IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01044-WJM-STV

DANIEL R. GOODWIN,

Plaintiff,

v.

NATIONAL ELECTRICAL ANNUITY PLAN,
CAROL SMITH CHAMBERS,
QUINN ELIZABETH GOODWIN,

Defendants.

And

NATIONAL ELECTRICAL ANNUITY PLAN,

Crossclaim Plaintiff,

v.

QUINN ELIZABETH GOODWIN,

Crossclaim Defendant.

And

CAROL SMITH CHAMBERS,

Counterclaim Plaintiff,

v.

DANIEL R. GOODWIN,

Counterclaim Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on eight motions: Defendant National Electrical Annuity Plan's ("NEAP") Motion for Default Judgment as to Crossclaim Defendant Goodwin [#69], Defendant NEAP's Motion for Summary Judgment [#70], Plaintiff's Motion for Summary Judgment on Defendant Carol Smith Chambers [#92], Defendant Carol Smith Chambers' Motion for Summary Judgment [#93], Plaintiff's Motion for Summary Judgment on Claim One [#98], Plaintiff's Motion to Dismiss Counter Claim [#117], Plaintiff's Motion for Judgment on the Pleadings [#145], and Plaintiff's Motion for Judgment After the Pleadings [#147]. These motions have been referred to this Court for recommendation. [##71, 95, 99, 119, 142, 146, 148] This Court has carefully considered the motions and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the motions. For the following reasons, the Court respectfully **RECOMMENDS** that Plaintiff's Motion for Summary Judgment on Claim One [#98] be **GRANTED** and the remaining motions be **DENIED**.

I. PROCEDURAL BACKGROUND

This action was commenced on April 13, 2020, by pro se[1] Plaintiff Daniel R. Goodwin to recover retirement funds distributed to Defendant Quinn Goodwin by Defendant NEAP (Claims One and Three)[2] and recover funds from Defendant Carol

[1] "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106,1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id*. at 1110 n.3. The court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

[2] Claim One is brought against Defendant NEAP and Claim Three is brought against Defendant Goodwin ("Ms. Goodwin"). [#6]

Smith Chambers ("Ms. Chambers") associated with the transfer of vehicle titles (Claim Two).[3] [##1, 6] In response to the Complaint, Defendant NEAP filed a cross claim against Ms. Goodwin for the amount of the retirement funds [#43] and Ms. Chambers filed a counterclaim against Plaintiff to recover moneys owed to her under a loan agreement. [#27]

On February 5, 2021, Defendant NEAP filed a Motion for Entry of Default and a Motion for Default Judgment as to Crossclaim Defendant Goodwin. [##68, 69] Ms. Goodwin has not responded to the motions. On February 10, 2021, the Clerk of the Court entered default as to Ms. Goodwin on NEAP's crossclaim.[4] [#72] Also on February 5, 2021, NEAP filed its Motion for Summary Judgment on Claim One. [#70] Plaintiff filed a response to the motion and NEAP filed a reply. [##125, 126] Plaintiff filed a cross Motion for Summary Judgment as to Claim One against Defendant NEAP [#98], and a response and reply to that motion have been filed [##108, 125].

On April 16, 2021, Plaintiff filed a Motion for Summary Judgment on Claim Two against Ms. Chambers and Ms. Chambers has filed a response. [##92, 120] On April 21, 2021, Ms. Chambers filed a Motion for Summary Judgment as to Claim Two; Plaintiff did not file a response. [#93] On May 27, 2021, Plaintiff filed a Motion to Dismiss Defendant Chambers' counterclaim, which this Court construed as a motion for summary judgment. [##117, 121] Defendant Chambers filed a response. [#141] Finally, on August 16 and 18, 2021, Plaintiff filed two motions for judgment on the pleadings. [##145, 147]

[3] Plaintiff filed his Amended Complaint on May 13, 2020. [#6]

[4] Plaintiff had separately filed a Motion for Entry of Default as to Ms. Goodwin. [#104] However, the Clerk of the Court did not enter default on that motion because "the affidavit or declaration required by Fed. R. Civ. P. 55(a) does not include the date service was complete." [#105]

The Court will address the Motions pertinent to each of Plaintiff's claims and the associated cross- or counter-claims in turn.

II. Legal Standards

A. Motions for Summary Judgment

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Buell Cabinet Co., Inc. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979) (citations omitted). When reviewing a cross-motion, the Court must "construe all inferences in favor of the party against whom the motion under consideration is made." *Pirkheim v. First Unum Life Insurance*, 229 F.3d 1008, 1010 (10th Cir. 2000) (quoting *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996)).

The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact, which the movant may do "simply by pointing out to the court a lack of evidence . . . on an essential element of the nonmovant's claim" when the movant does not bear the burden of persuasion at trial. *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir. 1998). If the moving party bears the burden of proof at trial, "the moving party must establish, as a matter of law, all essential elements of the [claim or affirmative defense on which summary judgment is sought] before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant's case." *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008). In other words, the

moving party "must support its motion with credible evidence showing that, if uncontroverted, the moving party would be entitled to a directed verdict." *Rodell v. Objective Interface Sys., Inc.*, No. 14-CV-01667-MSK-MJW, 2015 WL 5728770, at *3 (D. Colo. Sept. 30, 2015) (citing *Celotex Corp.*, 477 U.S. at 331). If the movant carries its initial burden, the burden then shifts to the nonmovant "to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial." *Adler*, 144 F.3d at 671 (quotation omitted).

"[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury. *See Anderson*, 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). Evidence, including testimony, offered in support of or in opposition to a motion for summary judgment must be based on more than mere speculation, conjecture, or surmise. *Bones v. Honeywell Int'l Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.

574, 587 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

B. Motions for Default Judgment

Default may be entered against a party who has failed to plead or otherwise defend. Fed. R. Civ. P. 55(a). Before entering default judgment, the Court must first consider whether it has subject matter and personal jurisdiction over the absent party. *See Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 772 (10th Cir. 1997); *Williams v. Life Sav. and Loan*, 802 F.2d 1200, 1202-03 (10th Cir. 1986). The Court must further consider whether the unchallenged facts constitute a legitimate basis for the entry of default judgment. *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010); *Malibu Media, LLC v. Ling*, 80 F. Supp. 3d 1231, 1239 (D. Colo. 2015).

