IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY FENCING CLUB LLC,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 17-0180
KENNETH D. FERNANDEZ-PRADA,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **JULY 14, 2017**

Presently before the Court is Defendant Kenneth D. Fernandez-Prada's ("Fernandez-Prada") Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Plaintiff Liberty Fencing Club LLC's ("Liberty Fencing") Response to Defendant's Motion to Dismiss, and Defendant's Reply Brief in Further Support of His Motion to Dismiss the Amended Complaint. For the reasons noted below, Defendant's Motion is denied.

I. BACKGROUND[1]

Liberty Fencing is a limited liability company that provides fencing lessons, training, coaching facilities, tournaments, and other activities to a variety of clients. (Id. ¶¶ 1, 6.) Marshal Davis ("Davis"), a "top active coach" at Liberty Fencing, and Fernandez-Prada were close friends for a number of years. (Id. ¶¶ 3, 7, 9.) Arising out of that close friendship, Davis hired Fernandez-Prada to work for Liberty Fencing as a coach. (Id. ¶ 3.)

On April 16, 2013, Liberty Fencing and Fernandez-Prada entered into a "Coach Agreement," ("Coach Agreement" or "Agreement") where Fernandez-Prada agreed to provide

[1] The following facts have been obtained from the First Amended Complaint ("Am. Compl.").

private and paired fencing lessons to Liberty Fencing customers as an independent contractor. (Id. ¶ 10.) The Coach Agreement also allowed Fernandez-Prada to provide lessons and coaching to Swarthmore College, as well as to the general public, but that Liberty Fencing would receive a portion of the profits. (Id. ¶ 11.) The Agreement had a term of five years and would terminate on April 16, 2018.[2] (Id. ¶ 12.) Fernandez-Prada agreed to perform the duties and responsibilities in the Agreement, which included "giving lessons on his own time, making his own schedule . . . and giving lessons in accordance with his own program." (Coach Agreement § 1(b).) The Agreement further stated that "Coach is free to follow his own pattern of work."[3] (Id.)

The Coach Agreement also contained a number of covenants that are relevant to the Amended Complaint. The Agreement contained a "Covenant Not to Compete," which provides that

> Coach agrees that during the Term and, for an additional period of two (2) years thereafter, he shall not directly or indirectly, as an employee of any person or entity (whether or not engaged in business for profit), individual proprietor, partner, agent, consultant, independent contractor, stockholder, officer, director, joint venturer, investor, lender or in any other capacity whatsoever, participate, directly or indirectly in the Company business, except on Company's behalf within fifty miles of the Premises and any other or subsequent location at which the Company's business is being conducted.

(Id. § 5(a).) Regarding a covenant of "Nondisclosure," Fernandez-Prada agreed that, for two years following the term, he would not

> reveal, disclose or make known to any third party, or use for his own benefit or for the benefit of any third party, any confidential

[2] The Amended Complaint alleges the Agreement would terminate on August 16, 2018. (Id. ¶ 12.) We believe this is a typographical error, as the "Effective Date" of the Agreement is April 16, 2013, and the Agreement was to conclude on the fifth anniversary of the Effective Date. (See id.; Ex. 1 § 2 ("Coach accepts engagement with Company for a period of five (5) year[s] . . . commencing on the Effective Date and ending on the fifth anniversary of the Effective Date.").)

[3] "Coach" is defined in the Agreement as "Kenneth D. Fernandez-Prada," and "Company" is defined as "Liberty Fencing Club LLC." (Coach Agreement.)

> or other proprietary information relating to Company, Company's services, the markets, clients, customers, suppliers, contacts or current or planned business operations of Company, or any of Company's shareholders, subsidiaries or affiliates (the "Confidential Information"), whether or not obtained with the knowledge and permission of Company and whether or not developed, devised or otherwise created in whole or in part by the efforts of the Company.

(Id. § 5(b) (emphasis omitted).) Lastly, the Agreement contained a "Non-Solicitation" provision, where Fernandez-Prada agreed that following a two-year period after the term, he would not

> recruit or solicit any employee, customer, former customer, customer family member, or supplier of Company, or otherwise induce such employee, customer, former customer, customer family member, or supplier to leave the employment of Company or to cease doing business with Company, as applicable, or to become an employee of or otherwise be associated or do business or take fencing classes or lessons with Coach or any individual, club, company, firm, corporation, business, or institution with which Coach is or may become associated in any capacity. Customers include anyone who at any time participated in any lessons, classes, camps, or competitions at the Company and/or on its Premises.

(Id. § 5(c).)

After signing the Coach Agreement, Fernandez-Prada regularly taught fencing classes at Liberty Fencing approximately two to three days per week. (Am. Compl. ¶ 17.) He also gave private fencing lessons to Liberty Fencing students and began traveling with customers to provide coaching at tournaments held around the country, which is a concept known as "strip coaching." (Id.)

According to Liberty Fencing, it developed an elite fencing program with exponential growth in the first twenty months Fernandez-Prada began working there. (Id. ¶ 18.) Around January 2015, however, Fernandez-Prada informed Davis of a job opportunity in London and his intent to terminate the Agreement three years early. (Id. ¶ 22.) Liberty Fencing claims that

despite Fernandez-Prada's "plans" to go to London for a job opportunity, he remained in the area and thus could have honored the Coach Agreement by continuing to coach at Liberty Fencing. (Id. ¶ 26.)

Additionally, and around the same time, Fernandez-Prada accompanied "two of [Liberty Fencing's] most valuable students/customers" to a national tournament run by USA Fencing. (Id. ¶ 28.) While at these tournaments, coaches would follow the "Strip Coaching Policy," (id.; Ex. 4 ("Strip Coaching Policy")), which Liberty Fencing claims both Fernandez-Prada and Davis jointly drafted. (Id. ¶¶ 28, 29.) The Strip Coaching Policy was "the official [Liberty Fencing] policy for all coaches and students. . . ." and "[a]ll coaches, including [Fernandez-Prada], agreed to be bound by the terms of [it]." (Id. ¶ 29.) Under the Strip Coaching Policy, students would pay Liberty Fencing, who in turn would pay coaches a portion of the proceeds. (Id. ¶ 30.) Liberty Fencing alleges that during the entirety of the aforementioned tournament, Fernandez-Prada solicited payment directly from a student and the student's father in direct violation of the Strip Coaching Policy. (Id. ¶ 31.) Liberty Fencing claims it was never paid a portion of the proceeds by either the student (or his father) or Fernandez-Prada. (Id. ¶ 32.)

Liberty Fencing also avers that in the same timeframe, Fernandez-Prada affiliated himself with Zeljkovic Fencing Academy ("ZFA"), a direct competitor that is located only six miles away from Liberty Fencing. (Id. ¶ 34.) According to Liberty Fencing, Davis found out that Fernandez-Prada had fabricated his London job opportunity in an effort to join, compete, and promote ZFA, all of which was in direct violation of the Coach Agreement. (Id. ¶ 35, 44.) Liberty Fencing claims Fernandez-Prada's affiliation with ZFA lasted until at least December 2015, and that he registered himself as a member of ZFA on the USA Official Fencing Membership List from August 1, 2015 through July 31, 2016. (Id. ¶¶ 38, 39.) In addition,

Liberty Fencing contends that Fernandez-Prada sent emails to current and former Liberty Fencing students to join ZFA and/or take lessons or coaching directly from him, which constitutes solicitation of Liberty Fencing students. (Id. ¶ 36, 41.) He also appeared on Facebook alongside former Liberty Fencing customers who were dressed in ZFA apparel. (Id. ¶ 37.) Lastly, Liberty Fencing alleges Fernandez-Prada shared confidential information about Liberty Fencing's fencers, proprietary coaching information and techniques, details about his coaching relationship and exit from Liberty Fencing, as well as the operations, philosophies, strategies, tactics, and coaching knowledge of Liberty Fencing. (Id. ¶ 40.)

On April 10, 2017, Liberty Fencing filed an Amended Complaint against Fernandez-Prada alleging breach of contract and unjust enrichment. (Am. Compl.) Liberty Fencing claims this Court has subject matter jurisdiction over the case by the way of diversity of citizenship pursuant to 28 U.S.C. § 1332(a). (Id. ¶ 4.) On May 2, 2017, Fernandez-Prada filed the instant Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Specifically, Fernandez-Prada contends that we lack subject matter jurisdiction over the Amended Complaint because Liberty Fencing cannot meet the amount in controversy requirement in 28 U.S.C. § 1332(a). (Def.'s Mem. Support Mot. to Dismiss at 5.) He also argues that Liberty Fencing's claims of breach of contract and unjust enrichment fail as a matter of law and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). (Id. at 1.)

II. LEGAL STANDARD

A. Rule 12(b)(1) Standard

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states." 28 U.S.C. § 1332(a). The diversity statute requires that there be

complete diversity between the parties, meaning that "each defendant is a citizen of a different State from each plaintiff." Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978). The statute further requires that the amount in controversy exceed $75,000 in order to properly invoke diversity jurisdiction. 28 U.S.C. § 1332(a); Auto-Owners Ins. Co. v. Stevens & Ricci Inc., 835 F.3d 388, 394-95 (3d Cir. 2016). The party asserting subject matter jurisdiction bears the burden of proving its existence. Lincoln Ben. Life Co. v. AEI Life, LLC, 800 F.3d 99, 105 (3d Cir. 2015) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006)); Morgan v. Gay, 471 F.3d 469, 474 (3d Cir. 2006).

A party may challenge the court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). "At issue in a Rule 12(b)(1) motion is the court's 'very power to hear the case.'" Petruska v. Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006) (quoting Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)) (footnote omitted). A motion filed under Rule 12(b)(1) may take two forms: (1) a facial attack, where the party contesting subject matter jurisdiction attacks the face of the complaint; or (2) a factual attack, where the existence of subject matter jurisdiction is attacked as a matter of fact. See id. n.3. "A facial attack concerns an alleged pleading deficiency[,] whereas a factual attack concerns the actual failure of a plaintiff's claims to comport factually with the jurisdictional prerequisites." Lincoln Ben., 800 F.3d at 105 (internal quotation marks and alterations omitted); Constitution Party of Pa. v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014).

When a party files a Rule 12(b)(1) motion that mounts a facial attack to subject matter jurisdiction, a court may consider only "the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). In reviewing a factual attack, on the

other hand, a court "may consider evidence outside the pleadings," id., but there is "no presumptive truthfulness attache[d] to plaintiff's allegations," Mortensen, 549 F.2d at 891.

It should be noted that in deciding a Rule 12(b)(1) motion on the allegation that the amount in controversy does not meet the jurisdictional minimum, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938) (footnotes omitted). Additionally, in determining whether a case involves the jurisdictional amount, it must be "'apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount.'" Samuel-Bassett v. KIA Motors Am., Inc., 357 F.3d 392, 397 (3d Cir. 2004) (quoting Red Cab, 303 U.S. at 289).

B. Rule 12(b)(6) Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). Pursuant to Rule 12(b)(6), the defendant bears the burden of demonstrating that the plaintiff has failed to set forth a claim from which relief may be granted. Fed. R. Civ. P. 12(b)(6); see also Lucas v. City of Phila., No. 11-4376, 2012 WL 1555430, at *2 (E.D. Pa. May 2, 2012) (citing Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005)). In evaluating a motion under Rule 12(b)(6), the court must view any reasonable inferences from the factual allegations in a light most favorable to the plaintiff. Buck v. Hamilton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2002).

The Supreme Court set forth in Twombly, and further defined in Iqbal, a two-part test to determine whether to grant or deny a motion to dismiss. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Initially, the court must ascertain whether the complaint is supported by well-pleaded factual allegations. Iqbal, 556 U.S.

at 679. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Twombly, 550 U.S. at 555. Conclusions of law can serve as the foundation of a complaint, but to survive dismissal they must be supported by factual allegations. Iqbal, 556 U.S. at 679. These factual allegations must be explicated sufficiently to provide a defendant the type of notice that is contemplated by Federal Rule of Civil Procedure 8. See Fed. R. Civ. P. 8(a)(2) (requiring a short and plain statement of the claim showing that the pleader is entitled to relief); see also Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008). Where there are well-pleaded facts, courts must assume their truthfulness. Iqbal, 556 U.S. at 679.

Upon a finding of a well-pleaded complaint, the court must then determine whether these allegations "plausibly" give rise to an entitlement to relief. Id. This determination is a "context specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. Plausibility compels the pleadings to contain enough factual content to allow a court to make a "reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. 544 at 570). This is not a probability requirement; rather, plausibility necessitates "more than a sheer possibility that a defendant has acted unlawfully." Id. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility.'" Id. (quoting Twombly, 550 U.S. at 557). In other words, a complaint must not only allege entitlement to relief, but must demonstrate such entitlement with sufficient facts to nudge the claim "across the line from conceivable to plausible." Id. at 683.

III. DISCUSSION

A. Federal Subject Matter Jurisdiction

Liberty Fencing filed its Amended Complaint on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332(a). (Am. Compl. ¶ 4.) In order to properly invoke diversity jurisdiction under 28 U.S.C. § 1332, there must be complete diversity between the parties and the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a); Owen Equip., 437 U.S. at 373; Auto-Owners, 835 F.3d at 394-95.

Liberty Fencing is a limited liability company located in Warrington, Pennsylvania. (Am. Compl. ¶ 1.) Fernandez-Prada is an individual "who resides in South Bend, Indiana." (Id. ¶ 2.) Neither of the parties assert any arguments regarding whether there is complete diversity. Based on the averments in the Amended Complaint, we find the complete diversity rule has been satisfied.

Fernandez-Prada claims this Court lacks subject matter jurisdiction over the Amended Complaint because Liberty Fencing cannot meet the jurisdictional amount in controversy requirement of $75,000. (Def.'s Mem. Support Mot. to Dismiss at 4.) First, he claims that damages "for the reimbursement of monies paid to [Fernandez-Prada] by [Liberty Fencing] customers" should not be included in the damages calculation because the Strip Coaching Policy was not binding on him. (Id. at 6-7.) Second, he argues that lost profits based on his alleged unlawful termination of the Coach Agreement are not recoverable because Liberty Fencing did not have an "unconditional right" to future income. (Id. at 7-8.) The essence of Fernandez-Prada's argument on that point is that Liberty Fencing cannot be awarded damages for unlawful termination of the Coach Agreement, as he theoretically could have scheduled zero fencing lessons. (Id.) Third, he argues that lost profits caused by his alleged unlawful solicitation of

Liberty Fencing customers cannot be included because a January 22, 2015 email, which Liberty Fencing attached as an exhibit to the Amended Complaint, is insufficient evidence to show solicitation in violation of the Coach Agreement. (Id. at 8-10.) Lastly, he claims that "lost profits caused by the subsequent drop off in [Liberty Fencing's] size and level of foil tournaments" and "lost profits caused by the halt in growth of [Liberty Fencing's] elite program when its students left the club with [Fernandez-Prada] to join ZFA" cannot be included in the damages calculus because Liberty Fencing pleads no facts and provides no evidence in support of its contentions. (Id. at 10-11.)

A motion brought under Rule 12(b)(1) may be either a facial attack or a factual attack to the court's subject matter jurisdiction. See Petruska, 462 F.3d at 302 n.3. "[A] facial attack 'contests the sufficiency of the pleadings . . . whereas a factual attack concerns the actual failure of a plaintiff's claims to comport factually with the jurisdictional prerequisites." Aichele, 757 F.3d at 358. Here, we construe Fernandez-Prada's attack on subject matter jurisdiction to be facial. As outlined above, his arguments concerning subject matter jurisdiction specifically relate to whether certain damages are recoverable as a matter of law and whether Liberty Fencing has pleaded sufficient facts in support of the damages alleged. In other words, his arguments challenge the sufficiency of the pleading, rather than a factual attack on the allegations in the Amended Complaint. Significantly, he has not filed an answer and has not provided any affidavits or other evidence to counter Liberty Fencing's allegations that the amount in controversy exceeds $75,000. See Team Angry Filmworks, Inc. v. Geer, 171 F. Supp. 3d 437, 440-41 (W.D. Pa. 2016) ("If the defendant challenges jurisdiction in its Rule 12(b)(1) motion before answering the complaint or 'otherwise present[ing] competing facts,' the Rule 12(b)(1) motion is, 'by definition, a facial attack.'" (citing Mortensen, 549 F.2d at 892 n.17)).

Accordingly, Fernandez-Prada has mounted a facial attack under Rule 12(b)(1), and we will consider only the allegations in the Amended Complaint and the documents referenced within, in the light most favorable to Liberty Fencing. See Aichele, 757 F.3d at 358.

Prior to addressing the allegations in the Amended Complaint, however, we briefly note that Fernandez-Prada's arguments concerning the amount in controversy requirement are also argued in a nearly identical fashion in his Rule 12(b)(6) Motion. We will discuss those arguments in great depth below, where we reject them in their entirety. Accordingly, for purposes of the amount in controversy requirement, we find that at this juncture, damages for reimbursement pursuant to the Strip Coaching Policy, damages for lost profits caused by Fernandez-Prada's alleged unlawful termination of the Coach Agreement, and damages for lost profits caused by his alleged unlawful solicitation of Liberty Fencing customers are recoverable as a matter of law. Further, we believe Liberty Fencing has alleged sufficient facts to sustain a claim for lost profits caused by the decrease in Liberty Fencing's size and level of foil tournaments.

"The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." Red Cab, 303 U.S. at 288. "In considering either a factual or facial challenge to the amount in controversy, the question for the Court is whether it 'appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'" Davis-Giovinzazzo Constr. Co. v. Tatko Stone Prods., Inc., No. 06-1270, 2007 WL 1166054, at *3 (E.D. Pa. Apr. 18, 2007) (quoting Red Cab, 303 U.S. at 289) (alteration in original).

The Amended Complaint alleges counts of breach of contract and unjust enrichment, with each count containing *ad damnum* clauses for damages in excess of $150,000. (Am. Compl.) Liberty Fencing contends that Fernandez-Prada caused it harm by: terminating the Coach Agreement three years early; immediately joining, promoting and/or representing a competitor within the geographic distance of the non-compete provision; using and disclosing confidential information regarding Liberty Fencing's business; and soliciting several of Liberty Fencing's current and former customers to join a competitor's fencing club. (Am. Compl. ¶¶ 49, 54.) Liberty Fencing specifically claims that it has "lost key students/customers to [Fernandez-Prada] and ZFA, potential elite fencing students/customers, lost sales of company apparel and equipment, *as well as tens of thousands of dollars in lost profits*." (Id. ¶ 45) (emphasis added). Liberty Fencing prays for relief in excess of $150,000 for

> reimbursement of monies paid to [Fernandez-Prada] by [Liberty Fencing] customers, lost profits caused by [Fernandez-Prada's] unlawful termination of the Parties' contract, lost profits caused by [Fernandez-Prada's] unlawful solicitation of [Liberty Fencing] customers, lost profits caused by [Fernandez-Prada's] other breaches of the Coach Agreement, lost profits caused by the subsequent drop off in [Liberty Fencing's] size and level of foil tournaments, lost profits caused by the halt in growth of [Liberty Fencing's] elite program when its students left the club with [Fernandez-Prada] to join ZFA, [and] specific performance of the covenants contained in the Parties' contract.

(Am. Compl.)

Fernandez-Prada contends that Liberty Fencing's allegations regarding the amount in controversy are intended only to obtain federal jurisdiction. (Def.'s Mem. Support Mot. to Dismiss at 4.) To the extent that Fernandez-Prada claims Liberty Fencing's allegations have not been made in good faith, we disagree. We discern no bad faith on the part of Liberty Fencing in the claims made in the Amended Complaint. Thus, Liberty Fencing's claimed sum will control

unless the $75,000 jurisdictional floor cannot be met to a legal certainty. See Samuel-Bassett, 357 F.3d at 397.

Taking the allegations in the Amended Complaint as true, we cannot determine to a legal certainty that Liberty Fencing's claims cannot reach the jurisdictional threshold to secure proper diversity jurisdiction. Accordingly, the Amended Complaint properly invokes federal subject matter jurisdiction, and Fernandez-Prada's Motion pursuant to Rule 12(b)(1) is denied.

B. Failure to State a Claim

As alluded to above, Fernandez-Prada argues that a number of claims in the Amended Complaint fail as a matter of law and should be dismissed with prejudice. First, he contends that claims relating to the Strip Coaching Policy should be dismissed because: (1) no party signed the Strip Coaching Policy; (2) the Strip Coaching Policy does not amend the terms of the Coach Agreement; and (3) Liberty Fencing pleads no violation of the Strip Coaching Policy, as the policy allows coaches' travel expenses and meals to be covered by the students. (Def.'s Mem. Support Mot. to Dismiss at 11-13.) Second, he argues that Liberty Fencing has failed to state a claim for breach of contract because: (1) he could not have unlawfully terminated the Coach Agreement early, as there was no obligation for him to schedule any fencing classes; and (2) Liberty Fencing has not pleaded sufficient facts to claim breaches of the non-compete, non-solicitation, and non-disclosure provisions of the Coach Agreement. (Id. at 13-22.) Finally, he argues that Liberty Fencing's unjust enrichment claim fails as a matter of law because: (1) the Amended Complaint does not allege the requisite elements to make out a claim of unjust enrichment; (2) a theory of unjust enrichment is inconsistent with a claim of breach of contract; and (3) there are no facts to form a basis that Fernandez-Prada has been unjustly enriched in the amount of $150,000. (Id. at 23-24.)

1. *Breach of Contract Claims*

We begin first with Fernandez-Prada's arguments concerning Liberty Fencing's failure to state a claim of breach of contract. Under Pennsylvania law, a prima facie case of breach of contract consists of: "(1) the existence of a contract, including its essential terms[;] (2) a breach of the contract; and[] (3) resultant damages."[4] Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C., 137 A.3d 1247, 1258 (Pa. 2016) (citing J.F. Walker Co. v. Excalibur Oil Grp., Inc., 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002)).

We initially note that Liberty Fencing has adequately pleaded the required elements to establish a breach of contract. Liberty Fencing avers that "Defendant entered into a valid and enforceable written contract whereby he assumed the role of independent contractor for [Liberty Fencing] for a five-year term." (Am. Compl. ¶ 47.) Liberty Fencing also alleges numerous manners in which the contract was breached and that "damages and irreparable harm" were caused. (Id. ¶¶ 49, 50.) However, Fernandez-Prada argues that he could not have unlawfully terminated the Coach Agreement early, and thus not breached any of the duties and responsibilities under the Agreement, because he had "no affirmative duty or obligation to provide these lessons . . . [which] were being provided entirely at [his] discretion." (Def.'s Mem. Support Mot. to Dismiss at 13.) He claims that he technically could have scheduled zero students to teach because the Agreement allowed him the ability to set his own teaching schedule, give lessons on his own time, follow his own pattern of work, and give lessons in accordance with his own program. (Id. at 7, 13; see also Coach Agreement § 1(b).)

[4] The Coach Agreement provides, "This Agreement shall be interpreted in accordance with and governed by the laws of the Commonwealth of Pennsylvania. . . . Any questions or matters arising under this Agreement as to validity, construction, performance, or otherwise, shall be determined in accordance with the laws of the Commonwealth of Pennsylvania." (Coach Agreement § 16.)

"'Every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and enforcement.'" CMR D.N. Corp. v. City of Phila., 803 F. Supp. 2d 328, 337 (E.D. Pa. 2011) (quoting Donahue v. Fed. Express Corp., 753 A.2d 238, 242 (Pa. Super. Ct. 2000)); see also Se. Pa. Transp. Auth. v. Gilead Scis., Inc., 102 F. Supp. 3d 688, 706 (E.D. Pa. 2015); Tanenbaum v. Chase Home Fin. LLC, No. 13-4132, 2014 WL 4063358, at *6 (E.D. Pa. Aug. 18, 2014); Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 643 (E.D. Pa. 2001); John B. Conomos, Inc. v. Sun Co., 831 A.2d 696, 706 (Pa. Super. Ct. 2003); Soloman v. U.S. Healthcare Sys. of Pa., Inc., 797 A.2d 346, 351 (Pa. Super. Ct. 2002). While it cannot override the express terms of a contract, the good faith duty is "an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 (3d Cir. 2000). "'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party.'" CMR, 803 F. Supp. 2d at 337 (quoting Herzog v. Herzog, 887 A.2d 313, 317 (Pa. Super. Ct. 2005)). "Actions that constitute bad faith include: 'evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.'" Id. at 337 (quoting Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992)).

The Coach Agreement provides that "Company hereby engages Coach, and Coach hereby accepts such engagement and agrees to perform the duties and responsibilities set forth in this Agreement." (Coach Agreement § 1(a).) The duties and responsibilities provide, among other things, that "Coach is giving lessons on his own time, making his own schedule (when the Premises is [sic] available), giving lessons in accordance with his own program. . . . and

follow[ing] his own pattern of work." (Id. § 1(b).) Liberty Fencing argues the Coach Agreement was intended to benefit both parties and that while Fernandez-Prada was free to make his own schedule, he was not free to simply not perform under the Agreement. (Pl.'s Mem. Support Pl.'s Resp. Def.'s Mot. to Dismiss at 13.) Liberty Fencing further argues that if Fernandez-Prada were to affirmatively decline to schedule any fencing lessons, the purpose of the Coach Agreement would be defeated. (Id.) We agree with Liberty Fencing.

Under Pennsylvania law, there is an implied covenant of good faith and fair dealing in every contract. See CMR, 803 F. Supp. 2d at 337 (quoting Donahue, 753 A.2d at 242). Such a covenant emphasizes faithfulness to a common purpose and the justifiable expectations of the parties. Id. (quoting Herzog, 887 A.2d at 317). The parties entered into the Coach Agreement, where Fernandez-Prada agreed to provide fencing lessons as an independent contractor on behalf of Liberty Fencing in return for payment per lesson. (See Coach Agreement § 1(b).) Indeed, while good faith and fair dealing is somewhat of an amorphous concept, courts have recognized that "evasion of the spirit of the bargain" constitutes bad faith in the context of a contract. See CMR at 337 (quoting Somers, 613 A.2d at 1213). Ironically, by arguing that he could not have unlawfully terminated the Coach Agreement early because he did not have an affirmative duty to schedule fencing lessons, Fernandez-Prada is essentially claiming that he could have acted in bad faith. In his view, he could have signed the Coach Agreement, which contained a term of five years, and never once performed for the duration of the term. We believe his argument would eviscerate the central purpose of the Agreement and evade the "spirit of the bargain." See id. Liberty Fencing contracted with Fernandez-Prada for the purpose of having him teach fencing lessons on behalf of the club. In turn, Fernandez-Prada would benefit from the Agreement by being paid for teaching the lessons. If Fernandez-Prada simply chose not to perform, the entire

contract would be rendered meaningless. In fact, the Coach Agreement inherently contemplates that he would be affirmatively giving lessons on behalf of Liberty Fencing. The Agreement states that "Coach is *giving lessons* on his own time, making his own schedule (when the Premises is [sic] available), *giving lessons* in accordance with his own program. . . . and follow[ing] his own *pattern of work*." (Coach Agreement § 1(b) (emphasis added).) The clause that Fernandez-Prada relies so heavily on does not provide that he could simply not schedule any fencing lessons and still be in compliance with the Agreement. Rather, the clause denotes the central purpose and function of the Agreement: that he will be *giving lessons*. Accordingly, we reject Fernandez-Prada's argument that claims related to unlawful termination of the Coach Agreement should be dismissed.[5]

We next turn to Fernandez-Prada's argument that all claims relating to alleged violations of the non-compete provision of the Coach Agreement should be dismissed with prejudice because Liberty Fencing has not pleaded sufficient facts to establish a plausible claim. Specifically, he argues that Liberty Fencing has not provided any facts or support that he engaged in "Company Business," which is a defined term in the Coach Agreement. (Def.'s Mem. Support Mot. to Dismiss at 16-17.) The Agreement defines "Company Business" as "fencing classes, lessons, training, tournaments, equipment and other activities." (Coach Agreement.) The non-compete provision of the Agreement provides that

> Coach agrees that during the Term and, for an additional period of two (2) years thereafter, he shall not *directly or indirectly*, as an employee of any person or entity . . . *or in any other capacity whatsoever, participate, directly or indirectly* in the Company business [sic], except on Company's behalf within fifty miles of

[5] As noted above, because we reject Fernandez-Prada's argument concerning whether claims pertaining to unlawful termination of the Coach Agreement should be dismissed, those potential damages based on lost profits are includable in the amount in controversy calculation. Moreover, as a general matter, "lost profits are recoverable in breach of contract actions." Co. Image Knitware, Ltd. v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. Ct. 2006).

> the Premises and any other or subsequent location at which the Company's business is being conducted.

(Id. § 5(a) (emphasis added).)

Liberty Fencing avers in its Amended Complaint that after unlawfully terminating the Coach Agreement early, Fernandez-Prada immediately affiliated himself with ZFA, a direct competitor located just six miles away from it. (Am. Compl. ¶ 34.) Such affiliation included joining, promoting, and competing for ZFA, all of which occurred until at least December 2015. (Id. ¶¶ 35, 38.) Liberty Fencing relies on and attaches as an exhibit to the Amended Complaint the "USA Fencing Membership List from August 1, 2015 through July 31, 2016," which it claims purports to show that Fernandez-Prada registered himself as a ZFA member during that time period. (Id. ¶ 39; Ex. 9.) Liberty Fencing also avers that he used social media to promote ZFA by publicly "liking" ZFA's Facebook page and posting pictures of former Liberty Fencing customers in ZFA apparel, with himself alongside them.[6] (Id. ¶ 37; Ex. 7.) Lastly, Liberty Fencing attaches an email as an exhibit to the Amended Complaint, where Fernandez-Prada states he will "open-bout"[7] at numerous other clubs.[8] (Am. Compl.; Ex. 5 (the "January 2015 Email").)

[6] Fernandez-Prada contends that claims relating to him being able to train at ZFA, pay dues at ZFA, "liking" ZFA on Facebook, and appearing in photographs with students in ZFA apparel should be precluded under Federal Rule of Civil Procedure 12(f) because they are "vexatious attempt[s] at including impertinent matter." (Def.'s Mem. Support Mot. to Dismiss at 25.) "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Disfavored by the court, a motion to strike will generally be denied unless the allegations confuse the issues or are not related to the controversy and may ultimately cause prejudice to one of the parties." Signature Bank v. Check-X-Change, LLC, No. 12-2802, 2013 WL 3286154, at *2 (D.N.J. June 27, 2013) (citing Tonka Corp. v. Rose Art Indus., Inc., 836 F. Supp. 200, 217 (D.N.J. 1993)).

Fernandez-Prada provides no reasoning regarding why the allegations and exhibits are not relevant to the dispute. On the contrary, the averments and the exhibits appear to be directly relevant to Liberty Fencing's claims. Accordingly, we fully reject Fernandez-Prada's argument to strike those allegations and exhibits from the Amended Complaint, and his request to strike is denied.

[7] "Open-bouting" occurs when individuals from different clubs appear at a given place to practice against other fencers. (Def.'s Mem. Support Mot. to Dismiss at 19.) Thus, Fernandez-Prada explains that it is akin to a "pick-up" game of basketball. (Id.)

We disagree with Fernandez-Prada that Liberty Fencing has not pleaded sufficient facts to support a claim of a breach of the non-compete provision in the Coach Agreement. For a period of two years after the term of the Agreement and within fifty miles of Liberty Fencing, the Agreement prohibits Fernandez-Prada from "directly or indirectly . . . in any capacity whatsoever, participat[ing] . . . in the Company [B]usiness." (Coach Agreement § 5(a).) Liberty Fencing has specifically pleaded that Fernandez-Prada immediately affiliated himself with ZFA after disassociating from Liberty Fencing. (Am. Compl. ¶ 34.) Further, it has attached exhibits to the Amended Complaint that corroborate the averments that Fernandez-Prada was affiliated with clubs within the geographic distance of the non-compete provision. (Id. ¶¶ 37, 39; Ex. 7, 9.) Finally, "Company Business" includes giving "fencing classes, lessons, training, tournaments, equipment *and other activities*." (Coach Agreement.) To the extent that Fernandez-Prada claims there is a difference between open-bouting and giving lessons, we believe the former is contemplated by "other activities." Accordingly, we deny his request for dismissal of claims related to the non-compete provision.

We next address Fernandez-Prada's argument that claims relating to the non-solicitation provision should be dismissed with prejudice because Liberty Fencing has not pleaded sufficient facts to sustain a claim. He further argues the January 2015 Email cannot be relied upon to show he instructed Liberty Fencing customers to join ZFA or to take lessons directly from him. (Def.'s Mem. Support Mot. to Dismiss at 18.) The non-solicitation provision of the Coach Agreement provides that following a two-year period after the term, he would not

> recruit or solicit any employee, customer, former customer, customer family member, or supplier of Company, or otherwise induce such employee, customer, former customer, customer family member, or supplier to leave the employment of Company

[8] Fernandez-Prada admits sending the email. (See Def.'s Mem. Support Mot. to Dismiss at 18.) ("Initially, it is noted that [Fernandez-Prada's] January 22, 2015 11:00 a.m. email . . ."

> or to cease doing business with Company, as applicable, or to become an employee of or otherwise be associated or do business or take fencing classes or lessons with Coach or any individual, club, company, firm, corporation, business, or institution with which Coach is or may become associated in any capacity. Customers include anyone who at any time participated in any lessons, classes, camps, or competitions at the Company and/or on its Premises.

(Coach Agreement § 5(c).)

Again, we disagree with Fernandez-Prada that the Amended Complaint does not contain sufficient facts to sustain a breach of the non-solicitation provision. As mentioned above, Liberty Fencing claims (and attaches as exhibits to the Amended Complaint) that Fernandez-Prada posted pictures on Facebook of former Liberty Fencing students dressed in ZFA apparel, with himself beside them. (Am. Compl. ¶ 37.) Additionally, ZFA's own Facebook account posted similar pictures as well. (Id.) Liberty Fencing explicitly avers that Fernandez-Prada "solicited [Liberty Fencing] students in order to induce them to join a competitor's fencing club while [he] was still employed at [Liberty Fencing] and bound by the Coach Agreement." (Id. ¶ 41.) Finally, Liberty Fencing claims that Fernandez-Prada "sent direct emails to current and former [Liberty Fencing] students to join ZFA and/or take lessons or coaching directly from [Fernandez-Prada], and engaged in personal communications with [Liberty Fencing] students/customers in attempts to bring them to ZFA." (Am. Compl. ¶ 36.) In reliance on that assertion, Liberty Fencing cites the January 2015 Email, which, as we noted above, Fernandez-Prada admits sending. In opposing the instant motion, Liberty Fencing urges that the January 2015 Email was sent for the primary purpose of having its current customers follow Fernandez-Prada to ZFA. (Pl.'s Mem. Support Pl.'s Resp. Def.'s Mot. to Dismiss at 16.) We are unable to discern to whom the email was sent or the purpose and intent for which it was sent. However, the lack of clarity is immaterial, as we conclude that based on the above averments, Liberty

Fencing has pleaded sufficient facts to allege a claim of a breach of the non-solicitation provision.

Fernandez-Prada's final argument concerning a breach of contract relates to the non-disclosure provision of the Coach Agreement. He argues that Liberty Fencing has failed to state a claim because it does not identify any facts to show what "Confidential Information" was shared under the Agreement. (Def.'s Mem. Support Mot. to Dismiss at 22.) The non-disclosure provision of the Coach Agreement provides that, for a period of two years following the term of the Agreement, he agreed

> not to reveal, disclose or make known to any third party, or use for his own benefit or for the benefit of any third party, any confidential or other proprietary information relating to Company, Company's services, the markets, clients, customers, suppliers, contacts or current or planned business operations of Company, or any of Company's shareholders, subsidiaries or affiliates (the "Confidential Information"), whether or not obtained with the knowledge and permission of Company and whether or not developed, devised or otherwise created in whole or in part by the efforts of the Company.

(Coach Agreement § 5(b) (emphasis omitted).)

In the Amended Complaint, Liberty Fencing avers that Fernandez-Prada has shared confidential information regarding Liberty Fencing's fencers to third parties and other clubs, which includes the names and contact information of its customers and proprietary coaching information and techniques. (Am. Compl. ¶ 40.) In addition, he "disclosed details about his coaching relationship and exit from [Liberty Fencing], as well as the operations, philosophies, strategies, tactics, and coaching knowledge of [Liberty Fencing]." (Id.) Taking those allegations as true, we believe they fall squarely within the definition of "Confidential Information" in the Coach Agreement. Accordingly, Fernandez-Prada's request for dismissal of claims related to the non-disclosure provision of the Agreement is denied.

2. *Unjust Enrichment Claims*

Fernandez-Prada argues that the count of unjust enrichment should be dismissed with prejudice because: (1) the pleading fails to allege the requisite elements of unjust enrichment; (2) the claim of unjust enrichment is inconsistent with a claim of breach of contract; and (3) there are no facts to show that he has been unjustly enriched in the amount of $150,000. (Def.'s Mem. Support Mot. to Dismiss at 23-24.) Liberty Fencing responds by stating that Fernandez-Prada was unjustly enriched when he accepted payment for providing fencing lessons on behalf of Liberty Fencing and that he received valuable confidential information which was used for his own benefit and a competitor's benefit. (Pl.'s Mem. Support Pl.'s Resp. Def.'s Mot. to Dismiss at 17-18.) Liberty Fencing also argues that it is allowed to plead a claim of unjust enrichment in the alternative when there is a question of whether a valid, enforceable contract exists. (Id. at 18-19.) We agree with Liberty Fencing, although not based on all of the arguments it sets forth.

A claim of unjust enrichment is one of quasi-contract. Cosby v. Am. Media, Inc., 197 F. Supp. 3d 735, 744 (E.D. Pa. 2016). "[A] claim of unjust enrichment must allege the following elements: (1) plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) acceptance and retention by the defendant of the benefits, under the circumstances, would make it inequitable for the defendant to retain the benefit without paying for the value of the benefit." Glob. Ground Support, LLC v. Glazer Enters., Inc., 581 F. Supp. 2d 669, 675 (E.D. Pa. 2008) (citing Com. ex rel. Pappert v. TAP Pharm. Prods., Inc., 885 A.2d 1127, 1137 (Pa. Commw. Ct. 2005)). "In Pennsylvania, the doctrine [of] unjust enrichment is 'inapplicable when the relationship between the parties is founded on a written agreement or express contract.'" Cosby, 197 F. Supp. 3d at 745 (quoting Benefit Tr. Life Ins. Co. v. Union Nat'l Bank, 776 F.2d 1174, 1177 (3d Cir. 1985)). However, a plaintiff is typically allowed to

plead unjust enrichment in the alternative when "there is some dispute as to whether a valid, enforceable written contract exists." Montanez v. HSBC Mortg. Corp. (USA), 876 F. Supp. 2d 504, 516 (E.D. Pa. 2012) (citing Premier Payments Online, Inc. v. Payment Sys. Worldwide, 848 F. Supp. 2d 513, 527 (E.D. Pa. 2012)). Further, if a contract governs only part of the relationship between the parties, a claim of unjust enrichment can be pleaded in the alternative to a claim of breach of contract. See Sheinman Provisions, Inc. v. Nat'l Deli, LLC, No. 08-0453, 2008 WL 2758029, at *4 (E.D. Pa. July 15, 2008) (citing United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991)).

We are able to simultaneously address Fernandez-Prada's first two arguments, which are that Liberty Fencing fails to plead the necessary elements of unjust enrichment, and that the claim necessarily fails as a matter of law because it is inconsistent with a breach of contract. This case actually involves two agreements: the Coach Agreement and the Strip Coaching Policy. At the outset, we reject Liberty Fencing's contentions that the unjust enrichment count survives because Fernandez-Prada received benefits through coaching at Liberty Fencing and received confidential information that he used for himself and for competitors. The concepts of giving fencing lessons and non-disclosure are fully governed under the Coach Agreement. (Coach Agreement §§ 1(b), 5(b).) Thus, the express contract precludes any unjust enrichment claims on those bases. See Cosby, 197 F. Supp. 3d at 745. However, Liberty Fencing also claims that Fernandez-Prada has been unjustly enriched "by accepting payments to which [Liberty Fencing] is lawfully entitled." (Am. Compl. ¶ 55.) It further avers that under the Strip Coaching Policy, students were to pay Liberty Fencing, who in turn would pay the coaches a portion of the proceeds. (Id. ¶ 30.) In violation of the Strip Coaching Policy, Fernandez-Prada "solicited student/customer Christopher Davis and his father, Charles Davis, to pay [him]

directly instead of through [Liberty Fencing]." (Id. ¶ 31.) Liberty Fencing contends it never received a portion of the proceeds from either the student/customer (or his father) or Fernandez-Prada. (Id. ¶ 33.)

The aforementioned allegations clearly relate to the Strip Coaching Policy, the validity and enforceability of which Fernandez-Prada strongly opposes. (Def.'s Mem. Support Mot. to Dismiss at 12 ("Since no party signed this Strip Coaching Policy, it is not binding upon [Fernandez-Prada]."); Def.'s Reply Br. at 8 ("[S]ince the Strip Coaching Policy was not signed, it has no binding effect upon [Fernandez-Prada].").) Because he opposes the validity and enforceability of the Strip Coaching Policy, Liberty Fencing's claim of unjust enrichment survives. See Montanez, 876 F. Supp. 2d at 516. Also, as Fernandez-Prada points out, the Coach Agreement is silent on issues regarding strip coaching. (Def.'s Mem. Support Mot. to Dismiss at 6.) Thus, the Coach Agreement only governs part of the relationship between the parties.

However, we note that the count of unjust enrichment moves forward only to the extent it relates to the Strip Coaching Policy, as all other allegations of unjust enrichment fall within the parameters of the Coach Agreement. Further, we believe the previously mentioned averments sufficiently meet the requisite elements of unjust enrichment. Accordingly, Fernandez-Prada's request for dismissal of that count with prejudice is denied.[9]

IV. CONCLUSION

We cannot determine to a legal certainty that Liberty Fencing cannot meet the amount in controversy requirement of $75,000. Further, we believe Liberty Fencing has alleged sufficient facts to form the basis of numerous breach of contract allegations, including unlawful

[9] We also reject Fernandez-Prada's argument that the facts pertaining to the unjust enrichment count do not provide a basis for a claim of $150,000 pursuant to the discussion above on the legal certainty test.

termination of the Coach Agreement and breaches of the non-compete provision, non-solicitation provision, and non-disclosure provision. Lastly, a claim for unjust enrichment survives, but only to the extent of the allegations related to the Strip Coaching Policy. Accordingly, Fernandez-Prada's Motion to Dismiss is denied.

An appropriate Order follows.