdown*, Andrews testified that he contributed to the melody through the beginning riff, which is later repeated in the bridge. Andrews Dep. 150:13–151:5. Perry testified that he contributed to "[t]he bridge, riff, and second guitar parts on top of the riffs and chord progression." Perry Dep. 36:24–37:7. As noted above, Crawford testified that he and Andrews developed the song idea for *Breakdown*, and he also developed an original drumbeat for the song. Crawford Dep. 21:14–21; 27:4–28:22; 32:18–22.

As to *Conviction*, Andrews testified that he suggested a lyric change and that he contributed to the structure of song through the bass line and rhythm, including certain stops and pauses, around which the melody was written. Andrews Dep. 154:21–155:12; 155:24–156:19. Perry testified that he contributed "arrangement, arrangement of the pre-chorus and the verse and the chorus music and second guitar parts." Perry Dep. 43:19–23. Crawford also testified that he contributed to a lyric change in *Conviction*. Crawford Dep. 32:25–33:13.

As to *Sinking*, Andrews testified that he contributed to the writing of the song, including through a specific contribution to the lyrics and to the "rhythmic stuff, stops" that provide structure to the song. Andrews Dep. 139:13–17; 140:5–22; 385:23–386:11. Perry testified that he contributed "[t]he second guitar parts and I believe the arrangement, guitar solo." Perry Dep. 45:22–25. Crawford contributed to the writing of *Sinking* through Absent Element's collaborative songwriting process. Crawford Dep. 6:20–22.

As to *Home*, Perry contributed to the foundational chord progression of the song, as well as the guitar solo that appears on the recording of the song on the "Daughtry" album. Perry Dep. 50:12–17; 51:18–52:5; 52:12–53:7. Andrews testified that he contributed to *Home* during the back and forth with Defendant while Defendant was in Los Angeles, as well as to the second guitar part while the song was being recorded for the "Daughtry" album. Andrews Dep. 386:25–387:4. Crawford testified that he contributed to the writing of *Home* through Absent Element's collaborative songwriting process. Crawford Dep. 33:19–34:18; 35:8–22.

IV. <u>Evidence showing that Defendant failed to account to Plaintiffs for his use of the songs at issue and engaged in other misconduct that harmed Plaintiffs.</u>

There is no dispute that Defendant used each of the songs at issue on his self-titled debut album "Daughtry." Crawford Dep. 126:12–16. In particular, Defendant confirmed that the song *Breakdown* that appears on that album combines music and lyrics from the Absent Element songs *Breakdown* and *Conviction*. Daughtry Dep. 161:8–162:5; 169:12–25. Defendant also admits that the song *Gone* that appears on the "Daughtry" album is derived from the Absent Element song *Sinking*. *Id.*, 182:13–183:7. Finally, Defendant admits that the song *Home* on the "Daughtry" album is the same song as that of the same name that was written while he was in Absent Element and performed at the last Absent Element show. *Id.*, 187:22–188:13.

There is also no dispute that Defendant has not shared with Plaintiffs the benefits he collected from his use of the songs *Breakdown*, *Conviction*, *Sinking*, and *Home*. Plaintiffs demanded an accounting in 2012 shortly before commencing this action. Financial records produced by Defendant show that since November 2006 he has collected substantial revenues from the songs *Breakdown*, *Gone*, and *Home* from the "Daughtry" album.[1] These have come to Defendant in several different revenue streams, including publishing royalties on these songs under his publishing agreement with BMG and Universal Music Publishing Group, performance royalties on these songs from BMI, record royalties on these songs as recorded on the "Daughtry" and "Leave this Town" albums under his recording agreement with 19 Recordings/Sony/RCA, concert revenue from live performances at which at least one of these songs was played, along with other royalties for digital streaming and international exploitations of these songs and related merchandising and sponsorship income. The parties' disagreement as to the extent of these revenues that are properly recoverable in this action is for another day. Nonetheless, there is no dispute that Defendant has shared none of these revenues with Plaintiffs, despite their demand that he account to them for these benefits.

Evidence in the record shows other misconduct by Defendant beyond his failure to account to Plaintiffs. Despite Plaintiffs' contributions to the authorship of each of the songs at

[1] These documents were designated highly confidential by Defendant. Plaintiffs can provide these documents to the Court at the hearing on Defendant's Motion if necessary.

issue and the parties' agreement to share songwriting credit equally, Daughtry has failed to do so with respect to the songs *Breakdown*, *Gone*, and *Home* from the "Daughtry" album. Crawford Dep. 283:4–13; 287:3–9. Instead, he has held himself out to the music industry and the public as the sole songwriter of those songs. *See* Affidavit of Andrew L. Rodenbough ("Rodenbough Aff.") Ex. A. Remarkably, since Absent Element's last performance, Defendant has released four "Daughtry" albums, and out of 49 total songs on those albums, *Breakdown*, *Gone*, and *Home*, together with *You Don't Belong*, which appears on the follow-up album to "Daughtry" and Plaintiffs contend uses portions of Absent Element songs as well, are the *only four songs on those albums* for which Defendant claims to be the sole author—every other song has other songwriters. *Id.* Plaintiffs have testified that the failure to credit them as songwriters has injured them in their musical careers. Crawford Dep. 284:2–4; 286:3–10.

In addition, while on American Idol, to further his own interests, Defendant convinced Plaintiffs to remove his image from the Absent Element website and not to use his name or image in marketing the Absent Element CD "Uprooted." Perry Dep. 284:22–285:14. Plaintiffs did so only because Defendants told them he would continue his musical relationship with Plaintiffs after his time on American Idol was over. Perry Dep. 337:25–338:17; 341:8–23. Subsequently, after Defendant had been voted off American Idol, he convinced Plaintiffs to stop selling "Uprooted" altogether—despite its escalating sales during that period—again for his own benefit, and to Plaintiffs' detriment. Andrews Dep. 216:5–8; 327:2–10; 328:1–7. Plaintiffs again complied, because they believed (based on Defendant's representations) that it would be beneficial to their <u>shared</u> musical future. Perry Dep. 337:25–338:17; 341:8–23. However, despite those and other similar representations made by Defendant over a period of several years, Defendant never made good on his promises. Defendant's misrepresentations therefore not only directly injured Plaintiffs by denying them their respective shares of additional "Uprooted" sales, they also induced Plaintiffs to refrain from asserting legal claims against Defendant. Perry Dep. 345:23–346:5.

LEGAL ARGUMENT

I. Legal standard.

"Summary judgment is a drastic measure and should be used with caution." *Mozingo v. Pitt Cnty. Mem'l Hosp., Inc.*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992).

> Irrespective of who has the burden of proof at trial . . . , upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact . . . and that he is entitled to judgment as a matter of law. The burden does not shift to the non-moving party unless the movant proffers sufficient evidence to negative[] [the non-movant's] claim . . . in its entirety."

Ray v. Lewis Hauling & Excavating, Inc., 145 N.C. App. 94, 97, 549 S.E.2d 237, 239 (2001) (alterations in original) (citations and internal quotation marks omitted). To defeat a motion for summary judgment, a non-moving party need only "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (alteration in original) (internal quotation marks omitted). In making that determination, all evidence submitted in support of or in opposition to the motion "must be viewed in the light most favorable to the party opposing the motion," with all inferences drawn in the opposing party's favor. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974). As explained in the sections that follow, when the available evidence is viewed in the light most favorable to Plaintiffs, it is clear that there are genuine issues of material fact with respect to each of Plaintiffs' claims. Accordingly, Defendant's summary judgment motion should be denied.

II. **The existence of multiple disputes of fact precludes entry of summary judgment in Defendant's favor on Plaintiffs' claims for relief.**

The disputed factual issues discussed above, if resolved in Plaintiffs' favor at trial, will entitle them to recovery on each of their claims. Plaintiffs assert five claims for relief: (1) constructive fraud, (2) statutory accounting, (3) equitable accounting, (4) unfair and deceptive trade practices, and (5) unjust enrichment. Aside from the alternative unjust enrichment claim, all of Plaintiffs' claims flow from the fiduciary duties Defendant owes Plaintiffs with respect to the four Absent Element songs at issue and/or the proceeds therefrom. His fiduciary duty arises from the parties' partnership agreement, which encompasses the songs and their proceeds. Plaintiffs' equitable accounting claim also flows from Plaintiffs' co-authorship of the songs at issue. As set out below, the existence of multiple material disputes of fact requires denial of Defendant's summary judgment motion.

A. Plaintiffs have forecast sufficient evidence to establish a partnership.

In North Carolina, a partnership is statutorily defined as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36(a). It has been described more fully by North Carolina's courts as "a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business." *Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 133, 298 S.E.2d 208, 211 (1982) (citing *Johnson v. Gill*, 235 N.C. 40, 68 S.E. 2d 788 (1952)). Critically, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." N.C. Gen. Stat. § 59-37(4); *see also Dean v. Manus Homes, Inc.*, 143 N.C. App. 549, 552, 546 S.E.2d 160, 162 (2001) ("Plaintiff testified to an agreement to split profits with defendants, illustrating *prima facie* evidence of a partnership."). There is no question that partners owe fiduciary duties to one another as to partnership affairs. *See Casey v. Grantham*, 239 N.C. 121, 124, 79 S.E.2d 735, 738 (1954) ("It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs.").

There is no requirement that a partnership be created by a written document, as "[a] partnership may be formed by an oral agreement." *Compton v. Kirby*, 157 N.C. App. 1, 11-12, 577 S.E.2d 905, 912 (2003). Moreover, "[t]o prove existence of a partnership, an express agreement is not required; the intent of the parties can be inferred by their conduct and an examination of all of the circumstances." *Id.* at 10, 577 S.E.2d at 912; *see also Eggleston v. Eggleston*, 228 N.C. 668, 674, 47 S.E.2d 243, 247 (1948). Thus, "[e]ven without proof of an express agreement to form a partnership, a voluntary association of partners may be shown by their conduct." *Potter v. Homestead Pres. Ass'n*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992).

Defendant baldly asserts in his opening brief that "the only evidence Plaintiffs have offered to suggest the existence of a partnership is the alleged agreement concerning co-ownership of property and the sharing of profits from public performances and the sales of *Uprooted*." Def.'s Mem. of Law at 32. Not so. When all inferences are drawn in Plaintiffs' favor, it is clear that they have forecast substantially more detailed evidence of a partnership than Defendant suggests. Most importantly, even with nothing more, Defendant's undisputed receipt of a share of Absent Element's profits, evidenced both by his own testimony and his receipt of a check for $9,613.00, is prima facie evidence that he was a partner of Absent Element, pursuant to N.C. Gen. Stat. § 59-37(4), and therefore sufficient to defeat summary judgment.

As detailed in Section I of the Statement of Disputed Material Facts above, Plaintiffs have forecast a range of additional evidence showing that the parties indeed formed a partnership. In summary, there is no dispute that Defendant and Plaintiffs combined their "property, effects, labor, and skill" to make Absent Element a profitable and successful band. The parties expressly agreed to share equally all profits and expenses from the band, an agreement they followed until Defendant's conduct giving rise to this action. The scale of their collective enterprise was substantial, with CD sales of approximately 20,000 and payments to various vendors in the tens of thousands of dollars. Andrews maintained a detailed accounting record for the partners to review, which tracked income, expenses, and distributions. Later, the parties agreed to a capital fund that received a 20% share of Absent Element profits and was used to cover vendor payments and other expenses. The record also shows that the parties used business cards and Absent Element email addresses, retained a manager, recorded their music in local studios, had the authority to bind one another, and made decisions jointly. Finally, and significantly, the parties expressly agreed to equal ownership of the songs brought to the band, which was embodied in the CD notation: "All songs written, produced, and performed by Absent Element."

In the face of this body of evidence showing the existence of a partnership, Defendant rests his argument entirely on the absence of certain legal formalities in the operation of Absent Element. He relies principally on an unpublished decision, *Qubain v. Granberry*, 2007 N.C. App. LEXIS 27 (N.C. Ct. App. Jan. 2, 2007). In suggesting that *Qubain* somehow requires that a joint enterprise exhibit a battery of legal formalities in order to constitute a partnership, Defendant stretches the case beyond its breaking point. To begin with, both North Carolina's partnership statutes and settled case authorities provide that a partnership is simply "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36(a). No North Carolina decision holds that such association must be memorialized in formal documentation to constitute a valid partnership. On the contrary, multiple North Carolina decisions confirm that such formalities are *not* required to provide sufficient evidence that a partnership existed. *See, e.g.*, *Dean v. Manus Homes, Inc.*, 143 N.C. App. 549, 552, 546 S.E.2d 160, 162 (2001) (upholding jury's finding that partnership existed where only evidence was alleged oral agreement to split profits and letter confirming agreement to split profits); *Peed v. Peed*, 72 N.C. App. 549, 554-55, 325 S.E.2d 275, 279-80 (1985).

Even aside from Defendant's erroneously expansive reading of *Qubain*, the present case is easily distinguishable because there is substantially more evidence of a partnership here than there was in *Qubain*. In *Qubain*, the only evidence of a partnership offered was joint ownership of a parcel of land, a joint bank account for financing its purchase, and the splitting of profits from its subdivision and sale. *Qubain*, 2007 N.C. App. LEXIS 27, at *7. But, as the court in *Qubain* noted, the receipt of profits from the sale of real estate is *not* prima facie evidence of partnership, pursuant to N.C. Gen. Stat. § 59-37(4)(e). *Id.* Here, the statutory exception relied on in *Qubain* is not applicable and by contrast, Defendant's receipt of his share of profits *is* prima facie evidence of partnership, and that prima facie evidence is supported by wide range of other conduct showing the band members acting as partners.

In sum, Plaintiffs' forecast of evidence is more than sufficient for a jury to find either that the parties expressly agreed to form an oral partnership or that a partnership should be implied from the facts and circumstances of their operation of Absent Element. In fact, Plaintiffs' forecast of evidence well exceeds that which other North Carolina courts have previously found to be sufficient to submit that issue to the jury. Accordingly, because there is a genuine issue of material fact as to the existence of a partnership, Defendant is not entitled to summary judgment as to Plaintiffs' constructive fraud, accounting, and UDTPA claims on that basis.

B. Plaintiffs have forecast sufficient evidence to establish that the songs at issue are partnership assets and/or that each Plaintiff has a property interest in the proceeds from those songs.

In addition to the existence of a partnership among the members of Absent Element, the facts also show that the Absent Element songs at issue are assets of the partnership and/or that Plaintiffs hold property interests in the proceeds from those songs. Record evidence shows that each song was written and brought to Absent Element prior to the parties ceasing partnership activities. Defendant's fiduciary obligations to his partners with respect these songs and the proceeds therefore survive any dissolution of the partnership and continue until the affairs of the partnership have been wound up, which has yet to occur. *See Chesson v. Rives*, 2013 NCBC LEXIS 46, at *9 (N.C. Super. Ct. Oct. 28, 2013) ("A partners' rights to partnership property and income are personal property rights, and he does not forfeit those rights until the partnership affairs have been wound up and the partnership is terminated.").

Defendant argues, however, that Plaintiffs cannot have any interest as partners in the songs at issue or the revenues derived therefrom because, he claims, there was never a written transfer of the copyrights in the songs to the partnership. As set out below, Defendant is wrong both in his premise that the only way Plaintiffs could have obtained such an interest was through a written transfer and in arguing that there was no written evidence of transfer.

1. The songs at issue were transferred to the partnership.

The Copyright Act provides that "[a] transfer of copyright ownership, <u>other than by operation of law</u>, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C. § 204(a) (emphasis added). Accordingly, there are two paths by which the songs at issue here can (and did) become partnership assets: (1) by "operation of law" and (2) by written transfer.

a. The songs at issue became partnership assets by operation of North Carolina partnership law.

In his opening brief, Defendant ignores entirely the clause of Section 204(a) of the Copyright Act that expressly recognizes that copyrights may be transferred without a writing "by operation of law." That omission is fatal to his summary judgment motion because, as explained below, the evidence in the record creates a genuine issue of material fact as to whether the songs at issue became partnership assets by operation of North Carolina partnership law.