In determining whether a claim for relief has been established, the well-pleaded facts of the complaint are deemed true. *See United States v. Craighead*, 176 F. App'x 922, 924 (10th Cir. 2006); *Malibu Media*, 80 F. Supp. 3d at 1239. Undisputed facts set forth in any affidavits and exhibits are also accepted as true. *See Reg'l Dist. Council v. Mile High Rodbusters, Inc.*, 82 F. Supp. 3d 1235, 1242-43 (D. Colo. 2015).

III. CLAIM ONE

Defendant NEAP and Plaintiff have filed cross motions for summary judgment on Claim One. [##70, 98] Claim One alleges that NEAP engaged in the "[u]nauthorized release of [Plaintiff's] pension and annuity." [#6 at 6]

A. Factual Background[5]

Defendant NEAP is a multiemployer employee benefit plan as defined by the Employee Retirement Income Security Act of 1974 ("ERISA"). [#70 at 2; #98 at 2] NEAP is funded by employer contributions, which are held in individual accounts for the benefit of covered employees. [*Id*.] NEAP's rules for the payment of benefits are detailed in the NEAP Plan of Benefits and Summary Plan Description. [*Id*.; ##59-5; 59-6] Plaintiff is a participant in a NEAP plan and, in July 2019, had a NEAP account valued at approximately $548,000. [##70 at 3; 98 at 2] On March 26, 2019, NEAP received an executed power of attorney form ("POA") from Plaintiff. [##70 at 3; 59-2 at 11-14; #98 at 2] The POA designated Plaintiff's daughter, Ms. Goodwin, as Plaintiff's agent and granted Ms. Goodwin "General Authority," including over Plaintiff's retirement plans. [*Id*.] The POA also contained "Special Instructions" stating:

> The Document is Authorize National Electrical Annuity Plan to Withdraw and Deposit in the Authority of Quinn Elizabeth Goodwin the Sum of 50,000.00 in the Bank of Quinn E Goodwin's Choice . . . Funds to be used on Legal Expen[s]es[.] Further Contributions to Quinn E Goodwin will be A[u]thorized in writing by Daniel R Goodwin or Full Balance Distributed to Quinn Goodwin upon Daniel Goodwin's Death.

[#59-2 at 13]

On April 4, 2021, NEAP notified Ms. Goodwin that partial withdrawal—such as the $50,000 withdrawal requested in the special instruction—is not permitted by the NEAP Plan of Benefits.[6] [#59-2 at 65-66] NEAP also sent a letter, on April 3, 2019, to Plaintiff's

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[5] The facts of this section are drawn from the administrative record, as detailed by Defendant NEAP and Plaintiff in their statement of facts in the briefing on the motions. [##59, 70, 98, 108, 125, 126] Unless noted, these facts are undisputed.

[6] The plan states: "WITHDRAWAL BENEFIT PRIOR TO NORMAL RETIREMENT AGE. . . . [U]pon application by the Participant, the entire amount of his Individual Account only shall be paid; no partial distributions are permitted . . . ." [#59-5 at 7; *See also* #59-6 at 8]

address-on-file explaining that partial withdrawals were not permitted. [*Id*. at 19] On April 5, 2019, Ms. Goodwin spoke with a NEAP representative by phone about permissible withdrawal options. [*Id*. at 66] Ms. Goodwin explained that Plaintiff was incarcerated and that correspondence should be addressed to her according to the POA. [*Id*.] NEAP sent Ms. Goodwin a withdrawal application packet on April 15, 2019. [*Id*. at 69]

On April 22, 2019, Ms. Goodwin contacted NEAP and stated that Plaintiff wanted his account to be rolled over into a Roth IRA; she further asked whether the IRA could be placed in her name. [*Id*. at 59-60] NEAP informed Ms. Goodwin that the plan rules did not permit the IRA to be placed in her name. [*Id*. at 59; #59-3 at 1; #59-5 at 24; #59-6 at 34] On May 13, 2019, and June 18, 2019, Ms. Goodwin discussed lump sum withdrawal options with a NEAP representative and was notified that a lump sum check would be issued in Plaintiff's name, rather than her name, in order to comply with ERISA's anti-assignment rule. [#59-2 at 66-67]

Ms. Goodwin submitted a Normal Benefit Application to NEAP on June 26, 2019, which requested a lump sum distribution of $532,000 from Plaintiff's account. [#59-2 at 25-34] Plaintiff did not sign the application. [*Id*. at 33-34] Ms. Goodwin requested that the check be mailed to her address, instead of a bank. [*Id*. at 61] On August 28, 2019, NEAP sent a letter to Plaintiff, in care of Ms. Goodwin, notifying Plaintiff that his Normal Benefit Application had been approved and that a check for $438,905.57 would be issued. [*Id*. at 36] The check was issued in Plaintiff's name, in care of Ms. Goodwin, on August 31, 2019. [*Id*. at 37] On January 3, 2020, Plaintiff revoked the POA and alleged that Ms. Goodwin had misappropriated his funds. [*Id*. at 38]

B. Claim Before the Court

The Amended Complaint does not identify the law under which Plaintiff brings his claims. However, Plaintiff concedes that Defendant NEAP is a plan governed by ERISA. [#98 at 2] ERISA contains a preemption provision, which preempts state laws that "relate to" the plan. 29 U.S.C. § 1144(a). Here, Plaintiff asserts that under the terms of the plan he is due benefits, which he alleges Defendant NEAP erroneously distributed to Defendant Goodwin. [#6] Such an allegation clearly "relates to" the plan. Thus, to the degree that Plaintiff seeks to bring state law claims, such claims likely are preempted by ERISA. *See e.g.*, *Lind v. Aetna Health Inc.*, 466 F.3d 1195, 1198-99 (10th Cir. 2006) (common law negligence and breach of contract claims preempted by ERISA).

