COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS, LLC	**:**	
Plaintiff	**:**	**CASE NO. 2012 CVH 00248**
vs.	**:**	**Judge McBride**
POWERS & STINSON, INC., et al.	**:**	**DECISION/ENTRY**
Defendants	**:**	

Lindhorst & Dreidame Co., LPA, Barry F. Fagel, attorney for the plaintiff Total Quality Logistics, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202.

Nichols, Speidel & Nichols, Donald W. White, attorney for the defendants Powers & Stinson, Inc., Blake Chambers, National Bankers Trust Company, and Sam Sehnert, 237 Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of motions for partial summary judgment filed by plaintiff Total Quality Logistics, LLC (hereinafter "TQL") and defendant National Bankers Trust Corporation (hereinafter "National Bankers Trust"), as well as a motion to strike filed by National Bankers Trust.

The court scheduled and held a hearing on the motions on November 25, 2013. At the conclusion of the hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence submitted for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The plaintiff TQL is a third-party logistics broker, which involves TQL obtaining freight orders from its customers and arranging transportation for this freight via independent trucking companies.[1] TQL requires all of the trucking companies with which it does business to sign a Broker/Carrier Agreement.[2] TQL entered into a Broker/Carrier Agreement with ERT Logistics and that agreement states in pertinent part the following:

> "4. COMPENSATION. CARRIER agrees to transport freight for BROKER, under the terms of its carrier authority, at a rate mutually agreed upon in writing * * * contained in BROKER's Load Confirmation Sheet(s). Additionally:
>
> (a) Any rates, which may be verbally agreed upon, shall be deemed confirmed in writing where CARRIER has billed the agreed rate and BROKER has paid it. Rates or charges * * * shall only be valid when specifically agreed to in a signed writing by the Parties.
>
> (b) CARRIER shall submit invoices, bills of lading and signed loading or delivery receipts for all transportation services furnished under this agreement to BROKER. CARRIER agrees that BROKER is the sole party responsible for payment of CARRIER invoices and that, under no circumstances, will CARRIER seek payment from the shipper, consignee, or other parties responsible for payment.
>
> * * *

[1] Affidavit of Christopher Brown at ¶¶ 2-3.
[2] Id. at ¶ 4.

> 8. CARGO LIABILITY AND CLAIMS. CARRIER shall issue a bill of lading in compliance with 49 U.S.C. § 80101 et seq., 49 C.F.R. § 379.101 * * * for the property it receives for transportation under this Agreement. * * * Additionally:
>
> (a) Any terms of the bill of lading (including but not limited to payment terms) inconsistent with the terms of this Agreement shall be controlled by the terms of this Agreement.
>
> * * *
>
> 19. FACTORING. Carrier shall provide BROKER written notice of any assignment, factoring, or other transfer of its right to receive payments arising under this contract at least thirty (30) days prior to each assignment, factoring or other transfer taking legal effect as to BROKER's payment obligation hereunder * * * ."[3]

The defendant National Bankers Trust is a factoring company that entered into an A/R Max Equity Line of Credit Agreement with ERT Logistics.[4] That agreement provides that all account receivables owned by ERT Logistics would serve as security for any and all advances made by National Bankers Trust to ERT Logistics.[5] The agreement further provides that ERT Logistics shall submit invoices to National Bankers Trust on a weekly basis when the "goods have been completely delivered or services rendered and [ERT Logistics] has performed all of its obligations to its customer in connection with the transaction."[6]

The defendant Powers & Stinson, Inc. (hereinafter "Powers & Stinson") is also a corporation which acts as a collection agency for, or purchases accounts receivables

[3] Id. at Exhibit A.
[4] Bankers National Trust Corporation Motion for Summary Judgment, Exhibit A, authenticated via Affidavit of Meredith Lucas at ¶ 3, filed November 25, 2013.
[5] Id.
[6] Id.

from, motor carriers.[7] National Bankers Trust and Powers & Stinson admitted in their answer that Powers & Stinson, as National Bankers Trust's agent, sent correspondence to Lund Fisheries, a TQL customer, demanding that Lund Fisheries pay the outstanding debt owed on its shipment.[8]

National Bankers Trust has moved for summary judgment as to Count I of TQL's complaint, which sets forth an action for breach of contract, with the contract being the Broker/Carrier Agreement. TQL has also moved for partial summary judgment and, although it is not expressly stated in the motion, it appears it seeks partial summary judgment on Count I of its Complaint, for breach of contract and on its request for a permanent injunction.

LEGAL ANALYSIS

I. MOTION TO STRIKE

TQL submitted with its motion for summary judgment the affidavit of Christopher Brown, the in-house corporate counsel for TQL.[9] The defendants have moved to strike portions of that affidavit.