As the quoted passage above makes clear, Section 204(a) straightforwardly provides that transfers "by operation of law" are not subject to the written instrument requirement. The cases that address this language of the provision generally concern a transfer by operation of state law. *See, e.g.*, *Design Basics, L.L.C. v. DeShano Cos., Inc.*, 2012 U.S. Dist. LEXIS 135387, at *11 (E.D. Mich. Sept. 21, 2012). For example, copyrights may transfer by operation of a state's corporate law when a corporation dissolves, *Gomba Music, Inc. v. Clarence Avant & Interior Music Corp.*, 2014 U.S. Dist. LEXIS 163992 (E.D. Mich. Nov. 24, 2014), when two entities merge, *Design Basics*, 2012 U.S. Dist. LEXIS 135387, or pursuant to state law governing real estate agents, *Valdez v. Laffey Assocs.*, 2010 U.S. Dist. LEXIS 30160, at *21 (E.D.N.Y. Mar. 26, 2010). Transfers of copyrights by operation of state law are governed by the applicable state law and do not conflict with the Copyright Act. *See, e.g.*, *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co.*, 510 F.3d 77, 81 n.1 (1st Cir. 2007); *Valdez*, 2010 U.S. Dist. LEXIS 30160, at *20. In analyzing transfers by operation of state law, courts look to whether the author of a copyrighted work intended, either expressly or implicitly, to transfer ownership of the work—that is, transfers of this sort turn on whether, as a factual matter, the transfer under state law was voluntary. *See, e.g.*, *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 41 (1st Cir. 2012); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 963 (8th Cir. 2005).

Applying those principles here, under the North Carolina Uniform Partnership Act ("NCUPA"), assets, such as the Absent Element songs at issue, can become partnership property even if they are not formally titled in the partnership's name. In particular, the NCUPA provides that "[a]ll property originally brought into the partnership stock or subsequently acquired by purchase *or otherwise*, on account of the partnership, is partnership property." N.C. Gen. Stat. § 59-38(a) (emphasis added). A partner therefore has an interest in property that is acquired for, and used by, the partnership, even if title to the property is never actually held in the partnership name. *See* N.C. Gen. Stat. §§ 59-40 (partnership property may be held in name of one or all individual partners), 59-54 (partner has property rights in partnership property), & 59-55 (partner's interest in partnership property is as tenant-in-common). These provisions mean that where, as here, partners intend that property (such as copyrights to the Absent Element songs) become partnership property and use it as such, it is partnership property "by operation of law" even if never formally titled in the partnership's name.

Significantly, this statutory interpretation is corroborated by North Carolina case authority which specifically recognizes that the foregoing provisions of the NCUPA allow partners to hold property interests irrespective of writing requirements that might be implicated in other contexts. For example, in *Potter v. Homestead Preservation Association*, the plaintiff's evidence showed that she and three other parties, including the defendants, entered into an oral partnership agreement for the purpose of acquiring and developing two large tracts of property.

Potter, 330 N.C. at 572, 412 S.E.2d at 3. The plaintiff and defendants agreed that each would own a 25% interest in the property and be entitled to an equal share of the profits. *Id.* Subsequently, the defendants acquired the two tracts of property in the name of a holding company they controlled. *Id.* After the parties had a falling out, the plaintiff brought a variety of claims to recover the value of her interest in the property.

On appeal, the North Carolina Supreme Court reversed a directed verdict that had been entered against the plaintiff on the grounds that there was no written transfer of the property at issue to her. In reversing that decision, the Court held that it did not matter that the property was not held in the plaintiff's name, because partnership property may be held in the name of fewer than all partners. *Id.* at 577, 412 S.E.2d at 6; *see also* N.C. Gen. Stat. § 59-40. Furthermore, it did not matter that there had not been a written transfer to the plaintiff, because a partner's interest in the partnership is a personal property interest and is therefore not subject to the statute of frauds. *Potter*, 330 N.C. at 577, 412 S.E.2d at 6; *see also* N.C. Gen. Stat. § 59-54. Because the plaintiff had presented sufficient evidence that the parties had agreed that the land would be owned by the partnership, and despite the absence of a written transfer, the Court held that "the evidence and the law support plaintiff's allegation that she was a partner holding a one-fourth interest in the 700-acre tract of land and that this theory of the case should have been submitted to the jury." *Potter*, 330 N.C. at 578, 412 S.E.2d at 6.

In determining whether property becomes partnership property by virtue of North Carolina partnership law,

> [a]n important factor . . . is whether the property is used by those partners for partnership purposes. If so, such use of the property is evidence of an intention that the property be partnership property. Thus, the use of such property for partnership purposes is strong evidence that the property, in fact, is partnership property.

In re Vannoy, 176 B.R. 758, 768 (Bankr. M.D.N.C. 1994) (citing *Potter*). In *Vannoy*, the court held that property held in the name of individual partners was partnership property because "the partners devoted the property solely to the purpose of the partnership," and the partners' intent that the property would be partnership property could be inferred from other documents. Plaintiffs here have offered substantial evidence indicating that the parties used the songs at issue for the purpose of the partnership and intended that the songs be partnership property. Under *Potter* and *Vannoy*, which control here, Plaintiffs' forecast of evidence concerning the parties' intent and conduct with respect to the songs at issue renders the question of whether those songs are partnership assets an issue for trial.

In particular, Plaintiffs have offered evidence that the parties agreed that all songs brought to or written in furtherance of the band—including each of the songs at issue—were to be equally owned and that the parties indeed shared equally in the proceeds from those songs. Plaintiffs' evidence also shows that the songs were all used for partnership purposes in that they were written and developed by Absent Element, rehearsed by Absent Element, and played at live performances by Absent Element in order to generate revenues through performances fees and merchandise sales, which also were shared equally. In addition, *Breakdown* and *Conviction* were used for recordings on the "Uprooted" album, which was sold to generate revenues for the band. The band members' intent that the songs be partnership assets is also evidenced by the copyright notation on the "Uprooted" CD, the copyright registration for "Uprooted," and the fact that Defendant's claim to be the sole author of the lyrics of certain songs was removed from the Absent Element website.

Rather than discuss the "by operation of law" prong of Section 204(a) and North Carolina partnership law, Defendant cites *Brown v. Flowers*, 297 F. Supp. 2d 846 (M.D.N.C. 2003)

("*Brown I*"), and *Price v. Fox Entertainment Group, Inc.*, 473 F. Supp. 2d 446 (S.D.N.Y. 2007), and argues that copyrights cannot be transferred to a partnership without a written agreement. Both cases are inapposite here.

First, the "by operation of law" language was not referenced, much less discussed, in either *Brown I* or *Price*. Both cases instead dealt with the question of whether *written* documents related to oral partnership agreements satisfied the signed-writing requirement of Section 204. *See Price*, 473 F. Supp. 2d at 460 (holding that the partnership's "supporting documents and certificates do not satisfy the writing requirement of the Copyright Act because it is undisputed that *those documents by their terms* do not transfer the copyright itself" (emphasis added)); *Brown I*, 297 F. Supp. 2d at 853 (noting that "a review of the written agreement itself confirms that the agreement makes no mention of any copyright ownership, or of any transfer of copyright ownership"). Thus, the plaintiffs in those cases argued that certain documents satisfied the writing requirement of Section 204(a), but the courts rejected that argument in both cases. However, that is a different proposition altogether than the question presented here of whether a transfer was effected by operation of North Carolina partnership law. The two arguments go to different prongs of Section 204(a).

Second, the subsequent history of *Brown I* further demonstrates that Defendant extends the case far beyond its actual holding. In *Brown I*, the court dismissed a claim expressly made under the Copyright Act—that certain documents relating to the alleged partnership satisfied the writing requirement of Section 204(a) and therefore established the plaintiff's interest in the songs at issue. However, the court went on to address later, at the summary judgment stage, whether the plaintiff acquired an interest in the songs under state law, including in connection with a partnership accounting claim. *See Brown v. Flowers*, 2005 U.S. Dist. LEXIS 23272

(M.D.N.C. Sept. 14, 2005), *aff'd*, 196 F. App'x 178 (4th Cir. 2006) ("*Brown II*"). Significantly, the court did not treat the absence of a writing as dispositive of these state-law theories. Instead, the court assessed the plaintiff's evidentiary forecast, ultimately concluding that the plaintiff "[had] not offered facts from which a fact finder could determine that the songs belonged to [the partnership]." *Id.*, 2005 U.S. Dist. LEXIS 23272, at *10.[2] If *Brown I* stood for the proposition, as Defendant incorrectly suggests, that the Copyright Act unequivocally bars an unwritten transfer to a partnership, then there would have been no need for the court in *Brown II* to consider whether as a factual matter the songs were partnership assets under North Carolina law.