Moreover, Plaintiff appears to concede that his state law claims are preempted, as he did not respond to NEAP's preemption argument. [#125] He has additionally withdrawn his request for emotional distress damages, now seeking only "replacement of unauthorized [funds] distributed." [##98 at 6; 125] Finally, to the degree that Plaintiff sought to only bring state law claims, which are preempted by ERISA, "the proper course would be for the court to recharacterize them, to the extent possible, as arising under ERISA, rather than dismissing them outright." *Yishak v. Old Republic Ins. Co*., No. 19-cv-03029-REB-NYW, 2020 WL 6870608 at *3 (D. Colo. Oct. 6, 2020). The court thus construes Claim One as arising under ERISA.

ERISA contains several civil enforcement provisions that may apply to this claim. For example, section (a)(2) permits a civil action "by a participant . . . for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). Section 1109, in turn, establishes liability for breach of fiduciary duty; however, this provision does not provide

a remedy for individual beneficiaries and therefore in inapplicable to this case. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985); *accord Walter v. Int'l Ass'n of Machinists Pension Fund*, 949 F.2d 310, 317 (10th Cir. 1991). Section (a)(3), by contrast, provides a remedy for individual participants, but only in the form of equitable relief. 29 U.S.C. § 1132(a)(3). Here, Plaintiff seeks not equitable relief, but money damages.

The Court therefore understands Plaintiff's claim to fall under section (a)(1)(B), which permits a plan participant to bring a suit in federal district court to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Plaintiff seeks the benefits owed to him under the plan in the form of the entire balance of his retirement account, and he alleges that NEAP improperly handled his account and his claim for $50,000. [#98 at 6]; *see also Danca v. Private Health Care Systems, Inc.*, 185 F.3d 1, 6 (1st Cir. 1999) (finding claim fell within the ambit of 29 U.S.C. § 1132(a)(1)(B) because it challenged "the process used to assess a participant's claim for a benefit payment under the plan."); *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (explaining that section 1132(a)(1)(B) "provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims . . . that runs directly to the injured beneficiary"). The Court will therefore proceed under that provision.

C. ERISA Standard of Review

In an ERISA case in which both parties move for summary judgment, "summary judgment is merely a vehicle for deciding the case; the factual determination of eligibility

for benefits is decided solely on the administrative record, and the non-moving party is not entitled to the usual inferences in its favor." *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment & Dependent Life Ins. Plan*, 605 F.3d 789, 796 (10th Cir. 2010) (quoting *Bard v. Bos. Shipping Ass'n*, 471 F.3d 229, 235 (1st Cir. 2006)). In an ERISA claim for benefits, "[t]he plan administrator's decision is reviewed by the court de novo unless the terms of the benefit plan give the administrator discretion to interpret the plan and award benefits." *Ellis v. Liberty Life Assurance Co. of Boston*, 958 F.3d 1271, 1279 (10th Cir. 2020) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101,115 (1989)). If the plan fiduciaries are entitled to exercise such discretion, judicial review is "limited to a determination of whether the decision is arbitrary or capricious, not supported by substantial evidence, or erroneous on a question of law." *Sandquist v. U.S. W. Mgmt. Pension Plan*, No. 91-S-0028, 91-S-0727, 1992 WL 469739, at *1-2 (D. Colo. Sept. 17, 1992).

The arbitrary and capricious standard is a deferential standard that is a "difficult one for a claimant to overcome." *Nance v. Sun Life Assur. Co. of Canada*, 294 F.3d 1263, 1269 (10th Cir. 2002). Under this standard, the administrator's decision should be upheld "so long as it is predicated on a reasoned basis" and supported by substantial evidence. *Adamson v. Unum Life Ins. Co. of Am.*, 455 F.3d 1209, 1212 (10th Cir. 2006). "Substantial evidence means 'more than a scintilla but less than a preponderance.'" *Pentland v. Metropolitan Life Ins. Co.*, __F. Supp. 3d__, 2021 WL 463629, at *7 (D. Colo. 2021) (quoting *Rekstad v. U.S. Bancorp.*, 451 F.3d 1114, 1119-20 (10th Cir. 2006)). In determining whether the plan administrator's decision was arbitrary and capricious, the Court "may only consider the evidence and arguments that appear in the administrative

record." *Id*. (citing *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992).

Defendant NEAP argues that this Court should apply the arbitrary and capricious standard of review.[7] [#70 at 8] NEAP points to language in the Plan documents that grants the plan administrator broad discretion to interpret the plan:

> The Trustees shall have full discretionary power and authority to construe and interpret the provisions of this Plan, the terms used herein, and the rules, regulations, and policies related thereto. The Trustees shall have full, discretionary, and exclusive power and authority to administer the Plan and to determine all questions of coverage and eligibility, methods of providing or arranging for the benefits specified in this Plan and all other related matters. Pension Benefits under this Plan will be paid only if the Trustees decide in their discretion that the applicant is entitled to them.

[#59-5 at 23][8] However, the Power of Attorney ("POA") which forms the basis of the instant dispute was not a Plan document. [#59-2 at 11-14]; *see also* Colo. Rev. Stat. § 15-14-741. The parties have not pointed to, and this Court has not been able to locate, any plan language giving the administrators discretion to interpret the authority granted in a POA.

There is conflicting ERISA caselaw regarding whether the interpretation of a POA, as it relates to claims determinations, should be done under the de novo or arbitrary and capricious standards. *Compare Taylor v. Kemper Financial Services, Co.*, No. 98 C 0929,

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[7] Plaintiff appears to agree that an arbitrary and capricious standard is the appropriate standard of review. [*See* #98 at 6]

[8] The Court has independently identified additional language it believes is relevant to this case:

> WITHOLDING PAYMENT. In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until there shall have been made an adjudication of such question or dispute which is satisfactory to the Trustees . . . .

[#59-5 at 25]

1999 WL 782027, at *3 (N.D. Ill. Sept. 27, 1999) ("Nothing in the benefit plan grants . . . discretionary authority to determine the validity of a power of attorney. Indeed, a grant of such discretionary authority to the plan administrator would make no sense, as the validity of a power of attorney is a question of law.") *with Stets v. Securian Life Ins. Co.*, 17-cv-09366 (ALC), 2020 WL 1467395, at *4 (S.D. N.Y. Mar. 25, 2020) (determining that plan was not arbitrary and capricious for accepting authority in a POA to make a beneficiary change). However, as detailed below, the Court need not resolve this split, as it finds that even under the deferential standard of review, NEAP erred as a matter of law in dispersing Plaintiff's benefits to Defendant Goodwin.

D. Analysis

"A power of attorney is an instrument by which a principal confers express authority on an agent to perform certain acts or kinds of acts on the principal's behalf." *In the Matter of Franzen*, 955 P.2d 1018, 1021 (Colo. 1998); Colo. Rev. Stat. § 15-14-702(7) (defining a POA as "a writing or other record that grants authority to an agent to act in the place of the principal"). It is undisputed that Plaintiff submitted to NEAP a Colorado statutory POA form that designated Defendant Goodwin as his POA and granted her "General Authority."[9] [#59-2 at 11-14]; Colo. Rev. Stat. § 15-14-741. The grant of general authority included authority over "retirement plans" and provided authority for Ms. Goodwin, as Plaintiff's agent, to act consistent with the "Uniform Power of Attorney Act" of the Colorado Revised Statutes. [*Id*.] The POA thus granted Ms. Goodwin the power to "select the form

[9] Neither party alleges that the POA was fraudulent. The Court likewise sees no reason to question the validity of the POA itself, which was signed by Plaintiff and a notary public. [#59-2 at 11-14] Colo. Rev. Stat. § 15-14-705 ("A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public.").

and timing of payments" and "withdraw benefits" from Plaintiff's NEAP account. [*Id*.] Colo. Rev. Stat. § 15-14-738(2)(a). However, the POA also contained "Special Instructions" stating:

> The Document is Authorize National Electrical Annuity Plan to Withdraw and Deposit in the Authority of Quinn Elizabeth Goodwin the Sum of 50,000.00 in the Bank of Quinn E Goodwin's Choice . . . Funds to be used on Legal Expen[s]es[.] **Further Contributions to Quinn E Goodwin will be A[u]thorized in writing by Daniel R Goodwin** or Full Balance Distributed to Quinn Goodwin upon Daniel Goodwin's Death.

[#59-2 at 13 (emphasis added)] The special instructions are at the heart of the instant dispute.

Plaintiff argues that NEAP ignored the special instructions "[d]irectly limiting and restricting the authority of account and retirement fund to withdrawal of 50,000.00." [#98 at 6] He further argues that the special instructions required NEAP to obtain Plaintiff's signature to authorize withdrawals other than the approved $50,000 or to verify Plaintiff's death, which would permit distribution of the entire account. [*Id*. at 5, 7] Finally, Plaintiff argues that Ms. Goodwin's request to place the funds in her name and have the check sent to her home—instead of a bank as listed in the special instructions—were "red flags."[10] [*Id*. at 7] NEAP argues, by contrast, that its reliance on the grant of general authority in the POA was in good faith and that its interpretation of the scope of the POA was reasonable based on the surrounding circumstances. [#70 at 8-9] It argues that the plan does not permit partial withdrawals and that Plaintiff's special instruction was merely a "preference." [*Id*. at 9]

[10] Plaintiff also argues that he did not sign portions of the POA that required a signature for certain specific actions. [#125 at 4-5] The Court does not address this argument, as Ms. Goodwin did not engage in the actions requiring additional signatures.

Under the Colorado Uniform Power of Attorney Act, "[t]he meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed." Colo. Rev. Stat. § 15-14-707. In this case, both the jurisdiction of execution and of intent are Colorado. [#59-2 at 11-14] However, the Court must consider the effect of ERISA on its analysis. Both ERISA and the plan documents are silent regarding the interpretation of POAs. And where ERISA is silent, courts should apply the federal common law looking, where necessary, to analogous state law. *Alves v. Silverado Foods, Inc.*, 6 F. App'x 694, 701 (10th Cir. 2001); *see also Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 971 (10th Cir. 2019) ("Generally, federal courts adopt state law even when the dispute is governed exclusively by federal [common] law." (internal quotation omitted)); *Pension Comm. Heileman-Baltimore Local 1010 IBT Pension Plan v. Bullinger*, No. HAR 92–204, 1992 WL 333653, at *2 (D. Md. Oct. 29, 1992) (finding that because ERISA is silent regarding effect of a POA on beneficiary designation, the Court must interpret the POA applying federal common law).

Both Colorado and federal common law require a POA to be strictly construed. *See People v. Stell*, 320 P.3d 382, 385 (Colo. App. 2013) (applying Colorado law and finding that POA must be strictly construed); *Taylor*, 1999 WL 782027, at *2 ("The federal common law of ERISA also holds that a power of attorney should be strictly construed."); *In re Shafer*, No. 2:13-cv-00405-JMS-MJD, 2014 WL 5599064, at *11 (S.D. Ind. Nov. 4, 2014) (finding under the federal common law of ERISA, a POA should be strictly construed, and courts will look to the specific powers the POA grants); *Clouse v. Philadelphia, Bethlehem & New England Railroad Co.*, 787 F. Supp. 93, 98 (E.D. Pa.

1992) (applying federal common law in ERISA case and recognizing only the specific powers granted in the POA); *Bullinger*, 1992 WL 333653, at *2 (applying federal common law and finding that POAs are construed narrowly). Moreover, POAs are deemed to only grant those authorities that they clearly express within the four corners of the document. *Bullinger*, 1992 WL 333653, at *4 (finding that in order to ensure uniform application in ERISA cases, courts should look only to the four corners of the POA to determine authorization).

