COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTCS, LLC	:	
Plaintiff	:	**CASE NO. 2018 CVH 00725**
vs.	:	**Judge McBride**
HG LOGISTICS, LLC, ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Matthew J. Wiles, counsel for the plaintiff Total Quality Logistics, LLC, 150 East Gay Street, 24th Floor, Columbus, Ohio 43215.

Robert A. McMahon, counsel for the defendants Joseph Dinsmore and Thomas Lubrecht, 2321 Kemper Lane, Suite 100, Cincinnati, Ohio 45206.

Anthony J. Hornbach and George B. Musekamp, counsel for the defendant HG Logistics, LLC, Joseph Castaneda, and Ethan Wiggins, 312 Walnut Street, Suite 1400, Cincinnati, Ohio 45202.

This cause is before the court for consideration of (1) the motion for partial judgment on the pleadings filed by the defendants Joseph Dinsmore and Thomas Lubrecht on November 19, 2018, and (2) the motion for partial judgment on the pleadings and to vacate the June 4, 2018 agreed interim injunction filed by the defendants HG Logistics, LLC, Joseph Castaneda, and Ethan Wiggins on November 20, 2018.

The court scheduled and held a hearing on the motions on January 4, 2019. At the conclusion of the hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceedings, 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

The plaintiff Total Quality Logistics (hereinafter referred to as "TQL") provides third-party logistics services, freight brokerage services, truck brokerage services, and assistance with supply-chain management across the continental United States.[1]

The defendant Joseph Dinsmore worked at TQL from March 3, 2014 until October 19, 2017.[2] Dinsmore worked in several positions, including as a Logistics Account Executive Trainee, Logistics Account Executive, and Sales Group Leader.[3] The defendant Joseph Castaneda worked at TQL from August 15, 2016 until July 26, 2017.[4] Castaneda worked at TQL in the positions of Logistics Account Executive Trainee and Logistics Account Executive.[5] The defendant Thomas Lubrecht was employed at TQL from June 13, 2015 until August 8, 2017.[6] He worked in the positions of Logistics Account Executive Trainee and Logistics Account Executive.[7] The defendant Ethan Wiggins worked at TQL from January 4, 2016 until November 7, 2017.[8] While working at TQL

[1] Compl., ¶ 9.
[2] Compl., ¶ 14.
[3] Compl., ¶ 17.
[4] Compl., ¶ 20.
[5] Compl., ¶ 23.
[6] Compl., ¶ 26.
[7] Compl., ¶ 29.
[8] Compl., ¶ 32.

Wiggins held the positions of Logistics Account Executive Trainee, Logistics Account Executive, and Logistics Coordinator.[9]

While employed at TQL, these four defendants each signed an Employee Non-Compete, Confidentiality, and Non-solicitation Agreement.[10] All of the agreements contained a one-year noncompetition and non-solicitation clause in Paragraph 9(b), which read as follows:

> "(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of the Employee's employment with TQL), and for a period of one (1) year after the termination or cessation of Employee's employment for any reason:
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> (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 an owner, shareholder, officer, director, partner, member, employee, joint venture, beneficiary, independent contractor, agent, or any other interest) in any Competing Business (as defined below), except the ownership of less than 1% of the outstanding equity securities or any publicity-held corporation or entity; and
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> (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 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; and
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> (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; and
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> (iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to disrupt any contractual or

[9] Compl., ¶ 35.
[10] Compl., ¶¶ 15, 21, 27, and 33.

other relationship, or prospective relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL; and

(v) Employee will not, directly or indirectly, employ, recruit, solicit, or assist others in employing, recruiting, or soliciting any person who is, or within the previous twelve (12) months has been, an employee of, consultant with, or been party to another business relationship with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement."[11]

In all instances, TQL alleged that it "recently learned" that the individual employee-defendants had started working for the defendant HG Logistics, LLC (hereinafter referred to as "HG") in positions that compete with TQL.[12] TQL alleges that HG is its direct competitor.[13]

On May 7, 2018, TQL filed a complaint against all four former employee-defendants as well as against the defendant HG. The complaint includes claims for breach of contract against all four individuals (Count 1 through 4), as well as a claim for tortious interference with a contract against HG. TQL is seeking a temporary restraining order, preliminary injunction, permanent injunction, money damages, punitive damages, and costs and attorney fees. That same day, TQL filed a motion for temporary restraining order and preliminary injunction requesting that all employee-defendants be prohibited from further violating their noncompetition agreements.

While the motion for temporary restraining order was pending, on June 4, 2018, the defendants Wiggins and Castaneda entered into an Agreed Interim Injunction with

[11] Compl. Exs. A, B, C, and D.
[12] Compl., ¶¶ 19, 25, 31, and 37.
[13] Compl., ¶ 3.

TQL. The order was to remain in place until the preliminary injunction hearing. The interim order did not include the exact language from the noncompetition agreements that the defendants had previously entered into. Instead, it prevented Wiggins and Castaneda from engaging in brokerage activity on behalf of HG and prohibited them from viewing, accessing, using, or disclosing any confidential TQL information. It further provided "[i]n light of this Agreed Interim Injunction, TQL's pending Motion for Temporary Restraining Order is **MOOT** against HG, Wiggins, and Castaneda. A hearing on TQL's pending application for a Preliminary injunction is set for 10 a.m. on July 31, 2018 and August 1, 2018." Moreover, in the interim order, TQL withdrew its request for a temporary restraining order and preliminary injunction against Dinsmore and Lubrecht.

Dinsmore and Lubrecht filed a motion for partial judgment on the pleadings on November 19, 2018. HG, Castaneda, and Wiggins filed a motion for partial judgment on the pleadings and to vacate the June 4, 2018 agreed interim injunction on November 20, 2018. All the defendants request that the court find that TQL is unable to receive injunctive relief against them. The court held oral argument on the motions on January 4, 2019. At the conclusion of the hearing, the court took the issues raised by the motions under advisement.

LEGAL STANDARD

Civ.R. 12(C) allows any party to move for judgment on the pleadings: "After the pleadings are closed but within such time as not to delay the trial, any party may move

for judgment on the pleadings."[14] The Ohio Supreme Court has characterized a Civ.R. 12(C) motion as a "* * * belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted."[15] Unlike a Civ.R. 12(B)(6) motion, however, parties use a motion under Civ.R. 12(C) specifically to resolve legal questions.[16]

Upon a motion for judgment on the pleadings, the trial court must "* * * construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn in favor of the nonmoving party.[17] As such, in determining a motion for judgment on the pleadings, the court is "* * * restricted solely to the allegations in the pleadings."[18]

However, it is also "axiomatic that a trial court may take judicial notice of its own docket."[19] Further, courts can take judicial notice of court proceedings in the immediate case in resolving Civ.R. 12(B)(6) motions.[20] Accordingly, the Twelfth District Court of Appeals has resolved that it is "* * * proper for the trial court to take judicial notice of its docket in the immediate case in the context of a Civ.R. 12(C) motion * * *."[21]

To grant dismissal under Civ.R. 12(C), "* * * it must appear beyond doubt that [the plaintiff] can prove no set of facts warranting the requested relief, after construing all

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[14] Civ.R. 12(C).
[15] *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001), citing *Nelson v. Pleasant*, 73 Ohio App.3d 479, 482, 597 N.E.2d 1137, 1139 (4th Dist. 1991).
[16] *Whaley*, 92 Ohio St.3d at 581, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931 (1996). *See Whitehead v. Skillman Corp.*, 12th Dist. Butler No. CA2014-03-061, 2014-Ohio-4893, ¶ 7, citing *Whaley*, 92 Ohio St.3d at 581.
[17] *Whaley*, 92 Ohio St.3d at 581, citing *Peterson v. Toedosio*, 34 Ohio St.2d 161, 165-166, N.E.2d 113 (1973).
[18] *Whaley*, 92 Ohio St.3d at 582, quoting *Peterson*, 34 Ohio St.2d at 166.
[19] *Whitehead*, 2014-Ohio-4893 at ¶ 8, quoting *Indus. Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St .3d 576, 580 (1994).
[20] *Whitehead*, 2014-Ohio-4893 at ¶ 8, citing *Mansour v. Croushore*, 194 Ohio App.3d 819, 2011–Ohio–3342, ¶ 18 (12th Dist.).
[21] *Whitehead*, 2014-Ohio-4893 at ¶ 8.

material factual allegations in the complaint and all reasonable inferences therefrom in the [nonmovant's] favor."[22]

ANALYSIS

"Injunctive relief is an equitable remedy that is available only where there is no adequate remedy at law."[23] It is also, "* * * an extraordinary remedy in equity, and being a creature of equity, it may not be demanded as a matter of right."[24]

Ohio courts have found, in some cases, "* * * the absence of an adequate remedy following a final judgment in cases involving possible trade-secret misappropriation and the request to enforce covenants not to compete[,]" and therefore grant permanent injunctions.[25] However, not all cases involving trade secret misappropriation or the breach of covenants not to compete require an injunction to adequately compensate the

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[22] *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 74, 765 N.E.2d 854 (2002). *See Mansour*, 2011-Ohio-3342 at ¶ 15, citing *State ex rel. Midwest Pride IV, Inc.*, 75 Ohio St.3d at 570 ("Under Civ.R. 12(C), dismissal is appropriate when a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.")

[23] *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).

[24] *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.

[25] *Wells Fargo Ins. USA Servs., Inc. v. Gingrich*, 12th Dist. Butler No. CA2011-05-085, 2012-Ohio-677, ¶ 12.

plaintiff.[26] Unlike monetary damages, which compensate for past harms, injunctions prevent future harms.[27]

I. DEFENDANTS DINSMORE AND LUBRECHT'S MOTION

First, the defendants argue that the court should dismiss TQL's request for injunctive relief because the noncompetition agreements have expired by their own terms. Dinsmore's noncompetition agreement would have expired on October 19, 2018 and Lubrecht's would have expired on August 8, 2018. Indeed, courts have dismissed cases when the plaintiff filed an action on a noncompetition agreement *after* the noncompetition agreement expired.[28]

However, this is not a case where the noncompetition agreement expired before the plaintiff sought an injunction. TQL has not sought a temporary restraining order or preliminary injunction against the defendants, as agreed in the interim order. But TQL did file this case, which requests a permanent injunction, prior to the expiration of the respective noncompetition agreements with Dinsmore and Lubrecht.

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[26] *See Wells Fargo Ins. USA Servs., Inc.*, 2012-Ohio-677 at ¶ 13.

[27] *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).

[28] *See Cynergies Consulting, Inc. v. Wheeler*, 8th Dist. Cuyahoga No. 90225, 2008-Ohio-3362, ¶¶ 27-28 (finding the trial court properly dismissed the plaintiff's claims for an injunction to enforce a noncompetition agreement where the plaintiff did not file its complaint until after the noncompetition clause expired); *Doran v. Heartland Bank*, 10th Dist. No. 16AP-586, 2018-Ohio-1811, 112 N.E.3d 355, ¶¶ 20-21 (affirming the trial court's dismissal of a claim for declaratory judgment by former employer against its former employee and his new employer for breach of contract, wherein the former employer wanted the court to determine if its noncompetition agreement was enforceable; the appellate court found that the noncompetition agreement expired without the former employer ever having filed for an injunction, and because a party must file for an injunction prior to the expiration of the restriction, the issue of enforceability for purposes of a declaratory judgment was moot).

Moreover, "Ohio courts have found that 'an injunction must account for periods of noncompliance in order to make judicial enforcement effective.'"[29] As such, when courts find that an employer has an enforceable non-competition agreement, but the former 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.[30] Of note though, courts credit defendants for the time they have not competed during the pendency of litigation.[31]

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."[32]

In examining the present case, the court does not find that partial judgment on the pleadings is appropriate at this point in the proceedings simply because the defendants'

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[29] *Cynergies Consulting, Inc.*, 2008-Ohio-3362 at ¶ 26, quoting *Penzone v. Koster*, 10th Dist. No. 07AP-569, 2008-Ohio-327. *See Weickert v. Bowden*, 188 Ohio App.3d 730, 2010-Ohio-2581, 936 N.E.2d 984, ¶ 14 (6th Dist.), citing *Trim-Line of Toledo v. Carroll*, 6th Dist. No. L-86-176, 1987 WL 7056, (Feb. 25, 1987) ("We have held that a noncompete agreement cannot expire in litigation while the enforceability of the agreement is being litigated."); *Homan, Inc. v. A1 AG Servs., L.L.C.*, 175 Ohio App.3d 51, 2008-Ohio-277, 885 N.E.2d 253, ¶ 18 (3d Dist.) (finding that, upon the conclusion of litigation of a noncompetition agreement, the defendant was bound to abide by its terms for any remaining period of time during which he did not refrain from competing); *Rogers v. Runfola & Associates, Inc.*, 57 Ohio St.3d 5, 8, 565 N.E.2d 540, 6 IER Cases 160 (1991) (modifying the trial court's injunction so as to enforce a non-competition covenant for one year from the date of the court's order even though that period extended beyond the expiration of the covenant).

[30] *See Rogers*, 57 Ohio St.3d at 9, quoting *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 28, 325 N.E.2d 544 (1975); *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).

[31] *See Homan, Inc.*, 2008-Ohio-277 at ¶ 18; *Trim-Line of Toledo*, 1987 WL 7056 at *3; *Luxottica Retail N. America v. CAS-MAN, Inc.*, S.D.Ohio No. 1:10CV374, 2011 WL 6100280, *1 (Dec. 7, 2011).

[32] *Litigation Mgt., Inc.*, 2011-Ohio-2794 at ¶ 26.

noncompetition agreements would have expired, absent litigation, last year. If the defendants later prove that they have not been competing with TQL for a year-long period, then equitable tolling would likely be inapplicable and the court would not further enforce the noncompetition agreement beyond this litigation. And certainly the court can take into account the fact that TQL has not sought a preliminary injunction against the defendants when determining whether a permanent injunction is warranted, but that will involve factual considerations not available to the court in the pleadings.

Next, the defendants argue that the doctrine of laches should apply to prevent TQL from receiving an injunction. The doctrine of laches is "based upon the maxim that equity aids the vigilant and not those who slumber on their rights."[33] "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes."[34]

"In order to successfully invoke the equitable doctrine of laches, 'it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.'"[35] Prejudice will not be "inferred from a mere lapse in time."[36] Further, "[t]he prejudice must be the result of the plaintiff's delay, not merely the result of the plaintiff's assertion or exercise of a right."[37]

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[33] *Crestmont Cadillac Corp. v. Gen. Motors Corp.*, 8th Dist. Cuyahoga No. 83000, 2004-Ohio-488, ¶ 34, quoting Black's Law Dictionary 875 (6th ed. 1990).
[34] (Internal quotations omitted.) *State ex rel. Doran v. Preble Cty. Bd. of Commrs.*, 12th Dist. No. CA2012-11-015, 2013-Ohio-3579, 995 N.E.2d 239, ¶ 14, quoting *Merchants Bank & Trust Co. v. Kelly*, 12th Dist. Butler No. CA2003–09–229, 2004-Ohio-3913, ¶ 20.
[35] *State ex rel. Doran*, 2013-Ohio-3579 at ¶ 14, quoting *Merchants Bank & Trust Co.*, 2004-Ohio-3913 at ¶ 20.
[36] *U.S. Playing Card Co. v. The Bicycle Club*, 119 Ohio App.3d 597, 603, 695 N.E.2d 1197 (1st Dist. 1997), citing *State ex rel. Meyers v. Columbus*, 71 Ohio St.3d 603, 605, 646 N.E.2d 173 (1995).
[37] *Watson v. Caldwell Hotel, LLC*, 2017-Ohio-4007, 91 N.E.3d 179, ¶ 45 (7th Dist.).

Moreover, the party asserting the defense must also show "knowledge, actual or constructive, of the injury or wrong * * *."[38] Therefore, "a delay in asserting a right does not of itself constitute laches."[39] "Instead, the proponent must demonstrate that he or she has been materially prejudiced by the unreasonable and unexplained delay of the person asserting the claim."[40]

In the instant case, it is possible that TQL delayed seeking injunctive relief against the defendants Dinsmore and Lubrecht, since their employment ended on October 19, 2017 and August 8, 2017, respectively, and this case was not filed until May 7, 2018. However, based on the pleadings, there is no way for the court to make the necessary finding that the defendants have been materially prejudiced, nor can it find that TQL had knowledge of the injury to the defendants.

In the complaint TQL alleges that it had "recently" discovered that the defendants were competing against it. Under the Civ.R. 12(C) standard, the court must construe that factual allegation in TQL's favor. Hence, a finding that TQL had knowledge or that the defendants have been materially prejudiced would require facts outside of the pleadings. Therefore, the court cannot find at this time that the doctrine of laches applies to bar TQL's

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[38] *Ohio Hosp. Assn. v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 06AP-471, 2007-Ohio-1499, ¶ 6, citing *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 325 (1994). *See U.S. Playing Card Co.*, 119 Ohio App.3d at 603, quoting *State ex rel. Meyers*, 71 Ohio St.3d at 605 ("The equitable doctrine of laches requires '(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.'").

[39] *Ohio Hosp. Assn*, 2007-Ohio-1499 at ¶ 6, citing *Smith v. Smith*, 168 Ohio St. 447 (1959), at paragraph three of the syllabus.

[40] *Ohio Hosp. Assn*, 2007-Ohio-1499 at ¶ 6, citing *Connin v. Bailey*, 15 Ohio St.3d 34, 35-36 (1984).

claims. Although it may apply, the court cannot determine this without being able to consider factual evidence.[41]

Finally, the defendants argue that TQL has abandoned its contract rights in failing to timely seek injunctive relief. Abandonment is "the intentional relinquishment of a known right."[42] "Parties who have entered into a contract may, by mutual consent or conduct, abandon the contract which they have entered into."[43] "Where one party effectively abandons a contract, the other party may accede to the abandonment and, in effect, the contract is dissolved by the mutual assent of both parties."[44]

However, like the issue of laches, this too is an issue that cannot be decided on a motion for judgment on the pleadings. As the Twelfth District Court of Appeals has observed: "* * * abandonment is a matter of intention and requires an intentional relinquishment of contractual rights, which may be implied from the conduct of the parties. Abandonment is a question of fact for the trier of fact."[45] Based on the factual allegations in the complaint, there is inadequate information for the court to make a finding of abandonment. Therefore, the court concludes that the defendants' motion for partial judgment on the pleadings should be denied.

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[41] *See Total Quality Logistics, LLC v. Ill's Hotshot, Inc.*, S.D.Ohio No. 1:17cv352, 2017 WL 5972001, * (Dec. 1, 2017) (upon a hearing for a motion for preliminary injunction, the court determined that it could not determine at that stage of the proceedings whether the doctrine of laches applied to bar the plaintiff's claims; however, the plaintiff's delay in seeking injunctive relief (based upon court filings and testimony) undermined the plaintiff's claim for injunctive relief).

[42] *Hunter v. BPS Guard Services, Inc.*, 100 Ohio App.3d 532, 541, 654 N.E.2d 405 (10th Dist.1995), quoting *Hodges v. Ettinger*, 127 Ohio St. 460, 463, 189 N.E. 113 (1934).

[43] *Hunter*, 100 Ohio App.3d at 541.

[44] *Hunter*, 100 Ohio App.3d at 541. *See Snell v. Salem Ave. Assoc.*, 111 Ohio App.3d 23, 31, 675 N.E.2d 555, (2d Dist. 1996) (holding same).

[45] *Mooney v. Green*, 4 Ohio App.3d 175, 178, 446 N.E.2d 1135 (12th Dist. 1982), citing 18 Ohio Jurisprudence 3d 196, Contracts, Section 275.

II. DEFENDANTS HG, WIGGINS, AND CASTANEDA'S MOTION

The defendants HG, Wiggins, and Castaneda argue in their motion for judgment on the pleadings that the court should find injunctive relief is unavailable to TQL because the natural expiration dates of Wiggins and Castaneda's noncompetition agreements have passed. Castaneda stopped employment with TQL on July 26, 2017, and Wiggins ceased on November 7, 2017. As such, their one-year noncompetition periods would have expired on July 16, 2018 and November 7, 2018, respectively. In response, TQL counters that a tolling provision in the noncompetition agreements prevents the noncompetition agreement from running during the time the defendants are in breach of it. The defendants maintain that the tolling provision is unenforceable.

Ohio courts have enforced tolling provisions in noncompetition agreements.[46] As such, the court will not find, at this point, that the possibility of tolling the defendants' noncompetition agreement is inequitable. Furthermore, as explained above, even absent a tolling provision in a noncompetition agreement, equitable tolling still applies during litigation. Thus, even if the court found that the tolling provision was unenforceable, equitable tolling may still apply. To determine whether equitable tolling applies would require facts outside the pleadings.

Additionally, the defendants Castaneda and Wiggins raise a defense of laches, as did defendants Dinsmore and Lubrecht. For the same reasons described in the section above, the court cannot determine whether the doctrine of laches applies at this junction because the defendants must show material prejudice by TQL's delay and that TQL had

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[46] *See Lindsey Const. & Design, Inc. v. Luttrell*, Stark C.P. No. 2013CV01747, 2015 WL 12806062, *10 (Apr. 29, 2015).

knowledge of the injury it was causing to the defendants in delaying. For these reasons, the court denies the defendants' motion for partial judgment on the pleadings.

Finally, the defendants' request to have the interim order enjoining them from directly competing with TQL vacated in advance of the preliminary injunction hearing. "Where a party voluntarily enters into an agreed entry or stipulation resolving an issue of contention, that party cannot later complain about the terms of the agreement, absent evidence of fraud, mistake, or misrepresentation."[47] In support of their motion, the defendants argue that they expected the preliminary injunction hearing to have occurred much earlier in this case. However, their argument is not supported by separate evidence of fraud, mistake, or misrepresentation (e.g. affidavits, etc.). Therefore, the court declines to vacate the interim order in advance of the preliminary injunction hearing.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motions for partial judgment on the pleadings are not well-taken and are hereby denied.

IT IS SO ORDERED.

DATED: 3-22-19

Judge Jerry R. McBride

[47] *Mitchells Salon & Day Spa, Inc. v. Bustle*, 187 Ohio App.3d 336, 2010-Ohio-1880, 931 N.E.2d 1172, ¶ 13 (1st Dist.), quoting *Doan v. Doan*, 1st Dist. No. C–960932, 1997 WL 602881, *2 (Oct. 2, 1997).

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry have been sent on this 22nd day of February 2019 by e-mail to Matthew J. Wiles, Attorney for the Plaintiff, at mwiles@dickinson-wright.com; to Anthony J. Hornbach, at Tony.Hornbach@ThompsonHine.com, and George B. Musekamp, at George.Musekamp@ThompsonHine.com, Attorneys for the Defendant HG Logistics LLC, Joseph Castaneda, and Ethan Wiggins; and to Robert A. McMahon, Attorney for the Defendants Joseph Dinsmore and Thomas Lubrecht, at bmcmahon@emclawyers.com.

Judicial Assistant to Judge McBride