There appear to be no authorities that specifically address the application of the "by operation of law" prong of Section 204(a) to state law partnership asset and transfer provisions like N.C. Gen. Stat. § 59-38(a). However, it has been recognized that copyrights can transfer "by operation of law" to "partners" in the analogous context of state marital law. For example, in *Marriage of Worth*, 195 Cal. App. 3d 768, 774 (Cal. Ct. App. 1987), a California appellate court concluded that books written by a husband during the marriage constituted community property by operation of California community property law in accordance with Section 204(a). *Id.* In reaching this conclusion, the court observed that "California community property law is based on a partnership model in which each spouse contributes to and shares in the prosperity of the marriage," and "notwithstanding that the copyright 'vests *initially*' in the authoring spouse, the copyright is automatically transferred to both spouses by operation of the California law." *Id.* (citation omitted).

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[2] It bears noting that on appeal to the Fourth Circuit, the dissenting judge would have found that the plaintiff's affidavit was sufficient to create an issue for trial as to whether the songs at issue in that case were partnership assets. *See Brown v. Flowers*, 196 F. App'x 178, 192 (4th Cir. 2006) ("Brown's affidavit is sufficient to counter Flowers's contrary contention that the recordings were not partnership assets. Therefore, the district court erred in granting summary judgment to the defendant on the partnership accounting claim.")

In view of these cases and the plain language of Section 204(a), Defendant's assertion that the only way songs could become partnership property is by a written transfer is plainly wrong. As explained above, whether these songs were transferred to the parties' partnership by operation of North Carolina partnership law turns on the intent and conduct of the parties and the scope of their partnership agreement. Plaintiffs' forecast of evidence on these issues, which is set out more fully in Sections I and II of the Statement of Disputed Material Facts, easily establishes a genuine issue of material fact as to whether the songs at issue were partnership assets. Accordingly, Defendant's summary judgment motion on this basis should be denied.

b. The songs at issue became partnership assets by written transfer.

In addition to offering facts that satisfy the "by operation of law" prong of Section 204(a), Plaintiffs have also forecast evidence that creates a genuine issue as to whether the copyrights to the songs at issue were transferred in accordance with the written instrument prong of Section 204(a). Given the evidence in the record of the parties' intent, the "Uprooted" CD signed by Defendant suffices to create an issue for trial on this point.

It bears emphasizing from the outset that the transfer *itself* does not need to be accomplished in writing to satisfy the Section 204(a) writing prong, but instead must be *evidenced* by a signed writing, even if it comes much later. *See, e.g.*, *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 827 (3d Cir. 2011) ("Under the statute's plain terms it is clear that an oral transfer can be given legal effect by a subsequent signed writing."); *Kennedys v. Biafra*, 2003 Cal. App. Unpub. LEXIS 5862, at *16-17 (Cal. Ct. App. June 18, 2003) (copyright owned by member of band validly transferred by oral agreement memorialized in writing ten years later). Moreover, the writing requirement prong does not require magic words or formalized documentation. *See Richards v. Platz*, 920 F. Supp. 2d 1316, 1343 (N.D. Ga. 2013). The question is, simply, whether the signed writing evidences the parties' intent to transfer a copyright. *See id.* An adequate writing that comes later will validate the transfer, effective as of the time of the original agreement. *See Bunge*, 632 F.3d at 827; *Kennedys*, 2003 Cal. App. Unpub. LEXIS 5862, at *16-17.

Here, the record shows that the parties' partnership agreement was that they would own equally all songs written by or brought to the band, and that agreement was memorialized in a writing that was signed by Defendant. The "Uprooted" CD states: "All songs written, produced, and performed by Absent Element © 2005." This is no less formal than other informal writings found by courts to show sufficiently an intent to transfer copyright under the second prong of Section 204(a). *See, e.g., Dean v. Burrows*, 732 F. Supp. 816, 823 (E.D. Tenn. 1989) (defendant's endorsement of check in payment for "mold designs and molds" held to satisfy requirement of signed writing). And the fact that the "Uprooted" CD refers only to the songs on that album does not mean the writing is limited to those songs. *See, e.g., SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1213 (10th Cir. 2009) (holding that "a linguistic ambiguity concerning which particular copyrights [are] transferred" does not create "an insuperable barrier invalidating the transaction"). Indeed, it is common practice in the music industry for written transfers to prospectively cover songs not yet written at the time of the transfer.

In sum, the evidence in the record creates a genuine issue of material fact as to whether the "Uprooted" copyright notation embodies the parties' intent to transfer the copyrights in the songs at issue to the partnership. Accordingly, Defendant's summary judgment motion should be denied on this additional ground.

2. Plaintiffs hold property interests as partners in the proceeds derived from the songs at issue.

Defendant contends that if Plaintiffs cannot show the songs at issue were partnership property, they cannot recover any revenues derived by Defendant's unilateral exploitation of those songs. In making this argument, Defendant reads Plaintiffs' claims too narrowly. Even if there were no transfer of the songs to the partnership—by operation of law or as evidenced by a signed writing—there is nonetheless sufficient evidence to show that Plaintiffs hold partnership interests in the *proceeds* derived from the songs.

As set out in Sections I and II of the Statement of Disputed Material Facts, the parties expressly agreed that *proceeds* from songs written in furtherance of the partnership—including the songs at issue—are to be shared equally. This agreement, which was struck before there were significant Absent Element revenues, by its very nature contemplated future revenues. In other contexts, such as with respect to contingency fees cases brought to a partnership of attorneys that later breaks up, the future proceeds from those cases can be assets of the partnership despite their uncertain or contingent nature. *See, e.g. Robinson v. Nussbaum*, 11 F. Supp. 2d 1, 3 (D.D.C. 1997); *Beckman v. Farmer*, 579 A.2d 618, 636 (D.C. 1990).

Similarly, many courts have concluded that *proceeds* from a copyright are property of a marital partnership even if the copyright is not transferred. For example, in *Rodrigue v. Rodrigue*, 218 F.3d 432, 439 (5th Cir. 2000), the court held that the "economic benefits" that flow from the copyright of the authoring spouse become property of the marriage partnership under Louisiana community property law. In adopting the *Rodrigue* approach, the Hawaii Supreme Court noted that this approach "comports with the partnership model . . . under which 'partners share equally in the profits of their partnership, even though they may have contributed unequally to capital or services.'" *Berry v. Berry*, 277 P.3d 968, 987 (Haw. 2012) (citing *Cox v.*

Cox, 250 P.3d 775, 782 (Haw. 2011), and quoting *Tougas v. Tougas*, 868 P.2d 437, 445 (Haw. 1994)). Similarly, an Illinois appellate court held that future royalties on books written during a marriage were marital property even with respect to those earned after the marriage dissolved. *See In re Marriage of Heinze*, 631 N.E.2d 728, 731 (Ill. App. Ct. 1994); *see also Dunn v. Dunn*, 802 P.2d 1314, 1318 (Utah Ct. App. 1990) (noting that "the right to future income is a marital asset where that right is derived from efforts or products produced during the marriage, even in cases where that right cannot be easily valued"); *Boutz v. Donaldson*, 991 P.2d 517 (N.M. Ct. App. 1999).

As these cases demonstrate, a state-law property interest clearly can arise in proceeds from copyrights irrespective of authorship and ownership. These cases are particularly instructive here, as the context of divorce is analogous to the dissolution of a partnership—these cases expressly acknowledge that even if a copyright has not otherwise been transferred, the separating partners share equally in the future proceeds from the copyrights created during the marriage. This approach is consonant with the NCUPA, which provides that a partner has a personal property interest in revenues and profits generated by partnership activity as part of his interest in the partnership. N.C. Gen. Stat. § 59-56; *see also Potter*, 330 N.C. at 577, 412 S.E.2d at 6. As such, until the partnership is fully wound up, he continues to have an interest in such revenues. *See Chesson v. Rives*, 2013 NCBC LEXIS 46, at *9 (N.C. Super. Ct. 2013) ("A partners' rights to partnership property and income are personal property rights, and he does not forfeit those rights until the partnership affairs have been wound up and the partnership is terminated." (citations omitted))

Plaintiffs have forecast evidence that the partners agreed that any revenues derived from songs written in furtherance of or brought to the band would belong to the members of the band in equal proportions. The existence of this agreement is evidenced in the parties' conduct in that they did, in fact, equally split the revenues derived from all of their songs regardless of each individual's contributions to a particular song and irrespective of ownership. In fact, Defendant specifically testified that at no point did he contend that he was entitled to a greater share of song revenues than were Plaintiffs. This testimony, along with the other evidence of the parties' intent and conduct detailed in Sections I and II of the Statement of Disputed Material Facts creates a genuine issue of material fact as to whether Plaintiffs hold property interests as partners in the future proceeds from Absent Element songs—including from the songs at issue.