Here, although the POA granted Ms. Goodwin general authority over Plaintiff's retirement accounts, that authority was limited by the special instruction requiring that "[f]urther Contributions to Quinn E Goodwin . . . be A[u]thorized in writing by Daniel R Goodwin." [#59-2 at 13] NEAP argues that the special instructions merely indicated Plaintiff's "preference" as to how Ms. Goodwin handled his account and that, based on the surrounding circumstances, it believed Ms. Goodwin had communicated with Plaintiff and was carrying out his wishes. [#70 at 9]; *see also Franzen*, 955 P.2d at 1021 (explaining that POAs giving agents broad authority are to be construed in light of the surrounding circumstances); *Stets*, 2020 WL 1467395, at *4 (looking to surrounding circumstances where POA was silent as to authority to change beneficiary designation, state law requiring express beneficiary designation was preempted, and neither ERISA nor plan prohibited the agents action).

NEAP's argument would be convincing if the POA in this matter had granted Ms. Goodwin general authority over Plaintiff's accounts without limit. But it did not. Plaintiff clearly indicated in the special instructions that Ms. Goodwin's authority to withdraw money was limited by his written authorization. [#59-2 at 13] Such a limitation is

consistent with the purpose of the special instructions portion of the statutory form, which was created expressly to allow a principal to modify general authority granted elsewhere in the document. Colo. Rev. Stat. § 15-14-741 cmt. ("The principal may modify any authority granted in the form by using the 'Special Instructions' section of the form."); *see also* Colo. Rev. Stat. § 15-14-738(2) (providing that "**[u]nless the power of attorney otherwise provides**," the agent may select the form and timing of payments and withdraw benefits (emphasis added)) . NEAP's perception that the special instructions were merely a "preference" is inconsistent, as a matter of law, with both the intention of the POA form and the plain language of Plaintiff's instructions.

Moreover, ERISA's fiduciary provision requires the plan administrator to discharge his duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). These fiduciary duties include the duty to pay funds to the correct person. *See Carland v. Metropolitan Life Insurance Co.*, 935 F.2d 1114, 1121 (10th Cir.1991). And, more broadly, "[c]ase law is well-settled that when a third party knows that an agent's authority is contained in a power of attorney, that party has the duty to read the instrument carefully for limitations of such authority." *Chicago Title Ins. Co. v. Progressive Housing, Inc.*, 453 F. Supp. 1103, 1107 (D. Colo. 1978). Even under a deferential standard of review, NEAP cannot simply ignore documents in its possession in favor of its perception of surrounding circumstances. *Carland*, 935 F.2d at 1121 (finding that plan administrator disregarded the heart of ERISA's fiduciary provision by ignoring documents submitted to it that indicated appropriate beneficiary).

The administrative record does not contain any writing signed by Plaintiff authorizing a distribution of Plaintiff's entire retirement account, an amount far exceeding

the $50,000 his POA authorized Ms. Goodwin to withdraw. [*See generally* #59] Accordingly, Ms. Goodwin did not have authority to withdraw funds other than the approved $50,000, and NEAP violated its duty to Plaintiff by releasing them to her. *Taylor*, 1999 WL 782027, *2 ("[T]he power of attorney did not 'reflect the clear and obvious intent' to grant [the agent] the power to change beneficiaries . . . so [the agent] did not have that authority.").

Accordingly, this Court RECOMMENDS that Plaintiff's Motion for Summary Judgment [#98] be GRANTED and that Defendant NEAP's Motion for Summary Judgment [#70] be DENIED as to Claim One. The Court further RECOMMENDS that Plaintiff's Motion for Judgment on the Pleadings as to Claim One [#147] be DENIED AS MOOT.

IV. CLAIM TWO AND COUNTERCLAIMS[11]

Plaintiff and Ms. Chambers have filed cross motions for summary judgment as to Claim Two. [##92, 93] At issue in Claim Two is whether Ms. Chambers converted

[11] As explained herein, Claims One and Three relate to Plaintiff's grant of a POA to Ms. Goodwin and Ms. Goodwin's use of that POA to withdraw all of the funds from Plaintiff's NEAP account. As detailed in the Factual Background to Claim Two and Counterclaims below, Claim Two involves Ms. Chambers' alleged conversion of Plaintiff's vehicles and Ms. Chambers' counterclaims involve Plaintiff's alleged failure to repay a loan to Ms. Chambers. Claim Two is thus asserted against a different defendant than the defendants in Claims One and Three, and it is not immediately apparent to the Court that Claim Two shares a common question of fact or law with Claims One and Three. Claim Two may therefore have been improperly joined. *See generally* Fed. R. Civ. P. 20 (setting forth permissive joinder of parties). Nonetheless, it appears that the Court has diversity jurisdiction over Claim Two. [#6 at 2, 7 (detailing the diverse citizenship of Plaintiff and Ms. Chambers and an amount in controversy on Claim Two that exceeds $75,000)] As a result, at the next status hearing, the parties shall be prepared to address whether Claim Two should be severed from Claims One and Three. *See generally* Fed. R. Civ. P. 21 ("Misjoinder of parties is not grounds for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.").

Plaintiff's property by unlawfully transferring title to seven of his vehicles to herself and then selling those vehicles to a third party. [#6 at 7] Ms. Chambers has filed counterclaims for breach of contract and unjust enrichment, arguing that Plaintiff owes her money under a loan agreement. [#27 at 2] Plaintiff has filed a motion for summary judgment on the counterclaims. [#117]

A. Factual Background[12]

Claim Two and Ms. Chambers' counterclaims relate to the same set of facts. [*See generally* ##92, 93, 117] Ms. Chambers asserts that she assisted Plaintiff while he was incarcerated by providing him with funds for legal fees, phone calls, commissary, and holiday packages. [#93-1 at ¶¶ 5, 13] She asserts that Plaintiff promised to repay her those funds and that she requested repayment on several occasions. [*Id*. at ¶ 14] In particular, Ms. Chambers asserts that Plaintiff signed a Loan Agreement in June 2016, through which she loaned him $35,000 for legal fees and took his vehicles as collateral. [#93 at 2; 93-2 at 1] During June and July 2016, Ms. Chambers also engaged a lawyer on Plaintiff's behalf named Elizabeth McClintock. [#92-1 at 11]

The parties agree to the existence, although not the origin or validity, of several vehicle POA forms. [*See generally* ##92, 120] Two of the POA forms are dated July 6,

[12] The Court's focus in addressing this motion must be on those facts that "cannot be or [are] genuinely disputed" as supported by "particular parts of materials in the record." *See* Fed. R. Civ. P. 56(c). The Court has carefully reviewed the exhibits filed in conjunction with the briefing on these motions. Some facts are taken from Plaintiff's briefing, and although those statements are not made under penalty of perjury and thus do not comply with the technical requirements of Rule 56(c)(4) or 28 U.S.C. § 1746, "[i]n deference to [Plaintiff's] pro se status and [his] apparent lack of familiarity with litigation formalities, the Court will assume that, if called upon to affirm the truth of the allegations in [his summary judgment briefing] under penalty of perjury, [he] would do so." *Wimbish v. Nextel W. Corp.*, 174 F. Supp. 3d 1275, 1277 n.1 (D. Colo. 2016). To the extent there are factual disputes, they are noted.

2016, and contain a notary signature and a signature reading "Daniel R. Goodwin," but do not contain vehicle identification information. [##92-1 at 12-13; 120 at 3] Two of the POAs were signed and notarized on July 6, 2016, and have information identifying a specific vehicle.[13] [##92-1 at 14, 20; 120 at 3] Four of the vehicle POAs were signed and notarized on June 15, 2016, and contain vehicle information.[14] [##92-1 at 25, 37, 43, 48; 120 at 3] The parties further agree to the existence of several vehicle titles conveying the vehicles identified in the POA forms from Plaintiff to Ms. Chambers. [#92-1 at 15-16, 21-22, 26-27, 38-39, 44-45, 49-50; 120 at 3] Ms. Chambers also submits to the Court a document titled "Loan and Vehicle Transfer Agreement" (the "Loan Agreement") and containing a signature in Plaintiff's name. [#93-2 at 1] The Loan Agreement is dated June 15, 2016. [*Id*.] The parties agree regarding the existence of a nearly identical, but blank and unsigned, loan agreement form dated June 2018. [##92 at 5; 92-1 at 66; 120 at 3]

Ms. Chambers asserts that the various vehicles identified in the above-listed POAs and titles were given to her as collateral for the Loan Agreement. [#93-1 at 2] By contrast, Plaintiff asserts that the documents signed on June 15, 2016—which includes the Loan Agreement and four of the vehicle POAs—are fraudulent and were not signed by him. [*See generally* ##92, 117] As support, Plaintiff submits records from the Pueblo County Sheriff's Office showing that he was incarcerated from June 3, 2016, to June 23, 2016, and indicating that there are no records of him having visitors during that period. [#92-1

[13] These POAs identify a "2007 HAU FLB" [#92-1 at 14] and a "1992 HRD MC" [*id.* at 20].
[14] These POAs identify the following vehicles: "1998 Monaco" [#92-1 at 25], "1969 Chevrolet Corvette" [*id.* at 37], "1990 Ford Bronco" [*id.* at 43], and "1985 EZ Boat" [*id.* at 48].

at 1-4] Ms. Chambers admits that those documents say he had no visitors, but asserts by affidavit that she did visit Plaintiff. [##120 at 3; 120-1 at ¶ 2] And although Ms. Chambers additionally asserts that there are records documenting her visits, she does not provide them to the Court. [#120-1 at ¶ 2]

Ms. Chambers also asserts that she could not have taken the forms to Plaintiff because only attorneys could visit in person at the facility where Plaintiff was incarcerated.[15] [#141-1 at ¶ 10] To that end, Ms. Chambers asserts that she obtained an attorney—Elizabeth McClintock—for Plaintiff, who "made her initial visit to Plaintiff at the Pueblo jail facility on 6/15/2016," at which time Ms. McClintock had Plaintiff sign the POA forms.[16] [#141-1 at ¶ 8; *See also* #93-1 at ¶¶ 6-8] Ms. Chambers then asserts that she met Ms. McClintock outside the jail facility to retrieve the signed forms. [#141-1 ¶ 8] Ms. Chambers also asserts in various places that some vehicle POA forms were taken to Plaintiff by his former attorney, Brian Wilson, including on June 17, 2016. [*See* #93-1 at ¶ 9]

During 2017 and 2018, Ms. Chambers requested that Plaintiff repay her the money she had loaned him. [##92-1 at 67-69; 93-1 at ¶¶ 14, 29] Plaintiff did not pay her any funds, and Ms. Chambers subsequently sold Plaintiff's vehicles for a total of $14,335 as partial repayment of the loans. [#93-1 at ¶¶ 32-34] The instant matter results.

B. Analysis

As an initial matter, the briefing on the instant motions for summary judgment as to Claim Two and the counterclaims is largely incomprehensible and contains a significant

[15] Non-attorney visits were conducted by video. [#141-1 at ¶ 10]
[16] Only one visitor log, submitted by Plaintiff, shows a visit from Ms. McClintock at the jail. [#92-1 at 4] That visit is listed as occurring on July 2, 2016. [*Id*.]

amount of seemingly unrelated information and allegations. The Court further notes that neither party has identified the elements of any claim, nor have the parties cited relevant caselaw regarding the application of the facts in this matter to the elements of the claim and counterclaims. Thus, the parties have not sufficiently established either that every element of their own claim has been met or that the opposing party has failed to produce evidence on some element of their claim. *See Adler*, 144 F.3d at 670-71; *Pelt*, 539 F.3d at 1280. The Court will nevertheless address each of the claims in turn.

i. Claim Two: Conversion

Claim Two appears to assert a claim for conversion and argues that Ms. Chambers illegally transferred titles to Plaintiff's vehicles first to herself and then to third parties.[17] [##6, 92] Under Colorado law, conversion is "any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another . . . . Predicates to a successful claim for conversion are the owner's demand for the return of the property, and the controlling party's refusal to return it." *Internet Archive v. Shell*, 505 F. Supp. 2d 755, 762 (D. Colo. 2007) (quoting *Glenn Arms Associates v. Century Mortg. & Inv. Corp.*, 680 P.2d 1315, 1317 (Colo. App. 1984). The parties have filed cross motions for summary judgment on this claim. [##92, 93]

Crucial to Claim Two is whether Ms. Chambers had authority to exercise ownership over Plaintiff's vehicles as repayment of the Loan Agreement. Plaintiff argues that four of the POAs and the Loan Agreement—all signed on June 15, 2016—were forgeries. [*See generally* #92] As support, he provides a record indicating that he was incarcerated from June 3 to June 23, 2016 [#92-1 at 3], and Pueblo County Sheriff's

[17] Neither the Complaint nor the briefing identifies the legal basis for Claim Two.

records stating: "There are no records of visitation during the timeframe requested 06/2016 to 07/2016."[18] [#92-1 at 2] Plaintiff thus argues that because he had no visitors on the date these documents were signed, they are forgeries. [*See generally* #92]

Ms. Chambers, on the other hand, attests that she gave the POAs to Ms. McClintock, Ms. McClintock met with Plaintiff, and Ms. McClintock returned with the signed POAs. [#141-1 at ¶ 8] Ms. Chambers further argues that the signed Loan Agreement [#93-2 at 1] and vehicle titles in her name [*Id*. at 2-7] conclusively show that Plaintiff owed her money and gave the vehicles as collateral for the loan. [#120 at 2]

Based on the above arguments and evidence, this Court finds that there is a genuine dispute of material fact regarding the validity of the POAs and the Loan Agreement, and therefore a genuine issue of material fact as to whether Ms. Chambers had authority to exercise ownership over Plaintiff's vehicles. Accordingly, neither party has carried their burden for summary judgment and this Court RECOMMENDS Plaintiff's Motion for Summary Judgment [#92] and Ms. Chambers' Motion for Summary Judgment [#93] be DENIED.[19]

[18] It is not clear to the Court whether this sentence means that Plaintiff had no visitors during that timeframe, or simply that the Sheriff does not have records of visitation from that period. And, indeed, to the extent this note suggests that Plaintiff did not receive any jail visits in either June or July 2016, it appears to be contradicted by other evidence submitted by Plaintiff. [#92-1 at 4 (indicating two visits by Ms. Chambers and one visit by Ms. McClintock in July 2016)]

[19] Plaintiff's Motion for Judgment on the Pleadings is largely incomprehensible but appears to rely on the same arguments raised in Plaintiff's Motion for Summary Judgment. [#145] Thus, for the reasons outlined above, this Court further RECOMMENDS that the Motion for Judgment on the Pleadings [#145] be DENIED.

ii. Counterclaims: Breach of Contract and Unjust Enrichment

Ms. Chambers' counterclaims for breach of contract and unjust enrichment allege that she loaned Plaintiff over $70,000, which Plaintiff promised to repay. [#27 at 2] Under Colorado law a breach of contract claim contains the following elements: "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *PayoutOne v. Coral Mortg. Bankers*, 602 F. Supp. 2d 1219, 1224 (D. Colo. 2009). "To establish a claim for unjust enrichment, a plaintiff must demonstrate that '(1) at [his or her] expense, (2) the defendant received a benefit (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying.'" *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1221 (10th Cir. 2004) (quoting *Martinez v. Colo. Dep't of Human Serv.*, 97 P.3d 152, 159 (Colo. App. 2003)). Plaintiff has moved for summary judgment on both claims. [#117]

Plaintiff's arguments for summary judgment on the counterclaims are largely identical to his arguments regarding Claim Two. Namely, he argues that he did not have visitors on the date the vehicle POAs and Loan Agreement were signed and, accordingly, that those documents are forgeries. [*See generally* #117] Ms. Chambers likewise presents largely identical arguments and evidence to support her argument that the loan agreement was valid. [*See* #141] As with Claim Two, the Court finds that there is a genuine issue of material fact as to whether the Loan Agreement was actually signed by Plaintiff.

Moreover, the purported loan agreement was for $35,000 [#93-2 at ¶ 1], and Ms. Chambers asserts that she loaned Plaintiff—and he agreed to pay back—over $70,000

[#141-1 at ¶ 1]. Plaintiff does not address these other funds he allegedly agreed to pay to Ms. Chambers.[20] Finally, Plaintiff does not address the elements of unjust enrichment and appears to make no argument as to that claim. [*See generally* #117] Accordingly, Plaintiff has not shown that he is entitled to judgment as a matter of law on these claims, and this Court RECOMMENDS that Plaintiff's "Motion For Dismiss of Counter Claim by Defendant Carol Smith/Chambers" [#117] be DENIED.

V. NEAP'S CROSSCLAIM

Finally, the Court turns to Defendant NEAP's Motion for Default Judgment [#69] and Motion for Summary Judgment [#70] as to its crossclaim against Defendant Goodwin.

A. Factual Background

NEAP alleges that Defendant Goodwin acquired Plaintiff's retirement funds from NEAP "in a manner that, in good conscience, requires her to refuse any beneficial interest [in] such funds." [#43 at 3] NEAP further argues that if the Court finds NEAP liable to Plaintiff for benefits under the plan, the Court should also find Ms. Goodwin liable to NEAP in the form of equitable restitution under ERISA, 29 U.S.C. § 1132(a)(3). [##43, 69, 70]

The facts as related to NEAP's crossclaim against Ms. Goodwin for equitable restitution are identical to the facts described in the analysis of Plaintiff's Claim One. *See* Section III.A, *supra*. In brief summary, Defendant Goodwin erroneously represented to NEAP that she was authorized under a power of attorney to act on Plaintiff's behalf in withdrawing all the funds in his retirement account. [#43 at 3] NEAP permitted Ms.

[20] Plaintiff does include documentation showing that on April 15, 2015, he paid off a balance of $57,192.58, which appears to be for an account between himself and Ms. Chambers. [#117-1 at 7-10] However, Plaintiff does not clearly describe how that account relates to the instant counterclaims and the Court will not make arguments or draw conclusions for him.