In Paragraphs 5 and 6 of the affidavit, Brown states that Powers & Stinson and National Bankers Trust are bound by the Broker/Carrier Agreement. This is a legal

[7] Brown Aff. at ¶ 5.
[8] Answer, filed July 6, 2012, ¶ 2, admitting the allegations set forth in Paragraph 14 of the Complaint, filed February 9, 2012, which states that "* * * [O]n or about October 3, 2011, National's agent – defendant Powers, who is a collection agency – sent correspondence to Lund's (TQL's customer) demanding that Lund pay National $1,025.00."
[9] Brown Aff. at ¶ 1.

conclusion regarding a question of law which is before the court for consideration and is not proper testimony. As such, those portions of Paragraphs 5 and 6 shall be stricken and shall not be considered by the court.

In Paragraphs 7, 9, and 10, Brown makes several statements about Powers & Stinson's actions of contacting multiple TQL customers demanding payments for carrier services and stating that, as a result, several customers threatened to stop doing business with TQL.

As set forth in the statement of facts, National Bankers Trust and Powers & Stinson admitted in their answer that Powers & Stinson, as National Bankers Trust's agent, sent correspondence to Lund Fisheries, a TQL customer, demanding that Lund pay the outstanding debt owed on its shipment. Therefore, to the extent that these portions of Brown's affidavit include the Lund Fisheries contact, they would be permissible as that fact is already in evidence.

However, National Bankers Trust specifically denied the remaining allegations of contacting other TQL customers. Therefore, TQL seeks to prove via Brown's affidavit that the defendants contacted several of its customers and that some of those customers have threatened to stop doing business with TQL as a result. Attached to the affidavit are two letters and several emails sent to and from Powers & Stinson regarding payment of outstanding accounts. One of these letters is to Lund Fisheries and it has already been established that they were contacted by Powers & Stinson. However, the other letter was not addressed to Christopher Brown and therefore he cannot authenticate this letter nor attest that it was actually sent to/received by a TQL client. Furthermore, the emails attached to the affidavit, some of which are addressed

to Christopher Brown, are set forth in an attempt to present the court with hearsay evidence of statements made by TQL customers to Brown and consequently cannot be considered by the court.

Absent these letters and emails, Christopher Brown's affidavit is based on hearsay evidence of which he does not have first-hand knowledge. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[10] None of the alleged communications between Powers & Stinson and TQL customers involved Christopher Brown and as a result his affidavit testimony on that subject is based on impermissible hearsay and is not admissible pursuant to Evid.R. 802.[11] Additionally, any communications by TQL customers to Brown or other TQL employees are being asserted for the truth of the matter therein, namely that they would cease doing business with TQL, and, as such, also constitute inadmissible hearsay.

Therefore, the portions of Christopher Brown's affidavit which sets forth facts relating to TQL customers, other than Lund Fisheries, being contacted by Powers & Stinson, as well as any communications made to TQL by those customers, shall be stricken from the affidavit and shall not be considered by the court.

II. SUMMARY JUDGMENT STANDARD OF REVIEW

[10] Evid.R. 801(C).
[11] Evid.R. 802 states that "[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio."

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."[12]

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.[13] 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.[14]

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:

> "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."[15]

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[?]"[16] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–

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[12] 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.

[13] *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.

[14] *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.

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

[16] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

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."[17]

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.[18] 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."[19]

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 of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[20] 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.[21] 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.[22]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[23] However, if the moving party satisfies this burden, then the

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[17] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[18] *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.
[19] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[20] *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.
[21] Id.
[22] Id.
[23] Id.

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.[24] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[25] 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."[26]

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 allegations.[27] 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.[28]

"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."[29]

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),

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[24] Id.
[25] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[26] *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.
[27] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[28] 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.
[29] *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.

which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[30]

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 affidavit.[31] 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.[32] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[33]

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

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[30] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[31] *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.
[32] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[33] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

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.[34]

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.[35]

III. BREACH OF CONTRACT

The central issue in both motions for summary judgment is whether National Bankers Trust is bound by the terms of the Broker/Carrier Agreement executed between TQL and ERT Logistics.

It should first be noted that the conduct at issue with regard to the claim of contacting Lund Fisheries involved Powers & Stinson, a collection agent which was National Bankers Trust's agent. It is well-settled in the law that " 'the act of an agent is the act of the principal within the employment when the act can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, and logical result of it.' "[36] Powers & Stinson contacted Lund Fisheries as part of performing its services as a collection agent for National Bankers

[34] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[35] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[36] *Boatwright v. Penn-Ohio Logistics* (Dec. 24, 2012), 7th Dist. No. 12-MA-39, 2012-Ohio-6238, ¶ 57, quoting *Tarlecka v. Morgan* (1932), 125 Ohio St.3d 319, 324, 181 N.E. 450.