C. Plaintiffs are entitled to an accounting as co-authors of the songs at issue.

Even if there were no partnership at all, or if there were a partnership but the songs at issue and their proceeds were not assets of the partnership, Defendant still would not be entitled to summary judgment on Plaintiffs' claim for an equitable accounting.[3] That is because the facts in the record create a genuine issue of material fact as to whether Plaintiffs are co-authors of the songs at issue. *See, e.g., Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984).

In determining whether parties are joint authors of copyright work, a court must assess whether the parties each made contributions to the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. A co-author's contribution must be original; however, the requirement of "originality" under the Copyright Act merely calls for independent creation, not novelty. *See, e.g., Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980). With respect to the quantum of the contribution, each co-author's contribution "need not be equal for them to have an equal state in

[3] Defendant erroneously contends that this court lacks jurisdiction to adjudicate a co-authorship claim. As noted below in Section III.D.2 below, the Middle District has already rejected Defendant's argument in this regard in remanding this case back to state court.

the work as a whole." *Brownstein v. Lindsay*, 742 F.3d 55, 64-65 (3d Cir. 2014). Although a co-author's contribution must be more than *de minimis,* under *Gaiman v. McFarlane,* 360 F.3d 644, 659 (7th Cir. 2004), and the cases that follow its approach, it is not necessary for the contribution to be independently copyrightable.[4]

Applying these principles here, Plaintiffs are co-authors of the songs at issue song so long as they each contributed independently created, non-trivial material, irrespective of whether such material is independently copyrightable, with the intent that their contributions be merged together to create the songs. This is a pure question of fact, and Plaintiffs have forecast sufficient evidence, when viewed in the light most favorable to them, for a jury to find that they are co-authors of the songs at issue. In particular, Plaintiffs detailed in Section III of the Statement of Disputed Material Facts testimony that shows that each of them participated in a group effort to write songs for Absent Element, including the songs at issue. The band's former manager confirmed the collaborative songwriting process that produced Absent Element's songs. Further, each Plaintiff identified specific contributions he made to the music and/or lyrics of these songs. Finally, the copyright notations on both the "Motionless" and "Uprooted" CDs, as well as the copyright registration filed with respect to "Uprooted" and the removal of any indication on Absent Element's website that Defendant alone wrote any Absent Element lyrics all further establish that the parties together made substantive contributions to Absent Element's songs. That forecast of evidence is more than sufficient for a jury to find that Plaintiffs are co-

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[4] This issue has not been addressed by the Fourth Circuit. However, in a Fourth Circuit dissenting opinion, Judge Gregory followed the approach in *Gaiman*. *See Brown v. Flowers*, 196 F. App'x 178, 186-91 (4th Cir. 2006) (Gregory, J., concurring in part and dissenting in part). A leading commentator on copyright law has likewise endorsed the Seventh Circuit's view that a joint author does not have to make an independently copyrightable contribution. *See* Nimmer on Copyright § 6.07[A][3]. Indeed, Professor Nimmer notes that the contribution of "ideas" can be sufficient to give rise to joint authorship. *See id.*, § 6.07[A][3][a].

authors of the songs at issue and further warrants denial of Defendant's motion for summary judgment as to Plaintiffs' equitable accounting claim.

III. <u>Defendant's various arguments in favor of summary judgment are unavailing.</u>

The discussion in Section II above establishes that there are genuine issues of material fact that preclude entry of summary judgment in Defendant's favor as to any of Plaintiffs' claims. That discussion therefore refutes much of the argument set out in Defendant's opening brief, which is largely premised on his erroneous assertions that there was no partnership or, alternatively, that the songs and their proceeds are not partnership assets. The subsections that follow address Defendant's remaining arguments, which are equally lacking in merit.

A. The dissolution of the partnership does not prevent Plaintiffs from recovering proceeds earned post-dissolution.

Defendant misreads the North Carolina Supreme Court's decision in *Campbell v. Miller* in arguing that Plaintiffs are entitled only to an accounting of "partnership funds and properties as of the date of dissolution." Def.'s Mem. of Law at 19. The holding of *Campbell* was limited, standing for the proposition that one partner's termination of an at-will partnership agreement, taken alone, cannot constitute a breach of contract. *See Campbell*, 274 N.C. 143, 161 S.E.2d 546. Thus, Defendant's contention that *Campbell* somehow limits Plaintiffs' ability to recover Defendant's post-dissolution earnings from the songs at issue is fraught with error.

First, Defendant confuses the *dissolution* of a partnership with its *termination*. "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." N.C. Gen. Stat. § 59-60. Therefore, Defendant is incorrect to the extent he argues that the dissolution of the partnership ends the partners' association and cuts off the potential for further revenues to accrue. *Cf. Timmermann v. Timmermann*, 538 P.2d 1254, 1260-61 (Ore. 1975) ("[T]here are three separate steps necessary for the complete extinguishment of an existing partnership. They are (1) Dissolution, (2) Winding up, and (3) Termination." (citation omitted)). Because the partnership is not terminated until winding up is completed, the partners continue to owe each other fiduciary duties post-dissolution.

Second, Defendant later reverses course in his brief on this very point, acknowledging that Plaintiffs may seek post-dissolution profits if they can show "proof that those earnings were derived from property owned by the partnership." Def.'s Mem. of Law at 19. That, of course, is precisely what Plaintiffs have argued and what they have forecast sufficient evidence to prove, among other theories. *See* Section II.B.1, above. The NCUPA provides that "[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners . . . from any use by him of its property." N.C. Gen. Stat. § 59-51(a). This is reinforced by N.C. Gen. Stat. § 59-52, which states that "[a]ny partner shall have the right to a formal account as to partnership affairs . . . [a]s provided by G.S. 59-51." N.C. Gen. Stat. § 59-52(3).

Neither of those statutory provisions suggests that the right to an accounting of a partner's use of partnership property is limited to uses that occur prior to dissolution. In fact, courts in several other states have expressly recognized that the accounting requirement extends past dissolution. *See, e.g.*, *Ruppe v. Utter*, 243 P. 715, 718 (Cal. Dist. Ct. App. 1925) ("[Defendant] was not authorized to prolong his possession of the assets of the firm for the purpose of continuing the business and deriving profits therefrom. Having done so he must be held to account to his retiring partner for any profits so made."); *Murgoitio v. Murgoitio*, 726 P.2d 685, 690 (Idaho 1986) ("A partner who uses partnership assets during the winding-up period is accountable to the partnership for any benefit or profit derived from such use.");

Timmermann, 538 P.2d at 1264 (holding that partner must account for profits from use of property occurring after dissolution).

Here, as set out above, Plaintiffs have forecast sufficient evidence to create an issue for trial as to whether the songs at issue were partnership property. Thus, by Defendant's own argument, Plaintiffs' constructive fraud and accounting claims survive summary judgment, including with respect to any profits Defendant collected post-dissolution but failed to share. Moreover, even if Defendant were somehow correct that Plaintiffs could not obtain an accounting of post-dissolution profits, there is also a genuine issue as to when dissolution occurred, as that fact is disputed in the record.

B. The Absent Element songs at issue are assets of the partnership and it is irrelevant whether Plaintiffs have ownership interests in the derivative Daughtry songs.

Defendant next argues that the partnership cannot own the Absent Element songs at issue here. Def.'s Mem. of Law at 19–25. He is incorrect for the reasons discussed in Section II.B above. Defendant also attempts to distinguish between ownership of a copyright by partners as individuals verses ownership by the partnership. *Id.* at 24. However, any such distinction is without a difference under North Carolina partnership law. As discussed earlier, assets can become partnership property even if they are not formally titled in the partnership's name. *See* Section II.B; *see also Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) (making no distinction between copyright co-ownership individually or copyright co-ownership by partnership). And, the record shows that the parties made no distinction between ownership as individuals and ownership as partners in Absent Element.

Defendant also argues that Plaintiffs cannot claim ownership of the songs on the "Daughtry" album that are derivative works of the songs at issue. Def.'s Mem. of Law at 25–28. Plaintiffs do not disagree—but that proposition has no bearing on Plaintiffs' claims. While

Plaintiffs do not claim ownership of the recordings and the derivative musical compositions on the "Daughtry" and "Leave This Town" albums, they *do* claim an interest in the underlying Absent Element songs that were used in creating those recordings and derivative musical compositions. The co-owner of a copyright, whether individually or as a partner, has a duty to account to his fellow co-owner for any use of the copyright. *See Oddo*, 743 F.2d at 633. This includes accounting for any revenue from any new works created by the other co-owner using the co-owned work. *See, e.g., Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 522-23 (9th Cir. 1990). Therefore, because the Absent Element songs at issue were used in creating the sound recordings and derivative musical compositions on "Daughtry" and "Leave This Town" albums, Plaintiffs are entitled to an accounting from Defendant's uses of those songs pursuant to the various theories discussed above.

C. Plaintiffs' constructive fraud claim is rooted in Defendant's fiduciary duty owed to Plaintiffs.

Essentially, a claim for constructive fraud rests on a breach of fiduciary duty by the defendant which benefitted him at the plaintiff's expense. *See Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 764 S.E.2d 203, 219-20 (N.C. Ct. App. 2014). Defendant's primary arguments contesting Plaintiffs' constructive fraud/constructive trust claims (*see* Def.'s Mem. of Law at 28–34) fail for the reasons addressed in Section II above: (1) the facts in the record are sufficient to show that Defendant owes a fiduciary duty to Plaintiffs due to their relationship as partners, and (2) the facts in the record are sufficient to establish that the Absent Element songs at issue are assets of the partnership. Defendant's other argument as to these claims is deficient as well.

Defendant's contention that the partnership had no assets or undistributed profits as of May 2006 is plainly wrong given Plaintiffs' forecast of evidence. Following Absent Element's last performance in June 2006, in addition to the Absent Element songs being partnership assets, there were numerous other partnership assets and affairs existing at that time that were not then (and still have not been) wound up. Through August of 2006, sales of "Uprooted" were producing a steady stream of partnership income, as evidenced by statements for the PayPal account Andrews operated on behalf of the partnership. Sales of "Uprooted" continue to this day. A purported lack of assets as of any particular date in 2006 therefore provides no basis for entering summary judgment on Plaintiffs' constructive fraud claim.[5]

D. Plaintiffs' statutory and equitable accounting claims are timely.

Once again, Defendant's primary line of attack on Plaintiffs' statutory and equitable accounting claims—that there are no remaining partnership assets subject to an accounting obligation (Def.'s Mem. of Law at 36–37)—fails for the reasons set out above in Section II. The evidence in the record creates issues for trial as to whether the Absent Element songs at issue and the proceeds from those songs are partnership property. Defendant's statute of limitations arguments as to these claims also fail.

1. Plaintiffs' statutory accounting claim is timely.

Defendant argues that a claim for a statutory partnership accounting is barred by the statute of limitations because such a claim must be brought within three years of dissolution of the partnership, and the partnership was dissolved no later than the summer of 2006. Def.'s Mem. of Law at 34–35. This argument is wrong on several levels.

[5] Defendant also argues that Plaintiffs must show the existence of a partnership in order to establish any fiduciary obligation on Defendant's part. Although Plaintiffs have indeed forecast sufficient evidence of a partnership, as explained at length above, North Carolina case authority makes clear that fiduciary duties are not limited to the partnership context and instead may arise in the absence of "a technical or legal relationship." *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971).

First, even if Defendant's premise as to when the limitations period began to run were correct, the record evidences no clear date of dissolution. Plaintiffs have stated that the parties never specified any date of dissolution. *See, e.g.*, Ryan Andrews's Responses to Interrogatories ¶ 1; Perry Dep. 13:6–14. Defendant, for his part, points to Crawford's decision to join another band, and Defendant's formation of his new band, as evidence of dissolution, but he cannot show any agreement that joining another band would automatically dissolve the partnership. Musicians often play in multiple bands, and in fact the Plaintiffs have acknowledged that each member had the authority to play and write music that was outside the scope of their agreement. *See* Crawford Dep. 66:15-67:6; Andrews Dep. 173:5-14. Therefore, there is no undisputed date of dissolution to which Defendant can peg a start date for any applicable statute of limitations.

Second, Defendant misconstrues North Carolina law in arguing that the limitations period begins running immediately upon dissolution. In fact, the limitations period does not begin to run "until one partner [has] notice of the other's termination of the partnership *and his refusal to account*." See *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 153, 143 S.E.2d 312, 316 (1965) (emphasis added); *see also Prentzas v. Prentzas*, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963) (noting that "the statute did not begin to run until [plaintiff] had notice of [defendant's] termination of the partnership relationship *and his refusal to account*" (emphasis added)). Defendant cites both *Bennett* and *Prentzas* but ignores this critical language, which indicates that the three-year statute of limitations does not actually begin to run until a partner refuses to account.[6] And, as Defendant concedes, it is undisputed that Plaintiffs did not make a demand for an accounting—and Defendant did not refuse that accounting—until 2012.

[6] Defendant also cites the century-old decision in *Moore v. Westbrook*, 156 N.C. 482, 72 S.E. 842 (1911), a case decided some thirty years before passage of the NCUPA, which now governs the questions here and which both *Prentzas* and *Bennett* were interpreting. Moreover,

Indeed, both *Bennett* and *Prentzas* make clear that the limitations period often does not begin to run until well after the date of dissolution. In *Bennett*, the partnership was dissolved by the death of a partner in 1936, but the action was not brought until 1963. *See Bennett*, 265 N.C. at 152, 143 S.E.2d at 315-16. The court, however, held that the plaintiffs had provided sufficient evidence that the action was timely filed, based on allegations of fraud on behalf of the partner from whom they demanded an accounting. *See id.* at 156, 143 S.E.2d at 318. Similarly, in *Prentzas*, after the defendant had promised multiple times (and failed) to make an accounting, the court held that the relevant date was not the date of dissolution, but the date on which the plaintiff knew the defendant "would not perform his duty and render a statement showing the status of the partnership." *Prentzas*, 260 N.C. at 103, 131 S.E.2d at 680; *cf. Warren v. Chapman*, 535 A.2d 856, 859-60 (D.C. 1987) (holding under Uniform Partnership Act that date of dissolution triggers right to demand accounting, not right to bring legal claim for accounting).

The foregoing legal authorities show that the statute of limitations on Plaintiffs' statutory accounting claim did not begin to run until Defendant rejected Plaintiffs' demand for an accounting in 2012. Thus, this action was instituted well within the statutory period. Furthermore, even if a limitations period were somehow triggered earlier, Plaintiffs still can recover under North Carolina's "continuing wrong" doctrine given Defendant's series of repeated wrongful acts of failing to account for the income that he has received—and continues to receive—on an on-going basis with respect to the Absent Element songs. *See Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010).

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the facts in *Moore* were markedly different from those here in that in *Moore* there was no longer on-going income or debt with respect to the partnership. *See Moore*, 156 N.C. at 492, 72 S.E. at 847.

2. Plaintiffs' equitable accounting claim is properly before this court and timely.

Defendant first argues that the Court lacks jurisdiction to determine co-authorship of copyrights for purposes of Plaintiffs' equitable accounting claim. Def.'s Mem. of Law at 37–38. This is *exactly* the same argument Defendant made in federal court in attempting without success to establish removal jurisdiction. The Middle District expressly rejected Defendant's exclusive jurisdiction argument in remanding the case. *See Andrews v. Daughtry*, 2013 U.S. Dist. LEXIS 24355 (M.D.N.C. Feb. 22, 2013).

As to Defendant's statute of limitations argument, Defendant does not contend that Plaintiffs' co-authorship claims are time-barred with respect to *Breakdown* and *Conviction.* He does make that argument as to *Home* and *Sinking*, but the Copyright Act requires a plain and express repudiation of ownership before the claim accrues. *See, e.g.*, *Roger Miller Music, Inc. v. Sony/ATV Pub'g, LLC*, 477 F.3d 383 (6th Cir. 2007) (holding copyright filings, openly and exclusively licensing the songs, and paying royalties did not amount to an express repudiation; rather repudiation requires that express notice be given from one party to the other specifically addressing and claiming ownership). Clearly, such plain and express repudiation of Plaintiffs' co-authorship did not occur until Defendant rejected Plaintiffs' request for an accounting shortly before this lawsuit was filed. Moreover, because Plaintiffs cannot (and do not) claim ownership of the recordings and derivative musical compositions on the "Daughtry" and "Leave This Town" albums, the copyright notices, registrations, or any other claims associated with the songs on those albums cannot provide the requisite repudiation of Plaintiffs' claims as to the underlying Absent Element songs.

3. Defendant's constructive fraud tolled the running of any applicable statute of limitations.

If a cause of action include allegations of fraud, the statute of limitations does not begin to run until the plaintiff either discovers, or should discover through due diligence, the defendant's fraud. *See Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). However, "[t]he existence and nature of a confidential relationship between the parties to a transaction may excuse a failure to use due diligence." *Id.* at 715-16, 318 S.E.2d at 321; *see also Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 156, 143 S.E.2d 312, 318 (1965) (failure to use diligence "may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth"). If, as here, the plaintiff and defendant are in a fiduciary relationship of trust, the plaintiff is not held to the standard of diligence that would otherwise apply and may be excused for a failure to discover fraud sooner.

In this case, facts in the record show that Defendant committed many acts of constructive fraud, and unfair and deceptive acts, against Plaintiffs beginning in 2006, all while he owed fiduciary duties to Plaintiffs as their partner and held an advantage in bargaining power over them given his stature in the music industry. However, as a result of their personal and fiduciary relationships with Defendant, Plaintiffs trusted him and believed he would act in their collective best interests. Their testimony shows that they thought of him as their trusted friend. As such, they continued to believe, for years, that eventually he would do right by them, and either account to them for what they were owed or resume his musical relationship with them to their mutual benefit. Additionally, this meant that the wrongfulness of certain of Defendant's actions, such as his demand that his image not be used to market "Uprooted" and his eventual demand that Plaintiffs stop selling the album altogether, did not become fully apparent to Plaintiffs until years later. These facts are sufficient for a jury to find that Plaintiffs were justified in not discovering Defendant's wrongful conduct sooner. *Cf. Bennett*, 265 N.C. at 156, 143 S.E.2d at 318 (holding that "[a]lthough plaintiffs' evidence is susceptible of inferences to the contrary, yet the jury could find from it that, in view of the confidential relationship existing between plaintiffs and [defendant], the former were not indiligent" in failing to bring their action sooner).

It also bears emphasizing that Defendant's statute of limitations arguments ignore Plaintiffs' express claim for constructive fraud. North Carolina courts have held that a claim for constructive fraud based on a breach of fiduciary duty—as Plaintiffs' claims are here—carries a ten-year statute of limitations. *See NationsBank v. Parker*, 140 N.C. App. 106, 113-14, 535 S.E.2d 597, 602 (2000). Because Plaintiffs filed this action in 2012, there is no question that all Defendant's conduct in question falls well within the ten-year period. Accordingly, Defendant's argument that Plaintiffs' accounting claims are time-barred fails for a host of reasons.

4. Defendant is equitably estopped from asserting any otherwise applicable statute of limitations.

In addition to the foregoing deficiencies in Defendant's statute of limitations arguments, Defendant also should be equitably estopped from asserting any of them as a defense. "[E]quity will deny the right to assert [the statute of limitations] when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959). If a plaintiff reasonably relies on a defendant's representations in delaying suit, the statute will be equitably tolled. *See Vanek v. Global Supply & Logistics, Inc.*, 2014 N.C. App. LEXIS 351, at *11 (N.C. Ct. App. 2014).

Here, the facts show that Plaintiffs delayed in bringing suit for several years because Defendant represented to them that he intended to return to playing music with them and that he could further their musical careers. Perry Dep. 348:23–349:18. Even after not becoming a part of the band "Daughtry," Plaintiffs believed that Defendant intended to resume his association with them at some point. *Id.*, at 350:17–20. Given his stature and fame in the music industry, and the resulting ability he had to "make or break" Plaintiffs' musical careers, the impact his promises had was significant. Plaintiffs reasonably relied on those representations, and only when it became clear that Defendant had been leading them on did they finally file suit. *Id.*, at 345:23–346:9. Therefore, having enticed Plaintiffs to hold off with promises he did not intend to keep, Defendant should not be allowed to assert a statute of limitations defense. *See Nowell*, 250 N.C. at 579, 108 S.E.2d at 891; *Vanek*, 2014 N.C. App. LEXIS 351, at *11.

E. Plaintiffs have forecast evidence that would entitle them to recovery under the Unfair and Deceptive Trade Practices Act.

Defendant argues that Plaintiffs cannot succeed on their UDTPA claims because (1) such claims purported "are not viable between partners," (2) the claim is preempted, and (3) the claim is untimely. Each of these arguments is baseless.

1. An UDTPA claim can lie between partners.

"In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Compton v. Kirby*, 157 N.C. App. 1, 19, 577 S.E.2d 905, 917 (2003). "Unfair" practices are ones that immoral, unethical, unscrupulous, or substantially injurious, whereas a "deceptive" trade practice "possesses the tendency or capacity to mislead, or creates the likelihood of deception." *Id.* at 20, 577 S.E.2d at 917. "Commerce" is broadly defined in the act as "all business activities, however denominated," excluding only the rendering of professional services. N.C. Gen. Stat. § 75-1.1. The term "business activities," in turn, "connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991).

Defendant rests his argument that there is no UDTPA claim among partners entirely upon the case of *White v. Thompson*, 364 N.C. 47, 691 S.E.2d 676 (2010). However, that decision cannot be read so broadly. Instead, it merely stands for the proposition that "any unfair or deceptive conduct *contained solely within a single business* is not covered by the Act." *Id.* at 53, 691 S.E.2d at 680 (emphasis added). That holding does not state or suggest that unfair conduct by one partner that damages another is necessarily "contained solely within a single business" and cannot also be "in or affecting commerce." In fact, multiple North Carolina courts have allowed UDTPA claims to proceed when those claims were based on breach of fiduciary duty or constructive fraud. *See Compton*, 157 N.C. App. at 20, 577 S.E.2d at 917 (allowing UDTPA claim based on constructive fraud by one partner against another to proceed, and stating that "North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim"); *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 668, 347 S.E.2d 864, 866 (1986) (evidence of constructive fraud sufficient to support UDTPA claim where conduct affected commerce).

Here, Plaintiffs' UDTPA claims may proceed because they have forecast evidence that Defendant's wrongful conduct was "in or affecting commerce." For example, the facts show that Defendant first induced them to not use his name or image to market the "Uprooted" album and later duped them into stopping sales of that album altogether (neither of which they were obliged to do), in both instances telling them it would be to their future benefit. This clearly affected commerce because it directly impacted one of the principal "business activities" of Absent

Element, the marketing and sale of the "Uprooted" album to the general public, while benefitting Defendant's own contractual commitments and his subsequent sale of the "Daughtry" album. Furthermore, Plaintiffs have forecast evidence that they were, in fact, co-authors of the Absent Element songs at issue, and that Defendant therefore deceptively represented to the public, the music industry, and the appropriate royalty-dispensing entities that he was the sole author of the songs at issue. Finally, by wrongfully denying Plaintiffs the songwriting credit they were entitled to—either by virtue of their co-authorship of the Absent Element songs or the parties' agreement to share songwriting credit—Defendant impaired Plaintiffs' ability to gain recognition and work in the songwriting industry, thereby negatively impacting their musical careers. All this wrongful and deceptive conduct was in or affecting commerce.

Because Plaintiffs have properly forecast evidence of wrongful and deceptive conduct by Defendant that was in or affecting commerce, their UDTPA claim survives summary judgment.

2. The Middle District has already held that Plaintiffs' UDTPA claim is not preempted.

Defendant recycles another argument previously made and rejected in federal court in this matter, namely that the Copyright Act preempts Plaintiffs' UDTPA claim. Def.'s Mem. of Law at 39. The cases he cites hold only that a UDTPA claim is preempted without an "extra element" *where the conduct constituting unfair and deceptive trade practices also underlies a copyright infringement claim. See, e.g., Vogel v. Wolters Kluwer Health, Inc.*, 630 F. Supp. 2d 585, 600 (M.D.N.C. 2008). Here, the conduct forming the basis of Plaintiffs' UDTPA claim has nothing to do with copyright infringement; as stated above, it sweeps far beyond even Defendant's failure to account to Plaintiffs for profits he has failed to share with them.