Goodwin to withdraw the entirety of Plaintiff's retirement account and mailed her the funds. Section III.A, *supra*. After receiving Plaintiff's funds, Ms. Goodwin kept those funds for herself, thus misappropriating them from Plaintiff. *Id*.

B. Analysis

In its Crossclaim, Defendant NEAP identifies a single claim against Ms. Goodwin under 29 U.S.C. § 1132(a)(3).[21] [#43] Section 1132(a)(3) states that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3).

The Supreme Court has described section 1132(a)(3)'s equitable relief requirement. In *Mertens v. Hewitt Associates*, the Court construed the "appropriate equitable relief" provision to authorize "those categories of relief that were typically available in equity," and thus rejected claims seeking "nothing other than compensatory damages." 508 U.S. 248, 255-56 (1993) (emphasis omitted). In *Great-West Life & Annuity v. Knudson*, the Court elaborated, stating that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." 534 U.S. 204, 214 (2002). Accordingly, "where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon

[21] Pursuant to 29 U.S.C. § 1132(e)(1), a federal district court has exclusive jurisdiction over matters arising under 29 U.S.C. § 1132(a)(3).

other property of the defendant." *Knudson*, 534 U.S. at 213-14 (quoting Restatement (First) of Restitution § 215 cmt. a, p. 867 (1936) (internal quotation marks omitted)).

Here, NEAP's Complaint and briefing fails to establish the status of the funds it seeks—it does not make any attempt to identify whether the funds are in Ms. Goodwin's possession or have been dissipated. NEAP has therefore failed to establish that its claim is for equitable, rather than legal, relief, as required by section 1132(a)(3).[22] *See Trustees of Nat. Asbestos Workers Med. Fund v. Wilson*, No. 2:12-cv-06449, 2014 WL 1329935, at *2 (S.D. W.Va. Mar. 28, 2014) (denying motion for default judgment under section 1132(a)(3) for failure to identify status of funds and establish that claim was for equitable, rather than legal, relief); *Tr. of Plumbers and Steamfitters Local Union No. 22 Joint Apprenticeship Training Tr. Fund v. Rossman*, 19-CV-00414-LJV, 2020 WL 5230908 at *4-*5 (W.D. N.Y. Sept. 1, 2020) (same); *Chilko v. Lorren*, No. 1:07cv1316 OWW GSA, 2008 WL 3154734, at *5 (E.D. Cal. Aug. 3, 2008) (same); *cf. Verizon Emp. Benefits Comm. v. Baldino*, No. 18-14251 (MAS) (TJB), 2020 WL 3183165, at *3 (D.N.J. June 15,

[22] In both its Motion for Summary Judgment and its Motion for Default Judgment, NEAP discusses the Colorado state common law doctrine of unjust enrichment. [##69 at 5-6; 70 at 10-11] However, it does not bring a claim under the state common law in its crossclaim [#43 at 3], nor does it discuss in its briefing the implications of ERISA preemption or the federal common law on a claim for unjust enrichment [##69; 70]. The Court therefore will not address these issues. In any event, in its recitation of the Colorado common law, NEAP maintains that it seeks equitable restitution [##69 at 5 ("Under Colorado law, **equitable** restitution is a judicially created remedy designed to avoid benefit to one to the unfair detriment of another." (emphasis added)); 70 at 11 ("**Equitable** restitution is a judicially created remedy designed to avoid benefit to one to the unfair detriment of another." (emphasis added))] and, as explained above, it is not clear that an equitable remedy is appropriate in this case. *See Hottinger Excavating & Ready Mix, LLC v. R.E. Crawford Constr., LLC*, No. 14-cv-00994-KMT, 2016 WL 9735771, at *4-5 (D. Colo. May 26, 2016) (applying the *Knudson* analysis of equitable and legal restitution to a Colorado unjust enrichment claim).

2020) (granting default judgment where plaintiff identified specific account and identifiable funds in control of defendant).

Accordingly, the Court cannot find that default judgment is appropriate under section 1132(a)(3) and therefore RECOMMENDS the Motion for Default Judgment be DENIED without prejudice to NEAP refiling a motion for default judgment that cures the deficiencies identified in this Recommendation.[23]

For the same reasons, this Court also RECOMMENDS that NEAP's Motion for Summary Judgment [#70] be DENIED as to the crossclaim against Ms. Goodwin. *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1229-31 (10th Cir. 2019) (affirming grant of summary judgment on section 1132(a)(3) claim because plaintiff failed to carry burden of showing that the relief he sought was equitable); *Cigna Healthcare of Texas, Inc. v. VCare Health Serv., PLLC*, No. 3:20-CV-0077-D, 2020 WL 3545160, at *5-6 (N.D. Tex. June 29, 2020) (granting motion to dismiss section 1132(a)(3) claim and finding that plaintiff "does not plausibly allege that the sum . . . that it seeks can clearly be traced to funds or property in the defendant[s'] possession." (internal quotation omitted)).

VI. CONCLUSION

For the foregoing reasons, this Court respectfully **RECOMMENDS** as follows:

(1) that Plaintiff's Motion for Summary Judgment on Claim One [#98] be **GRANTED** and his Motion for Judgment on the Pleadings as to Claim One [#147] be **DENIED AS MOOT**;

[23] Because the Court decides the motion on other grounds, it does not address this Court's personal jurisdiction over Ms. Goodwin.

(2) that Defendant NEAP's Motion for Summary Judgment [#70] be **DENIED** as to Claim One and **DENIED WITHOUT PREJUDICE** as to the Crossclaim;

(3) that Defendant NEAP's Motion for Default Judgment as to its Crossclaim [#69] be **DENIED WITHOUT PREJUDICE**;

(4) that Plaintiff's Motion for Summary Judgment as to Claim Two [#92] and his Motion for Judgment on the Pleadings [#145] be **DENIED**;

(5) that Defendant Chambers' Motion for Summary Judgment as to Claim Two [#93] be **DENIED**; and

(6) that Plaintiff's Motion to Dismiss Counterclaim [#117] be **DENIED**.[24]

DATED: August 26, 2021

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[24] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).