COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FREEMAN INDUSTRIAL PRODUCTS, LLC, et al.,	:	
	:	**CASE NO. 2010 CVH 01023**
Plaintiffs		
vs.	:	**Judge McBride**
ARMOR METAL GROUP ACQUISITIONS,	:	**DECISION/ENTRY**
	:	
Defendant		
	:	

Graydon Head & Ritchey, L.L.P., Michael A. Roberts, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202-3157, and Nichols, Speidel & Nichols, Donald W. White, attorney for the plaintiffs/counterclaim defendants Freeman Industrial Products, LLC, Dale Freeman and Bonnie Freeman, 237 Main Street, Batavia, Ohio 45103.

Finney, Stagnaro, Saba & Patterson, L.P.A., Peter A. Saba and Jeffrey M. Nye, attorneys for the defendant/counterclaimant Armor Metal Acquisitions, Inc. dba Victory Industrial Products, 2623 Erie Avenue, Cincinnati, Ohio 45208.

This cause is before the court for consideration of the following motions filed by the plaintiff Freeman Enclosure Systems: (1) motion for summary judgment; (2) motion for leave to amend pleadings; (3) motion for fees and costs; (4) motion for recovery of injunction bond; and (5) motion to compel.

The court scheduled and held a hearing on these motions on February 27, 2012. At the conclusion of that hearing, the court took the motions under advisement.

Upon consideration of the motions, the record of the proceeding, 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 AND PROCEDURAL BACKGROUND

The plaintiffs Freeman Industrial Products, LLC, Dale Freeman and Bonnie Freeman filed their complaint in the present case on May 10, 2012, bringing claims for declaratory judgment and tortious interference. The defendant Armor Metal Group Acquisitions filed counterclaims alleging breach of various contracts, misappropriation of trade secrets, breach of common law duty of confidentiality, tortious interference with a business relationship, tortious interference with contract, replevin, unjust enrichment, respondeat superior, and conspiracy.

On September 20, 2010, Judge Victor Haddad, the judge originally assigned to this case, issued a decision granting the defendant's motion for a preliminary injunction against the plaintiffs. The plaintiffs appealed that decision to the Twelfth District Court of Appeals, which reversed and vacated the preliminary injunction in a decision issued on April 25, 2011that will be discussed in greater detail in the sections below.

The plaintiffs now seek summary judgment as to all of the defendant's contract-based counterclaims**,** arguing that the Twelfth District's decision has conclusively and finally ruled upon the merits of those claims.

LEGAL ANALYSIS

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(A) SUMMARY JUDGMENT STANDARD

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[1]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[2] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[3]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

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

[2] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

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

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[4]

Whether a genuine issue exists meanwhile 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[?]"[5] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, 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."[6]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[7] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence

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[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[8] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[9] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[10] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[11]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[14] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[15]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported

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[9] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[15] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.

allegations.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[18]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[19]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed

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[16] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[17] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[18] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[19] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

affidavit.[20] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[24]

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[20] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[21] *Davis v. Loopco Indus., Inc.,* 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[23] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[24] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

(B) ANALYSIS

The plaintiffs now seek summary judgment as to all contract-based claims and counterclaims brought by the defendant/counterclaimant.

As noted above, the plaintiffs in the present case appealed Judge Haddad's granting of the defendant's a preliminary injunction to the Twelfth District Court of Appeals. In a lengthy opinion issued on April 25, 2011, the court of appeals reversed and vacated that decision. After setting forth the facts as presented at the preliminary injunction hearing, the court of appeals found the plaintiff's argument meritorious that "the trial court abused its discretion by finding that Armor Metal was likely to succeed on its claim that the restrictive covenants within the APA (asset purchase agreement) were enforceable even though Victory Delaware defaulted on the Batavia lease."[25] The court first found that "[t]he unambiguous language of the APA establishes that the Batavia lease was integrated into the APA fully and was not meant to be deemed an irrelevant term of the APA once closing occurred[,]" based on the language of Section 7.10 of the APA.[26] The court went on to note that "[e]ven if ambiguity existed regarding the degree to which the Batavia lease is incorporated into the APA or what role it played past closing, the parties' intent clearly establishes that the Freemans and Victory Delaware intended for the lease to be an ongoing part of the APA."[27] The court then went on to

[25] *Freeman Industrial Products, LLC v. Armor Metal Group Acquisitions, Inc.*, 193 Ohio App.3d 438, 952 N.E.2d 543, 2011-Ohio-1995, ¶ 13.
[26] Id. at ¶ 20.
[27] Id. at ¶ 21.

discuss certain evidence presented at the preliminary injunction hearing which would support this conclusion.[28]

In the paragraph prior to these discussions, the court of appeals noted that "* * * neither of the trial court's findings is supported by clear and convincing evidence."[29] Judge Haddad had also found that "even if the Batavia lease had been made an ongoing part of the APA, the terms are divisible so that Victory Delaware's breach did not excuse the Freemans' performance."[30] However, the court of appeals found that "the trial court did not take into consideration the parties' intent regarding the divisibility of the APA and lease."[31] The appellate court noted that "[w]hile the contract's wording is a factor to consider, the primary consideration is the intention of the parties as determined by the wording and the subject matter to which it has reference and by the circumstances of the particular transaction giving rise to the question."[32] The court of appeals then went on to discuss the pertinent evidence regarding the parties' intent on the issue.[33]

The court of appeals next dealt with Judge Haddad's finding that "even if the terms of the Batavia lease were incorporated into the APA and were not divisible, Victory Delaware's breach of the Batavia lease was not material."[34] The court of appeals examined the circumstances of the breach as presented at the preliminary

[28] Id. at ¶¶ 21-22.
[29] Id. at ¶ 19.
[30] Id. at ¶ 23.
[31] Id. at ¶ 24.
[32] Id. at ¶ 24.
[33] Id. at ¶¶ 25-30.
[34] Id. at ¶ 31.

injunction hearing and concluded that "the Batavia lease was an essential term to the purpose of the APA, the breach of which was material."[35]

Finally, the court of appeals held that "[e]ven assuming that the trial court did not abuse its discretion in finding that Armor Metal would succeed on the merits specific to the restrictive covenants, Armor Metal did not present clear and convincing evidence that the covenants were assignable to an entity that did not also take on Victory Delaware's obligations."[36] The court of appeals found that the Freemans' termination agreement could not alter the APA's assignability clause, that the APA was controlling, and that the APA contemplated a sale to a single entity of all or substantially all of its assets for assignment to apply.[37] The court of appeals concluded that "Armor Metal's $30,000 payment for the intellectual property did not satisfy the condition set forth in the termination agreement permitting assignment upon a sale of Victory Delaware[,]" and that the restrictive covenants were invalidated and unassignable once Victory Delaware disbanded and sold its parts at auction.[38]

After finding several remaining assignment of error moot, the appellate court concluded its decision as follows:

> "Normally, a party's inability to show a substantial likelihood that it would prevail on the merits of its claim is not the only factor to be taken into consideration under a preliminary-injunction standard. However, in the current case, the remaining three factors are made inapplicable because the Freemans are not bound by the restrictive covenants. Specifically, without a valid contract, or the right to hold the Freemans to covenants, Armor Metal cannot show that it will suffer irreparable injury if the injunction is not granted.

[35] Id. at ¶¶ 32-34.
[36] Id. at ¶ 35.
[37] Id. at ¶¶ 35-41.
[38] Id. at ¶ 42.

> Further, without a valid contract binding the Freemans to Armor Metal, we need not consider whether third parties will be affected or whether the public interest will be served by an injunction.
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> We also note that our decision affects the counterclaim defendants. The trial court specifically found that the counterclaim defendants were not bound by any employment contracts or restrictive covenants they may have signed with Victory Delaware because those contracts and covenants were not assignable. The court, nonetheless, enjoined the counterclaim defendants from misappropriating trade secrets, tortuously interfering with Armor Metal's relationships, and manufacturing and selling products using Armor Metal's designs, processes, and techniques. Without being bound by restrictive covenants or contractual obligations, the counterclaim defendants should not have been enjoined. Even if the trial court enjoined the counterclaim defendants based on its injunction against the Freemans from hiring the counterclaim defendants, the invalidation of the injunction also terminates any injunction against the counterclaim defendants as well.
>
> Because the Freemans and counterclaim defendants are not bound, the trial court's decision granting Armor Metal's request for a preliminary injunction was an abuse of discretion. Having found the Freemans' and counterclaim defendants' consolidated arguments meritorious, we sustain their third assignment of error. The trial court's decision is therefore reversed, and the judgment granting a preliminary injunction is vacated."[39]

In reading the analysis of the court of appeals, it must not be forgotten that the decision on appeal was one regarding a preliminary injunction. "It is well established in Ohio law that a plaintiff is not required to prove his case on the merits at a preliminary hearing."[40] "The granting or denial of a preliminary injunction does not amount to an

[39] Id. at ¶¶ 56-58.

[40] *Ohio Association of Public Schools Employees v. Mayfield City School District Board* (June 23, 1983), 8th Dist. Nos. 44932 and 45118, 1983 WL 5498, *3.

adjudication of the ultimate rights in controversy, is not conclusive on the court on a subsequent hearing, and concludes no rights of the parties."[41]

The plaintiffs argue that the "law of the case" doctrine renders any subsequent proceedings moot. In this regard, it has been stated:

> "The law of the case is a longstanding doctrine in Ohio jurisprudence. '[T]he doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and the reviewing levels.' * * * The doctrine is 'necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.' * * * Where a court has already addressed and rejected an appellant's claims, the claims lack merit under the law of the case doctrine."[42]

Significantly, "[h]owever, '[w]hen subsequent proceedings involve an expanded record or different legal issues, the doctrine of the law of the case does not apply.' "[43] It is probable, or at least possible, in the present case that the permanent injunction hearing would involve an expanded record on these issues. This is also significant given that much of the appellate court's analysis involves some factual considerations (i.e., intent of the parties) which are always open to revision upon the presentation of further evidence at the permanent injunction hearing. If the court later finds, after the permanent injunction hearing is held, that there is no expanded record or no new

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[41] Id., quoting *Gessler v. Madigan*, 41 Ohio App.2d 76, 79, 322 N.E.2d 127 (Ohio App. 3rd Dist., 1974).
[42] *McGarry & Sons, Inc. v. Marous Bros. Constr. Inc.* (Dec. 30, 2011), 11th Dist. No. 2011-L-001, 2011-Ohio-6859, ¶ 18 (citations omitted).
[43] Id. at ¶ 19, citing *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 880 N.E.2d 132, 2007–Ohio–6189, at ¶ 18, citing *Johnson v. Morris*, 108 Ohio App.3d 343, 349, 670 N.E.2d 1023 (Ohio App. 4th Dist., 1995).

evidence of consequence to these issues, the court will revisit the "law of the case" issue at that time.

The decision as to the preliminary injunction in this case does not have a *res judicata* effect on the parties' ability to see this case through to a permanent injunction hearing. Therefore, the court finds that the appellate decision in the present case does not foreclose the parties' ability to go forward with a permanent injunction hearing on their claims.

Furthermore, for the purposes of clarification, the court also notes that the defendant's motion for temporary restraining order/preliminary injunction based on misappropriation of trade secrets and tortious interference will be allowed to proceed. In addition to presenting evidence, the parties will be free to make any legal arguments at that hearing with respect to the decision of the court of appeals which only briefly mentions misappropriation and interference.

II. MOTION FOR LEAVE TO AMEND PLEADINGS

The plaintiffs and counterclaim defendants filed a joint motion for leave to amend their respective pleadings. Both seek to assert claims against the defendants and David Schmitt for interference, abuse of process, malicious prosecution, and bad faith. The plaintiffs asserted their claims against Schmitt in their original complaint and later dismissed those claims without prejudice, so they now seek to reassert those claims.

The motion indicates that the plaintiffs are moving pursuant to both Civil Rule 15(A) and (E), which state as follows:

> "(A) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.
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> * * *
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> (E) Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

The defendant correctly argues that, pursuant to Civ.R. 15(E), "a supplemental pleading must contain only matters in common with the original complaint and may not raise a new and different cause of action."[44] Therefore, the plaintiffs motion to add new causes of action pursuant to Civ.R. 15(E) is improper.

However, new causes of action may be added pursuant to Civ.R. 15(A). As noted in that rule, leave of court to file an amended pleading shall be freely given when justice so requires. If a plaintiff "fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to

[44] *Gilson v. Windows & Doors Showcase, LLC* (June 9, 2006), 6th Dist. Nos. F-05-017 and F-05-024, 2006-Ohio-2921, ¶ 25.

amend the pleading."[45] The court must consider whether the motion is merely a delaying tactic or one which would cause prejudice to the defendant.[46]

After reviewing the proposed amended pleading attached as Exhibit A to the motion, the court finds at this early stage that the movants have made a *prima facie* showing of being able to marshal support for the new claims sought to be pleaded. The court finds that this motion was not filed as a delaying tactic and, given that this case is not set to be concluded until 2013 based on the schedule agreed upon by the parties, the court finds that there is no prejudice to the defendants in allowing the filing of the amended complaint and allowing the counterclaim defendants to file their claims.

As such, the joint motion to file amended pleadings filed by the plaintiffs and counterclaim defendants is well-taken and shall be granted.

III. FEES AND COSTS AND RECOVERY OF INJUNCTION BOND

The plaintiffs also move this court for fees and costs incurred in obtaining dissolution of the preliminary injunction and for recovery of the injunction bond.

First, the court finds that these motions should not be considered separately because the plaintiff cannot collect fees and costs related to the dissolution of the preliminary injunction above and beyond the amount of the injunction bond. Due to the fact that "* * * a defendant can always ask the court to increase a bond the plaintiff

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[45] *Grenga v. Youngstown State Univ.* (Nov. 1, 2011), 10th Dist. No. 11AP-165, 2011-Ohio-5621, ¶ 14, citing *Wilmington Steel Products, Inc. v .Cleveland Elec. Illuminating Co.* (1991), 60 Ohio St.3d 120, 121-122, 573 N.E.2d 622.

[46] *Edmondson v. Steelman*, 87 Ohio App.3d 455, 458, 622 N.E.2d 661 (Ohio App. 12th Dist., 1992).

posted if the defendant believes the amount posted is insufficient to cover his potential damages, [Civ.R. 65(C)] limits a defendant's recovery of damages and attorney[']s fees to the amount of the bond posted."[47]

Pursuant to Civ.R. 65(C):

> "No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.
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> The party obtaining the order or injunction may deposit, in lieu of such bond, with the clerk of the court granting the order or injunction, currency, cashier's check, certified check or negotiable government bonds in the amount fixed by the court. * * * "

"As a prerequisite to recovery of damages upon an injunction bond, it must be decided that the injunction ought not to have been granted."[48] "A denial of permanent injunctive relief by a trial court * * * does not mean that the issuance of the preliminary injunction was improper."[49] This law suggests that the ultimate resolution of the permanent injunction is not always determinative of whether the preliminary injunction should or should not have been granted.

This case presents one of the rare instances in which a preliminary injunction decision is taken on appeal and a decision is rendered as to whether the preliminary

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[47] *Shuttleworth v. Knapke* (Feb. 28, 2003), 2nd Dist. No. 02CA1582, 2003-Ohio-918, ¶ 19, citing, *Professional Investigations and Consulting Agency, Inc. v. Kingsland* (1990), 69 Ohio App.3d 753, 591 N.E.2d 1265 (Ohio App. 10th Dist., 1990).
[48] *Consun Food Industries, Inc. v. Fowkes*, 81 Ohio App.3d 63, 69, 610 N.E.2d 463 (Ohio App. 9th Dist., 1991), citing *Benrus Watch Co. v. Weinstein Wholesale Jewelers, Inc.*, 108 Ohio App. 525, 529, 163 N.E.2d 406, 409 (Ohio App. 6th Dist, 1959).
[49] Id., citing *Daniel Constr. Co. v. Internatl. Bhd. of Elec. Workers, Local 88,* (Dec. 10, 1986), 4th Dist. Nos. 1237 and 1243, 1986 WL 14075.

injunction was properly granted. In this case, the court of appeals concluded that the preliminary injunction as entered by the prior trial court should not have been granted and, consequently, reversed and vacated the decision granting that injunctive relief. While this court has found that the appellate decision does not preclude the parties' right to proceed to the next stage of these proceedings, namely a permanent injunction hearing, this finding does not vitiate the appellate court's final decision that the *preliminary* injunction should not have been granted based on the facts and evidence before the court at that hearing.

The court finds that an evidentiary hearing will be scheduled and that the plaintiff will be required to present evidence at said hearing as to the amount of damages incurred as a result of the issuance of the preliminary injunction in the present case, including attorney's fees.

IV. MOTION TO COMPEL

At the hearing on this matter, the parties submitted the plaintiffs' motion to compel filed on June 10, 2011 to the court without argument. The memoranda in opposition to the motion to compel, including the supplemental memorandum filed on February 13, 2012, indicates that the requested discovery has been served. The court will deny the motion to compel based on this representation. If the plaintiff still has discovery which remains outstanding, it may file an additional motion to compel setting forth the specific discovery that remains to be received.

CONCLUSION

The plaintiffs' motion for summary judgment is not well-taken and is hereby denied.

The plaintiffs' and counterclaim defendants' joint motion for leave to file amended pleadings is well-taken and is hereby granted.

The plaintiffs' motion for recovery of damages under the injunction bond (which this court has consolidated with the motion for fees and costs) shall be set for an evidentiary hearing by the court and the parties when they are present at the court on April 23, 2012.

The plaintiffs' motion to compel is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 16th day of April 2012 to all counsel of record and unrepresented parties.

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