The Middle District reached this very conclusion in holding that Plaintiffs' UDTPA claims were not preempted. *See Andrews*, 2013 U.S. Dist. LEXIS 24355, at *39-42. Defendant tries to recast that ruling by claiming the court held Plaintiffs' UDTPA claim was not preempted solely on the basis of a fiduciary relationship. Def.'s Mem. of Law at 40. Therefore, Defendant claims, if no fiduciary relationship exists, the Middle District's decision suggests that the UDTPA claims are preempted. *Id.*

To begin with, the evidence in the record is sufficient to create an issue of fact as to the existence of a fiduciary duty for the reasons explained above. Furthermore, Defendant's selective reading of the Middle District's first remand decision ignores its plain language, which states that "where a plaintiff's allegations under the UDTPA involve *misrepresentation, deception, a confidential relationship, or palming off*, the claim is not completely preempted by the Copyright Act," and then concludes that Plaintiffs' complaint indeed makes such allegations. *Andrews*, 2013 U.S. Dist. LEXIS 24355, at *40 (emphasis added). Therefore, it is not *only* Plaintiffs' claims of a fiduciary relationship that prevented the claim from being preempted, but *also* their allegations regarding a variety of deceptive conduct and misrepresentations unrelated to any claim for infringement. None of those theories depend on the existence of a partnership. Moreover, the Middle District noted that Plaintiffs' UDTPA claim cannot equate to a claim for copyright infringement and therefore is not preempted because one copyright co-owner cannot infringe against another co-owner. *Id.*, at *39. Defendant's argument that Plaintiffs' UDTPA claim is preempted therefore fails again.

3. Plaintiffs' UDTPA claim is timely.

In arguing that Plaintiffs' UDTPA claim is time-barred, Defendant misunderstands the factual bases for the claim. The statute of limitations for a claim under the UDTPA is four years. N.C. Gen. Stat. § 75-16.2. Plaintiffs' forecast of evidence supporting their UDTPA claim extends well beyond conduct on Defendant's part in 2007, including his failure to give the

Plaintiffs songwriting credit on the song "You Don't Belong," released in 2009 and his continued pattern of failing to credit Plaintiffs with respect to the songs at issue in accordance with their songwriting contributions and the parties' agreement. These actions have all affected the marketplace by preventing Plaintiffs from gaining recognition in the industry, and have deceived the public and music industry by causing them to believe that Defendant is the sole author of the songs at issue. Finally, for the same reasons set out above, the running of the statute on UDTPA claims is tolled by Defendant's constructive fraud, and Defendant should be equitably estopped from asserting the statute of limitations as a defense.

F. Plaintiffs' unjust enrichment claim is an alternative claim.

Plaintiffs' unjust enrichment claim is expressly cast as an alternative claim. Defendant conveniently elides this fact in arguing that the claim for unjust enrichment cannot succeed because Plaintiffs have alleged a contract between the parties. Def.'s Mem. of Law at 45. Quite plainly, Plaintiffs maintain their unjust enrichment claim in the alternative.

Defendant also argues that Plaintiffs' claim for unjust enrichment is preempted by the Copyright Act. Def.'s Mem. of Law at 45–46. Once again, the same argument was made and rejected in federal court. Defendant argued in the Middle District that Plaintiffs' claim was preempted because it was made in the alternative to other claims and presupposed that a partnership did not exist. *See Andrews*, 2013 U.S. Dist. LEXIS 24355, at *43. The court rejected this argument—as it did with Defendant's other preemption arguments—because it is undisputed that the conduct Plaintiffs allege to be wrongful *could not serve as the basis for a claim of copyright infringement* because "Plaintiffs here make no claim remotely akin to infringement." *Id.* at *43-44. Therefore, contrary to Defendant's argument, it was quite clearly *not* the potential existence of a partnership between the parties that led the Middle District to conclude that Plaintiffs' claim for unjust enrichment was not preempted.

G. Defendant's defense of laches is baseless.

Defendant argues that Plaintiffs' claims should be barred by the doctrine of laches. In North Carolina, the mere passage of time cannot support a claim for laches; instead, the party asserting the doctrine must show some harm or prejudice occasioned by an unreasonable delay. *See, e.g., Irby v. Freese*, 206 N.C. App. 503, 508, 696 S.E.2d 889, 892 (2010). If a claim is governed by a statute of limitations, that statute provides the best guide as to whether any purported delay is unreasonable; when claims fall within the statutory period, courts are generally loathe to apply laches to bar relief. *See Irby*, 206 N.C. App. at 511, 696 S.E.2d at 894; *cf. Petrella v. MGM*, 134 S. Ct. 1962, 1975 (2014) (noting that the original purpose of laches was to serve "as a guide when no statute of limitations controlled the claim").

Defendant suggests that Plaintiffs should have raised their claims in 2006, before he exploited their songs for his personal benefit and years before any applicable statute of limitations would have run. In essence, he argues that Plaintiffs should have anticipated his breaches of fiduciary duty and filed suit in advance to prevent them from occurring. He argues that he has been harmed because he presumably would have acted differently had Plaintiffs asserted their claims sooner and the partnership assets been wound up earlier. But this is no proper showing of harm for purposes of laches. The only party suffering any harm here is Plaintiffs, who have been harmed by Defendant's failure to account to them. Defendant, who has retained the benefit of Plaintiffs' shares of the proceeds at issue for years, cannot show any harm at all from Plaintiffs' purported delay in asserting their rights.

At bottom, Defendant contends that Plaintiffs adopted a "wait-and-see" approach and chose not to make their claims until the songs at issue had achieved success. The United States

Supreme Court, however, has recently addressed a similar argument, and it held that when the exploitation of copyrighted works is at issue and the claims are otherwise within the applicable statute of limitations, the doctrine of laches should not apply to bar a claim, even in the face of a period of delay that far exceeds any delay Defendant claims occurred in this case. *See Petrella*, 134 S. Ct. at 1975. Defendant's laches argument should similarly be rejected here.

H. Plaintiffs may proceed on their claim for punitive damages.

Finally, Defendant argues in passing that Plaintiffs' claim for punitive damages cannot survive summary judgment because they cannot prove the existence of a statutory "aggravating factor," including fraud. Def.'s Mem. of Law at 48. However, Defendant ignores that Plaintiffs have forecast evidence sufficient to survive summary judgment on a claim for constructive fraud. "Punitive damages are justified in cases of constructive fraud, as long as some compensatory damages have been shown with reasonable certainty." *Compton*, 157 N.C. App. at 21, 577 S.E.2d at 917 (internal quotation marks and citation omitted). As explained above, the record evidence shows that the parties formed a partnership and that Defendant breached his fiduciary duty as a partner in order to benefit himself, and he also breached a fiduciary duty owed due the unusually disparate bargaining power among the parties. Therefore, Plaintiffs have sufficiently established a claim for constructive fraud, and, as a result, Plaintiffs' claim for punitive damages necessarily survives summary judgment as well.

CONCLUSION

For the reasons set out above, Plaintiffs have forecast more than sufficient evidence to create genuine issues of material fact as to each of their claims for relief in this action. Accordingly, Defendant's motion for summary judgment should be denied.

This the 13th day of February, 2015.

Coe W. Ramsey
N.C. Bar No. 25482
E-mail: cramsey@brookspierce.com
Charles E. Coble
N.C. Bar No. 25342
E-mail: ccoble@brookspierce.com
Andrew L. Rodenbough
N.C. Bar No. 46364
E-mail: arodenbough@brookspierce.com
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
P.O. Box 1800
Raleigh, NC 27602
Telephone: 919-839-0300
Facsimile: 919-839-0304
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following by email and by hand delivery:

David L. Brown
Dbrown@nelsonbrownco.com
Brady A. Yntema
byntema@nelsonbrownco.com
NELSON BROWN & CO.
800 Green Valley Road, Suite 302
Greensboro, North Carolina 27408
Attorneys for Defendant

I hereby certify that a copy of the foregoing document was served upon the following by email and by depositing a copy of same in the United States mail, postage prepaid, and addressed as follows:

Leon Gladstone
lgladstone@gladstonemichel.com
Anthony DiPietra
adipietra@gladstonemichel.com
GLADSTONE MICHAEL WEISBERG
WILLNER & SLOANE ALC
4551 Glencoe Avenue, Suite 300
Marina del Rey, California 90292-7925
Attorneys for Defendant

This the 13th day of February, 2015.

Andrew L. Rodenbough