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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WIEDENBEN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

TOTAL QUALITY LOGISTICS, LLC :
Plaintiff : **CASE NO. 2015 CVH 01669**
vs. : **Judge McBride**
BRIAN JENSEN : **DECISION/ENTRY**
Defendant :

Barry F. Fagel, counsel for the plaintiff Total Quality Logistics, LLC, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202

Stephen E. Imm, counsel for the defendant Brian Jensen, 4270 Ivy Pointe Boulevard, Suite 225, Cincinnati, Ohio 45245

This cause is before the court for consideration of a motion for summary judgment filed by the defendant Brian Jensen on May 22, 2017. The court held a hearing on the motion on August 11, 2017, and at the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the motion, the evidence presented for the court's consideration, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

This case involves a dispute involving a severance agreement (“the Agreement”) between the plaintiff Total Quality Logistics, LLC (hereinafter referred to as “TQL”) and the defendant Brian Jensen. TQL is a brokerage company that links customers in need of freight transportation with motor carriers in exchange for a fee.¹

Jensen is a former employee of TQL, who left employment from TQL to work for R&L Carriers (hereinafter referred to as “R&L”), which is a less than load carrier.² When last employed at TQL, Jensen was an operational sales specialist.³ In that role, he handled claims issues, primarily with carriers.⁴

TQL believed that Jensen would be violating his non-competition agreement with TQL if he went to work for R&L.⁵ R&L has a company affiliated with it, Paramount, that is a brokerage company.⁶

In June 2014, Jensen informed Mark Funk, his supervisor and former Director of Carrier Operations at TQL, that he was tendering his resignation and planned on accepting employment at R&L.⁷ Funk told Jensen that he was concerned about whether the new position might violate his non-competition agreement with TQL.⁸

¹ Am. Compl., ¶ 3.

² B. Jensen Aff., ¶ 6, B. Jensen Dep., pg. 17.

³ B. Jensen Dep., pg. 8.

⁴ B. Jensen Dep., pg. 8.

⁵ L. Kramer Aff., ¶ 5, M. Funk Aff., ¶ 7.

⁶ B. Jensen Dep., pg. 18.

⁷ M. Funk Aff., ¶¶ 2-4, B. Jensen Dep., pg. 19.

⁸ M. Funk Aff., ¶ 5.

On June 23, 2014, Jensen emailed Laura Kramer, Senior Human Resources Manager at TQL, providing her with two-weeks notice that his last day at TQL would be July 3, 2014.⁹ On June 24th, he then exchanged several emails with Kramer regarding her concern that his new job may violate his non-competition agreement.¹⁰

After Jensen emailed a description of the R&L position on June 24th, Chris Brown, TQL's corporate counsel, emailed Jensen, and carbon-copied several others at TQL (Kramer, Funk, and Marc Bostwick), outlining additional concerns about the non-competition agreement.¹¹ Brown noted that he knew Jeff Wade, the general counsel at R&L, and that he could reach out to him. The emails continued through June 25th, at which time Jensen emailed Brown, Kramer, Bostwick, and Funk the contact information for his R&L recruiter, David Skidmore, and invited them to contact him.¹²

Brown had a conference call with Skidmore of R&L and Jensen.¹³ Brown told Skidmore that he believed Jensen would be violating his non-competition agreement with TQL if he worked at R&L.¹⁴ Brown demanded that R&L take various measures to prevent proprietary disclosures.¹⁵ Skidmore assured Brown that Jensen would not be placed on any projects related to Paramount and that R&L would not accept any proprietary information from Jensen.¹⁶ After the call, R&L never responded to Brown's further requests made in writing.¹⁷

⁹ Ex. 1 to B. Jensen Aff.

¹⁰ Ex. 1 to B. Jensen Aff.

¹¹ Ex. 1 to B. Jensen Aff.

¹² Ex. 1 to B. Jensen Aff.

¹³ C. Brown Aff., ¶ 6.

¹⁴ C. Brown Aff., ¶ 6.

¹⁵ C. Brown Aff., ¶ 7.

¹⁶ B. Jensen Dep., pg. 36.

¹⁷ C. Brown Aff., ¶ 7.

Because TQL believed that Jensen could not work for R&L, it decided to offer him severance pay.¹⁸ Sometime thereafter, near the end of June 2014, Kramer, Bostwick, and Funk met with Jensen to discuss the Agreement, which they provided to him at the meeting.¹⁹ Kramer and Funk aver that they told Jensen at the June meeting that TQL was providing him severance pay because he could not accept employment with R&L.²⁰ At no point during or after the June meeting did Jensen represent to TQL whether he was planning on accepting employment with R&L.²¹ After the meeting, TQL was under the impression that Jensen would not work for R&L.²²

The Agreement provides, in pertinent part, as follows:

“1. Termination of Employment. Employee agrees to resign from employment with Employer, and such resignation will be effective on July 1, 2014. Employee further agrees that Employee will never apply for or seek employment with Employer at any time after resignation. Employee’s entitlement to any benefits including, but not limited to, medical, dental, and vision insurance for Employee and, as applicable, any family member under Employer’s insurance programs, shall cease on July 1, 2014, and coverage will terminate in accordance with the plan documents.

a. Employer agrees to pay 8 weeks of severance pay that will be paid at the Employee’s normal pay rate and will be paid over the next 8 weeks during normal payroll runs. This payment includes any unused vacation that would be paid to the Employee.

b. Employer will provide Employee with a neutral employment reference, providing the dates of service and position held, on the condition that the Employee directs any such reference requests to the Human Resources Manager of Employer.