Trust. Therefore, the act of Powers & Stinson of contacting Lund Fisheries is the act of National Bankers Trust in this case.

"To set forth a claim for breach of contract, a plaintiff must prove the following elements: (1) the existence of a contract, (2) the plaintiff fulfilled its contractual obligations, (3) the defendant failed to fulfill its contractual obligations, and (4) the plaintiff incurred damages as a result."[37]

National Bankers Trust argues that it is entitled to summary judgment on TQL's claim for breach of contract because it was not a party to the Broker/Carrier Agreement and, instead, that the bill of lading is the transportation contract which gives rise to the account receivable assigned to National Bankers Trust pursuant to its credit agreement with ERT Logistics.

R.C. 1309.404, which is Ohio's codification of U.C.C. § 9-404, states in relevant part as follows:

> "(A) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to divisions (B) to (E) of this section, the rights of an assignee are subject to:
>
> (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
>
> (2) Any other defense or claim of the account debtor against the assignor that accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.
>
> (B) Subject to division (C) of this section and except as provided in division (D) of this section, the claim of an account debtor against an assignor may be asserted against

[37] *Deerfield Twp. v. Mason* (March 4, 2013), 12th Dist. No. CA2011-12-138, 2013-Ohio-779, ¶ 15.

> an assignee under division (A) of this section only to reduce the amount the account debtor owes.* * *"

Chapter 1309 of the Ohio Revised Code applies to the sale of accounts.[38] A factoring agreement such as the one between National Bankers Trust and ERT Logistics is a sale of accounts governed by Chapter 1309.[39]

In the case at bar, the contract between TQL and ERT Logistics sets forth the fact that TQL is the sole party responsible for payment for the carrier services provided by ERT Logistics. The contract between the parties states that any terms of the bills of lading, including payment terms, which are inconsistent with the terms of the Broker/Carrier Agreement are controlled by the terms of the Broker/Carrier Agreement. Therefore, any right to payment set forth in the bills of lading is trumped by the Broker/Carrier Agreement between the parties which dictates that the monies owed to ERT Logistics for its carrier services are owed solely by TQL. Therefore, the right to payment held by ERT does not arise from the bills of lading; instead, it arises from the Broker/Carrier Agreement.

National Bankers Trust argues that R.C. 1309.404(B) prohibits TQL from bringing any action against it other than to assert a claim to reduce the amount owed. The case law discussing this provision tends to broadly state that subsection (B) does not afford the account debtor the right to affirmative recovery from an assignee and limits any affirmative claim by the account debtor to those claims that would reduce the amount owed by the debtor.[40] However, the plain language of subsection (B) applies to the

[38] R.C. 1309.109(A)(3).
[39] See, *Systran Financial Services Corp. v. Giant Cement Holding, Inc.*, 252 F.Supp.2d 500, 503-505 (N.D.Ohio,2003).
[40] See, e.g., *Bank of America, N.A. v. Trinity Lighting, Inc.* (N.D. Ill., Aug. 9, 2011), No. 10-C-2250, 2011 WL 3489693, *2-4; and, *Riviera Finance of Texas, Inc. v. Capgemini US, LLC*, 511 Fed.Appx. 92, 94 (2nd Cir.,2013).

claim of an account debtor against an *assignor* that may be asserted against an assignee. The breach of contract claim raised in this case by TQL, the account debtor, is not against the assignor, ERT Logistics, but is instead directly against the assignee National Bankers Trust and Powers & Stinson as its agent for their actions of contacting TQL's customers in an attempt to collect an amount owed in violation of the provision of the Broker/Carrier agreement which explicitly prohibits such conduct.

R.C. 1309.404(A)(1) states that the rights of an assignee are subject to all terms of the agreement between the account debtor and assignor. Whether this would subject the assignee to all terms of the Broker/Carrier Agreement, many of which would not be relevant to the assignee, is not a question which needs to be reached in the case at bar. The assignee in the case at bar was assigned ERT Logistics' account receivables which, as to the parties involved in this claim, arose from the Broker/Carrier Agreement between TQL and ERT Logistics. Therefore, at a minimum, this subjected National Bankers Trust and its agents, as assignees, to the terms of the Broker/Carrier Agreement dealing with payment and any other provisions pertinent thereto. One such provision would be the section dealing with bills of lading which specifically states that any terms of the bill of lading, including payment terms, inconsistent with the terms of the Broker/Carrier Agreement are to be controlled by the terms of the Broker/Carrier Agreement, as this provision directly deals with and affects payment issues.

