IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

XTREME LIMO, LLC, *et al.*,	:	
	:	
Plaintiffs,	:	Case No. 16 CV 011502
	:	
vs.	:	JUDGE HOLBROOK
	:	
SHAWN M. ANTILL, *et al.*,	:	
	:	
Defendants.	:	

DEFENDANT ANTILLS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF XTREME EXPRESS LLC'S COUNT TWO (BREACH OF FIDUCIARY DUTY), COUNT FOUR (BREACH OF CONTRACT) AND COUNT ELEVEN (UNJUST ENRICHMENT)

Defendant Shawn Antill ("Antill") respectfully moves this Court to grant summary judgment in his favor and against Plaintiff Xtreme Express LLC ("Xtreme Express") on all three of its claims contained in the Second Amended Complaint; Count Two (Breach of Fiduciary Duty), Count Four (Breach of Contract) and Count Eleven (Unjust Enrichment). The reasons for Defendant Antill's motion are explained in the accompanying Memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

If this dispute is about anything, it is about a handful of disputed limousine runs between two limousine companies. And yet, the owner of the three plaintiff companies, Fernando Crosa ("Crosa"), has brought a tidal wave of claims against the defendants - not only on behalf of (1) his limousine company, but also on behalf of (2) his cargo transport company, Xtreme Express, and (3) his underground storage tank inspection company, US Tank Alliance, Inc. ("US Tank"). Neither Xtreme Express nor US Tank engage in the limousine business. Further, neither company has lost any customers or revenue because of any actions attributed to the Defendants. So why is Crosa expanding this dispute by including these companies as plaintiffs? The answer is simple – REVENGE.

The individual defendants, Shawn Antill and Kyle Rich, used to work for Crosa's companies. After several years of faithful service, Antill and Rich decided they wanted their own piece of the American dream. When the opportunity fell in their lap, they bought an existing limo company. This angered Crosa. So, he launched a campaign to crush Antill, Rich and their business. His strategy, of course, has been to use the court system to wage a war of attrition. This explains why Crosa initiated claims on behalf of Xtreme Express and US Tank against the Defendants even though those companies have suffered no damages – none.

This motion concerns the claims brought by Xtreme Express LLC. Defendant will address US Tank's claims in a separate motion. To clarify, Xtreme Express confirmed at its 30(b)(5) deposition that its three claims are directed at Antill only. Those claims are: (1) Count 2 – Breach of Fiduciary Duty; (2) Count 4 – Breach of Contract; and, (3) Count Eleven – Unjust Enrichment.[1]

[1] Express, p. 169-172

From Xtreme Express's 30(b)(5) deposition, it is clear the gravamen of Xtreme Express's claims is that Antill breached his fiduciary duty and his employment contract by making efforts to buy Classic Limos, while he was still working for Xtreme Express. It is undisputed, however, that Xtreme Express and Classic Limos are in entirely different industries. Xtreme Express is a cargo transport company. During the time-period in question, its sole business was transporting medical supply products exclusively for one customer. By contrast, Classic Limos is a limousine business that transports people.

As the Court will see, each of Xtreme Express's claims fail as a matter of law. The Court will also see that it was clear from the time this lawsuit was filed, and after, that Xtreme Express had never suffered any damages whatsoever - and no reasonable person could have believed that it had.

II. BACKGROUND FACTS

Fernando Crosa is the sole member of Xtreme Express LLC, an Ohio limited liability company. (Compl. ¶5, 14).[2] Since its founding in 2014, Xtreme Express has operated as a cargo transport company. (Express, p. 22).[3] Unlike co-plaintiff Xtreme Limo LLC ("Xtreme Limo") and co-defendant Classic Limousines ("Classic"), Xtreme Express does not transport people. (Express, p. 23).

Xtreme Express hired Antill to be its President in August 2014. (Express, p. 53). Antill was working as a manager at that time at one of Crosa's other companies, Xtreme Limo. (Express, p. 53). Although Antill performed his work for Xtreme Limo, he was technically employed by US Tank, at Crosa's direction, so he could take advantage of US Tank's health insurance benefits.

[2] In this Motion, Antill will refer to Plaintiffs' Second Amended Complaint as "Compl."
[3] In this Motion, Antill will refer to the 30(b)(5) deposition of Xtreme Express LLC as "Express, p. __."

(Compl. ¶39). Crosa promoted Antill to President of Xtreme Limo at the same time that he hired him to be President of Xtreme Express in August 2014. (Express, p. 53).

In April 2016, Antill was approached about purchasing Classic Limousines. (Express, p. 180). The purchase transaction was consummated on October 25, 2016. (Antill Vol. I, p. 92). The next day, October 26, 2016, Antill informed Crosa of the purchase and resigned as President of Xtreme Limo. (Compl. ¶72; Express, p. 142-143). At that time, Antill agreed to stay on at Xtreme Limo for a brief period to help with the transition. (Express, p. 144). Further, Antill offered to stay on as President of Xtreme Express but Crosa declined. (Express, p. 146; Antill Vol. I, p. 73-74, 82-83).

After Antill's departure, Crosa assumed the role of Xtreme Express's President and hired Adam Oakerson to be the General Manager. (Express, p. 41). Owens & Minor was Xtreme Express's sole customer during the time Antill worked there. (Express, p. 24). Owens & Minor continues to be a key customer of Xtreme Express as of the date of its 30(b)(5) deposition, April 1, 2019. This is well after Antill's departure, some 2 ½ years ago. Further, Xtreme Express began adding additional customers in 2018. (Express, p. 24). And while the company's annual revenues were mostly flat from 2014 through 2017 – at around $350,000 – it ended 2018 with around $750,000 in revenue. (Express, p. 31-32). According to Crosa, the company expects significant revenue growth in 2019 – projecting to end the year with $1.6 million in revenue. (Express, p. 194).

III. LEGAL STANDARD

The Court is well-aware of the summary judgment standard. Antill moves for summary judgment on Xtreme Express's claims because there are no genuine issues of material fact, and Antill is entitled to judgment as a matter of law.

It is important to note, however, that the Tenth District Court of Appeals instructs that claims for damages directed at officers of Ohio limited liability companies for breach of fiduciary duty and breach of contract are governed by the liability standard set forth in R.C. §1705.292(D). See *Ahmed v. Wise*, 10th Dist. No. 12AP-613, 2013-Ohio-2211 (construing R.C. §1705.292(D)). That section states:

> An officer shall be liable in damages for a violation of the officer's duties under division (B) of this section only if it is proved by *clear and convincing evidence* in a court of competent jurisdiction that the officer's action or failure to act involved an act or omission undertaken with *deliberate intent to cause injury to the limited liability company or undertaken with reckless disregard* for the best interests of the company. This division does not apply if, and only to the extent that, at the time of an officer's act or omission that is the subject of complaint, either of the following is true:
>
> **(1)** The articles or the operating agreement of the limited liability company state by specific reference to division (D) of this section that the provisions of this division do not apply to the limited liability company.
>
> **(2)** A written agreement between the officer and the limited liability company states by specific reference to division (D) of this section that the provisions of this division do not apply to the officer.

Xtreme Express's operating agreement does not contain any statement disclaiming the applicability of R.C. §1705.292(D). (Express, Exhibit A-3). Nor does the written agreement between Antill and Xtreme Express state that R.C. §1705.292(D) does not apply to him. Accordingly, the Court must apply the liability standard set forth in R.C. §1705.292(D) to Xtreme Express's breach of fiduciary and breach of contract claims against Antill.

IV. ANALYSIS

A. The Court Should Dismiss Xtreme Express's Breach of Fiduciary Duty Claim

1. Xtreme Express cannot prove by clear and convincing evidence that Antill intended to deliberately injure the company or acted with a reckless disregard for the company's best interests.

More than two years have passed since Xtreme Express filed its claims against Antill. Despite ample time to conduct discovery, Xtreme Express admits that it does not have any

evidence proving that Antill purchased Classic Limousines with the deliberate intent to injure or harm Xtreme Express. (Express, p. 215, 219). Further, there is no evidence (much less clear and convincing evidence, as required by R.C. §1705.292(D)), suggesting that Antill acted with reckless disregard for Xtreme Express's best interests when he purchased a limousine company or at any other time. "Reckless disregard" is defined as "a perverse disregard of a known risk." *Kleeman v. Carriage Trace, Inc.*, 2nd Dist. No. 21873, 2007-Ohio-4209 (quoting *Hancock v. Ashenhurst*, 10th Dist. No. 03AP-1163, 2004 Ohio 3319, at P11). But neither Antill, nor any other reasonable person, would expect that purchasing a limousine business would have any materially detrimental effect on Xtreme Express, which was a cargo transport company handling exclusively medical supplies for a single, specific customer. Indeed, Xtreme Express admits that it never lost its sole customer and even increased the amount of business it did with that customer in the years after Antill's departure. (Express, p. 197).

By reviewing Crosa's testimony during Xtreme Express's 30(b)(5) deposition, the Court can see how Crosa struggled to come up with a basis for the breach of fiduciary claim. At the end of the day, the sum of his testimony was that Antill breached his fiduciary duty simply by engaging in preparations to buy Classic Limos. Along those lines, Crosa claimed that Antill should have spent that time instead (a) making sales calls, (b) hiring employees and (c) building a website.

> Q: I want to know all the ways that Xtreme Express, LLC, believes my client breached his fiduciary duties as alleged in the Second Amended Complaint. So far you told me that he breached those duties by purchasing a competing Limo company; by having communications regarding the purchase of that Limo -- Limo company during business hours for six months; that he didn't make any sales calls; that he didn't hire employees, and he didn't create a website. My question to you is: Other than those things I just listed off, what other ways did he breach his fiduciary duties as (sic) Xtreme Express, LLC, has (sic) alleged in its Second Amended Complaint?
>
> A: As it stands today, those are all the ways that he has breached his fiduciary duty. As it stands here today. (Express, p. 190).

There is no legal authority to support that an officer breaches his fiduciary duty simply by preparing to buy his own business – much less when that business is in a totally different industry than his employer's. Crosa can question whether Antill did all he could have to grow Xtreme Express during the period in question - but that is a question any boss can ask. The relevant question here is: Did Antill act or fail to act with (a) a deliberate intent to cause injury to Xtreme Express or (b) a reckless disregard for the best interests of Xtreme Express? The next question, of course, would be: Could Xtreme Express prove either of these by clear and convincing evidence? The answer to both questions is clearly – NO.

During his testimony as Xtreme Express's corporate designee, Crosa suggested that Antill owed a fiduciary to him, personally. (Express, p. 183-185). But Crosa is mistaken. R.C. §1705.292(A)(3) makes it clear that an officer who is not a member (like Antill) owes a fiduciary duty to the limited liability company only – not to its members. The possibility that Antill's purchase of a limousine company might affect Crosa's other interests is irrelevant to Xtreme Express's claims. Antill did not violate the standard set forth in R.C. §1705.292 with respect to Xtreme Express. And there is absolutely no evidence even suggesting that he did.

Summary judgment is warranted on Xtreme Express's breach of fiduciary claims because no reasonable jury could find by "clear and convincing evidence" that Antill intended to deliberately injure the company or acted with a reckless disregard for the company's best interests.

2. Xtreme Express hasn't suffered any injury from Antill's alleged breach of fiduciary duties.

To prove a claim for breach of fiduciary duty under Ohio law, the following elements must be established: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. As explained above, Xtreme Express simply did not suffer any injury resulting from Antill's actions.

During Xtreme Express's 30(b)(5) deposition, Crosa bent over backwards to invent an injury. The Court can read Crosa's machinations for itself. At the end of the day, however, Crosa (and Xtreme Express pursuant to Rule 30(b)(5)) admitted the following:

- Xtreme Express did not lose any customers due to Antill's alleged actions. (Express, p. 220). Indeed, the company's only account at the time, Owens & Minor, continued growing after Antill's departure. Further, Xtreme Express added customers in 2018. (Express, p. 24).
- Xtreme Express did not lose any vendor relationships due to Antill's alleged actions. (Express, p. 220)
- Xtreme Express's revenues at the end of 2019 are expected to increase to approximately 4.5 times what its annual revenue was at the time Antill departed the company – up to $1.6 million from $350,000. (Express, p. 194).
- In one of his transparent attempts to invent damages, Crosa claimed Xtreme Express lost employees because of Antill. But Crosa (a) could not identify the employees, (b) admitted he replaced them and (c) admitted he continued to grow the company and get more business. (Express, p. 220-221).

As the Court knows, the precise amount of damages (or even their nature) that plaintiffs are seeking in this lawsuit has been vague, shifting and elusive - at best. And it became clear during Xtreme Express's 30(b)(5) deposition, that Crosa was simply fabricating losses that he could attribute to Antill.

For instance, Crosa tried to claim that if Antill had not been working on the purchase of Classic Limos during the six-month period between April 26 and October 26, 2016, Xtreme Express would have earned an extra $1.2 million. Of course, Xtreme Express only earned around $350,00 in each of 2015 and 2017 (the year after Antill's departure). Even with both Crosa and a

new general manager working in 2018, the company only earned $750,000. Further, Crosa admitted that Xtreme Express's only customer at the time, Owens & Minor, was "looking for some cost savings and we had to give some discounts in order to keep the work" in 2016. (Express, p. 31). Crosa eventually admitted that he was simply basing this $1.2 million figure on the amount of work Xtreme Express was able to attract two years later in 2018. (Express, p. 200-201). Of course, he admitted (because he had to) that he did not have any evidence to support that Antill could have obtained the additional business the company picked up in 2018 during the six-month period in 2016. (Express, p. 202-205). It should be noted that the company's revenue (from its sole customer, Owen's & Minor) remained flat at $350,000 even in 2017 – the first full year in which Crosa replaced Antill as President. From Crosa's testimony in pages 200-209 of Xtreme Express's 30(b)(5) deposition, the Court can clearly see the great lengths Crosa will go to invent damages in this case.

Under continued cross-examination, however, Crosa eventually testified that the definitive dollar amount of damages Xtreme Express is seeking for its breach of fiduciary claim against Antill in this case is "approximately $30,000." Crosa explained that Xtreme Express is only seeking the disgorgement of Antill's compensation for the period April 26, 2016 to October 26, 2016, which Crosa characterized as Antill's "period of faithless servancy." (Express, p. 211). But there is simply no evidence to substantiate that Antill was a "faithless servant." Xtreme Express has not put forth any evidence, other than Crosa's unsubstantiated claims, that Antill's efforts to buy his own limo company affected the performance of his duties at Xtreme Express, a cargo transport company, in any material way.

Even had Antill engaged in efforts to purchase a company in the *same business* as Xtreme Express, which he did not, Ohio courts uniformly hold that *preparing to compete* is not competing.

See *Cary Corp. v. Lindner*, 8th Dist. No. 80589, 2002-Ohio-6483.[4] Despite Crosa's unsubstantiated claims to the contrary, the evidence clearly establishes that Antill continued performing his duties as President of Xtreme Express during the time he was preparing to buy Classic Limos. For instance, during the period in question, there were only three people working at Xtreme Express – Antill and two drivers. (Express, p. 224). Antill's job required him to handle all day-to-day decisions associated with operating the company. (Express, p. 127). Crosa had no active role during that time. (Express, p. 223). Notwithstanding Antill's efforts to buy Classic Limos, Xtreme Express earned substantially the same revenue during 2016 as it did in 2015 and 2017. (Express, p. 24). Clearly, this could not have happened if Antill failed to perform his duties *for an entire six months*, as Crosa claims.

Xtreme Express's failure to establish any injury resulting from Antill's alleged breach of fiduciary duty is fatal to its claim and warrants summary judgment.

B. The Court Should Dismiss Xtreme Express's Breach of Contract Claim

1. Xtreme Express admits that it suffered no damages from Antill's alleged breach of contract.

To prevail on a breach of contract claim, Xtreme Express must prove: (1) the existence of, and terms of, a contract; (2) performance by Xtreme Express; (3) non-performance by Antill; and (4) damages caused by Antill's breach. See *O'Brien v. Ohio State Univ.*, 10th Dist. No. 06AP-946, 2007-Ohio-4833. As described above, Xtreme Express admits it has not suffered any quantifiable damages resulting from any of Antill's actions. The company never lost customers. It never lost revenue. It never lost vendor relationships. Indeed, the company continued to grow

[4] See also, *Travel Trunk v. Russell*, 5th Dist. No. 2003CA00294, 2004-Ohio-1288 at P20 ("The mere registration with the Secretary of State in anticipation of her new business does not, of itself, constitute competition.")

at a nice rate in the years after Antill's departure. The following exchange during Xtreme Express's 30(b)(5) deposition is very telling:

Q: Okay. So what then – what damages are you claiming that flow, right, directly from these alleged breach of contract acts that you pointed out to me?

A: My attorneys' fees.

Q: Okay. So what else?

A: I believe that's it. I mean, you – you – I gave you the number for fiduciary duty.

In the passage above, Xtreme Express admits that no damages flowed from any alleged breach of contract actions other than the attorneys' fees Xtreme Express spent to bring its claim. It is important to note, however, that Xtreme Express's breach of contract claim is a straight claim for money damages – it has no claim for injunctive relief, specific performance or declaratory judgment.[5] Put another way, Xtreme Express brought a breach of contract claim simply to collect the attorneys' fees associated with bringing the claim – because it otherwise suffered no monetary damages and is not asking for any other relief. This is the very definition of a frivolous claim and proves that Crosa's real goal here is to cause the defendants as much financial pain as possible through litigation expenses.

Crosa claims that Antill's pursuit of another business opportunity means Antill breached his contractual obligation to work "full-time" at Xtreme Express. (Express, p. 226-228). But any assertion that Antill's "full-time" attention was a material term of the contract is disingenuous because the parties never really contemplated that Antill would work "full-time" at Xtreme Express. Indeed, the contract expressly recognized that Antill would continue working simultaneously as the President of Xtreme Limo – another "full-time" job. (Express, p. 120, 126).

[5] Count Twelve of the Second Amended Complaint is Xtreme Limo LLC's claim for a permanent injunction related to its claimed trade secrets. This is the only request for injunctive relief in the Second Amended Complaint and does not relate to Xtreme Express LLC in any way.

Further, the contract expressly permitted Antill to engage in an *unlimited* amount of buying, selling, flipping and renting of real estate for himself or anyone else he chose. (Express, p. 121, 126). And last, the contract even permitted Antill to engage in other businesses, so long as he had written permission from the company. (Express, p. 121-122, 126-127). A fair reading of the contract establishes that Antill's satisfactory management of the company was the material term – not the exact amount of time he spent doing it. Indeed, Crosa, himself confirmed as much. (Express, p. 124-125).

Antill points out again that the 10th District instructs that the standard set forth in R.C. §1705.292 applies to breach of fiduciary duty and breach of contract claims in cases such as this. Accordingly, there is no way a reasonable jury could find, by clear and convincing evidence, that Antill breached this contract or Xtreme Express suffered any damages resulting from any alleged breach. The Court should grant summary judgment to Antill on this claim.

2. Antill's performance of the contract was relieved because of Xtreme Express's prior material breach.

The parties originally intended that Antill would be an "employee" of Xtreme Express. Accordingly, the contract expressly required Xtreme Express to withhold state and federal taxes. (Compl. Ex. 2, Section 3(a)). After the contract was executed, Xtreme Express chose to pay Antill as a 1099 independent contractor and not as an employee. (Express, p. 136). Accordingly, Xtreme Express did not withhold state or federal taxes from Antill's compensation as the contract required. (Express, p. 134-135). Crosa admitted that Antill was simply paid thirty percent of the company's monthly profits straight from the "checkbook." (Express, p. 139). Accordingly, Xtreme Express did not provide Antill with several of the benefits he would have received as a W-2 employee – i.e., employers' portion of FICA contribution, workers' compensation coverage, unemployment compensation coverage, etc.

Xtreme Express's initial failure to treat Antill as a W-2 employee was a material breach of the "employment agreement." It is well-established that a party's breach of a material term of a contract relieves the other party of performance. See *Ehrhardt v. Hamilton Fan & Blower Co*., 1st Dist. No. C-850265, 1986 Ohio App. LEXIS 5985. The parties were free to choose whatever arrangement they wished, subject to applicable law. The contract in question was an "employment agreement" - not an "independent contractor" agreement. Legally, there is no such thing as a "1099 employee." IRS Form 1099 is used to identify payments made to independent contractors. The distinction between employee and independent contractor is important and has clear legal implications.[6] Crosa was aware of several of those important implications. (Express, p. 70-76). The contractual requirement to withhold state and federal taxes would require Xtreme Express to contribute the employer's portion of FICA (6.2% of wages) for Antill's benefit and would have insured that he had workers' compensation and unemployment compensation coverage. This was, therefore, a material term of the "employment agreement." The failure to do so undermined the very purpose of selecting that specific agreement in lieu of another. To be sure, Antill could still owe obligations under a separate independent contractor agreement – written or oral. But once Xtreme Express stopped treating Antill as an "employee" and began treating him as an "independent contractor," he was relieved of any further obligations under the written "employment agreement."

C. The Court Should Dismiss Xtreme Express's Unjust Enrichment Claim.

1. The unjust enrichment claim cannot survive because it covers the same subject matter as an express written contract.

[6] See *Barcus v. Buehler*, 10th Dist. No. 14AP-942, 2015-Ohio-3122 at *P26. ("The use of a 1099 form 'typically suggests that the parties were not acting in an employer/employee relationship but rather in that of an independent contractor relationship.'")

In Count Eleven of the Second Amended Complaint, Xtreme Express brings a claim for unjust enrichment. At Xtreme Express's 30(b)(5) deposition, Crosa confirmed that the unjust enrichment claim concerned exclusively the "money" Xtreme Express paid to Antill. (Express, p. 237-238). Crosa also confirmed that the "money" referred to in the claim is the same "money" covered by the written employment contract between Xtreme Express and Antill. (Express, p. 238). Further, Crosa confirmed that the "employment duties" referred to in the unjust enrichment claim are the same duties that are covered by the employment contract and are the subject of Xtreme Express's breach of contract claim. (Express, p. 238-239).

To summarize, Xtreme Express's unjust enrichment claim covers the exact same subject matter as the parties' written employment contract, and therefore its breach of contract claim. It is black-letter law in Ohio, however, that "the doctrine of unjust enrichment claim cannot apply when an express contract exists." *Bickham v. Standley*, 3rd Dist. No. 8-09-01, 2009-Ohio-3530. The Court, therefore, must dismiss Xtreme Express's unjust enrichment claim.

V. CONCLUSION

Antill directs this summary judgment motion exclusively at Xtreme Express's claims because that company has no place in this dispute - and it is far past the time to bring some reasonableness to this lawsuit. Crosa brought Xtreme Express into this lawsuit for the sole purpose of increasing the litigation expenses to the Defendants – no other reason. The Defendants have not competed with Xtreme Express in any way. Xtreme Express never lost any customers because of the Defendants. It never lost any revenue because of the Defendants. There is absolutely no evidence that any of the Defendants' actions caused Xtreme Express any injury, whatsoever. Nor is Xtreme Express seeking any sort of injunctive relief, specific performance or declaratory judgment that might otherwise justify suing Antill.

Antill respectfully urges the Court to begin reigning in Crosa's war of attrition. It can start by granting summary judgment against Xtreme Express on all three of its meritless claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, a copy of the foregoing was served on counsel for all parties via the Clerk of Court's electronic filing system and/or e-mail.

/s/ *Danny L. Caudill*
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