¹⁸ L. Kramer Aff., ¶ 6, M. Funk Aff., ¶ 8.

¹⁹ L. Kramer Aff., ¶ 7, M. Funk Aff., ¶ 9, B. Jensen Dep., pgs. 60, 65.

²⁰ L. Kramer Aff., ¶ 8, M. Funk Aff., ¶ 10.

²¹ B. Jensen Aff., ¶ 4, L. Kramer Aff., ¶ 9, M. Funk Aff., ¶ 11, B. Jensen Dep., pg. 78.

²² M. Funk Aff., ¶ 11.

c. Employer agrees that it will not contest Employee's efforts to obtain unemployment compensation.

d. Information about Employee's COBRA rights, including rights to continue to participate in Employer's group health and dental insurance program(s) and Employee's conversion privilege under the group life insurance plan are described in separate documents that will be mailed to Employee. If Employee elects COBRA coverage Employer will pay COBRA premiums through September 30, 2014.

e. Employee waives all claims against Employer and releases Employer from any and all claims as further described in Paragraph 2 of this Agreement.

f. Within five calendar days of the Effective Date, each Party agrees to return to the other Party any property in their possession belonging to the other party.

* * *

3. Adequate Consideration. The Parties agree that the consideration provided for by Paragraph 1(a)-(f) of this Agreement is above and beyond any amounts or duties already owed to the Employer and is adequate consideration for all promises and releases contained in this Agreement.

* * *

10. Entire Agreement. This Agreement expresses the entire agreement between the Parties and supersedes and preempts any prior understandings, agreements, or representations by or among the Parties, written or oral, which may have related to the subject matter in any way, and can only be modified by a subsequent written agreement between the parties."²³

The agreement also requires Jensen not to disclose any trade secrets or other confidential or proprietary information and not to make any disparaging statements about

²³ Ex. 2 to B. Jensen Aff.

TQL.²⁴ Finally, it requires Jensen to cooperate with TQL relating to transition issues with Jensen's departure.²⁵

After carefully reviewing the Agreement, the defendant signed it.²⁶ The agreement is signed by Kramer and Jensen, and both dated it July 8, 2014.²⁷

In July 2014, approximately two weeks after leaving TQL, Jensen began his employment with R&L as a project manager.²⁸ TQL would not have provided a severance payment to Jensen had TQL known that Jensen was planning to work at R&L.²⁹ In that role as project manager, Jensen facilitated communications relating to the development of software.³⁰ Since joining R&L, Jensen has not engaged in activities that compete with TQL's business, and has not disclosed any confidential information or trade secrets.³¹

PROCEDURAL BACKGROUND

On November 21, 2016, TQL filed an amended complaint against Jensen based on four causes of action: (1) breach of contract, (2) fraud, (3) negligent misrepresentation, and (4) unjust enrichment. TQL prayed for damages as follows: \$7,761.52 for compensatory damages, punitive damages, costs incurred, reasonable attorney fees, and prejudgment interest.

²⁴ Ex. 2 to B. Jensen Aff., ¶¶ 6-7.

²⁵ Ex. 2 to B. Jensen Aff., ¶ 8.

²⁶ B. Jensen Aff., ¶ 5.

²⁷ Ex. 2 to B. Jensen Aff.

²⁸ B. Jensen Dep., pgs. 11, 15.

²⁹ L. Kramer Aff., ¶ 9.

³⁰ B. Jensen Dep., pg. 15.

³¹ B. Jensen Aff., ¶ 6.

On May 22, 2017, Jensen filed a motion for summary judgment on all of TQL's claims. TQL filed a memorandum in opposition on July 7, 2017. Jensen filed his reply in support of his summary judgment motion on July 18, 2017. The court held a hearing on the motion on August 11, 2017. At the conclusion of the hearing, the court took the motion under advisement.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party when:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."³²

The court must view the evidence in a light most favorable to the nonmoving party.³³ Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.³⁴ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."³⁵

³² *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

³³ *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

³⁴ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

³⁵ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present “a sufficient disagreement to require submission to a jury” or is it “so one-sided that the party must prevail as a matter of law”?³⁶ This threshold inquiry determines whether there are “any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”³⁷

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.³⁸ This burden requires the movant to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”³⁹ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.⁴⁰

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a “triable issue of fact” remains.⁴¹ The duty of the nonmoving party is more than that of resisting the motion’s allegations.⁴² Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”⁴³ The nonmoving party must

³⁶ Id. at 251-52.

³⁷ Id. at 250.

³⁸ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

³⁹ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

⁴⁰ Id. See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

⁴¹ *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

⁴² *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 25 (12th Dist.).

⁴³ (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

present documentary evidence of specific facts showing that there is a genuine issue for trial.⁴⁴ It may not rely on the pleadings or unsupported allegations.⁴⁵

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”⁴⁶ The trial court maintains the sound discretion to admit or exclude relevant evidence.⁴⁷ When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.⁴⁸

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.⁴⁹ “Personal knowledge” is defined as “[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay.”⁵⁰ “Absent evidence to the contrary, an affiant’s statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E).”⁵¹ Furthermore, if the affiant does not

⁴⁴ *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

⁴⁵ *Id.*

⁴⁶ See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 (“Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.”).

⁴⁷ *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

⁴⁸ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

⁴⁹ Civ.R. 56(E); *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁵⁰ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁵¹ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."⁵²

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."⁵³ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).⁵⁴

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."⁵⁵ If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."⁵⁶

LEGAL ANALYSIS

I. BREACH OF CONTRACT

⁵² *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁵³ *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

⁵⁴ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

⁵⁵ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

⁵⁶ *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

A contract is "generally defined as a promise, or set of promises, actionable upon breach."⁵⁷ To prevail on a breach of contract claim, a plaintiff must prove: "(1) the existence of a contract, (2) plaintiff fulfilled its contractual obligations, (3) defendant failed to fulfill its contractual obligations, and (4) plaintiff incurred damages as a result."⁵⁸ A plaintiff proves that a defendant has breached a contract by showing the defendant "did not perform one or more of the terms of the contract."⁵⁹ After the plaintiff shows the breach of contract, then the burden shifts to the defendant to assert a defense."⁶⁰

The construction of contracts is a matter of law.⁶¹ The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties."⁶² When confronted with an issue of contract interpretation, courts examine the contract as a whole.⁶³ Generally courts presume that the parties' intent resides in the language they chose to employ in the contract.⁶⁴ If the language is clear, then the court is confined to

⁵⁷ *Artisan Mechanical, Inc. v. Beiser*, 12th Dist. Butler No. CA2010-02-039, 2010-Ohio-5427, ¶ 25.

⁵⁸ *Frisby v. Solberg*, 12th Dist. Butler No. CA2015-11-204, 2016-Ohio-7644, ¶ 9, citing *Underwood v. Boeppler*, 12th Dist. Butler No. CA2014-02-055, 2015-Ohio-156, ¶ 13. See *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12 (holding same).

⁵⁹ *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).

⁶⁰ *Abruzzi's Inc. v. Abruzzi's Pizza, Inc.*, 8th Dist. Cuyahoga No. 73002, 1998 WL 355846, *3 (July 2, 1998).

⁶¹ *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus (1978).

⁶² *Drone Consultants, L.L.C. v. Armstrong*, 12th Dist. Warren Nos. CA2015-11-107, CA2015-11-108, 2016-Ohio-3222, ¶ 14, citing *Baruk v. Heritage Club Homeowners' Assn.*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 60.

⁶³ *Toledo Edison CoSunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 38.

⁶⁴ *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Shifrin v. Forest City Ets., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992).

the writing in the contract itself to discern the parties' intent.⁶⁵ Additionally, courts apply the contract construction maxim that "the inclusion of a specific thing implies the exclusion of those not mentioned."⁶⁶

Moreover, when "the parties following negotiation make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides."⁶⁷

TQL did not respond to Jensen's summary judgment arguments regarding its breach of contract claim, and therefore Jensen's motion is unopposed as to that claim. When viewing the facts in a light most favorable to TQL, the nonmoving party, the court finds that Jensen did not breach his contract with TQL. TQL's complaint alleges that "Jensen entered into an agreement with TQL wherein TQL agreed to pay Jensen \$7,761.52, provided Jensen would not accept the employment with R&L."⁶⁸

Although the Agreement imposes a number of conditions on Jensen in exchange for his severance compensation, TQL has not alleged that that Jensen breached any of those obligations. Moreover, the Agreement does not contain any provision requiring Jensen not to work for R&L. Because the contract imposes a number of obligations on

⁶⁵ *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, quoting *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. Warren No. CA2012-07-061, 2010-Ohio-5186, ¶ 12.

⁶⁶ *Grine v. Payne*, 6th Dist. Wood No. WD-00-044, 2001 WL 279767, *2 (Mar. 23, 2001), citing *Helberg v. Natl. Union Fire Ins. Co.*, 102 Ohio App.3d 679, 683 (6th Dist. 1995). See *Board of Educ. of the Youngstown City School District v. Youngstown Educ. Assoc.*, 7th Dist. Mahoning No. 82 C.A. 135, 1984 WL 6538, *3 (Feb. 27, 1984) ("It is a maxim of contract law that the expression of one or more things in a contract implies the exclusion of all not expressed.")

⁶⁷ *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 544 N.E.2d 920 (1989), at the syllabus.

⁶⁸ Compl., ¶ 14.

Jensen, but not the requirement that he not work at R&L, the Agreement must be construed as not restricting where Jensen can work.⁶⁹

Furthermore, TQL does not allege that Jensen made any promises during the June meeting that he would not work for R&L. The undisputed facts show that Jensen did not make any such affirmative promise. However, even if he did, the Agreement contains an integration clause, in which TQL agrees as follows:

"10. Entire Agreement. This Agreement expresses the entire agreement between the Parties and supersedes and preempts any prior understandings, agreements, or representations by or among the Parties, written or oral, which may have related to the subject matter in any way, and can only be modified by a subsequent written agreement between the parties."⁷⁰

Accordingly, the court finds that TQL's breach of contract claim fails because Jensen did not breach a contract with TQL.

II. NEGLIGENT MISREPRESENTATION

The elements for a negligent misrepresentation claim include the following:

"One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."⁷¹

⁶⁹ *Grine*, 2001 WL 279767 at *2, citing *Helberg*, 102 Ohio App.3d at 683.

⁷⁰ Ex. 2 to B. Jensen Aff., ¶ 10.