The accounts receivable assigned to National Bankers Trust and its agent are accounts between TQL and ERT Logistics. Regardless of the language set forth in the bills of lading, the agreement contracted for and entered into between those two parties dictates that the amounts owed for the carrier services performed by ERT Logistics

would be owed solely by TQL, not its customers. So there is not now, nor has there ever been, an amount owed to ERT Logistics by Lund Fisheries or any other customer or consignee; the amount owed to ERT Logistics is owed by TQL. ERT Logistics cannot be permitted to freely contract with TQL and then circumvent its agreement with TQL and the obligations and protections agreed to therein by assigning the contract, or any portion of the contract, to a third party. An assignment of a contract is not permitted to materially change the duty of the obligor, materially increase the other party's burden or risk under the contract, materially impair the chance of the other party securing performance, or materially reduce the contract's value.[41] As such, ERT Logistics cannot render meaningless the provisions of its contract stating that payment is owed solely by TQL and prohibiting the carrier from seeking payment from the shipper, consignee, or other parties under any circumstances by simply assigning its right to payment under the contract to a factoring company which may then ignore the mandates of the contract under which the right to payment arises. The factoring company receiving the right to the account receivable, which is the right to the payment under the contract, receives that right subject to the terms of the agreement between the parties. Therefore, under R.C. 1309.404(A)(1), the factoring company is subject to the terms of the Broker/Carrier Agreement affecting payment and issues related thereto, including collection efforts.

As a result, National Bankers Trust's action via its agent Powers & Stinson of contacting Lund Fisheries to collect payment for a carrier service performed by ERT Logistics which arose under the Broker/Carrier Agreement violated that agreement and constituted a breach of contract.

[41] See, e.g., *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* (2006), 112 Ohio St.3d 482, 488-489, 861 N.E.2d 121.

Based on this finding, it is not necessary for the court to reach the issue of *res judicata*/collateral estoppel raised by the plaintiff with respect to the decision issued in the case of *National Bankers Trust Corporation v. Total Quality Logistics, LLC* (W.D. Tenn.), Case No. 12-CV-02206. However, the court notes for the record that collateral estoppel "precludes the relitigation in a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action."[42] " * * * '[A]n absolute due process requisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action."[43] The Tennessee case dealt with whether TQL was permitted to set off claims for pending invoices, which falls squarely within the language of R.C. 1309.404(B). The case did not address the question of whether TQL could bring a claim for breach of contract as discussed above and, as such, the issues in this case and the Tennessee case are not identical and collateral estoppel would not apply.

TQL is seeking both monetary damages and injunctive relief as a result of the breach and the conduct resulting in the breach. Monetary damages have not been proven at this juncture and remain an issue for trial.

With regard to TQL's request for a permanent injunction, "[i]n order to obtain a permanent injunction, a party must show by clear and convincing evidence that immediate and irreparable injury, loss, or damage will result to the applicant and that

[42] *DLK Co. of Ohio v. Meece* (March 11, 2013), 12th Dist. No. CA2012-07-060, 2013-Ohio-860, ¶ 40, citing *Providence Manor Homeowners Assn., Inc. v. Rogers* (Aug. 6, 2012), 12th Dist. No. CA2011–10–189, 2012–Ohio–3532, ¶ 40.
[43] Id. at ¶ 43, quoting *Rogers* at ¶ 46.

there is no adequate remedy at law.[44] "Irreparable harm is an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete."[45]

While, based on the admitted contact with Lund Fisheries, the court could consider granting an injunction as to contact with that customer, TQL requests injunctive relief prohibiting the defendants from contacting any customer based on allegations of the defendants' past actions. However, as set forth above, the portions of Christopher Brown's affidavit containing those facts were stricken due to the fact that they contained inadmissible hearsay evidence. Therefore, TQL has not met its burden of demonstrating its entitlement to the injunctive relief it requests by clear and convincing evidence at this time and that request remains an issue for trial.

CONCLUSION

The defendant National Bankers Trust Corporation's motion to strike is hereby granted in part as set forth in the applicable section above.

The plaintiff TQL's motion for partial summary judgment as to Count I of its Complaint for breach of contract is well-taken and is hereby granted except as to the issue of damages. TQL's motion for partial summary judgment as to its request for a permanent injunction is not well-taken and is hereby denied.

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[44] *1st Natl. Bank v. Mountain Agency, LLC* (May 11, 2009), 12th Dist. No. CA2008-05-056, 2009-Ohio-2202, ¶ 47, citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-68, 747 N.E.2d 268 (Ohio App. 1st Dist., 2000).

[45] Id., citing *DK Prods., Inc. v. Miller* (Feb. 2, 2009), 12th Dist. No. CA2008-05-060, 2009-Ohio-436, ¶ 13.

The defendant National Bankers Trust Corporation's motion for summary judgment as to the claim for breach of contract against it 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 30th day of January 2014 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride