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CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTCS, LLC	:	
Plaintiff	:	**CASE NO. 2015 CVH 01460**
vs.	:	**Judge McBride**
HYBRID LOGISTICS, INC., ET AL.	:	**DECISION/ENTRY**
	:	
Defendants		

Lindhorst & Dreidame, Barry F. Fagel and Matthew C. Curran, counsel for the plaintiff Total Quality Logistics, LLC, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202

Gottesman & Associates, Zachary Gottesman and Stephen R. Ramsey, counsel for the defendant Larry Shepherd, 36 East 7th Street, Suite 1650, Cincinnati, Ohio 45202

This cause is before the court for consideration of (1) the defendant Larry Shepherd's motion for summary judgment on all of the plaintiff Total Quality Logistics' claims, filed on October 27, 2017, (2) the plaintiff's motion for summary judgment on its breach of contract claim, filed on October 27, 2017, (3) the plaintiff's motion for summary judgment on the defendant's counterclaims, filed on October 27, 2017, and (4) the defendant's motion to strike the plaintiff's amended demand for judgment and for sanctions, filed on January 8, 2018.

The court scheduled and held a hearing on the motions for summary judgment December 15, 2017 and on the motion to strike and for sanctions on February 23, 2018.

At the conclusion of the respective hearings, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceedings, the evidence presented 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 AND PROCEDURAL BACKGROUND

On November 5, 2015, the plaintiff Total Quality Logistics, LLC (hereinafter referred to as "TQL") filed a complaint against the defendant Larry Shepherd and Hybrid Logistics, Inc. (hereinafter referred to as "Hybrid").[1] Since then, TQL has voluntarily dismissed Hybrid from this case.

TQL's complaint includes claims against Shepherd for breach of contract, breach of fiduciary duty, trade secret misappropriation, and punitive damages.[2] TQL requests relief in the form of temporary, preliminary, and permanent injunctions against Shepherd, as well as compensatory damages, punitive damages, and attorney fees subject to a maximum cumulative total of $50,000.[3]

Shepherd filed counterclaims against TQL, including claims for attorney fees under R.C. 1333.64 and for tortious interference with contractual relations.[4] He has requested relief in the form of costs, attorney fees, and damages.[5]

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[1] Pls. Compl.
[2] Pls. Compl., ¶¶ 42-65.
[3] Pls. Compl.
[4] Defs. Answer and Countercl., ¶¶ 81-83.
[5] Defs. Answer and Countercl.

TQL is a national provider of freight brokerage services.[6] TQL links customers who need freight transported with over-the-road trucking companies in exchange for a fee.[7]

Larry Shepherd is a former TQL employee who was originally hired by TQL in July 2007 as a logistics account executive, also referred to as a broker.[8] In that position he found third party trucks to move freight for TQL customers.[9]

Before working for TQL, Shepherd did not have any experience in the trucking industry.[10] Shepherd received at least several weeks of classroom training and on-the-job training, during which time he was paired with a current TQL sales representative or broker.[11] In his capacity as a broker, Shepherd was able to deal with TQL customers located anywhere in the continental U.S.[12] He would reach customers primarily by phone or email.[13]

On August 20, 2012, Shepherd was promoted to the position of Satellite Office Manager ("SOM").[14] In addition to his existing broker duties, Shepherd also managed the TQL Cincinnati North office, in Westchester, Ohio, where he managed 30 to 70 brokers.[15] As an SOM, Shepherd coached his team, answered questions on customer related issues, provided improvement programs, and reported the profits and losses for brokers

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[6] Pls. Compl., ¶ 6.
[7] Pls. Compl., ¶ 7.
[8] L. Shepherd Dep., 14:19-15:2, J. Montelisciani Aff., ¶ 3.
[9] L. Shepherd Dep., 15:3-16.
[10] L. Shepherd Dep., 11:25-12:2.
[11] L. Shepherd Dep., 14:3-15.
[12] L. Shepherd Dep., 29:17-24.
[13] L. Shepherd Dep., 30:4-8.
[14] L. Shepherd Dep., 35:8-12; 137:22-25.
[15] L. Shepherd Dep., 35:17-36:8; M. Bostwick Dep., 63:3-7.

in his office.[16] As an SOM, he had access to certain information that he did not have access to before, including the financial information for his office and its profits and losses, and other SOMs shared financial information with him regarding their offices.[17] He also had access to TQL pricing structures, sales strategies, customers, and TQL's general operations.[18]

Additionally, during his time at TQL, Shepherd had access to a confidential TQL database and software called Load Manager.[19] Load Manager has historic data related to lanes, which are trucking routes, that TQL uses for its customers.[20] It also includes client information, load information, carrier information, rates, and commodities.[21]

Shepherd signed multiple non-competition agreements with TQL, beginning when he first started employment there as a broker.[22] Shepherd entered into a second non-competition and non-solicitation agreement on March 19, 2013 ("Agreement"), which provides:

> "* * * **WHEREAS,** TQL enters into a long-term incentive compensation plan, which is available only to certain employees, only if Employee executes this Agreement, which establishes the term of the non-compete provision at two (2) years; * * *
>
> 9. Covenants and Remedies. * * *
>
> (b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of two (2) years after termination or cessation of Employee's employment for any reason:

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[16] L. Shepherd Dep., 36:22-38.
[17] L. Shepherd Dep., 38:3-22.
[18] L. Shepherd Dep., 134:17-23.
[19] M. Bostwick Dep., 52:12-15.
[20] M. Bostwick Dep., 52:16-10.
[21] D. Sizemore Dep., 44:7-20.
[22] L. Shepherd Dep., 12:24-13:4.

(i) Employee will not, directly or indirectly, own, operate, maintain, consult with, be employed by (including self-employment), engage in, or have any other interest (whether as owner, shareholder, officer, director, partner, member, employee, joint venture, beneficiary, independent contractor, agent, or any other interest) in a Competing Business (as defined below), except the ownership of less than 1% of the outstanding equity securities of any publicly-held corporation or entity;

(ii) Employee will not directly or indirectly, either as an employee, agent, consultant, contractor, officer, owner, or in any other capacity or manner whatsoever, whether or not for compensation, participate in any transportation-intermediary business that provides services anywhere in the Continental United States, including but not limited to any person or organization that provides shipping, third-party logistics, freight brokerage, truck brokerage, or supply-chain management services;

(iii) Employee will not, directly or indirectly, solicit any Customer, Motor Carrier, client, consultant, supplier, vendor lessee, or lessor, or take any action, to divert business from TQL * * *."[23]

On January 20, 2014, Shepherd was terminated from TQL.[24]

Hybrid is one of TQL's competitors in the transportation and brokerage services industry, as it also has customers for which it moves freight using third party trucking companies.[25] After being terminated from TQL, Shepherd began working for Hybrid on March 31, 2014.[26] He worked from its Jacksonville, Florida office, but it also has other offices throughout the country.[27] In his position at Hybrid, Shepherd hires, manages, and

[23] Pls. Ex. 1 to L. Shepherd Dep.
[24] L. Shepherd Dep., 50:22-23; J. Montelisciani Aff., ¶ 18.
[25] L. Shepherd Dep., 85:9-23, 112:17-22.
[26] L. Shepherd Dep., 71:10-11.
[27] L. Shepherd Dep., 85:24-14.

trains brokers.[28] In his role he has also worked directly with all of Hybrid's customers when brokers need help dealing with them.[29]

Because of the Agreement, before he started his new employment, Shepherd had communications about the new position with Jeffrey Montelisciani, who was TQL's Vice President of Sales at the time, and Chris Brown, who was TQL's chief legal counsel.[30] On March 5, 2014, Shepherd emailed the two a job description of his new position.[31]

In response, Brown emailed Shepherd to ask if Hybrid provides freight brokerage services or has an active freight broker MC number, which is a unique identifier assigned to each carrier by the Federal Motor Carrier Safety Administration.[32] Shepherd does not know if he responded to Brown's email regarding whether Hybrid provided freight brokerage services.[33] He never received an answer from Brown or Montelisciani informing him that he could accept work with Hybrid without violating the Agreement.[34] Shepherd also believes, but cannot specifically recall, that he may have had other phone or email conversations with Brown and Montelisciani, before or after he sent them an email with the job description, informing them that he accepted work at Hybrid.[35] As of the time of his deposition for this case, TQL's litigation had not affected Shepherd's employment with Hybrid.[36]

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[28] L. Shepherd Dep., 86:21-24, 90:19-21.
[29] L. Shepherd Dep., 92:3-13.
[30] L. Shepherd Dep., 71:13-25, 76:6-14, C. Brown Aff., ¶ 1.
[31] L. Shepherd Dep., 72:1-4; Pls. Ex. 7 to L. Shepherd Dep.
[32] Pls. Ex. 7 to L. Shepherd Dep.
[33] L. Shepherd Dep., 74:2-4.
[34] L. Shepherd Dep., 76:19-22.
[35] L. Shepherd Dep., 81:11-19.
[36] L. Shepherd Dep., 142:20-22.

Shepherd is also aware that Darren Sizemore and Brent Sterling from TQL contacted the Jacksonville office at Hybrid and asked to speak to him.[37] Darren Sizemore serviced Double Eagle Produce and Transportation's ("Double Eagle") account at TQL in 2015 and 2016.[38] Brent Sterling serviced Double Eagle's account at TQL in 2014.[39] Shepherd never attempted to return their calls.[40] Brown also called Hybrid in 2015 and asked to speak to Larry Shepherd.[41] The phone was given to a different Larry, but not Shepherd.[42] Brown was told that no Larry Shepherd worked at Hybrid.[43]

Double Eagle had been a TQL customer since 2011.[44] Double Eagle is a trucking, shipping, and logistics company that specializes in the transportation of produce, primarily grapes, potatoes, and strawberries.[45] Shepherd was the primary contact with Double Eagle while he worked at TQL.[46] As the broker for Double Eagle's account, he was familiar with the prices TQL charged Double Eagle.[47]

Double Eagle now conducts business with Hybrid instead of TQL.[48] Before Shepherd worked for TQL, Double Eagle had not done any business with Hybrid.[49] After Shepherd began working at TQL, he did not reach out to Paul Guerra, who was his Double Eagle contact, about switching to Hybrid.[50] Instead, Guerra contacted Shepherd by

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[37] L. Shepherd Dep., 125:20-23, 126:5-127:10.
[38] D. Sizemore Dep., 21:5-7.
[39] B. Sterling Dep., 65: 16-19.
[40] L. Shepherd Dep., 125:9-19.
[41] C. Brown Aff., ¶ 2.
[42] C. Brown Aff., ¶ 2.
[43] C. Brown Aff., ¶ 2.
[44] Joint Ex. H to M. Bostwick Dep.
[45] P. Guerra Aff., ¶ 3.
[46] L. Shepherd Dep., 139:24-140:2.
[47] L. Shepherd Dep., 137:18-21.
[48] L. Shepherd Dep., 100:25-101:2, 109:9-11.
[49] L. Shepherd Dep., 101:3-5.
[50] L. Shepherd Dep., 102:22-25, P. Guerra Aff., ¶ 9.

phone.[51] A different account manager, not Shepherd, handles the Double Eagle account at Hybrid.[52]

Double Eagle used several logistic companies to move its freight during its busy season, including both TQL and Hybrid.[53] Double Eagle provides outside logistics companies with information to enable them to cover its loads, including produce information, lanes, carrier requirements, dates of travel, and the amount it is willing to pay.[54]

Guerra claims that, after Shepherd left TQL, his new account executive, Sterling, was unable to find the number of trucks Double Eagle needed to move its freight during its peak season.[55] Guerra avers that TQL received fewer Double Eagle loads in 2014 because Sterling was not effective, not reliable, and failed to cover loads sent to him.[56] Guerra further claims that the decision to give TQL less loads in 2014 had nothing to do with Larry Shepherd, but with TQL's performance.[57]

Sizemore does recall one time during which Guerra expressed he was afraid to give Sterling loads.[58] By contrast, Sterling testified that Guerra liked him, and he did good work for Double Eagle.[59] He also avers that he covered all of the loads that Guerra had given to him, and that a lack of service on his part was not the reason that TQL stopped receiving loads from Double Eagle.[60]

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[51] L. Shepherd Dep., 103:3-5.
[52] L. Shepherd Dep., 106:2-11.
[53] P. Guerra Aff., ¶ 45.
[54] P. Guerra Aff., ¶ 5.
[55] P. Guerra Aff., ¶ 8.
[56] P. Guerra Aff., ¶ 10.
[57] P. Guerra Aff., ¶ 12.
[58] D. Sizemore Dep., 23:16-22.
[59] B. Sterling Dep., 81:19-82:2.
[60] B. Sterling Aff., ¶¶ 5, 9.

In 2015, Guerra claims he gave more loads to TQL because he had a new account representative, Sizemore, who was more effective at handling Double Eagle's loads.[61] In 2016, Double Eagle reduced the number of loads it gave to TQL because it entered into a contract with a carrier and because Sizemore was replaced with another account representative.[62] Guerra did not want to continue to do business with TQL when it had such high turnover and he would have to start again with another inexperienced broker.[63]

Double Eagle generated $236,402 in brokerage revenue for TQL in 2011, $211,922 in brokerage revenue in 2012, and $328,487 in brokerage revenue in 2013.[64] In 2014, the year that Shepherd was terminated, TQL brokerage revenue was $56,718, in 2015 the brokerage revenue was $116,921, and in 2017 Double Eagle had no business with TQL.[65]

TQL believes that Shepherd had access to numerous alleged trade secrets, including how to haggle with trucking companies, how to have carriers carry a difficult load, how to get employees to work for TQL, what is a successful LAE (Logistics Account Executive), marketing strategies to carriers and customers, retention strategies with respect to customers and carriers, how to mitigate losses, how to troubleshoot problems, how to listen to phone calls, which customers TQL is successful with, Shepherd's customers, contact information for those customers, Shepherd's lanes for his customers, pricing information Shepherd knew, carriers Shepherd knew would carry loads, what to charge for various loads, and TQL sales reports.[66] TQL believes that Shepherd

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[61] P. Guerra Aff., ¶ 11.
[62] P. Guerra Aff., ¶ 13.
[63] P. Guerra Aff., ¶ 13.
[64] Joint Ex. H to M. Bostwick Dep.
[65] Joint Ex. I to M. Bostwick Dep.
[66] M. Bostwick Dep., 59:1-63:25.

misappropriated Double Eagle as a client.[67] TQL does not have any facts, evidence or witnesses that Shepherd misappropriated, meaning that he either used or disclosed, any TQL trade secrets, only a belief that he did.[68]

TQL is unaware of any documents that Shepherd removed from TQL.[69] TQL does not have any knowledge that Shepherd took or stole electronic data in any form before his termination from TQL.[70] If Shepherd took confidential information from TQL, it would have been information that he memorized.[71] TQL is also unaware of whether Shepherd used any specific information about how TQL taught him to be a broker at Hybrid.[72] TQL also does not have evidence that Shepherd stole TQL's software or client or carrier lists.[73]

Regarding the procedural posture of this case, both parties filed all their motions for summary judgment on October 27, 2017. Each party had the opportunity to file response briefs in opposition and reply briefs in support of their own motions. The court held a hearing on all three motions for summary judgment on December 15th. Shepherd subsequently filed a notice of filing of supplemental authority in support of his motion for summary judgment on January 9, 2018, to which TQL filed a response on February 8th.

On November 17, 2017, TQL filed an amended demand for judgment. The demand remains the same as in TQL's complaint, except it now asks for compensatory damages in excess of $1,000,000. On January 8, 2018, Shepherd filed a motion to strike TQL's amended demand for judgment and for sanctions, to which TQL had an opportunity

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[67] M. Bostwick Dep., 64:1-14, 72:12-20, 73:12-18; 91:6-8.
[68] M. Bostwick Dep., 114:14-21.
[69] M. Bostwick Dep., 41:6-8.
[70] M. Bostwick Dep., 41:15-21.
[71] M. Bostwick Dep., 42:19-24.
[72] M. Bostwick Dep., 68:12-18.
[73] M. Bostwick Dep., 73:19-22.

to respond.[74] The court held a hearing on the motion to strike and for sanctions on February 23rd.

(I) MOTIONS FOR SUMMARY JUDGMENT

(A) LEGAL STANDARD

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

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[75]

The court must view the evidence in a light most favorable to the nonmoving party.[76] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[77] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[78]

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[74] Shepherd also filed a reply brief in support of its motion to strike and for sanctions.
[75] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[76] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[77] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[78] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[79] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[80]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[81] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[82] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[83]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[84] The duty of the nonmoving party is more than that of resisting the motion's allegations.[85] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[86] The nonmoving party must

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[79] Id. at 251-52.
[80] Id. at 250.
[81] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[82] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[83] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[84] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[85] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[86] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

present documentary evidence of specific facts showing that there is a genuine issue for trial.[87] It may not rely on the pleadings or unsupported allegations.[88]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[89] The trial court maintains the sound discretion to admit or exclude relevant evidence.[90] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[91]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[92] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[93] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will

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[87] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[88] Id.
[89] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[90] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[91] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[92] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[93] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

suffice to meet the requirements of Civ.R. 56(E)."[94] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[95]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[96] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[97]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[98] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[99]

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.[100] Summary judgment is inappropriate when

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[94] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[95] Id.
[96] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[97] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[98] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[99] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[100] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[101]

Finally, Civ.R. 56(D) allows for partial summary judgment:

> "If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."[102]

"Civ. R. 56(D) is designed for the occasions when a court is able to simplify a case by eliminating any issues not in dispute."[103]

(B) SUMMARY JUDGMENT ON TQL'S CLAIMS

Shepherd has moved for summary judgment on all of TQL's claims, which include: breach of contract, breach of fiduciary duty, misappropriation of trade secrets, punitive damages, and injunctive relief. TQL moved for summary judgment on its claim for breach of contract. As such, the court will concurrently deal with both parties' motions for summary judgment on the breach of contract claim.

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[101] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[102] Civ.R. 56(D).
[103] *Thornton v. Premium Glass Co., Inc.*, 5th Dist. Fairfield No. 09-CA-52, 2010-Ohio-1796, ¶ 19, citing *Ferguson v. Allied Anesthesia Inc.*, 10th Dist. Franklin No. 88 AP-483.

(1) BREACH OF CONTRACT

To prevail on a breach of contract claim, the plaintiff must prove: "(1) the existence of a contract, (2) that the plaintiff fulfilled its contractual obligations, (3) that the defendant failed to fulfill its contractual obligations, and (4) that the plaintiff incurred damages as a result."[104]

"Damages are not awarded for a mere breach of contract; the amount of damages awarded must correspond to injuries resulting from the breach."[105] For breaches of a non-competition agreement, damages are usually measured in lost profits.[106] When the plaintiff is an established business, "the loss of profits usually can be proven with sufficient certainty as evidence of past performance will form the basis for a reasonable prediction as to the future."[107]

Shepherd's contract with TQL includes two provisions that TQL claims Shepherd breached, the non-competition agreement and the non-solicitation agreement. Each will be dealt with in turn.

(i) NON-COMPETITION AGREEMENT

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[104] *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12.

[105] *Woehler v. Brandenburg*, 12th Dist. Clermont No. CA2011-12-082, 2012-Ohio-5355, ¶ 24, quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Oho App.3d 137, 144, 684 N.E.2d 1261 (9th Dist. 1996).

[106] *Ginn v. Stonecreek Dental Care*, 12th Dist. Feyette Nos. CA2015-01-001, CA2015-01-002, 2015-Ohio-4452, ¶ 1. *See Briggs v. GLA Water Mgt.*, 6th Dist. Wood Nos. WD-12-062, WD-12-063, 2014-Ohio-1551, ¶ 30, citing *Burckhardt v. Burckhardt*, 42 Ohio St. 474 (1885) ("It has been consistently held in Ohio that in a breach of a covenant not to compete, the usual measure of damages is lost profits.").

[107] *Ginn*, 2015-Ohio-4452 at ¶ 18, citing *Ginn v. Stonecreek Dental Care*, 12th Dist. Fayette No. CA2014-06-015, 2015-Ohio-1600, ¶ 24.

"It is well-established that as a general rule, restrictive covenants not to compete are disfavored by the law."[108] Non-competition agreements will be enforced to the extent they are "reasonable."[109] Whether a non-competition clause is valid and enforceable is an issue for the court to determine.[110]

To determine whether a restraint is reasonable, courts ask whether the "* * * restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public."[111] When a non-competition agreement is not reasonable, the trial court is "empowered to fashion a reasonable covenant between the parties."[112] In doing so, trial courts consider the following factors:

> " * * * '[T]he absence or presence of limitations as to time and space, * * * whether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the

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[108] *Willis Refrigeration, Air Conditioning & Heating, Inc. v. Maynard*, 12th Dist. Clermont No. CA99-05-047, 2000 WL 36102, *7 (Jan. 18, 2000), citing *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health*, 124 Ohio App.3d 308, 314, 706 N.E.2d 336 (10th Dist. 1997).

[109] *Willis Refrigeration, Air Conditioning & Heating, Inc.*, 2000 WL 36102 at *7, citing *Robert W. Clark, M.D., Inc.*, 124 Ohio App.3d at 315. *See Rogers v. Runfola & Associates, Inc.*, 57 Ohio St.3d 5, 8, 565 N.E.2d 540, 6 IER Cases 160 (1991), quoting *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 325 N.E.2d 544 (1975), paragraph one of the syllabus (noting that non-competition agreements "* * * to the extent necessary to protect an employer's legitimate interest.")

[110] *UZ Engineered Products Co. v. Midwest Motor Supply Co.*, 147 Ohio App.3d 382, 2001-Ohio-8779, 770 N.E.2d 1068, ¶ 33 (10th Dist. 2001).

[111] (Emphasis omitted.) *Rogers*, 57 Ohio St.3d at 8, quoting *Raimonde*, 42 Oho St.2d at paragraph two of the syllabus.

[112] *Rogers*, 57 Ohio St.3d at 8. *See Middletown Janitor Supply Co. v. Hayes*, 12th Dist. Butler No. CA84-03-040, 1985 WL 8673, *2 (May 20, 1985) ("If the covenant not to compete is an unreasonable restriction upon the employee, courts have the power to modify said restriction.").

> employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment.' * * * "[113]

The second requirement to enforce a non-competition agreement, as noted above, is that it does not impose undue hardship. Notably, "* * * any person who is prevented from practicing his profession or trade for a period of time in an area in which it has been practiced, suffers some hardship."[114] However, to modify a non-competition agreement, there must be "* * * more than just some hardship."[115] When determining undue hardship, it "* * * cannot be determined on a post hoc basis, but rather by the terms of the agreement at the time it was entered into."[116]

As to the third factor, the public interest, "[p]reserving the sanctity of contractual relations and preventing unfair competition have traditionally been in the public interest."[117]

Ultimately, whether an individual non-competition agreement is reasonable and should be upheld must be decided on its own facts.[118] In many circumstances, two-year

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[113] *Rogers*, 57 Ohio St.3d at 8, quoting *Raimonde*, 42 Ohio St.2d at 25.
[114] *AK Steel Corp. v. AccelorMittal USA, L.L.C.*, 2016-Ohio-3285, 55 N.E.3d 1152, ¶ 19 (12th Dist.), quoting *Wall v. Firelands Radiology, Inc.*, 106 Ohio App.3d 313, 333, 666 N.E.2d 235 (6th Dist. 1995).
[115] *AK Steel Corp.*, 2016-Ohio-3285 at ¶ 19, citing *Wall*, 106 Ohio App.3d at 333.
[116] *Try Hours, Inc. v. Douville*, 2013-Ohio-53, 985 N.E.2d 955, ¶ 28 (6th Dist.), quoting *N. Frozen Foods, Inc. v. McNamara*, 8th Dist. Cuyahoga No. 71378, 1997 WL 691182, *2 (Nov. 6, 1997).
[117] *Blakeman's Valley Office Eqiup., Inc. v. Bierdeman*, 152 Ohio App.3d 86, 2003-Ohio-1074, 786 N.E.2d 914, ¶ 39 (7th Dist.), citing *Ratchford v. Proprietors' Ins. Co.*, 47 Ohio St.3d 1, 8, 546 N.E.2d 1299 (1989).
[118] *Raimonde*, 42 Ohio St.2d at 25, quoting *Extine v. Williamson Midwest*, 176 Ohio St. 403, 200 N.E.2d 297 (1964). *See Willis Refrigeration, Air Conditioning & Heating, Inc.*, 2000 WL 36102 at *7, citing *Robert W. Clark, M.D., Inc.*, 124 Ohio App.3d at 336 ("In determining whether the restrictions of a covenant are reasonable, each case is to be decided on its own facts.").

long restrictions have been deemed unreasonable.[119] In such cases, courts most often modify the time restriction from two-years to one-year.[120] By contrast, one-year non-competition agreements, even global ones, are more often upheld.[121] When two-year restrictions are upheld, they typically involve a narrow geographic restriction.[122]

In examining the present case, the Agreement provides for the following non-competition clauses:

> "* * * **WHEREAS,** TQL enters into a long-term incentive compensation plan, which is available only to certain employees, only if Employee executes this Agreement, which establishes the term of the non-compete provision at two (2) years; * * *

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119 *See Rogers*, 57 Ohio St.3d at 8 (finding a two-year restriction that prevented employees from court reporting or stenography in a single county unreasonable); *Am. Bld. Serv., Inc. v. Cohen*, 78 Ohio App.3d 29, 33-34, 603 N.E.2d 432 (1992) (finding a two-year noncompetition agreement that prevented a former employee from working in any county in which the employer had a customer to be unreasonable).

120 *See Rogers*, 57 Ohio St.3d at 9 (modifying a non-competition agreement from two-years to one-year).

121 *See AK Steel Corp.*, 2016-Ohio-3285 at ¶ 22 (12th Dist.) (finding a global, one year non-compete reasonable where the employee was a highly sought after senior executive of a major steel company who had access to confidential information and corporate strategic initiatives); *Try Hours, Inc.*, 2013-Ohio-53 at ¶ 32 (finding reasonable a one-year non-competition agreement that prevented a former employee from working in the expedited freight industry in the continental U.S.); *Dangelo v. Total Quality Logistics*, S.D. Ohio No. 1:09CV512, 2009 WL 10679469, *3 (Aug. 24, 2009) (finding reasonable a one year non-competition agreement with a geographic restriction of the continental U.S. for a broker at TQL)

122 *See Middletown Janitor Supply Co.*, 1985 WL 8673 at *2 (upholding a two-year non-competition agreement where employee had access to additional confidential information concerning the operation of the business after being promoted to manager, but finding that a geographic restriction of 90 miles was overbroad); *Harris v. University Hospitals of Cleveland*, 8th Dist. Cuyahoga Nos. 76724 and 76785, 2002 WL 363593, *4-5 (Mar. 7, 2002) (upholding a two-year non-competition agreement that also placed a geographic restriction of five miles); *UZ Engineered Products Co.*, 2001-Ohio-8779 at ¶ 43 (upholding a two-year non-competition agreement that restricted former employees from working in the same geographic territory in which the employee had worked for the plaintiff); *Wall v. Firelands Radiology, Inc.*, 106 Ohio App.3d 313, 331, 666 N.E.2d 235 (6th Dist. 1995) (upholding a three-year non-competition agreement that restricted the employee from working within a 20-mile radius). *Cf. Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 271-272, 747 N.E.2d 268 (1st Dist. 2000) (upholding a three-year non-competition agreement for a senior-level manager responsible for international marketing who had an in-depth knowledge of his employer's global business goals and strategies, market research, financial data, and technological developments; it is unclear if there was a geographic restriction).

> 9. Covenants and Remedies. * * *
>
> (b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of two (2) years after termination or cessation of Employee's employment for any reason:
>
> (i) Employee will not, directly or indirectly, own, operate, maintain, consult with, be employed by (including self-employment), engage in, or have any other interest (whether as owner, shareholder, officer, director, partner, member, employee, joint venture, beneficiary, independent contractor, agent, or any other interest) in a Competing Business (as defined below), except the ownership of less than 1% of the outstanding equity securities of any publicly-held corporation or entity;
>
> (ii) Employee will not directly or indirectly, either as an employee, agent, consultant, contractor, officer, owner, or in any other capacity or manner whatsoever, whether or not for compensation, participate in any transportation-intermediary business that provides services anywhere in the Continental United States, including but not limited to any person or organization that provides shipping, third-party logistics, freight brokerage, truck brokerage, or supply-chain management services * * *."[123]

The non-competition agreement contains a two-year time limit. Although there is a geographical limitation, it extends to the entire continental U.S. As such, Shepherd would need to seek employment outside of the continental U.S. for two years to practice in the trucking industry to remain in compliance with the contract. While other courts have deemed two-year periods to be a reasonable restriction on employment in certain circumstances, the court must consider this time limitation in conjunction with the expansive geographical limitation. As cited above, cases that include a two-year or more long time restrictions also have finite geographic limitations. In contrast, the non-

[123] Pls. Ex. 1 to L. Shepherd Dep.

competition agreement in this case effectively bars all competitive employment whatsoever for two years.

The court understands that TQL's business is nationwide and that it competes with companies also providing similar third-party logistics throughout the country. TQL also provided Shepherd with extensive training and provided him his first experience in the trucking brokerage industry. However, in balancing the wide geographic area covered by the non-competition agreement with the length of time that Shepherd is precluded from engaging in competitive employment and all other relevant factors, the court finds that a two-year limitation is not reasonable. Instead, a one-year limitation is reasonable. Thus, the non-competition clause in the Agreement is reformed to include a restrictive period of one year, as opposed to two years.

Shepherd argues that the court should not reform the Agreement. Instead, he maintains that the court should find it entirely unenforceable. Contract reformation is an equitable principle,[124] and Shepherd believes that TQL has not acted in good faith in entering into a two-year non-competition agreement with him, and therefore TQL should be precluded from the equitable result of having the contract reformed to one-year.

However, the court cannot find that TQL acted in bad faith in contracting for a two-year non-competition agreement. Shepherd cited this court's decision in *Total Quality Logistics, Inc. v. Joseph Anthony Filipski, et al.*, Clermont C.P. No. 2017 CVH 00903, (Jan. 10, 2008), to argue that TQL did not draft the Agreement in good faith. In *Filipski* the court ruled that TQL's two-year non-competition agreement was unreasonable and reformed it to one-year. However, *Filipski* involved a broker at TQL, not a TQL employee

[124] *Priore v. State Farm Fire & Cas. Co.*, 8th Dist. Cuyahoga No. 99692, 2014-Ohio-696, ¶ 27, quoting *Marconi v. Savage*, 8th Dist. Cuyahoga No. 99163, 2013-Ohio-3805, ¶ 23.

in the position of an SOM, like Shepherd, who had slightly more access to confidential information. Although the court does not find the two-year restriction reasonable even for an SOM, it does not find that TQL exercised less than good faith in having Shepherd agree to the greater time period. It is not as though TQL continued to use a two-year non-competition agreement for its brokers following the *Filipski* decision. As such, the court finds Shepherd's argument that it should find the Agreement entirely unenforceable unavailing.

The court finds that Shepherd breached the one-year non-competition clause in the reformed Agreement. He admitted in his deposition that Hybrid is a competitor of TQL, as it is also in the industry of linking customers with freight trucking companies in exchange for a fee. He stated that the two companies in their work have precisely the same objective. Thus, Hybrid is a competitor of TQL's. Shepherd was terminated on January 20, 2014, and on March 31, 2014 he began working at Hybrid. Because Shepherd's employment with Hybrid was within the first year after leaving employment with TQL, Shepherd violated reformed provision 9(b)(i)-(ii) of the Agreement.

TQL has argued for damages of $1,104,544. This number was calculated, however, based upon lost profits for the years of 2014-2017 and a nearly two-year long breach by Shepherd. Therefore, there remains a genuine issue of material fact as to how much TQL was damaged by Shepherd's breach from March 31, 2014 until January 20, 2015. Hence, TQL is granted partial summary judgment on its breach of contract cause of action regarding the non-competition clause. The court holds that Shepherd is liable for breach of the non-competition clause in the Agreement, but the jury must determine the amount of damages at trial.

(ii) NON-SOLICITATION AGREEMENT

The Agreement also includes a non-solicitation provision that TQL argues that Shepherd breached:

> "* * * 9. Covenants and Remedies. * * *
>
> (b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of two (2) years after termination or cessation of Employee's employment for any reason:
>
> * * * (iii) Employee will not, directly or indirectly, solicit any Customer, Motor Carrier, client, consultant, supplier, vendor lessee, or lessor, or take any action, to divert business from TQL * * *."[125]

It is undisputed that Hybrid never did business with Double Eagle until Shepherd began to work for it. It is also undisputed that Double Eagle has done business with Hybrid and eventually ceased doing any business with TQL by 2017.

Shepherd, in requesting summary judgment, argues that he did not breach the clause because Guerra independently contacted him regarding Double Eagle. Guerra averred that he stopped using TQL's business because he was unhappy with it. Thus, because he did not pursue Double Eagle upon joining Hybrid, Shepherd maintains that he did not violate the non-solicitation clause.

TQL counters that there exist genuine issues of material fact as to why Double Eagle stopped using TQL and began using Hybrid instead. TQL highlights the deposition of Sterling, who provides testimony that counters Guerra's testimony on multiple points.

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[125] Pls. Ex. 1 to L. Shepherd Dep.

For example Sterling claims that Guerra liked him, he always covered Double Eagle's loads, and Double Eagle stopped using TQL's services for reasons unrelated to his servicing on the account.

Ultimately, whether Shepherd violated the non-solicitation clause hinges upon which version of events the jury believes since the factual record before the court supports two different versions of events. Furthermore, even if Shepherd is found to have violated it, if Double Eagle had independently planned to cease using TQL as its broker, then there is also a genuine issue of material fact as to whether TQL was damaged by Shepherd's purported violation. For purposes of summary judgment, reasonable minds could come to more than one conclusion on these issues, those being whether Shepherd solicited Double Eagle and whether, if he did, that caused TQL to suffer damages. As such, the court cannot grant summary judgment on this issue to either party.

(2) COUNT OF MISAPPROPRIATION OF TRADE SECRETS

Shepherd moves for summary judgment on TQL's cause of action for misappropriation of trade secrets. Under Ohio law, the misappropriation of trade secrets is a recognized tort for which an injured party may obtain damages.[126] Shepherd conceded in oral argument that TQL does have trade secrets. However, he maintains that the only trade secrets that TQL has identified are his general skills and the customer

[126] *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 181, 707 N.E.2d 853 (1999) citing *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 19 Ohio App.3d, 484 N.E.2d 280 (1985).

Double Eagle, neither of which constitute a trade secret. Moreover, he argues that there is no evidence that he misappropriated any TQL trade secrets.

TQL counters that it has sufficiently identified the trade secret information with the requisite specificity to survive summary judgment. TQL argues that the evidence shows that Shepherd misappropriated the price, lane, and profit information for Double Eagle, which are trade secrets. Furthermore, TQL believes that the defendant took pricing, profit, route, lane, and contact information for 11 more customers.

In his reply, Shepherd reiterates that the evidence submitted in support of summary judgment shows that TQL does not have any proof of trade secret misappropriation, and as such its claim must fail.

As mentioned, Shepherd does not deny that TQL has trade secrets. Instead, he posits that TQL has failed to identify trade secrets that he stole. As the entity claiming trade-secret status, TQL must be able to identify the trade secrets Shepherd misappropriated.[127] Shepherd highlights, among other sources, Marc Bostwick's deposition answers, as illustrating that TQL has not identified which trade secrets TQL not only has, but the ones in particular that Shepherd misappropriated. TQL contends that it has amply identified the trade secrets.

Ohio's trade secret laws are purposed to "* * * maintain commercial ethics, encourage invention, and protect an employer's investments and proprietary

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[127] *State v. Corp. for Findlay Market*, 135 Ohio St.3d 416, 2013-Ohio-1532, 98 N.E.2d 546, ¶ 18, citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399-400, 732 N.E.2d 373 (2000).

information."[128] In the Ohio Uniform Trade Secrets Act ("OUTSA"), R.C. 1333.61(B) defines misappropriation as any of the following:

> "* * * (2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:
>
> (a) Used improper means to acquire knowledge of the trade secret;
>
> (b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;
>
> (c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake."[129]

In turn, the term "improper means" is defined to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[130] Whether misappropriation occurred can be a question for the finder of fact.[131]

In most cases involving former employees accused of trade secret misappropriation, such cases are a "* * * matter of balancing or reconciling the conflicting rights of the employer to enjoy the use of secret processes * * * which were developed through his own initiative and investment and the right of employees to earn a livelihood

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[128] *Fred Siegel Co., L.P.A.*, 85 Ohio St.3d at 183, quoting *Levine v. Beckman*, 48 Ohio App.3d 24, 28, 548 N.E.2d 267 (10th Dist. 1988).
[129] R.C. 1333.61(B).
[130] R.C. 1333.61(A).
[131] *See Columbus Steel Castings Co. v. Alliance Castings Co., L.L.C.*, 10th Dist. Franklin Nos. 11AP-351, 11AP-355, 2011-Ohio-6826, ¶ 51.

by utilizing their personal skill, knowledge, and experience."[132] To balance these interests courts distinguish between "* * * knowledge and skill that is general in the trade as a whole and 'secret' knowledge which is acquired particularly and specifically from the employer."[133]

Upon reviewing the record, the court finds that Shepherd should be granted summary judgment on TQL's misappropriation of trade secrets claim. Although TQL argues there are genuine issues of material fact as to whether Shepherd misappropriated trade secrets, the record before the court indicates otherwise. Bostwick, testifying as TQL's corporate representative, admitted that TQL does not have any facts, evidence, or witnesses to show that Shepherd used or disclosed any TQL trade secrets.[134] Instead, TQL only believes that he did.[135] To show trade secret misappropriation under R.C. 1333.61(B), Shepherd must have used or disclosed TQL's trade secrets. Because there are TQL admissions that there is no evidence that Shepherd used or disclosed trade secrets, when viewing the evidence most strongly in favor of TQL, reasonable minds can only come to but one conclusion, and that conclusion is that Shepherd did not misappropriate TQL trade secrets.

(3) BREACH OF FIDUCIARY DUTY

[132] *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 24 Ohio St.3d 41, 46, 492 N.E.2d 814 (1986), citing *GTI Corp. v. Calhoon*, 309 F.Supp. 762, 768 (S.D. Ohio 1969).
[133] *Valco Cincinnati, Inc.*, 24 Ohio St.3d at 46.
[134] M. Bostwick Dep., 114:14-21.
[135] M. Bostwick Dep., 114:14-21.

"A claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care."[136] To show breach of fiduciary duty, the plaintiff must show that the defendant had a duty "* * * not to subject the [plaintiff] to the injury complained of, a failure to observe such duty, and an injury resulting proximately therefrom."[137]

A fiduciary is a person who has "* * * a duty, created by his undertaking, to act primarily for the benefit of another in maters connected with his undertaking."[138] Typically, "* * * the proximate cause of an event is generally thought of as 'that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that even would not have occurred.'"[139]

Shepherd argues that TQL cannot prove that he breached a fiduciary duty because Bostwick testified that he did not take or misappropriate any confidential information or trade secrets from TQL. He highlights Bostwick's testimony admitting that TQL does not have any evidence that Shepherd used or disclosed TQL's trade secrets. As the movant,

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[136] *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235, 75 A.L.R.4th 729 (1988).
[137] *Strock*, 38 Ohio St.3d at 216, citing *Stamper v. Parr-Ruckman Home Town Motor Sales*, 25 Ohio St.2d 1, 3, 265 N.E.2d 785 (1971). *See Morgan v. Ramby*, 12th Dist. Warren Nos. CA2010-10-095, CA2010-10-101, 2012-Ohio-763, ¶ 25, citing *Keybank Natl. Assoc. v. Guarnieri & Secrest, P.L.L.*, 7th Dist. No. 08 CO 46, 2008-Ohio-6362, ¶ 33 ("To recover under a breach of fiduciary duty claim, a party must show the existence of a fiduciary relationship, failure to comply with a duty accorded that relationship, and damages proximately caused by that failure.").
[138] (Emphasis omitted.) *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 35, quoting *Strock*, 38 Ohio St.3d at 216. *See D & H Autobath v. PJCS Properties I, Inc.*, 2012-Ohio-5845, 983 N.E.2d 891, ¶ 28, quoting *Stone v. Davis*, 66 Ohio St.2d 74, 79, 419 N.E.2d 1094 (1981) ("A 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.'").
[139] *Morgan*, 2012-Ohio-763 at ¶ 25, quoting *Wilson v. AC & S, Inc.*, 169 Ohio App.3d, 720, 864 N.E.2d 682, 2006-Ohio-6704, ¶ 106 (12th Dist.).

Shepherd has thus shown that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law.[140]

TQL did not oppose Shepherd's argument on breach of fiduciary duty in its response, nor did it set forth any facts that would create a genuine issue of material fact on this issue. As such, the court finds that TQL has not met its reciprocal burden, as the nonmoving party, to set forth specific facts, beyond the allegations in its pleadings, demonstrating that a "triable issue of fact" remains.[141] Thus, the court grants Shepherd's summary judgment on TQL's claim of breach of fiduciary duty.

(4) PUNITIVE DAMAGES

In the instant case Shepherd maintains that TQL is unable to show that he acted with malice because the evidence shows he did not take or misappropriate any of TQL's trade secrets or confidential information. Alternatively, Shepherd posits that he is entitled to summary judgment because TQL cannot show that he acted with malice because he did not use TQL's trade secrets or exact revenge on TQL.

In response, TQL argues that whether the defendant acted with malice is a genuine issue of material fact. TQL highlights evidence that Shepherd may have been avoiding fully revealing the nature of his job to TQL.

Punitive damages in Ohio have typically been permitted in civil tort actions that "* * * involve ingredients of fraud, malice, or insult."[142] Such damages are designed for "* *

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[140] *See AAAA Enterprises, Inc.*, 50 Ohio St.3d at 161.
[141] *Dresher*, 75 Ohio St.3d at 293.
[142] *Villela v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 37, 542 N.E.2d 464 (1989).

* the punishment of the guilty party for the wicked, corrupt, and malignant motive and design, which prompted him to the wrongful act."[143] They also are designed to make an example of the malicious party to deter others from engaging in similar conduct.[144]

In order to show malice sufficient to warrant punitive damages, the defendant must have operated under: "(1) that state of mind * * * which * * * is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."[145] Because punitive damages are assessed for punishment, "* * * a positive element of conscious wrongdoing is always required."[146] A plaintiff cannot be awarded punitive damages for a defendant's "mere negligence."[147] In proving malice, it is almost always necessary to rely upon the defendant's conduct and the surrounding circumstances.[148] Furthermore, "* * * actual malice can be inferred from conduct and surrounding circumstances which may be characterized as reckless, wanton, willful or gross."[149]

Significantly as to the case at bar, punitive damages are not available for situations involving merely breach of contract.[150] "[P]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which

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[143] *Villella*, 45 Ohio St.3d at 37, quoting *Delting v. Chocklet*, 70 Ohio St.2d 134, 136, 436 N.E.2d 208 (1982).
[144] *Harris*, 2002 WL 363593 at *9, citing *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus.
[145] *Villella*, 45 Ohio St.3d at 37, quoting *Preston*, 32 Ohio St.3d 334. *See Levy v. Seiber*, 2016-Ohio-68, 57 N.E.3d 331, ¶ 62, citing *Preston*, 32 Ohio St.3d at 335 (holding same).
[146] *Murty*, 32 Ohio St.3d at 335.
[147] *Levy*, 2016-Ohio-68 at ¶ 64, citing *Preston*, 32 Ohio St.3d at 335.
[148] *Villella*, 45 Ohio St.3d at 37, quoting *Davis v. Tunison*, 168 Ohio St. 471, 475, 155 N.E.2d 904 (1959).
[149] *Villella*, 45 Ohio St.3d at 37, citing *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 184, 327 N.E.2d 654, 658 (1975).
[150] *Ancona v. Martin*, 12th Dist. Clermont No. 879, 1981 WL 5161, *4 (July 22, 1981), citing *Levin v. Lielsen*, 37 Ohio App.2d 29, 306 N.E.2d 173 (8th Dist. 1973).

punitive damages are recoverable."[151] In the present case, the court has found that Shepherd did not commit tortious conduct, namely he did not misappropriate trade secrets nor did he breach a fiduciary duty. Because TQL's only remaining cause of action is for breach of contract, and that conduct does not form the basis of a tort, punitive damages are no longer available to TQL. Therefore the court grants Shepherd's motion for summary judgment on TQL's cause of action for punitive damages.

(5) COUNT FOR INJUNCTIVE RELIEF

Finally, Shepherd moves the court to deny TQL's prayer for an injunction. There are two potential bases for an injunction against Shepherd. The first basis for an injunction could be to enforce Shepherd's non-competition agreement. The second potential basis is for threatened misappropriation of trade secrets, pursuant to R.C. 1333.62.

"Injunctive relief is an equitable remedy that is available only where there is no adequate remedy at law."[152] It is also " * * * an extraordinary remedy in equity, and being a creature of equity, it may not be demanded as a matter of right."[153] Ohio courts have found, in some cases, "* * * the absence of an adequate remedy following a final judgment

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[151] *R.L.R. Invests., L.L.C. v. Wilmington Horsemens Group, L.L.C.*, 2014-Ohio-4757, 22 N.E.3d 233, ¶ 29, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993).

[152] *Dunning v. Varnau*, 12th Dist. Brown Nos. CA2016-09-017, CA2016-10-018, 2017-Ohio-7207, ¶ 26, citing *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 510, 584 N.E.2d 704 (1992). *See McNamara v. Wilson*, 12th Dist. Butler No. CA2013-12-239, 2014-Ohio-4520, ¶ 43, citing *Haig*, 62 Ohio St.3d at 510 (holding same).

[153] *Litigation Mgt., Inc. v. Bourgeois*, 32 IER Cases 677, 100 U.S.P.Q.2d 1936, 2011-Ohio-2794, ¶ 9 (8th Dist.), citing *Perkins v. Village of Quaker City*, 165 Ohio St. 120, 133 N.E.2d 595 (1956), syllabus.

in cases involving possible trade-secret misappropriation and the request to enforce covenants not to compete[,]" and therefore grant permanent injunctions.[154] However, not all cases involving trade secret misappropriation or the breach of covenants not to compete require an injunction to adequately compensate the plaintiff.[155] Unlike monetary damages, which compensate for past harms, injunctions prevent future harms.[156]

To receive a permanent injunction, the moving party must "* * * show by clear and convincing evidence that immediate and irreparable injury, loss, or damage will result to the applicant."[157] An irreparable injury is one that has " * * * no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete."[158]

As stated, there are two potential bases for an injunction: trade secrets or the non-competition/non-solicitation agreement. Beginning with the matter of trade secrets, the OUTSA directly deals with injunctive relief for trade secret cases.[159] R.C. 1333.62 provides that "[a]ctual or threatened misappropriation may be enjoined."[160]

The Ohio Supreme Court has echoed that "* * * injunctions are, of course, the appropriate remedy to restrain the continued and future use, or threatened use, of misappropriated trade secrets."[161] A permanent injunction may be needed in a trade

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[154] *Wells Fargo Ins. USA Servs., Inc. v. Gingrich*, 12th Dist. Butler No. CA2011-05-085, 2012-Ohio-677, ¶ 12.
[155] *See Wells Fargo Ins. USA Servs., Inc.*, 2012-Ohio-677 at ¶ 13.
[156] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 17, citing *Lemley v. Stevenson*, 104 Ohio App.3d 126, 136, 661 N.E.2d 237 (6th Dist. 1995).
[157] *Dunning*, 2017-Ohio-7207 at ¶ 26, citing *McNamara*, 2014-Ohio-4520.
[158] *Dunning*, 2017-Ohio-7207 at ¶ 26, citing *1st Natl. Bank v. Mountain Agency, L.L.C.*, 12th Dist. Clermont No. CA2008-05-056, 2009-Ohio-2202, ¶ 47.
[159] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 9.
[160] R.C. 1333.62(A).
[161] *Valco Cincinnati, Inc.*, 24 Ohio St.3d at 47.

secrets case when the circumstances are "* * * so egregious and violative of the relationship of the parties * * *."[162] "When a trade secret is misappropriated, a threat of actual harm is presumed."[163] Further, a plaintiff can show an actual threat of irreparable injury by establishing "* * * that the employee possessed knowledge of the employer's trade secrets."[164] Like other types of injunctions, to receive an injunction for a trade secret the court must be able to find that the plaintiff is entitled to it by clear and convincing evidence.[165]

If Shepherd possesses detailed and comprehensive knowledge of TQL's trade secrets, he would pose a threat of irreparable harm because he undertook employment with a direct competitor of TQL in a position substantially similar to that which he held at TQL. This is so even though he did not, by TQL's admission, use or disclose its trade secrets. There remains, however, a genuine issue of material fact as to whether Shepherd does possess such knowledge.

The information that TQL claims is privileged, which is mostly information from in its Load Manager, is lengthy, detailed, and complex. This information does not appear susceptible to ready memorization, and TQL does not claim that Shepherd printed this information out or saved it electronically. Indeed, Sterling testified that this information

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[162] Id. at paragraph two of the syllabus.
[163] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 14, citing *Procter & Gamble Co.*, 140 Ohio App.3d at 268.
[164] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 14, quoting *Levine v. Beckman*, 48 Ohio App.3d 24, 27, 548 N.E.2d 2267 (10th Dist. 1988). *See Fifth Third Processing, Solutions, LLC v. Elliott*, S.D. Ohio No. 1:11-CV-247, 2011 WL 4946330, *8 (Oct. 18, 2011) (finding that the inevitable disclosure rule only applies if the former employee possesses detailed and comprehensive knowledge of the employer's trade secrets; simply having access to confidential or trade secret documents is insufficient to draw the conclusion that the employer would suffer actual harm).
[165] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 10, citing *Acadia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8th Dist. Cuyahoga No. 92145, 2009-Ohio-4878, ¶ 18.

would be impossible to memorize.[166] There is, therefore, a genuine issue of material fact as to whether Shepherd has memorized parts of the alleged trade secret information. Although it seems unlikely that four years after his termination from TQL that Shepherd could still remember this information, his ability to memorize this type of information is a factual issue. If Shepherd does not possess a detailed and comprehensive knowledge of TQL's trade secrets, as he argues, then it is not inevitable that he will disclose those secrets while working for a competitor, and therefore Shepherd may not pose an actual threat to TQL.[167]

Next, the court must decide whether to grant Shepherd's motion for summary judgment as to TQL's request for injunctive relief based on Shepherd's non-competition agreement. In the context of non-competition agreements, "* * * an actual threat of harm exists when the employee possesses knowledge of the employer's trade secrets and begins working in a position that causes [him] to compete directly with the former employer * * *."[168] To show a threat of harm, the employer can show "* * * facts establishing that an employee with detailed and comprehensive knowledge of the former

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[166] B. Sterling Dep., 15:5-7.

[167] *See Fifth Third Processing, Solutions, LLC*, 2011 WL 4946330 at *8 (finding that the inevitable disclosure rule does not apply if the former employee does not possess detailed and comprehensive knowledge of the employer's trade secrets; simply having access to confidential or trade secret documents is insufficient to draw the conclusion that the employer would suffer actual harm).

[168] *Try Hours, Inc.*, 2013-Ohio-53 at ¶ 35, quoting *Jacono v. Invacare Corp.*, 8th Dist. Cuyahoga No. 86605, 2006-Ohio-1596, ¶ 38. *See Convergys Corp. v. Trackman*, 169 Ohio App.3d 665, 2006-Ohio-6616, 864 N.E.2d 145 (1st Dist.), citing *Procter & Gamble Co.*, 140 Ohio App.3d at 267 ("* * * in an action to enforce a non-compete agreement, an actual threat of harm exists when an employee possesses knowledge of an employer's trade secrets and begins working in a position that causes him to directly compete with the former employer * * *."); *Procter & Gamble*, 140 Ohio App.3d at 274, citing *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995) ("According to the inevitable-disclosure rule, a threat of harm warranting injunctive relief can be shown by facts establishing that an employee with detailed and comprehensive knowledge has begun employment with a competitor of the former employer in a position that is substantially similar to the position held during the former employment.").

employer's trade secrets and confidential information now works for a competitor of the former employer * * *" in a substantially similar position.[169]

Additionally, when courts find that an employer has an enforceable non-competition agreement, but the employee has been violating it, courts can enforce it from the date of the court's decision, even if the non-competition period would have already expired.[170] Courts sometimes continue to enforce an expired agreement because failing to do so "* * * may cause some employee[s] to gamble at the expense of the employer[s]. An employee may decide to breach in the hope that the breach is not discovered for the duration of the non-compete with the expectation that the worst that can happen thereafter is a lawsuit for damages that are difficult to calculate and prove."[171]

As discussed above, not all cases involving the breach of a non-competition agreement require an injunction to adequately compensate the plaintiff. Given that it is unclear how much confidential information Shepherd was exposed to and retained in his role at TQL, the court does not find it appropriate to rule on the issuance of a permanent injunction in advance of the trial. Although Shepherd argues that it would be impossible for him to retain such information without printing it or electronically storing it, as discussed, there are genuine issues of material fact as to the depth of Shepherd's knowledge and retention. The court is unwilling to find, as a matter of law, that it was impossible for Shepherd to retain confidential information he was exposed to at TQL.

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[169] *Try Hours, Inc.*, 2013-Ohio-53 at ¶ 35, quoting *Jacono*, 2006-Ohio-1596 at ¶ 38.
[170] *See Rogers*, 57 Ohio St.3d at 9, citing *Raimonde*, 42 Ohio St.2d at 28. *See Duracote Corporation v. Ryan*, 11th Dist. Portage No. 1247, 1983 WL 6234, *2 (April 15, 1983) (enforcing a one-year non-competition agreement two years and ten months after the employee's employment terminated).
[171] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 26.

Further there are genuine issues of material fact concerning whether TQL can be adequately compensated for the breach of its non-competition agreement with monetary damages, or whether, more than four years after Shepherd left TQL, TQL additionally requires an injunction in order to protect it from future harm. As such, Shepherd's motion for summary judgment on TQL's request for an injunction is denied.

Lastly, the court will briefly address Shepherd's argument that TQL is foreclosed from injunctive relief involving an equitable remedy because TQL does not have clean hands in requesting it due to the fact that TQL waited until 21 months after he started working at Hybrid before filing for injunctive relief.[172] The record shows that TQL tried to discover earlier whether Shepherd was working at Hybrid, but was unable to do so because Hybrid employees told TQL counsel that Shepherd did not work there. Moreover, Shepherd himself did not return TQL's phone calls. Thus, TQL has not acted in bad faith in delaying filing for injunctive relief.

(C) SHEPHERD'S CLAIMS

TQL has moved for summary judgment on both of Shepherd's counterclaims, which include attorney fees and tortious interference with contract.

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[172] *See Farley v. Farley*, 10th Dist. Franklin Nos. 99AP-1103, 99AP-1282, 2000 WL 1231091, *7 (Aug. 31, 2000), citing *Klaustemeyer v. Cleveland*, 89 Ohio St. 142, 105 N.E. 278 (1913) ("It is of course a fundamental rule of equity that he who seeks equity should come to equity with clean hands, and that he who seeks equity must do equity."); *Marinaro v. Major Indoor Soccer League*, 81 Ohio App.3d 42, 45, 610 N.E.2d 450 (9th Dist. 1991), quoting *Kinner v. Lake Shore & Michigan S. Ry. Co.*, 69 Ohio St. 339, 69 N.E. 614 (1904), paragraph one of the syllabus ("The maxim, 'he who comes into equity must come with clean hands,' requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject matter of his suit.").

(1) ATTORNEY FEES

TQL moves for summary judgment on Shepherd's claim for attorney fees under R.C. 1333.64 for bringing a trade secrets claim. TQL argues that summary judgment is appropriate because an R.C. 1333.64(A) claim for attorney fees can only prevail when a trade secret misappropriation claim is fundamentally untenable, and its claim is not untenable because many courts have found that TQL has trade secrets. Shepherd counters that the claim should survive because Bostwick testified that TQL had no evidence that Shepherd used or disclosed any trade secret information.

R.C. 1333.64(A) provides, in relevant part: "The court may award reasonable attorney's fees to the prevailing party, if any of the following applies: (A) A claim for misappropriation is made in bad faith."[173] The word "may" in R.C. 1333.64 indicates that an award of attorney fees is discretionary.[174]

The court finds that summary judgment is not appropriate because TQL has not met its burden of demonstrating that it is entitled to summary judgment as a matter of law. TQL's argument in its motion is that its misappropriation claim is tenable. However, as found in Section I(B)(1), this court finds that TQL's claim for misappropriation for trade secrets is untenable because it has no evidence that Shepherd used or disclosed its trade secrets. This being the case, TQL's summary judgment motion on this claim is denied.

(2) COUNT OF TORTIOUS INTERFERENCE WITH A CONTRACT

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[173] R.C. 1333.64(A).
[174] *Becker Equip., Inc. v. Flynn*, 12th Dist. Clermont No. CA2002-12-313, 2004-Ohio-1190, ¶ 11.

TQL moves for summary judgment on Shepherd's claim for tortious interference with a contract. TQL argues that it cannot be held liable for tortious interference because the alleged interference, filing the present suit, was an action it was privileged to do. It also argues that Shepherd cannot show that his relationship with Hybrid has been damaged. In response, Shepherd asserts that there has been interference because he was fired from Hybrid, and he should be allowed to pursue this claim if he prevails on his summary judgment arguments on TQL's claims.[175]

"The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another."[176] The elements of tortious interference with contractual relations are: "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages."[177]

To show lack of justification for the interference, the fourth element, the plaintiff must prove "* * * that the defendant's interference with another's contract was improper * * *" since "* * * *[o]nly* improper performance interference is actionable * * *."[178] Therefore,

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[175] Defs. Resp. in Opp'n. to Pls. Mot. for Summ. J., pg. 6.
[176] *Ginn v. Stonecreek Dental Care*, 30 N.E.3d 1030, 2015-Ohio-1600, ¶ 11 (12th Dist.) quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14, 651 N.E.2d 1283 (1995).
[177] *Fred Siegel Co., L.P.A.*, 85 Ohio St.3d at paragraph one of the syllabus, citing *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 650 N.E.2d 863 (1995), at paragraph two of the syllabus.
[178] (Emphasis added) *Fred Siegel Co., L.P.A.*, 85 Ohio St.3d at paragraph two of the syllabus, 176, citing *Kenty*, 72 Ohio St. 415.

although a defendant's interference may have caused damages, such interference is not tortious if the interference was justified.[179]

"Ohio courts recognize the defense of privilege to tortious-interference-with-contract claims, and whether absolute privilege applies in a given case is necessarily one of law for the trial court to determine."[180] Furthermore, a party is privileged to cause an interference "* * * by in good faith asserting or threatening to protect a legally protected right of his own which he believes may otherwise be impaired or destroyed by the performance of the contract or transaction."[181] Accordingly, a plaintiff who files a lawsuit in good faith to protect its legal rights is privileged from being held liable for intentional interference.[182]

In the instant case, Shepherd claims that TQL tortiously interfered with his contractual relationship with Hybrid. In its motion for summary judgment, TQL argues that it was privileged in filing this suit because Shepherd worked for a competitor and stole TQL customers. TQL posits that it is allowed to protect its confidential information and prevent Shepherd from stealing its customers by filing suit. Furthermore, TQL

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[179] *Fred Siegel Co., L.P.A.*, 85 Ohio St.3d at 176. *See Ireton v. JTD Realty Invests., L.L.C.*, 12th Dist. Clermont No. CA2010-04-023, 2011-Ohio-670, ¶ 57, citing *Fred Siegel Co., L.P.A.*, 85 Ohio St.3d at paragraph one of the syllabus (stating tortious interference involves interference that was not privileged or justified).
[180] *Clauder v. Holbrook*, 1st Dist. Hamilton No. C-990145, 2000 WL 98218, *3 (Jan. 28, 2000), citing *Smith v. Ameriflora 1992, Inc.*, 96 Ohio App.3d 179, 187, 644 N.E.2d 1038 (10th Dist. 1994) and *Surace v. Waliger*, 25 Ohio St.3d 229, 234, 495 N.E.2d 939 (1986).
[181] *Clauder*, 2000 WL 98218 at *3, citing Restatement of Law 2d, Torts (1979), Section 773. *See Columbia Dev. Corp. v. Krohn*, 1st Dist. Hamilton No. C1300842, 2014-Ohio-5607, ¶ 26, citing *Clauder*, 2000 WL 98218 at *3 ("One is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third person by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may be otherwise impaired or destroyed by the performance of the contract or transaction.").
[182] *See Clauder*, 2000 WL 98218 at *3 (finding defendant privileged to a lawsuit for specific performance on a contract). *See Columbia Dev. Corp.*, 2014-Ohio-5607 at ¶¶ 39-32 (finding a party's actions of taking legal action privileged and justified where its underlying legal actions were successful).

highlights that it did not contact any customers to tell them not to do business with Shepherd, nor has Shepherd's employment been impacted by this suit. In other words, TQL maintains that Shepherd cannot show that he has been damaged in his relationship with Hybrid.

In response, Shepherd argues that if he wins on his summary judgment motion against TQL's claims, he should be able to pursue this claim. He also notes that Hybrid did terminate Shepherd as a result of this case, although he did not submit an affidavit or other evidence in support of this factual point.

The court finds that TQL is privileged in filing this suit against Shepherd. As discussed above, Shepherd has in fact breached his non-competition agreement with TQL, providing TQL a legitimate and justifiable reason to sue Shepherd to enforce its legal rights. Furthermore, Shepherd's argument that he should be able to pursue this claim if he prevails on his summary judgment claims against TQL is unpersuasive because he has not been granted summary judgment on all claims.

Additionally, to prevail on a tortious interference claim, Shepherd must show resulting damages from the alleged interference. In his deposition he testified that his employment with Hybrid has not been impacted. Thus, TQL was able to show that Shepherd cannot satisfy all elements for his tortious interference cause of action.

However, Shepherd has not been able to satisfy his reciprocal burden by highlighting any evidence in the record that creates a genuine issue of material fact on this point. He argues in his opposition memorandum that he has been terminated from Hybrid as a result of this case. However, he did not cite to evidence properly submitted under Civ.R. 56(C). Although Shepherd had already been deposed by the time he was

allegedly fired at Hybrid, he could have submitted an affidavit with his memorandum in opposition averring that he had been terminated. He did not do so. For the foregoing reasons, the court grants summary judgment in favor of TQL on Shepherd's claim for intentional interference with a contractual relationship.

(II) MOTION TO STRIKE AMENDED DEMAND FOR JUDGMENT AND FOR SANCTIONS

A. LEGAL STANDARD

Under Civ.R. 11, any attorney or pro se party who has signed a pleading, motion, or other document has certified "* * * that the party has (1) read the document; (2) to the best of his or her knowledge, harbored good grounds to support the document; and (3) did not file the document with the purposes of delay."[183] Specifically, Civ.R. 11 provides, in relevant part:

> "Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name * * *. The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. <u>If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served.</u> For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees

[183] *Jones v. Nichols*, 12th Dist. Warren No. CA2012-02-009, 2012-Ohio-4344, ¶ 18, citing *Long v. Rhein*, 12th Dist. Nos. CA2002-02-007 and CA2002-02-008, 2003-Ohio-711, ¶ 15.

> incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted."[184]

If any of the above requirements are "willfully" violated, then the trial court may "* * * include an award to the opposing party of its expenses and reasonable attorney fees."[185] The standard for Civ.R. 11 is one of subjective bad faith, "* * * so it is the attorney's actual intent or belief that determines whether or not his conduct was willful."[186]

B. LEGAL ANALYSIS

"Civ.R. 15(A) tells the litigant how and when to amend 'pleadings' * * *."[187] Once 28 days have passed for responsive pleading, a party may request leave of court under Civ.R. 15(A) to amend the complaint.[188] In pertinent part, Civ.R. 15(A) provides:

> "A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires. * * *"[189]

[184] (Emphasis added.) Civ.R. 11.
[185] *Jones*, 2012-Ohio-4344 at ¶ 18, citing *Long*, 2003-Ohio-711 at ¶15.
[186] *Ransom v. Ransom*, 12th Dist. Warren No. 2006-03-031, 2007-Ohio-457, ¶ 25, citing *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, ¶ 9 (1st Dist.). *See Jones*, 2012-Ohio-4344 at ¶ 18, citing *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 937 N.E.2d 1274, 2010-Ohio-50731, ¶ 8 (holding same).
[187] *Hoover v. Sumlin*, 12 Ohio St.3d 1, 4, 465 N.E.2d 377 (1984).
[188] *Scovanner v. Ohio Valley Voices*, 12th Dist. Clermont No. CA2012-01-017, 2012-Ohio-3629, ¶ 27.
[189] Civ.R. 15(A).

However, Civ.R. 54(C) also deals with amendments to pleadings. While "* * * Civ.R. 15(A) deals with amendments generally, Civ.R. 54(C) is applicable only to amendments of the money demand for relief."[190] Civ.R. 54(C) provides:

> "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings."[191]

Before Civ.R. 54 was amended in 1994, it required that amendments to the demand for judgment be made in advance of seven days before the trial.[192] Presently, Civ.R. 54(C) does not include that restriction. "Under this rule, the trial court is obligated to grant a good-faith motion to amend the monetary amount, without any showing of cause, if filed some reasonable period before trial."[193]

One of the issues regarding TQL's amendment is whether it was made in good faith or whether it was purposely delayed so that Shepherd was prevented from removing the case at bar to federal court at the outset of this litigation using diversity jurisdiction. As it pertains to diversity jurisdiction, federal courts have diversity jurisdiction "* * * where the suit is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of costs and interest."[194] In order to remove a case, the defendant

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[190] *Fulton v. Aszman*, 4 Ohio App.3d 64, 75, 446 N.E.2d 803 (12th Dist. 1982). Although *Fulton* deals with Civ.R. 54(C), it dealt with an earlier version. The above-quoted principle remains true, but *Fulton* is otherwise not particularly instructive on Civ.R. 54(C) because of the amendment to the rule in 1994 removed the provision allowing any judgment amendment so long as it was made in advance of seven days before trial.
[191] Civ.R. 54(C).
[192] 1994 Staff Note, Civ.R. 54.
[193] *Stan Alan Acceptance Corp. v. Chapman*, 9th Dist. Summit No. 21873, 2004-Ohio-4330, ¶ 11.
[194] *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871, 48 Fed.R.Serv.3d 278, 2000 Fed.App. 0378P (6th Cir. 2000), citing 28 U.S.C. 1332(a).

must satisfy the burden of proving the diversity jurisdiction requirements, including the amount in controversy.[195]

Courts have long held that the plaintiff can avoid removal to federal court by pleading low damages: "If he [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more the defendant cannot remove."[196] Indeed, "* * * because the plaintiff is 'master of the claim,' a claim specifically less than the federal requirement should preclude removal."[197]

Notably, under 28 U.S.C. 1446, which governs the procedures for removal of civil actions to federal court, when "* * * the notice for removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith * * *."[198]

TQL was aware that it could prevent Shepherd from removing this case to federal court by pleading low damages because TQL has prevented multiple removals to federal court in other cases of public record by pleading less than the jurisdictional amount. For instance, in *Total Quality Logistics, LLC v. Covar Transportation*, S.D. Ohio No. 1:17-cv-797, 2017 WL 6546617 (Dec. 22, 2017), TQL prayed for damages in its complaint, filed

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[195] *Rogers*, 230 F.3d at 871, citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S.Ct. 35, 66 L.Ed. 144 (1921).
[196] *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 294, 58 S.Ct. 586, 82 L.Ed. 845 (1938).
[197] *Rogers*, 230 F.3d at 871, citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993).
[198] 28 U.S.C. 1446(c)(3)(B).

in state court, as follows: "Compensatory and punitive damages and attorney fees of a maximum cumulative total of $70,000 from each Defendant, individually and severally."[199]

When the defendant tried to remove to federal court, the Southern District of Ohio explained that, generally, "* * * the sum claimed by the plaintiff controls * * *" concerning the jurisdictional amount necessary for removal.[200] The court went on: "The Supreme Court has acknowledged that a plaintiff who does not wish to try his claims in federal court 'may resort to expedient suing for less than the jurisdictional amount, and though he would justly be entitled to more, the defendant cannot remove.'"[201] The court concluded: "That is precisely what TQL did here. By demanding 'a maximum' recovery of less than $75,000, TQL has limited the amount in controversy in this action to below the jurisdictional threshold."[202] As such, the court remanded the case to state court.[203]

In turning to the present case, the court finds two fatal issues with TQL's amended demand. First, under *Stan Alan Acceptance Corporation v. Chapman*, a case cited by TQL, TQL neglected to file a motion for leave to amend the demand with the court, which Civ.R. 54(C) requires. Second, as *Stan Alan Acceptance Corporation* explains, amendments to the demand for judgment must be made in good faith. The court finds that the amendment was not made in good faith.

As discussed, TQL was well aware that originally pleading compensatory, punitive damages, and attorney fees of a maximum cumulative total of $50,000 would prevent

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[199] *Total Quality Logistics, LLC v. Covar Transportation*, S.D. Ohio No. 1:17-cv-797, 2017 WL 6546617, *2 (Dec. 22, 2017).
[200] Id., citing *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006).
[201] *Covar Transportation*, 2017 WL 6546617 at *3, quoting *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 294, 58 S.Ct. 586, 82 L.Ed. 845 (1938).
[202] *Covar Transportation*, 2017 WL 6546617 at *3.
[203] Id. at *5.

Shepherd from removing to federal court. TQL claims it pleaded low damages because it had not received discovery from Shepherd yet and did not realize the extent of the business that he had conducted with Double Eagle. In other words, TQL claims that it thought this was a case involving low monetary damages. This position is unavailing. The measure for damages in a non-competition agreement breach case is measured, as explained in Section I(B)(1), by examining TQL's lost profits on the Double Eagle account by looking at its past business with Double Eagle.

Thus, TQL would have known when it filed the case on November 5, 2015 the extent of its lost profits because that is information it has control over and exclusive access to. It is disingenuous for TQL to suggest that it believed it had less than $50,000 in compensatory, punitive damages, and attorney fees when it filed the case at bar. This conclusion is buttressed by the manner in which TQL calculated damages in its motion for partial summary judgment. TQL claims in its motion that it was damaged in the amount of $1,104,544, and it calculates this amount using its own lost profits figures.[204]

However, even if it did not know the full extent of its damages, TQL waited to file this amended demand until November 17, 2017, two years into this litigation. TQL had the ability to prevent Shepherd from removing to federal court, and it exercised that power in pleading under $75,000 in damages. The court does not find that, at this late date, TQL's amendment of its judgment demand from $50,000 to in excess of $1,000,000 is in good faith. Accordingly, under Civ.R. 11, the court strikes TQL's amended demand. TQL is limited to receiving a maximum award of $50,000.

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[204] TQL's Mot. for Partial Summ. J., pgs. 4-5.

That notwithstanding, the court does not find that Shepherd has shown that TQL's counsel, and not just TQL as a party, has willfully violated Civ.R. 11.[205] As such, the court declines to impose sanctions on TQL's counsel.

CONCLUSION

For the foregoing reasons, the court finds as follows:

Shepherd's motion for summary judgment on all of TQL's claims is granted in part and denied in part. Shepherd's motion for summary judgment as to TQL's claims of misappropriation of trade secrets, breach of fiduciary duty, and punitive damages are well-taken and hereby granted. Shepherd's motion for summary judgment on TQL's claim of breach of contract, as well as on TQL's prayer for injunctive relief, is not well-taken and is hereby denied.

TQL's motions for summary judgment are granted in part and denied in part. TQL's motion for summary judgment on its breach of contract claim is granted in part and denied in part. The court finds that Shepherd breached the non-competition portion of the Agreement, but damages remain to be determined at trial. TQL's claim of breach as to the non-solicitation portion of the Agreement is not-well taken and is hereby denied.

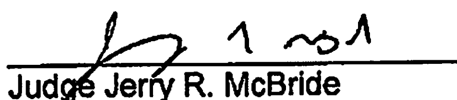
[205] *See Jones*, 2012-Ohio-4344 at ¶ 18 (requiring a finding that the violation be willful before imposing monetary sanctions); *T.M. v. J.H.*, 6th Dist. Lucas Nos. L-10-1014, L-10-1034, 2011-Ohio-283, ¶ 98, citing *Shaffer v. Mease*, 66 Ohio App.3d 400, 409, 585 N.E.2d 77 (4th Dist. 1991) (explaining that Civ.R. 11 sanctions may only be imposed upon attorneys or, in certain circumstances, pro se litigants).

TQL's motion for summary judgment on Shepherd's counterclaims are granted in part and denied in part. TQL's motion on Shepherd's claim of tortious interference with contractual relations is well-taken and hereby granted. TQL's motion for summary judgment on Shepherd's claims for attorney fees under R.C. 1333.64 is not well-taken and is hereby denied.

Shepherd's motion to strike TQL's amended demand for judgment and for sanctions is granted in part and denied in part. Shepherd's motion to strike TQL's amended demand for judgment is well-taken and hereby granted. TQL's monetary relief at trial is limited to compensatory, punitive damages, and attorney fees of a maximum cumulative total of $50,000. Shepherd's motion for sanctions upon his motion is not well-taken and is hereby denied.

IT IS SO ORDERED.

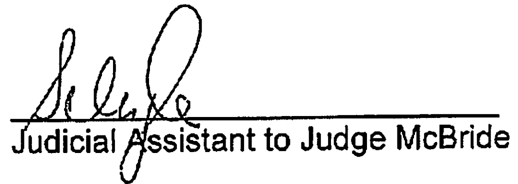
DATED: 4-16-18



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order was sent on this 16th day of April 2018 by e-mail to Barry F. Fagel, at bfagel@lindhorstlaw.com, and Matthew C. Curran, at mcurran@lindhorstlaw.com, Attorneys for the Plaintiff Total Quality Logistics LLC, and to Zachary Gottesman, at zg@zgottesmanlaw.com, and Stephen R. Ramsey, at sramsey@zgottesmanlaw.com, Attorneys for the Defendant Larry Shepherd.



Judicial Assistant to Judge McBride