⁷¹ *Levy v. Seiber*, 2016-Ohio-68, 57 N.E. 331, ¶ 36 (12th Dist.), quoting *Delman v. Cleveland Heights*, 41 Ohio St.3d 1, 4, 534 N.E.2d 835 (1989).

The Twelfth District Court of Appeals has summarized the above elements as follows: "(1) a defendant who is in the business of supplying information; and (2) a plaintiff who sought guidance with respect to his business transactions from the defendant."⁷² As these elements suggest, negligent misrepresentation requires *supplying* information and does not occur when there is a mere omission: "A defendant can only be liable for affirmatively supplying false information."⁷³

The list of occupations in which a defendant is in the business of supplying information " * * * is limited to certain professionals, such as 'attorneys, surveyors, abstractors of title and banks dealing with non-depositors' checks."⁷⁴ The tort of negligent misrepresentation does not have an application in the employer-employee context.⁷⁵ Courts have observed that " * * * [n]o court in Ohio, however, has held the tort of negligent misrepresentation applicable to the employer-employee context."⁷⁶

As with its breach of contract claim, TQL did not oppose Jensen's motion on its negligent misrepresentation claim. When viewing the evidence in a light most favorable to TQL, the court finds that TQL's negligent misrepresentation claim fails for several reasons. First, TQL's claim does not allege that Jensen made an affirmative

⁷² *Levy*, 2016-Ohio-68 at ¶ 37, quoting *Hamilton v. Sysco Food Servs. of Cleveland Inc.*, 170 Ohio App.3d 203, 2006-Ohio-6419, 866 N.E.2d 559, ¶ 20 (8th Dist.).

⁷³ *Hayes v. Computer Associates Intern., Inc.*, N.D. Ohio No. 3:02CV7452, 2003 WL 21478930, *6 (June 24, 2003), citing *Textron Financial Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 150, 684 N.E.2d 1261 (9th Dist. 1996).

⁷⁴ (Internal citation omitted.) *Levy*, 2016-Ohio-68 at ¶ 37.

⁷⁵ *Hamilton v. Sysco Food Servs. of Cleveland, Inc.*, 170 Ohio App.3d 203, 2006-Ohio-6419, 866 N.E.2d 559, ¶ 21 (8th Dist.). See *Lynch v. EG & G Mound Applied Technologies, Inc.*, 2d Dist. Montgomery No. 17333, 1999 WL 34790, *4 (Jan. 29, 1999) (noting that Ohio courts have not found negligent misrepresentation applicable in employer-employee cases).

⁷⁶ *Hamilton*, 2006-Ohio-6419 at ¶ 21, quoting *Nichols v. Ryder Truck Rental, Inc.*, 8th Dist. Cuyahoga No. 65376, 1994 WL 285000 (June 23, 1994). See *Vickers v. Wren Industries, Inc.*, 2d Dist. Montgomery No. Civ.A.20914, 2005-Ohio-3656, ¶ 47, citing *Nichols*, 1994 WL 285000 ("No court in Ohio has held the tort of negligent misrepresentation applicable to the employer-employee relationship.").

representation, only that he remained silent during the June meeting. Second, the tort of negligent misrepresentation does not apply to employer-employee disputes.

Furthermore, Jensen, whose job was to advise carriers on claims issues, was not in the business of providing information for guidance to TQL.⁷⁷ Moreover, even if Jensen was among the correct class of defendants, TQL did not seek guidance with respect to a business transaction, as required. Instead of seeking guidance, TQL told the defendant he could not work for R&L and provided him with the Agreement. Thus, Jensen was not asked to give business guidance to TQL as an operational sales specialist, which was his role at TQL. The matter concerned his employment at TQL. For the foregoing reasons, TQL's claim for negligent misrepresentation fails.

III. FRAUD

A. ELEMENTS OF FRAUD

Under Ohio law, a claim for fraud contains six elements: "(1) a representation (or concealment of a fact when there is a duty to disclose), (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with the intent of misleading another into relying upon it, (5) justifiable

⁷⁷ *Vickers*, 2005-Ohio-3656 at ¶ 48 (finding that the defendants were entitled to summary judgment in their favor on the plaintiffs' claim for negligent misrepresentation because that claim does not apply in the employer-employee context).

reliance, and (5) resulting injury proximately caused by the reliance.”⁷⁸ Summary judgment on a fraud claim “is appropriate when a plaintiff fails to produce sufficient evidence from which a jury could find in his favor.”⁷⁹

Of note, TQL argues that Jensen committed two types of fraud- fraudulent concealment and constructive fraud. TQL did not plead either of these in its amended complaint. Instead, it alleged that Jensen made an affirmative representation that he would not work for R&L during the June meeting. TQL no longer alleges that, but instead argues that Jensen committed fraud by concealment and constructive fraud. The above elements are those used for fraud by concealment, although fraud by concealment is “generally captioned simply as a ‘fraud claim,’”⁸⁰ or “fraudulent inducement.”⁸¹ Constructive fraud is different from actual fraud because it does not require proof of fraudulent intent, and instead derives from a special confidential or fiduciary relationship.⁸²

Because TQL did not plead fraudulent concealment or constructive fraud, Jensen argues that TQL should not be allowed to now argue either. In response, TQL posits that it can argue those two claims, but if not, it asks the court to allow it to amend its pleadings

⁷⁸ *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27, citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986). See *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984), quoting *Friedland v. Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456 (1980), paragraph one of the syllabus (holding same).

⁷⁹ *Mohme v. Deaton*, 12th Dist. Warren No. CA2005-12-133, 2006-Ohio-7042, ¶ 29, citing *Interstate Gas Supply, Inc. v. Calnex Corp.*, 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638, ¶ 84.

⁸⁰ *Schmitz v. Natl. Collegiate Athletic Assn.*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 57 (8th Dist.).

⁸¹ See *Bender v. Logan*, 2016-Ohio-5317, 76 N.E.3d 336, ¶ 52 (4th Dist.) (quoting the above elements as the elements for fraudulent inducement).

⁸² *Schmitz*, 2016-Ohio-8041 at ¶ 63, citing *Cohen v. Estate of Cohen*, 23 Ohio St.3d 90, 91-92, 491 N.E.2d 698 (1986). See *Association for Responsible Development v. Fieldstone Ltd. Partnership*, 2d Dist. Montgomery No. 16994, 1998 WL 785330, *3 (Nov. 13, 1998), citing *Lake Hlawatha Park Assn. v. Knox County Agri. Soc.*, 28 Ohio App. 289, 162 N.E. 653 (5th Dist. 1927).

to conform to the facts. In reply, Jensen maintains that TQL should not be allowed to amend its pleadings at this late stage in the case, after more than two years of litigation and with discovery already complete.⁸³ Even if the court permitted TQL to amend its pleadings, it would make no difference in the outcome of this motion because the facts, when viewed in a light most favorable to TQL, do not allow for a finding of either fraudulent concealment or constructive fraud.

As explained for the first element, “[f]raud may consist not only of affirmative misrepresentation, but also of nondisclosure when there is a duty to disclose.”⁸⁴ One way in which a non-disclosing party may have a duty to speak is if it has a fiduciary relationship to the other party.⁸⁵ A fiduciary relationship is a relationship “in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.”⁸⁶ A fiduciary is a person who has “* * * a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.”⁸⁷ A fiduciary relationship can be created by contract or when both parties in an informal relationship “* * * understand that a special trust or confidence has been reposed.”⁸⁸

⁸³ Before filing the amended complaint, TQL filed its original complaint on December 22, 2015.

⁸⁴ *Levy*, 2016-Ohio-68 at ¶ 31.

⁸⁵ (Emphasis omitted.) *Universal Real Estate Solutions, Inc. v. Snowden*, 2014-Ohio-5813, 26 N.E.3d 1272, ¶ 12, quoting *State v. Warner*, 55 Ohio St.3d 31, 54, 564 N.E.2d 18 (1990) (“And the duty to disclose arises when one party has information ‘that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.’”).

⁸⁶ *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 35, quoting *Stone v. Davis*, 66 Ohio St.2d 74, 78, 419 N.E.2d 1094 (1981). See *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 442, 662 N.E.2d 1074 (1996), quoting *In re Termination of Employment of Pratt*, 40 Ohio St.2d 107, 115, 321 N.E.2d 603 (1974) (holding same).

⁸⁷ (Emphasis omitted.) *Massien*, 2010-Ohio-1864 at ¶ 35, quoting *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988).

⁸⁸ *Massien*, 2010-Ohio-1864 at ¶ 35, quoting *Stone*, 66 Ohio St.3d at 78. See *Ed Schory & Sons, Inc.*, 75 Ohio St.3d at 442 (holding same).

The Ohio Supreme Court has explained that “[a]lthough some employees may have fiduciary relationships with their employers, [n]ot all employees are fiduciaries.”⁸⁹ Indeed, for a fiduciary relationship to exist, there must be “more than the ordinary relationship of employer and employee.”⁹⁰ To determine whether an employee is a fiduciary to the employer, “* * * emphasis should be placed upon whether the assigned job duties require, as essential qualifications over and above technical competency requirements, a high degree of trust, confidence, reliance, integrity and fidelity.”⁹¹

Other than having a fiduciary relationship, a duty to speak may arise when “* * * full disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts.”⁹² For instance, “* * * a party must speak upon failing to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the nondisclosing party knows that the failure to disclose such information to the other party will render a prior statement of representation untrue or misleading.”⁹³

Significantly, the “affirmative duty to disclose, however, is not without its limitations.”⁹⁴ “Courts have often found no affirmative duty to disclose in situations where

⁸⁹ *Massien*, 2010-Ohio-1864 at ¶ 37, quoting *Laurel Valley Oil Co. v. 76 Lubricants Co.*, 154 Ohio App.3d 512, 2003-Ohio-5163, 797 N.E.2d 1033, ¶ 40.

⁹⁰ (Internal citations omitted.) *Massien*, 2010-Ohio-1864 at ¶ 37, quoting *State ex rel. Charlton v. Corrigan*, 36 Ohio St.3d 68, 71, 521 N.E.2d 804 (1988).

⁹¹ *Massien*, 2010-Ohio-1864 at ¶ 37, quoting *State ex rel. Charlton*, 36 Ohio St.3d at the syllabus.

⁹² (Emphasis omitted.) *Levy*, 2016-Ohio-68 at ¶ 31, citing *Blon v. Bank One*, 35 Ohio St.3d 98, 101, 519 N.E.2d 363 (1988).

⁹³ (Internal citations omitted.) *Levy*, 2016-Ohio-68 at ¶ 31, citing *State v. Warner*, 55 Ohio St.3d 31, 54, 564 N.E.2d 18 (1990).

⁹⁴ *Universal Real Estate Solutions, Inc.*, 2014-Ohio-5813 at ¶ 12, quoting *Isroff v. Westhall Co.*, 9th Dist. Summit No. 14184, 1990 WL 15192, *3 (Feb. 21, 1999).

the complainant * * * failed to make reasonable attempts to discover such [concealed] information * * *.⁹⁵

In the case at bar, even if Jensen did have a special or fiduciary relationship with TQL, his affirmative duty to disclose was limited by TQL's failure to make any reasonable attempts to discover whether Jensen planned on working for R&L. The easiest and most reasonable step would have been to ask the defendant during the June meeting. Barring that, it would have been reasonable to contact Skidmore at R&L, whom attorney Brown at TQL had already been in touch with. Alternatively, when Kramer met the defendant to receive his signed Agreement, she could have asked at that point, before signing the agreement herself, whether the defendant was planning on working for R&L. However, TQL took none of these minimal steps to avoid the situation it now finds itself in. As such, TQL has failed to satisfy the first element for its fraud claim, whether it be fraudulent concealment or constructive fraud.

Additionally, for the first element to be satisfied there must also be "concealment of a fact." Generally fraud cannot "be predicated upon promises or representations relating to future actions or conduct."⁹⁶ "As a result, representations concerning what will occur in the future are considered to be predictions and not fraudulent misrepresentations."⁹⁷ However, fraud may exist based upon a promise of a future action,

⁹⁵ *Universal Real Estate Solutions, Inc.*, 2014-Ohio-5813 at ¶ 12, quoting *Irsoff*, 1990 WL 15192 at *3.

⁹⁶ *Deaton*, 2006-Ohio-7042 at ¶ 30 citing *Calex Corp.*, 2006-Ohio-683 at ¶ 85. See *Williams v. Edwards*, 129 Ohio App.3d 116, 124, 717 N.E.2d 368 (1st Dist. 1998), citing *Glass v. O'Toole*, 36 Ohio App. 450, 173 N.E. 214 (8th Dist. 1930) ("Furthermore, fraud is generally predicated on a misrepresentation relating to a past or existing fact, and not on promises or representations relating to future actions or conduct.").

⁹⁷ (Internal citation omitted.) *Barich v. Scheidler Med. Group, L.L.C.*, 12th Dist. Butler No. CA2015-01-004, 2015-Ohio-4446, ¶ 19.

occurrence, or conduct *if* the promising party “has no intention of keeping his promise.”⁹⁸ Showing that the promising party had no intent of keeping the promise may be “shown by circumstantial evidence.”⁹⁹ However, showing the defendant’s intention *cannot* be shown by “the fact of nonperformance.”¹⁰⁰

The alleged concealment, that Jensen planned on working for R&L despite accepting the severance payment, is a future act that, typically, cannot be a basis for fraud. TQL alleges that the concealment can be a basis for fraud because Jensen had no intention of declining R&L during the June meeting with Kramer, Funk, and Bostwick, and therefore the limited exception allowing for future acts applies. Jensen argues that this is not the case because the evidence shows he always intended to work for R&L. He notes that he told TQL supervisors and attorneys that he was planning on working at R&L in emails and in person before the meeting, he did not renounce this position during the June meeting, he accepted the Agreement from TQL (given to him at the June meeting) that did not include a requirement that he not work for R&L, and he returned the signed Agreement to TQL. As such, Jensen has identified circumstantial evidence that his intention to work for R&L has always remained consistent, including during the June meeting.

In contradistinction, TQL has not highlighted circumstantial evidence indicating that the above exception to future acts should apply. As mentioned, the fact that the defendant did not perform by later working for R&L cannot be considered as evidence of

⁹⁸ (Emphasis added.) *Deaton*, 2006-Ohio-7042 at ¶ 30.

⁹⁹ *Deaton*, 2006-Ohio-7042 at ¶ 30 citing *Applegate v. Northwest Title Co.*, 10th Franklin Dist. No. 03AP-855.

¹⁰⁰ *Deaton*, 2006-Ohio-7042 at ¶ 30, citing *Applegate v. Northwest Title Co.*, 10th Dist. Franklin No. 03AP-855.

the defendant's intent at the time of the June meeting.¹⁰¹ As such, TQL has not met its reciprocal burden of identifying evidence that creates a genuine issue of material fact regarding Jensen's intentions at the end of the June meeting. Because TQL has not shown that the exception should apply, the court concludes that the concealment concerns a future act that is not actionable in a fraud claim.

Regarding the fifth element, justifiable reliance, factors to consider in determining justifiable reliance include "the nature of the transaction, the materiality of the representation or the fact concealed, the parties' relationship, and their respective intelligence, age, mental and physical condition, knowledge, and means of knowledge."¹⁰² A person's reliance is justified when "the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation."¹⁰³ The justifiable reliance requirement is based on the policy that the " * * rule of law is one of policy and its purpose is, while suppressing fraud on the one hand, not to encourage negligence and inattention to one's own interests. * * *"¹⁰⁴

No reasonable fact finder could find that TQL's reliance on Jensen's silence was justifiable. TQL is a sophisticated business with legal counsel available to it, which it in fact used during the days leading up to Jensen's departure to manage his exit and protect its interests. It is unreasonable to tell an employee that the reason he is being paid a

¹⁰¹ *Deaton*, 2006-Ohio-7042 at ¶ 30, citing *Applegate*, No. 03AP-855.

¹⁰² *Aztec Internatl. Foods, Inc. v. Duenas*, 2013-Ohio-450 at ¶ 47, citing *Fairbanks Mobile Wash, Inc. v. Hubbell*, 12th Dist. Nos. CA2007-05-062, CA2007-05-068, 2009-Ohio-558, ¶ 26.

¹⁰³ *Duenas*, 2013-Ohio-450 at ¶ 47, citing *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App.3d 647, 657, 681 N.E.2d 1343 (12th Dist. 1996).

¹⁰⁴ *Bender*, 2016-Ohio-5317 at ¶ 54, quoting *Amerifirst Savings Bank of Xenia v. Krug*, 136 Ohio App.3d 468, 495-496, 737 N.E.2d 68 (2d Dist. 1999).

severance is to not work for a certain company, while simultaneously handing him an agreement containing no such term, and expect his *silence* to be a promise that supersedes the express terms of the contract. The undisputed evidence shows that Jensen never, at any point, told TQL he would not work for R&L. TQL claims that the *only* reason it gave Jensen a severance was so he would not accept the R&L position. If that is so, then it is unreasonable to offer Jensen a severance without, at the very least, confirming he will now rescind his acceptance at R&L. This case is the result of TQL's " * * negligence and inattention to [its] own interests. * * *"105 TQL failed to ask Jensen if he would agree to rescind his acceptance at R&L, and to include in its contract that it drafted a provision requiring him to do so.

TQL argued in oral argument that the reason the contract was presented without a term prohibiting Jensen from working at R&L was because the contract was handled by HR and not by the legal department. However, "[t]he law in Ohio is well-settled that one competent to contract who signs a written document without reading it is bound to its terms, assumes any risks attendant to his omission, and cannot avoid its consequences by asserting detrimental reliance upon the representations * * * of others."¹⁰⁶ TQL assumed a risk in having its HR department draft and offer its contractual terms to Jensen in the Agreement without first having its legal department review the contract. The fact that TQL's legal department did not review the Agreement prior to TQL's offer is an omission on TQL's part, and it cannot now avoid the consequences by asserting that it

¹⁰⁵ *Bender*, 2016-Ohio-5317 at ¶ 54, quoting *Amerifirst Savings Bank of Xenia*, 136 Ohio App.3d at 495-496.

¹⁰⁶ *Bender*, 2016-Ohio-5317 at ¶ 56, quoting *Cossin v. Ron Rush Motor Sales*, 10th Dist. Franklin No. 86Ap-182, 1986 WL 10750, *2 (Sept. 25, 1986).

relied on the defendant's silence on this critical point in the June meeting.¹⁰⁷ As such, the court concludes that TQL did not justifiably rely on Jensen's silence. For the above reasons, TQL's fraud claim fails.

B. PAROL EVIDENCE RULE

"The parol evidence rule states that 'absent fraud, mistake or other invalidating cause, the parties' final written agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements."¹⁰⁸ Thus, the parol evidence rule can be avoided to " * * * introduce evidence for the purpose of fraudulent inducement."¹⁰⁹ Significantly, however, the parol evidence rule may not be avoided in a fraudulent inducement claim that alleges that the inducement to sign the writing was a promise that contradicts the terms of the signed contract.¹¹⁰ "Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms."¹¹¹ The Ohio Supreme Court has summarized that " * * * a fraudulent inducement case is not made out

¹⁰⁷ See 2016-Ohio-5317 at ¶ 59 (finding that a party that did not read contracts before signing them "cannot now disavow them" with a fraudulent concealment claim).

¹⁰⁸ *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000).

¹⁰⁹ *Galmish*, 90 Ohio St.3d at 28, citing *Drew v. Christopher Constr. Co., Inc.*, 140 Ohio St. 1, 41 N.E.2d 1018 (1942), paragraph two of the syllabus.

¹¹⁰ *Galmish*, 90 Ohio St.3d at 29.

¹¹¹ (Emphasis added.) *Id.*, quoting *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 533 N.E.2d 325 (1988), paragraph three of the syllabus. See *Ed Schory & Sons, Inc.*, 75 Ohio St.3d at 441-442 (holding that the parol evidence rule applied where the plaintiff proffered extrinsic evidence to the written agreement, notwithstanding the plaintiff's claim of negligent misrepresentation, because parol evidence involved the "same subject matter" as the applicable written agreements); *Bender*, 2016-Ohio-5317 at ¶ 61 (stating that the parol evidence rule does not apply when the oral agreement deals with the same subject matter as the written contract but has different terms).

simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract."¹¹²

In the instant case TQL wishes the court to consider the communications made during the June meeting to decide whether Jensen fraudulently induced TQL into offering and entering into the Agreement. As mentioned, generally the parol evidence rule can be avoided to show fraudulent inducement.¹¹³ Although TQL alleges fraud, its purported oral agreement or understanding with Jensen about the purpose of the severance compensation cannot be enforced in preference to the signed Agreement that "pertains to exactly the same subject matter, yet has different terms."¹¹⁴ The Agreement explicitly sets forth the conditions under which Jensen is receiving the severance compensation. Yet TQL alleges that the sole reason it provided severance compensation was because Jensen was not permitted to work for R&L. This being the same subject matter, even if TQL's fraud claim was not meritless, it would still fail because the court would be unable to consider the June meeting, which is when TQL alleges Jensen fraudulently induced TQL into providing him severance compensation.

IV. UNJUST ENRICHMENT

To succeed on a cause of action for unjust enrichment, a plaintiff must demonstrate the following: "(1) he conferred a benefit upon a defendant, (2) the defendant had

¹¹² *Galmish*, 90 Ohio St.3d at 29.

¹¹³ *Galmish*, 90 Ohio St.3d at 28, citing *Drew*, 140 Ohio St. at paragraph two of the syllabus.

¹¹⁴ (Emphasis added.) *Galmish*, 90 Ohio St.3d at 29, quoting *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 533 N.E.2d 325 (1988), paragraph three of the syllabus.

knowledge of the benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment."¹¹⁵

"[U]njust enrichment is a quasiconttractual theory of recovery.¹¹⁶ An unjust enrichment cause of action compensates the plaintiff for the benefit it conferred on the defendant.¹¹⁷ "Quantum meruit is the measure of damages afforded in an action for quasicontract."¹¹⁸ A claim for quantum meruit "is generally awarded when one party confers some benefit upon another without receiving just compensation for the reasonable value of services rendered."¹¹⁹

"In the absence of fraud, illegality, or bad, however, a plaintiff may not recover in quantum meruit when an express contract governs the parties' obligations."¹²⁰ As such, a "person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed between them the other should give in return."¹²¹

¹¹⁵ *RG Long & Assocs., Inc. v. Kiley*, 12th Dist. Warren No. CA2014-10-129, 2015-Ohio-2467, ¶ 14, citing *Estate of Everhart v. Everhart*, 12th Dist. Fayette Nos. CA2013-07-019 and CA2013-09-026, 2014-Ohio-2476, ¶ 46.

¹¹⁶ *Bender*, 2016-Ohio-5317 at ¶ 66, quoting *Dailey v. Craigmyle & Sons Farms, L.L.C.*, 177 Ohio App.3d 439, 2008-Ohio-4034, 894 N.E.2d 1301, ¶ 20 (4th Dist.). See *Lone Star Equities v. Dimitrouleas*, 2015-Ohio-2294, 34 N.E.3d 936, ¶ 69 (2d Dist.), quoting *Crawford v. Hawes*, 2013-Ohio-3173, 995 N.E.2d 966, ¶ 34 (2d Dist.) ("In Ohio, unjust enrichment is a claim under quasi-contract law against a person in receipt of benefits that he is not justly and equitably entitled to retain.").

¹¹⁷ *Bender*, 2016-Ohio-5317 at ¶ 67, quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21.

¹¹⁸ *Bender*, 2016-Ohio-5317 at ¶ 68, quoting *Dailey*, 2008-Ohio-4034 at ¶ 20.

¹¹⁹ *A.N. Bros. Corp. v. Total Quality Logistics, L.L.C.*, 2016-Ohio-549, 59 N.E.3d 758, ¶ 41 (12th Dist.), quoting *Aultman Hosp. Assn.*, 46 Ohio St.3d at 55.

¹²⁰ *Bender*, 2016-Ohio-5317 at ¶ 69, citing *Aultman Hosp. Assn.*, 46 Ohio St.3d at 54-55. See *Lone Star Equities*, 2015-Ohio-2294 at ¶ 17, citing *Hughes v. Oberholtzer*, 62 Ohio St. 330, 335, 123 N.E.2d 393 (1955) (stating that as "a general rule, an express agreement and an implied contract, such as one which would be raised under a quasi-contract/unjust enrichment theory, cannot exist in connection with the same thing at the same time.").

¹²¹ *Bender*, 2016-Ohio-5317 at ¶ 69, quoting *Ullmann v. May*, 147 Ohio St. 468, 478, 72 N.E.2d 63 (1947).

The record clearly shows that TQL entered into the Agreement with Jensen wherein TQL agreed to pay Jensen eight weeks compensation if Jensen agreed to resign from TQL, never apply for employment with TQL again, waive and release TQL from all claims, and return all TQL's property, not disclose trade secrets or other proprietary information, and not make any disparaging remarks about TQL.¹²² Further, TQL agreed in the Agreement that the consideration provided for was "above and beyond any amounts or duties already owed to the Employer and is adequate consideration for all promises and releases contained in this Agreement."

There is no absence of a contract in this case, nor is there a case for fraudulent inducement into a contract, as explained in Section III. Accordingly, TQL cannot succeed on a quasicontract claim because it has a valid contract with Jensen. Moreover, Jensen fulfilled all of his duties under the Agreement, and therefore TQL has received the compensation it bargained for from Jensen in exchange for the severance payment. Accordingly, TQL's claim for unjust enrichment fails.

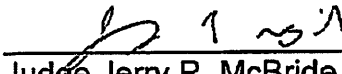
CONCLUSION

For the aforementioned reasons, the court finds the defendant Brian Jensen's motion for summary judgment is well-taken and is hereby granted. Accordingly, of the plaintiff TQL's claims against the defendant are dismissed.

¹²² Ex. 2 to B. Jensen Aff., ¶¶ 1.

IT IS SO ORDERED.

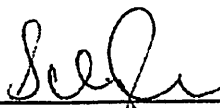
DATED: 1-23-2018



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 30th day of January 2018 by e-mail to Barry F. Fagel, Attorney for the Plaintiff, at bfagel@lindhorstlaw.com, and to Stephen E. Imm, Attorney for the Defendant, at sei@kgnlaw.com.



Judicial Assistant to Judge McBride