COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

J.B. POINDEXTER & CO., INC., et al.	:	
Plaintiffs	:	**CASE NO. 2013 CVH 01867**
vs.	:	**Judge McBride**
KELLERMAN COACHWORKS, INC, et al.	:	
Defendants	:	**DECISION/ENTRY**
	:	

Janszen Law Firm Co., L.P.A., August T. Janzen, 4750 Ashwood Drive, Suite 201, Cincinnati, Ohio 45241-2446, and Keating, Muething & Klekamp, PLL, Paul D. Songer, One East Fourth Street, Suite 1400, Cincinnati, Ohio 45202, counsel for the plaintiffs J.B. Poindexter & Co., Inc. and Eagle Specialty Vehicles, LLC.

Graydon Head & Ritchey LLP, Michael A. Roberts, counsel for the defendants Kellerman Coachworks, Inc., Joseph Kellerman, Robert Toney, Brian McCarthy and Kurt Franckhauser, 511 Walnut Street, Suite 1900, Cincinnati, Ohio 45202.

Nichols, Speidel & Nichols, Donald White, counsel for defendants Mike Kellerman, Stephen Kellerman and K2 Products LLC, 237 East Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion to dismiss filed by the plaintiffs J.B. Poindexter & Co., Inc. and Eagle Specialty Vehicles, LLC.

The court scheduled and held a hearing on the motion to dismiss on February 28, 2014. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The defendants Kellerman Coachworks, Inc., Joseph Kellerman, Robert Toney, Brian McCarthy and Kurt Franckhauser set forth the following counterclaims against the plaintiffs: (1) Request for fees for being the prevailing party on the bad faith assertion of trade secret misappropriation claim pursuant to R.C. 1333.64(A); (2) Request for fees for knowingly groundless pursuit of claim under R.C. 4165.03; (3) malicious litigation – tort of unfair competition; and (4) interference with relations.

The plaintiffs now seek to dismiss each of those counterclaims pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted.

The plaintiffs also seek to dismiss the following counterclaims set forth by defendants Mike Kellerman, Steve Kellerman, and K2 Products, LLC: (1) Request for attorney fees and costs to prevailing party; (2) Request for fees for being the prevailing party on the bad faith assertion of trade secret misappropriation pursuant to R.C. 1333.64(A); (3) Request for fees for knowingly groundless pursuit of claim under R.C. 4165.03; (4) Malicious litigation – tort of unfair competition; and (5) Interference with relations.

STANDARD OF REVIEW

"A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."[1] "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * * ."[2] " 'The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.' "[3] "It must appear beyond doubt that [the counterclaimant] can prove no set of facts entitling [it] to relief."[4]

LEGAL ANALYSIS

(A) FEES PURSUANT TO R.C. 1333.64

R.C. 1333.64(A) states as follows: "The court may award reasonable attorney's fees to the prevailing party, if any of the following applies * * * [a] claim of misappropriation is made in bad faith." There are counterclaims for fees pursuant to R.C. 1333.64(A) set forth by both groups of defendants.

As the language of the statute states, fees may only be awarded under this statute to a "prevailing party," meaning this provision does not begin to operate unless a

[1] *Volbers-Klarich v. Middletown Mgt., Inc.* (2010), 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 11, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292.
[2] Id., citing Civ.R. 12(B).
[3] Id. at ¶ 12, quoting *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756.
[4] Id., citing *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280, 649 N.E.2d 182.

party loses on its misappropriation of trade secrets claim. If such a claim is unsuccessful, the court must then determine if such a claim was made in bad faith.

The defendants noted in their memorandum on this matter that they asserted this claim as a counterclaim in this matter to preserve the claim if it was deemed to be a compulsory counterclaim. All of the parties appear to be in agreement that this counterclaim is not actionable unless the plaintiffs' claim for misappropriation of trade secrets fails, at which time the court would then engage in an analysis to determine if all the requirements of the statute were met in order to award fees pursuant thereto.

The court does not find that it is appropriate to dismiss these counterclaims; however, the parties may operate under the understanding that these counterclaims are not ripe unless the plaintiffs' claim for misappropriation of trade secrets is unsuccessful. If that claim is ultimately unsuccessful, the counterclaims for fees pursuant to R.C. 1333.64(A) will then be considered in due course. If the misappropriation claim is successful, these counterclaims will be dismissed.

(B) FEES PURSUANT TO R.C. 4165.03

R.C. 4165.03 provides as follows:

> "(A)(1) A person who is likely to be damaged by a person who commits a deceptive trade practice that is listed in division (A) of section 4165.02 of the Revised Code may commence a civil action for injunctive relief against the other person, and the court of common pleas involved in that action may grant injunctive relief based on the principles of equity and on the terms that the court considers reasonable. Proof of monetary damage or loss of profits is not required in a civil action commenced under division (A)(1) of this section.

> (2) A person who is injured by a person who commits a deceptive trade practice that is listed in division (A) of section 4165.02 of the Revised Code may commence a civil action to recover actual damages from the person who commits the deceptive trade practice.
>
> (B) The court may award in accordance with this division reasonable attorney's fees to the prevailing party in either type of civil action authorized by division (A) of this section. An award of attorney's fees may be assessed against a plaintiff if the court finds that the plaintiff knew the action to be groundless. An award of attorney's fees may be assessed against a defendant if the court finds that the defendant has willfully engaged in a trade practice listed in division (A) of section 4165.02 of the Revised Code knowing it to be deceptive."

There are counterclaims for fees pursuant to R.C. 4165.03 set forth by both groups of defendants.

As with the counterclaims discussed above, fees may only be awarded to a "prevailing party" pursuant to R.C. 4156.03(B). Like the previous counterclaims, the court will not dismiss these counterclaims; however, the parties may operate under the understanding that these counterclaims are not ripe unless the plaintiffs' claim for unfair and deceptive trade practices is unsuccessful. Only if that claim is unsuccessful will these counterclaims be considered by the court. If the plaintiffs' claim for deceptive trade practices is successful, these counterclaims will be dismissed.

(C) MIKE KELLERMAN'S CLAIM FOR ATTORNEY FEES AND COSTS

Mike Kellerman has asserted a counterclaim for fees and costs to be awarded to a prevailing party pursuant to the consulting agreement he entered into with Eagle Coach.

As noted in this court's prior decision regarding the defendants' motion for judgment on the pleadings, the court granted Mike Kellerman judgment on the pleadings as to the claim against him that he violated the consulting agreement after the term of the agreement ended. The court noted that Section VIII(D) of the consulting agreement provides for fees for the prevailing party and, as Mike Kellerman prevailed on that portion of the claim, fees would be awarded after a hearing to be held at a later time.

Judgment on the pleadings was denied as to the claim against Mike Kellerman that he breached the consulting agreement during the term of the agreement. As with the fee requests discussed above, this claim is not ripe unless Mike Kellerman is the prevailing party as to this claim. If judgment is granted to Mike Kellerman on this claim, then the court will consider this fee request. If judgment is granted to the plaintiffs on this claim, counterclaim two requesting fees and costs pursuant to the consulting agreement will be dismissed.

(D) MALICIOUS LITIGATION – TORT OF UNFAIR COMPETITION

In these counterclaims, the following factual allegations are set forth:

> "The suit Eagle has filed * * * to initiate this proceeding is objectively baseless in the sense that no reasonably litigant could realistically expect success on the merits. * * *

> No objective litigant could conclude that Eagle's suit is reasonably calculated to elicit a favorable outcome * * *.
>
> Eagle's baseless lawsuit is designed to conceal Eagle's attempt to interfere directly with [Defendants'] business and business relationships as an anticompetitive weapon. Prior to filing its suit against KCI, Eagle threatened individuals who had interest in joining KCI, industry suppliers, funeral coach dealers, GM, and customers all for the anti-competitive purpose of having those employees, dealers, customers, and suppliers refrain from doing business with KCI. * * *
>
> Eagle's anticompetitive conduct was persistent and continuous in nature and has resulted in damage to the Defendants. * * *
>
> Eagle has pursued this litigation for the purpose of injuring Defendants in their business. The action by Eagle is not founded upon good faith. It was instituted with the intent and purpose of harassing and injuring a rival producing and selling the same commodity."[5]

The defendants state in their memorandum that these counterclaims are not claims for malicious prosecution but are instead *Leadscope* claims. An action for malicious prosecution cannot be asserted as a counterclaim because, before an action for malicious prosecution will lie, there must first be a termination of the initial case in favor of the party bringing the malicious prosecution claim.[6] As such, these counterclaims could not survive if they were claims for malicious prosecution. However, given the defendants' representation that these claims are only claims for unfair competition, the court will examine them as such.

In *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, several former employees of Chemical Abstracts Service, a division of the

[5] Answer and Counterclaim of Kellerman Coachworks, Inc., Joseph Kellerman, Robert D. Toney, Brian McCarthy, and Kurt Franckhauser, ¶¶ 10-14. See also, Answer and Counterclaims of Mike Kellerman, Steve Kellerman, and K2 Products, LLC, ¶¶ 26-30.

[6] See, e.g., *Fogle v. Riber*, 12th Dist. Fayette No. CA85-08-011, 1986 WL 7388, *2 (June 30, 1986).

plaintiff in that case, American Chemical Society, left their employment with Chemical Abstracts Service and started their own business, Leadscope, Inc., to develop a software product.[7] Those employees had worked on a comparable project at Chemical Abstracts Service.[8] Chemical Abstracts Service filed an action against the former employees and Leadscope for claims such as breach of employment agreements, misappropriation of trade secrets, unfair competition, breach of fiduciary duty and the duty of loyalty, and conversion.[9] Leadscope brought several counterclaims, including a counterclaim for unfair competition.[10] The case ultimately went to a jury trial and the jury returned verdicts in favor of Leadscope on several of its counterclaims, including its claim for unfair competition.[11]

The Ohio Supreme Court noted that "[a]lthough the courthouse doors are open to all litigants, both the United States Supreme Court and this court have set limitations on the right to redress claims that are brought as a sham, to vex and annoy, or in an attempt to interfere directly with a competitor's business relationships."[12] It cited the following discussion of the United States Supreme Court regarding "sham litigation":

> "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under [*E. RR. Presidents Conference v.*] *Noerr* [*Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (" *Noerr–Pennington* Doctrine")] and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this

[7] *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 4.
[8] Id.
[9] Id. at ¶ 10.
[10] Id.
[11] Id. at ¶ 15.
[12] Id. at ¶ 23.

> second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," * * * (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon[.]"[13]

The Ohio Supreme Court later adopted this definition of "sham litigation" in its discussion of an employer retaliation case.[14] The court noted in *Leadscope* that "the analysis in *Professional Real Estate Investors* is not limited to the confines of federal antitrust law, but is applicable to cases involving unfair competition claims based upon malicious litigation."[15]

In *Leadscope*, the Ohio Supreme Court held that "[t]o successfully establish an unfair competition claim based upon legal action, a party must show that the legal action is objectively baseless and that the opposing party had the subjective intent to injure the party's ability to be competitive."[16] The burden of proving a claim of unfair competition by way of malicious litigation is on the party bringing such a claim, regardless of whether the opposing party sets forth the affirmative defense of immunity in its answer.[17]

The plaintiffs argue that this counterclaim fails because the "Defendants allege no facts or conduct, other than the filing of this civil action, as the basis for their *Leadscope* claim." However, the *Leadscope* court upheld the jury's verdict on the unfair competition claim on the basis that there was overwhelming evidence that Chemical Abstracts had an intent to harm Leadscope's business as its motivation in filing the

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[13] Id. at ¶ 25, quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993).
[14] *Greer–Burger v. Temesi,* 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 11.
[15] Id. at ¶ 31, fn. 2.
[16] Id. at paragraph one of the syllabus.
[17] Id. at ¶ 40.

lawsuit; specifically that Chemical Abstracts was attempting to use the lawsuit as a way to impede Leadscope's success and to bankrupt the company.[18] The lower appellate court noted in its ruling that much of the evidence supported the claim that Chemical Abstract's "unfair competition was rooted in its alleged desire to suppress, by any means necessary, Leadscope as a new software competitor."[19] The Ohio Supreme Court, in turn, was unable to find the evidence in the record upon which Chemical Abstract relied upon in bringing its lawsuit.[20] It was after this analysis that the jury's verdict was upheld.

While the plaintiffs suggest that more is required than the filing of a lawsuit in order to assert a successful claim for unfair competition based upon legal action, this does not appear to be correct based on the Ohio Supreme Court's analysis of the facts in *Leadscope*. The plaintiffs are correct, however, that more than a mere allegation that the legal action was filed for the purpose of unfair competition is required in order for the defendants to prevail on this claim. The defendants will be required to present evidence sufficient for a reasonable conclusion to be drawn that the plaintiffs had the subjective intent to injure the defendants' ability to be competitive when filing the lawsuit and the defendants will also need to establish that that the legal action is objectively baseless. However, this being a motion to dismiss and not a motion for summary judgment, the court finds that that allegations set forth in the counterclaims, while not very specific, are sufficient to withstand a Civ.R. 12(B)(6) motion and that the court cannot say that the defendants can prove no set of facts entitling them to relief.

[18] Id. at ¶¶ 58 and 71.
[19] Id. at ¶ 72, quoting *Am. Chem. Soc. v. Leadscope*, 10th Dist. Franklin No. 08AP-1023, 2010-Ohio-2725, ¶ 32.
[20] Id. at ¶ 73.

(E) TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

"The elements of tortious interference with a business relationship are (1) a business relationship, (2) the tortfeasor's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom."[21] "In turn, the elements of the tort only 'require that one intentionally and improperly interfere with the plaintiff's prospective contractual or business relations by (1) inducing or otherwise causing a third person not to enter into or continue the prospective relation, or (2) preventing the plaintiff from acquiring or continuing the prospective relation.' "[22]

In the case at bar, Mike Kellerman, Steve Kellerman, and K2 Products state with respect to this counterclaim that they "have a protected interest in retaining their relationships with their debtors and their vendors, suppliers, dealers, customers, and prospective customers[,]" and that "[w]ith malice and/or reckless disregard for the rights of Mike, Steve, and K2, Eagle has, for anticompetitive purposes, intentionally interfered without justification in those relationships * * *" and that they have been, and continue to be, damaged."[23] The defendants Kellerman Coachworks, Inc., Joseph Kellerman, Robert Toney, Brian McCarthy and Kurt Franckhauser allege that "KCI has a protected interest in retaining its employees, hiring employees, and doing business with vendors, suppliers, and dealers in the hearse industry[,]" and that "Eagle has, for anticompetitive purposes, intentionally interfered without justification in those relationships * * *" and

[21] *DK Prods., Inc. v. Miller*, 12th Dist. Warren No. CA2008-05-060, 2009-Ohio-436, ¶ 10, citing *Knox Mach. v. Doosan Mach., USA, Inc.*, 12th Dist. Warren No. CA2002–03–033, 2002–Ohio–5147, ¶ 23.
[22] Id., quoting, *Dryden v. Cincinnati Bell Tel. Co.*, 135 Ohio App.3d 394, 400, 734 N.E.2d 409 (1st Dist.1999).
[23] Answer and Counterclaims of Mike Kellerman, Steve Kellerman, and K2 Products, LLC, ¶¶ 33-34.

that KCI has been, and continues to be, damaged.[24] Additionally, all of the prior allegations were incorporated into this count, including the following allegation: "Prior to filing its suit against KCI, Eagle threatened individuals who had interest in joining KCI, industry suppliers, funeral coach dealers, GM, and customers all for the anti-competitive purpose of having those employees, dealers, customers, and suppliers refrain from doing business with KCI."[25]

The plaintiffs argue that the vendors, suppliers, dealers, customers, etc. at issue in this counterclaim are also the plaintiffs' vendors, suppliers, dealers and customers. As such, the plaintiffs argue that they had every legal right to communicate with their own vendors, suppliers, dealers and customers about their position regarding any of those entities doing business with their competitor Kellerman Coachworks.

However, the court unfortunately cannot reach the merits of this legal argument at this juncture because the fact that the vendors, suppliers, dealers, customers, etc. at issue are shared between the parties is not a factual allegation set forth in the defendants' answers or counterclaims. Instead, in order to analyze this legal argument, the court would have to assume a fact that is in evidence outside the four corners of the counterclaims, which is not permitted when ruling on a motion to dismiss made pursuant to Civ.R. 12(B)(6). In their answers, the defendants admitted to the allegation in the plaintiffs' complaint that KCI and/or its employees have contacted industry customers, dealers and vendors but denied the remainder of the allegations set forth in that particular paragraph, which includes allegations that the defendants have formed relationships with *the plaintiffs'* customers, dealers, and suppliers.

[24] Answer and Counterclaim of Kellerman Coachworks, Inc., Joseph Kellerman, Robert D. Toney, Brian McCarthy, and Kurt Franckhauser, ¶¶ 16-17.
[25] Id. at ¶ 12.

The plaintiffs further argue that the defendants have failed to allege the breach or termination of any business relationship and, as such, have failed to set forth a prima facie claim for tortious interference. As set forth above, the counterclaim alleges that the plaintiffs intentionally interfered with the subject relationships and that, as a result, the defendants have been, and continue to be, damaged.

The plaintiffs are correct that these allegations do not clearly set forth an allegation that there was a breach or termination of a business relationship. In their memorandum, the defendants argue that, on the same day the answers and counterclaims were served, the plaintiffs were also served with the affidavit of Joe Kellerman, which sets forth several specific allegations regarding the termination of at least one business relationship. The defendants set forth this information in their memorandum for the purpose of requesting leave to amend their counterclaim in the event that the court finds their allegations to be insufficient.

Leave is hereby granted to file an amended counterclaim and the defendants shall provide a more definite statement with regard to the tortious interference claim. The defendants shall file their amended counterclaim within seven (7) days of the date of this decision and shall serve it upon the plaintiffs. The plaintiffs shall file a responsive pleading to the amended counterclaim within fourteen (14) days of the date the amended counterclaim is served upon them.

CONCLUSION

The motion to dismiss filed by the plaintiffs is not well-taken and is hereby denied. However, as noted above, the parties are to move forward with this case with the understanding that the counterclaims setting forth requests for attorney fees are not to be considered claims in the case in chief and those claims will only become ripe if the defendants are the prevailing parties on the claims at issue.

The defendants' motion for leave to amend their tortious interference counterclaim is hereby granted. The defendants shall file their amended counterclaim within seven (7) days of the date of this decision and shall serve it upon the plaintiffs. The plaintiffs shall file a responsive pleading to the amended counterclaim within fourteen (14) days of the date the amended counterclaim is served upon them.

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 3rd day of April 2014 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride