

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**FILED**  
2018 JAN -5 PM 2:08  
BARBARA A. WIEDENBEIN  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH

**TOTAL QUALITY LOGISTICS, LLC** :  
Plaintiff : **CASE NO. 2017 CVH 00407**  
vs. : **Judge McBride**  
**BRAKEBUSH TRANSPORTATION** : **DECISION/ENTRY**  
**INC., ET AL.** :  
Defendants :

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

White, Getgey & Meyer Co., LPA, Katherine A. Clemens and C. Joseph McCullough, counsel for the defendants Gregory Hay and Brakebush Transportation, Inc., 7587 Central Parke Boulevard, Mason, Ohio 45040

This cause is before the court for consideration of separate motions to dismiss for lack of personal jurisdiction filed on May 8, 2017 by the defendants Brakebush Transportation, Inc. (hereinafter referred to as "Brakebush") and Gregory Hay. Oral arguments were heard with respect to the motions on July 14, 2017. At the conclusion of the oral arguments of counsel, 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**

This case stems from a dispute between an employer- Total Quality Logistics, LLC (hereinafter referred to as "TQL")- with its former employee, the defendant Gregory Hay, and his new employer, the defendant Brakebush Transportation, Inc. ("hereinafter referred to as "Brakebush"). The recitation of facts contained herein is limited to those facts which are pertinent to the issue of whether this court has personal jurisdiction over Hay and Brakebush.

TQL is a broker which links a customer in need of freight transportation with a motor carrier in exchange for a fee. TQL is an Ohio limited liability company headquartered in Ohio.

Brakebush is a Wisconsin corporation with its headquarters and principal place of business in Wisconsin. Brakebush also has a physical office and employees in Texas, where it currently employs TQL's former employee, the defendant Gregory Hay.

Brakebush transports chicken products for its parent company, Brakebush Brothers, Inc.<sup>1</sup> Brakebush moves raw chicken to and from its three production facilities (in Wisconsin, Minnesota, and Texas), as well as finished chicken products from those facilities to its customers. Brakebush does not have any offices, employees, or fixed

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<sup>1</sup> Initially Brakebush Brothers, Inc. was also a named defendant in this suit. However, TQL has since voluntarily dismissed Brakebush Brothers, Inc. from this action.

physical presence in Ohio. Brakebush sells its services from its Wisconsin or Texas locations.

Since June 23, 2015, TQL has retained Brakebush to deliver loads for TQL's customers on 70 occasions. Approximately half of these loads were tendered to Brakebush by TQL brokers located in Ohio. Four of the loads were picked up in Ohio.

For all of the loads, Brakebush sent invoices to TQL at its Clermont County office, which is where payment to Brakebush from TQL emanated from. In addition to moving loads for TQL customers, Brakebush has also worked with TQL previously to move its chicken products when Brakebush did not have enough trucks or drivers to move the chicken products itself. Brakebush does not consider itself to be a competitor of TQL because it does not broker freight the way that TQL does by acting as a middle-man.

In 2017 Brakebush stopped using TQL to find carriers to move its freight, except on occasion, because it was less expensive for Brakebush to move the freight itself rather than to out-source it to another carrier using a third-party broker, like TQL. Since TQL commenced this action, Brakebush has completely stopped using TQL to broker its loads. Additionally, Brakebush has stopped providing freight moving services to TQL customers.

Brakebush has two contracts with TQL, unrelated to this litigation, that both contain a forum selection clause. The first contract is a broker-carrier agreement that provides:

**"15. GOVERNING LAW. Unless preempted by or controlled by the Federal Transportation Laws and Regulations this Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. CARRIER and BROKER further agree that the exclusive venue for any lawsuit necessary to resolve a dispute not resolved pursuant to paragraph 16 below shall be in state or federal court in Cincinnati, Hamilton County, Ohio."**<sup>2</sup>

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<sup>2</sup> Ex. 1 to M. Bostwick's Aff.

In turn, Paragraph 16 required the parties to submit to dispute resolution to resolve disputes that arise "under this agreement."<sup>3</sup>

The second agreement with Brakebush reads as follows: "9. **Governing Law, Forum, Venue.** Customer and TQL agree that the exclusive jurisdiction and venue for any lawsuit to resolve and dispute arising out of this Agreement shall be in state court in Clermont County, Ohio. \* \* \*"<sup>4</sup>

Brakebush's truck fleet is currently used mostly for moving freight to or from a Brakebush Brothers production facility. Brakebush only carries freight for third parties when convenient backhaul loads can be arranged.

Hay formerly worked as a broker for TQL, and in that role he connected non-TQL shippers to non-TQL carriers. Hay is a Texas resident, but during his employment with TQL and subsequently when he was hired by Brakebush, he was a Florida resident. Hay does not own property in Ohio and he was not trained by TQL in Ohio. Hay began employment at TQL on September 4, 2012. While employed at TQL, all of Hay's emails were routed through servers in Ohio, his phone calls were made using a landline routed through Ohio, his phone number began with a (513) area code (the area code for Clermont County), his salary and commission was processed in Ohio and paid into his bank account in Florida, and during his training he viewed training modules and videos that originated from TQL's Ohio office.

While a broker at TQL, Hay had a customer in Ohio for whom he brokered more than 130 loads. He also brokered 14 or more separate loads that were transported into Ohio between January 2014 and January 2017. Finally, Hay had seven prospective

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<sup>3</sup> Ex. 1 to M. Bostwick's Aff.

<sup>4</sup> Ex. 2 to M. Bostwick's Aff.

customers in Ohio while employed at TQL, and he would have had to contact these prospective customers regularly.

Hay entered into confidentiality agreement and restrictive covenant ("Agreement") on September 4, 2012, which is the basis for TQL's present breach of contract claim against Hay. Hay signed the Agreement in Florida and remitted it to a supervisor in Florida. The discussions surrounding the agreement that Hay had with TQL occurred in Florida. The agreement requires, among other things, that Hay maintain the secrecy of TQL's confidential information/trade secrets, that Hay refrain from soliciting TQL customers for a period of one year following the termination of employment, that Hay not disclose TQL's confidential information/trade secrets, and that Hay not compete against TQL or work for a TQL competitor for a period of one year from the termination of Hay's employment with TQL.<sup>5</sup>

The Agreement contains a forum selection clause, which reads as follows:

**"16. CONSENT TO JURISDICTION AND VENUE – WAIVER OF JURY TRIAL.** The Employee hereby consents to jurisdiction and venue for any action brought by the Company arising out of a breach or threatened breach of this Agreement in the United States District Court for the Middle District of Florida, Tampa Division, or in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida \* \* \*.

**20. RULES OF CONTRUCTION \* \* \***

(c) Governing Law. This Agreement shall be governed and construed in accordance with the statutory and decisional law of the State of Florida."

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<sup>5</sup> Ex. 1. to Compl.

On February 9, 2017, Hay's employment with TQL terminated. At some point after that, Hay began work with Brakebush in Texas, where he is presently employed. Hay avers that in his new employment with Brakebush he has been instructed not to use any information he may have obtained while at TQL, and that he has followed that instruction. In his new position, Hay oversees the shipment of raw materials from vendors located in the southwest to Brakebush's production facility in Irving, Texas. He claims he has never worked on a Brakebush shipment that did not involve shipping goods to or from a Brakebush production facility. As such, he has not arranged for any of Brakebush's occasional backhaul loads. Hay believes that Brakebush is not a competitor of TQL and that he therefore could work for Brakebush in good faith.

On April 7, 2017, TQL filed a complaint against the defendants alleging the following causes of action: (1) breach of contract against Hay only, (2) breach of fiduciary duty against Hay only, (3) misappropriation of trade secrets against both defendants, (4) intentional interference with contract and unfair competition against Brakebush only, and (5) punitive damages against both defendants. TQL also requested a temporary restraining order, a preliminary injunction, and a permanent injunction against all parties.

At a hearing on the temporary restraining order, held on April 18, 2017, counsel for Brakebush appeared for the limited purpose of moving to dismiss for lack of personal jurisdiction. The court then set a schedule for briefing on the issue.

On May 8, 2017, Brakebush and Hay moved to dismiss for lack of personal jurisdiction under Civ.R. 12(B)(2) and included the affidavits of Hay and Michael Schwersenska (Brakebush's Director of Transportation). TQL filed memoranda in opposition to both defendants' motions on May 30, 2017, along with the affidavit of Mark

Bostwick (TQL's risk manager). Both defendants filed their replies in support on June 30, 2017, along with supplemental affidavits from Hay and Schwersenska.

The court listened to oral arguments as to the respective motions to dismiss on July 15, 2017. At the conclusion of the oral arguments, the court took the motions under advisement.

### STANDARD OF REVIEW

"In order to render a valid judgment, a court must have personal jurisdiction over the defendant."<sup>6</sup> If the court has not acquired personal jurisdiction over the defendant, then the judgment is void.<sup>7</sup>

Civ.R. 12(B) provides, in pertinent part:

"Every defense, law or fact, to a claim of relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: \* \* \* (2) lack of jurisdiction over the person."<sup>8</sup>

The defense of lack of personal jurisdiction "usually must be raised either in the defendant's answer or in a motion filed prior to the filing of the answer."<sup>9</sup> When the

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<sup>6</sup> *Nix v. Lytle*, 12th Dist. Butler No. CA2012-06-119, 2013-Ohio-331, ¶ 11, citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984). See *EnQuip Technologies Group, Inc. v. Tycon Technologies, S.R.L.*, 2d Dist. Greene Nos. 2009 CA 42, 2009 CA 47, 2010-Ohio-28, ¶ 57, citing *Maryhew*, 11 Ohio St.3d at 156 (holding same).

<sup>7</sup> *Nix*, 2013-Ohio-331 at ¶ 11, citing *Beachler v. Beachler*, 12th Dist. Preble No. CA2006-03-007, 2007-Ohio-1220, ¶ 13.

<sup>8</sup> Civ.R. 12(B)(2).

<sup>9</sup> *Beachler*, 2007-Ohio-1220 at ¶ 17, citing *Franklin v. Franklin*, 5 Ohio App.3d 74, 75-76 (7th Dist. 1981).

defendant makes an objection based on personal jurisdiction, "the plaintiff has the burden of establishing that the court has jurisdiction."<sup>10</sup>

The court may resolve the issue of whether personal jurisdiction exists by "hear[ing] the matter on affidavits, depositions, or interrogatories, or it may hold a hearing on the issue and receive oral testimony."<sup>11</sup> When the trial court considers whether personal jurisdiction exists without having a hearing on the issue, the plaintiff only needs to make a "prima facie showing of personal jurisdiction and the trial court must view the allegations in the pleadings and documentary evidence in a light most favorable to the plaintiff, resolving all reasonable competing inferences in its favor."<sup>12</sup> A plaintiff makes a prima facie showing when the plaintiff "produces sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction over the defendant."<sup>13</sup>

In reference to the prima facie standard, "courts have noted that the personal jurisdiction determination involves a seemingly 'lopsided standard' in favor of the plaintiff. \* \* \* However, courts have justified these standards by noting that any other rule would allow for pretrial dismissal of claims based merely on a defendant presenting an affidavit refuting the allegations of personal jurisdiction."<sup>14</sup> Even if the plaintiff satisfies the prima facie standard, the plaintiff will continue to "bear 'the burden of proving, in its case-in-chief

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<sup>10</sup> *Beachler*, 2007-Ohio-1220 at ¶ 14. See *Simmons v. Budde*, 38 N.E.3d 960, 2015-Ohio-3780, ¶ 7 (10th Dist.), citing *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 785, ¶ 27 ("Upon a defendant's motion to dismiss, the plaintiff bears the burden of establishing that the trial court has personal jurisdiction over the defendant.")

<sup>11</sup> *Beachler*, 2007-Ohio-1220 at ¶ 15, citing *Jurko v. Jobs Europe Agency*, 43 Ohio App.2d 79, 85 (8th Dist. 1975).

<sup>12</sup> *Booth v. Watershed Wellness Ctr.*, 12th Dist. Butler No. CA2013-04-065, 2013-Ohio-5272, ¶ 7, citing *Natl. City Commercial Corp. v. All About Limousines Corp.*, 12th Dist. Butler No CA2005-08-226, 2009-Ohio-1159, ¶ 5.

<sup>13</sup> *Booth*, 2013-Ohio-5272 at ¶ 7, citing *Bulford v. Von Wilhendorf, LLC*, 12th Dist. Warren No. CA2006-02-022, 2007-Ohio-347, ¶ 10.

<sup>14</sup> *State ex rel. DeWine v. 9150 Group, L.P.*, 977 N.E.2d 112, 2012-Ohio-3339, ¶ 15 (9th Dist.).

at trial, existence of facts upon which jurisdiction is based by a preponderance of the evidence.”<sup>15</sup>

## LEGAL ANALYSIS

In Ohio, to determine whether a trial court has personal jurisdiction over a nonresident defendant, the trial court must determine “(1) whether the long-arm statute and the applicable rule of civil procedure confer jurisdiction and, if so, (2) whether the exercise of jurisdiction would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution.”<sup>16</sup> Thus, even if the Ohio long-arm statute confers jurisdiction over a nonresident defendant, “an Ohio court cannot exercise personal jurisdiction over [the defendant] if doing so would violate [the defendant’s] right to due process.”<sup>17</sup>

### I. LONG-ARM STATUTE

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<sup>15</sup> *Id.* citing *Serras v. First Tennessee Bank Natl. Assn.*, 875 F.2d 1212, 1214 (6th Cir.1989).

<sup>16</sup> *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 92014, ¶ 12, citing *Kentucky Oaks Mall Co. v. Mitchell’s Formal Wear, Inc.*, 53 Ohio St.3d 73, 75, 559 N.E.2d 447 (1990). See *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 28, citing *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K’s Foods, Inc.*, 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048 (1994) (holding same).

<sup>17</sup> *Maui Toys v. Brown*, 7th Dist. Mahoning No. 12 MA 172, 2014-Ohio-583, ¶ 55, citing *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 45.

Ohio's long-arm statute is R.C. 2307.382, which outlines specific activities by which a nonresident defendant comes within an Ohio court's personal jurisdiction.<sup>18</sup> R.C. 2307.382 provides, in pertinent part:

"(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

\* \* \*

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state \* \* \*."<sup>19</sup>

Civ.R. 4.3 permits service of process on nonresidents in specific circumstances and mirrors the long-arm statute.<sup>20</sup> Civ.R. 4.3 provides, in relevant part:

"Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. 'Person' includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

\* \* \*

(9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably

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<sup>18</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 29.

<sup>19</sup> R.C. 2307.382.

<sup>20</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 35.

have expected that some person would be injured by the act in this state \* \* \*."<sup>21</sup>

For purposes of R.C. 2307.382, a "person" includes "an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this state [Ohio]."<sup>22</sup>

There are two types of personal jurisdiction, general or specific, and the type of jurisdiction that the forum state maintains over a nonresident depends upon "the nature of the contacts that the defendant has with the forum state."<sup>23</sup> General jurisdiction exists when "a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state."<sup>24</sup>

However, Ohio does not recognize general jurisdiction over nonresidents.<sup>25</sup> As quoted above, the Ohio long-arm statute only allows for a "cause of action arising from" the defendant's actions, as delineated in R.C. 2307.382(A)(1)-(9). Furthermore, R.C. 2307.382(C) provides that "[w]hen jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him." To allow general jurisdiction in Ohio " \* \* \* would come dangerously

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<sup>21</sup> Civ.R. 4.3.

<sup>22</sup> R.C. 2307.381.

<sup>23</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 46, citing *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1992).

<sup>24</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 46, citing *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002).

<sup>25</sup> *Conn v. Zakharov*, 867 F.3d 705, 717 (6th Cir. 2012). See *Wenglor Sensors, Ltd. v. Baur*, 847 F.Supp.2d 1041, 1044 (S.D. Ohio 2012), citing *Signom v. Schneck Fuels, Inc.*, No. C-3-07-037, 2007 WL 1726492, \*3 (S.D. Ohio June 13, 2007) ("Ohio does not recognize general jurisdiction over nonresidents").

close to collapsing Ohio's two-part jurisdictional inquiry into one, an outcome that the Ohio Supreme Court has repeatedly rejected."<sup>26</sup>

In oral argument, TQL argued that Ohio courts can exercise general jurisdiction over nonresident defendants, and in doing so highlighted *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 78. *Kauffman* explained that personal jurisdiction can be either general or specific, but in did so in explaining the requirements of due process, which are discussed below. In any case, the plaintiff involved in *Kauffman* did not argue that the Ohio trial court had general jurisdiction over the nonresident defendant. As such, the court is not persuaded that *Kauffman* has done away with the requirement in the Ohio long-arm statute that, to have jurisdiction over a nonresident defendant, the cause of action must arise from those of the defendant's actions that satisfy R.C. 2903.382(A)(1)-(9).

To begin with, R.C. 2307.382(A)(1) and its corollary Civ.R. 4.3(A)(1), when taken together, enable a court to exercise personal jurisdiction over a nonresident defendant and provide for service of process to effectuate that jurisdiction if the cause of action arises from the nonresident defendant's "[t]ransacting any business in this state."<sup>27</sup> "The phrase 'transacting any business' is broad and encompasses more than 'contract.'"<sup>28</sup> This phrase also includes "to carry on business" and "to have dealings."<sup>29</sup>

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<sup>26</sup> *Conn*, 667 F.3d at 717.

<sup>27</sup> *Clark v. Connor*, 82 Ohio St.3d 309, 312, 695 N.E.2d 751 (1998).

<sup>28</sup> *Id.*, quoting *Kentucky Oaks Mall Co.*, 53 Ohio St.3d at 75, 559 N.E.2d 447.

<sup>29</sup> *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 638 N.E.2d 541 (1994), quoting *Kentucky Oaks Mall Co.*, 53 Ohio St.3d at 75. See *Natl. City Commercial Corp. v. All About Limousines Corp.*, 12th Dist. Butler No CA2005-08-226, 2009-Ohio-1159, ¶ 11, quoting *U.S. Sprint Communications Co. Ltd. Partnership*, 68 Ohio St.3d at 185.

Due to this broad definition, personal jurisdiction under the long-arm statute does not necessarily require the defendant's physical presence in Ohio.<sup>30</sup> Moreover, because of the large breadth of the phrase "transacting any business," "questions concerning the applicability of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) have been resolved on 'highly particularized fact situations, thus rendering any generalization unwarranted.'"<sup>31</sup>

The Ohio Supreme Court found that R.C. 2307.382(A)(1) was satisfied although a nonresident defendant did not maintain a physical presence in Ohio in the seminal case *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 559 N.E.2d 477 (1990). In that case a nonresident defendant, a Georgia corporation, negotiated a commercial lease for Kentucky property with an Ohio-based company.<sup>32</sup> When examining the defendant's contacts with Ohio, the court cited the following facts: the lease was negotiated via telephone with an Ohio company, the defendant entered into a 10-year contract that was mailed to Ohio, and the contract created ongoing duties and obligations.<sup>33</sup> Upon examining the definition of "transacting business," described above, the Court held that the defendant's conduct fell within the ambit of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1).

In the trade secret case of *Fern Exposition Services, L.L.C. v. Lenhof*, 1st Dist. Hamilton No. C-130791, 2014-Ohio-3246, a nonresident former employee was sued by his Ohio-based former employer.<sup>34</sup> In finding that Ohio had personal jurisdiction over the

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<sup>30</sup> *Goldstein*, 70 Ohio St.3d at 236, citing *Kentucky Oaks Mall*, 53 Ohio St.3d 73.

<sup>31</sup> *Clark*, 82 Ohio St.3d at 312-313, quoting *U.S. Sprint Communications Co. Ltd. Partnership*, 68 Ohio St.3d at 185. See *Goldstein*, 70 Ohio St.3d at 236, quoting *U.S. Sprint Communications Co. Ltd. Partnership*, 68 Ohio st.3d at 185.

<sup>32</sup> *Kentucky Oaks Mall Co.*, 53 Ohio St.3d at 74-76.

<sup>33</sup> *Id.* at 76.

<sup>34</sup> *Fern Exposition Servs., L.L.C. v. Lenhof*, 1st Dist. Hamilton No. C-130791, 2014-Ohio-3246, ¶ 1.

employee, the court noted, among other facts, that the defendant-employee had regularly accessed information on the plaintiff-employer's computer servers in Ohio.<sup>35</sup> Thus, whether a nonresident uses Ohio computer servers is a fact weighing in favor of finding jurisdiction.<sup>36</sup>

In *The Rightthing, LLC v. Brown*, N.D. Ohio No. 3:07 CV 135, 2009 WL 249694 (Feb. 2, 2009), the court had to determine whether Ohio had jurisdiction over a nonresident defendant-employee who formerly worked for an Ohio corporation in a trade secret misappropriation and non-competition case. In finding that the defendant transacted business in Ohio, the court noted that "[w]hile this Court does not hold that an out-of-state employee of an Ohio corporation alone constitutes 'transacting any business,' the Court finds that such a status is at least a step in the right direction."<sup>37</sup>

In the earlier case of *Faurecia Exhaust Systems, Inc. v. Walker*, 464 F.Supp.2d 700, 706 (N.D. Ohio 2006), the court found that a nonresident contracting for employment with an Ohio-based employer was, on its own, sufficient to find that the defendant transacted business in Ohio, especially because one of the causes of action involved breach of that contract. Hence, whether a nonresident employee has contracted with an Ohio business is an important factor in examining personal jurisdiction.

In turning to the case at bar, the court ultimately finds that Hay's conduct falls within the large breadth of "transacting business," thus conferring jurisdiction under the Ohio long-arm statute. The phrase transacting business includes not only contracting

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<sup>35</sup> Id. at ¶ 26.

<sup>36</sup> See *The Rightthing, LLC v. Brown*, N.D. Ohio No. 3:07 CV 135, 2009 WL 249694, \*3 (Feb. 2, 2009) (in a trade secret misappropriation and non-competition breach case, the court found the nonresident employee transacted business in Ohio, noting that regularly accessed information stored on Ohio-based data servers).

<sup>37</sup> *The Rightthing, LLC*, 2009 WL 249694 at \*3.

business, but also "to carry on business" and "to have dealings."<sup>38</sup> The Twelfth District Court of Appeals has explained that, "[w]here a non-resident defendant contracts with an Ohio resident to create an ongoing business relationship, such defendant is 'transacting business' in Ohio pursuant to the plain meaning of R.C. 2307.382(A)(1)."<sup>39</sup>

Given the totality of the circumstances, Hay transacted business in Ohio. Hay signed a contract with TQL that specifically stated that TQL was an Ohio corporation and created ongoing obligations to TQL. Further, Hay had an Ohio phone number, all his communications with customers were routed through a server located in Ohio, Hay used TQL's computer server in Ohio to conduct all of his business emails, a portion of Hay's job training originated from Ohio, and his salary and commission was processed and paid from Ohio. In viewing the allegations in the pleadings and the evidence in the light most favorable to TQL and making all reasonable inferences in TQL's favor, the court finds that TQL has made a prima facie showing that Hay transacted business within the meaning of the Ohio long-arm statute and Civ.R. 4.3.<sup>40</sup>

Hay argues that his relationships with Ohio clients at TQL should not be considered because they are not substantially related to the causes of action TQL has filed against him and because he is protected under the fiduciary shield doctrine. The court agrees that the defendant's interactions with his former Ohio clients or securing loads that were dropped off in Ohio are not relevant to the long-arm analysis because the causes of action

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<sup>38</sup> *Kentucky Oaks Mall Co.*, 53 Ohio St.3d at 75.

<sup>39</sup> *Bullford*, 2007-Ohio-347 at ¶ 12.

<sup>40</sup> See *International Paper Co. v. Goldschmidt*, 872 F.Supp.2d 624, 630, citing *Coast to Coast Health Care Services, Inc. v. Meyerhoffer*, S.D. Ohio No. 2:10-cv-734, 2012 WL 169963 (Jan. 19, 2012) (explaining that Ohio courts have found that a nonresident employee transacted business with an Ohio resident employer when, among other things, the corporation's principal place of business was Ohio; the plaintiff provided the employee with software, programming and other tools needed to carry out her employment; and the defendant was paid by the Ohio plaintiff).

at issue are unrelated to Hay's Ohio clients and prospective clients. TQL has not posited that the defendant has stolen any of its Ohio customers or prospective customers, and Brakebush was not an Ohio customer. Accordingly, the court need not address whether the fiduciary shield doctrine applies to prevent the court from considering Hay's interactions with Ohio customers and prospective customers.<sup>41</sup>

In turning next to Brakebush, the court finds that jurisdiction is conferred over Brakebush under 2307.382(A)(6). R.C. 2307.382(A)(6) and the corresponding Civ.R. 4.3(A)(9) permit a court to exercise personal jurisdiction over a nonresident defendant and provide for service of process to effectuate that jurisdiction "if the cause of action arises from a tortious act committed outside Ohio with the purpose of injuring persons, when the nonresident defendant might reasonably have expected that some person would be injured thereby in Ohio."<sup>42</sup> " \* \* \* Courts take a "broad approach" to applying R.C. 2307.382(A)(6).<sup>43</sup>

Here, TQL has filed causes of action against Brakebush for misappropriation of trade secrets and intentional interference with contract and unfair competition. Specifically regarding the intentional interference claim, TQL alleges that Brakebush knew of the Agreement TQL had with Hay and yet it hired him anyway, causing TQL to lose out on business opportunities. TQL has argued that Brakebush's decision to hire

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<sup>41</sup> The fiduciary shield doctrine "prevents a court from considering an individual's acts done in an official capacity when analyzing whether the individual is subject to personal jurisdiction in the forum state." *Maui Toys*, 2014-Ohio-583 at ¶ 25, citing *S & R Recycling, Inc.*, 195 Ohio App.3d 744, 2011-Ohio-3371, 961 N.E.2d 1153, ¶ 27 (7th Dist.). However, there are exceptions to the doctrine, one of which excepts torts the defendant committed within the scope of his employment. *Maui Toys* at ¶ 28, citing *Yo-Can, Inc. v. Yogurt Exch.*, 149 Ohio App.3d 512, 2002-Ohio-5194, 778 N.E.2d 80, ¶ 47 (7th Dist.).

<sup>42</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 43, quoting *Clark*, 82 Ohio St.3d at 313.

<sup>43</sup> *Nationwide Life and Annuity Ins. Co. v. Golden*, S.D. Ohio No. 2:12-cv-213, 2013 WL 97718, \*5 (Jan. 7, 2013), citing *Schneider v. Hardesty*, 669 F.3d 693, 700 (6th Cir. 2012).

Hay is the reason that Brakebush no longer retains TQL as a broker when it needs a third party to ship its freight. Brakebush has countered that its decision not to hire TQL anymore was based on an independent business decision because it was less expensive for Brakebush to ship its freight in-house. Additionally, Brakebush was aware that TQL was an Ohio company, and thus any injury to TQL would occur in Ohio, because it had previously engaged in unrelated contracts with TQL that stated as much. In viewing the allegations and evidence in the light most favorable to the plaintiff, and in making all reasonable inferences in the plaintiff's favor, the court believes that TQL has met its prima facie burden of demonstrating that Brakebush committed a tortious act outside Ohio with the purpose of injuring TQL, when Brakebush might reasonably have expected that TQL would be injured thereby in Ohio.

## II. DUE PROCESS

Although the defendants may fall within Ohio's long-arm jurisdiction, "[t]he extent to which the reach of the long-arm statute is limited by due process is a question of federal law."<sup>44</sup> "Ohio's long-arm statute is not coterminous with due process."<sup>45</sup> As such, although Ohio's long-arm statute may confer jurisdiction over the defendants, it is possible that due process concerns may prevent the court from exercising jurisdiction over the defendants.<sup>46</sup>

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<sup>44</sup> *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, 839 N.E.2d 67, ¶ 26 (10th Dist.), quoting *Scullin Steel Co. v. Natl. Ry. Utilization Corp.*, 676 F.2d 309, 311 (6th Cir. 1982).

<sup>45</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 45, citing *Goldstein*, 70 Ohio St.3d at 238, fn. 1.

<sup>46</sup> See *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 45.

Under the Fourteenth Amendment, “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’”<sup>47</sup> To obtain personal jurisdiction over a nonresident defendant, the defendant must have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>48</sup> As long as the defendant has sufficient minimum contacts with the forum state, the defendant need not have a physical presence in the forum state.<sup>49</sup> If minimum contacts are established, then courts consider the contacts “in light of other facts to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’”<sup>50</sup>

The court must consider whether it has specific jurisdiction over the defendants. Specific jurisdiction arises when “a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contact with the forum.”<sup>51</sup>

The Sixth Circuit Court of Appeals has articulated a three-part test for determining whether a court holds specific jurisdiction over a nonresident defendant:

“First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with

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<sup>47</sup> *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 471–472, 105 S.Ct. 2174, 85 L.Ed. 528 (1985), citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

<sup>48</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). See *Burger King Corp.*, 471 U.S. at 474, quoting *International Shoe Co.*, 326 U.S. at 316 (explaining that the “constitutional touchstone” of due process “remains whether the defendant purposely established ‘minimum contacts’ in the forum state.”).

<sup>49</sup> *Burger King Corp.*, 471 U.S. at 476.

<sup>50</sup> *Id.*, quoting *International Shoe Co.*, 326 U.S. at 320.

<sup>51</sup> *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414, fn. 8.

the forum state to make the exercise of jurisdiction over the defendant reasonable."<sup>52</sup>

Under the first prong of the specific jurisdiction test, the nonresident defendant must have "purposely avail[ed] [himself] of the privilege of conducting activities with the forum State."<sup>53</sup> A defendant has purposely availed himself when his "contacts with the forum state 'proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."<sup>54</sup> The contacts must be such that the defendant can "reasonably anticipate being haled into court" in the forum state.<sup>55</sup> Accordingly, in ascertaining minimum contacts "the focus is on \* \* \* the relationship among the defendant, the forum, and the litigation."<sup>56</sup> When evaluating the contacts, courts will examine any "prior negotiations contemplated, future consequences, along with the terms of the contract and the parties' 'actual course of dealing' to determine whether [the nonresident defendant] purposely established minimum contacts with the forum."<sup>57</sup>

The second prong of the specific jurisdiction test involves determining whether the plaintiff's claims arose from the defendant's contacts with the forum state.<sup>58</sup> An action arises from the defendant's contacts when the contacts "are related to the operative facts

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<sup>52</sup> *Bird*, 289 F.3d at 874, quoting *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

<sup>53</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 45, quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

<sup>54</sup> (Emphasis original.) *Burger King Corp.*, 471 U.S. at 475, quoting *McGee v. Internatl. Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed 223 (1957).

<sup>55</sup> *Burger King Corp.*, 471 U.S. at 474, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

<sup>56</sup> *Fallang*, 40 Ohio St.3d at 107.

<sup>57</sup> *Clark*, 82 Ohio St.3d at 314, quoting *Burger King Corp.*, 471 U.S. at 479.

<sup>58</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 70.

of the controversy."<sup>59</sup> "This 'does not require that the cause of action formally arise from defendant's contacts with the forum; rather this criterion requires only that the cause of action, of whatever type, *have a substantial connection with the defendant's in-state activities.*'"<sup>60</sup>

For the final step in the specific jurisdiction test, the defendant's acts or consequences "must have a substantial connection to the forum state to make exercise of jurisdiction over the defendant reasonable."<sup>61</sup> Courts consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."<sup>62</sup> For this third step, " \* \* \* once the first two questions have been answered in the affirmative \* \* \* 'resolution of the third involves merely fettering out the unusual cases where that interest cannot be found.'<sup>63</sup>

With respect to the defendant's burden, courts recognize that " \* \* \* modern transportation and communications made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity."<sup>64</sup> Regarding the forum state's interest, it is "beyond dispute" that the forum state will have a " \* \* \* significant

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<sup>59</sup> *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996).

<sup>60</sup> (Emphasis original.) *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 70, quoting *Third Natl. Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989).

<sup>61</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 71.

<sup>62</sup> (Internal Citations Omitted.) *Burger King Corp.*, 471 U.S. at 477, quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

<sup>63</sup> *Coast to Coast Health Care Services, Inc.*, 2012 WL 169963 at \*6, quoting *Southern Machine Company*, 401 F.2d at 384.

<sup>64</sup> *Goldstein*, 70 Ohio St.3d at 237, citing *Burger King Corp.*, 471 U.S. 462.

interest in redressing injuries that actually occur within the state."<sup>65</sup> Moreover, "Ohio has a legitimate interest in protecting the business interests of its citizens \* \* \*,"<sup>66</sup> as well as exercising jurisdiction over " \* \* \* those who commit torts within its territory."<sup>67</sup>

In examining the present case, the court will begin with Brakebush because it finds that Brakebush's contacts with Ohio do not satisfy the second prong of the due process test. The causes of action against Brakebush do not arise from its activities with Ohio. As explained, "only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contact."<sup>68</sup>

All of Brakebush's contacts with Ohio that TQL has identified are unrelated to this case. Although Brakebush has moved loads for TQL customers over the past several years, none of those customers are at issue in this case. Furthermore, when Brakebush contracted with Hay to hire him, Hay was in Florida, not Ohio. TQL has also argued that two forum selection clauses in two contracts between TQL and Brakebush provide the court with jurisdiction over Brakebush for this case. However, the terms of those contracts are limited, by their own terms, to actions arising under those agreements. Those agreements are not at issue in this case, and therefore those forum selection clauses do not impact this court's personal jurisdiction over Brakebush. In sum, the court cannot find that TQL's causes of action against Brakebush have a substantial connection with the

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<sup>65</sup> *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 72, quoting *Keeton*, 465 U.S. at 776.

<sup>66</sup> *Bird*, 289 F.3d at 875.

<sup>67</sup> (Citation omitted.) *Falang*, 40 Ohio St.3d at 108.

<sup>68</sup> *Coast to Coast Health Care Services, Inc.*, 2012 WL 169963 at \*5, quoting *Southern Machine Company*, 401 F.2d at 383, fn. 29.

Brakebush's activities in Ohio.<sup>69</sup> As a result, the court cannot exercise personal jurisdiction over Brakebush.

In examining whether personal jurisdiction over Hay comports with due process, the court must decide whether it has specific jurisdiction over Hay.<sup>70</sup> First, the court must determine if Hay purposefully availed himself of the privileges of acting in Ohio or causing a consequence in Ohio.

In *The Rightthing, LLC v. Brown*, N.D. Ohio No. 3:07 CV 135, 2009 WL 249694 (Feb. 2, 2009), discussed above, a nonresident employee was sued for, *inter alia*, violating a non-competition agreement and misappropriation of trade secrets. In finding that the defendant purposely availed herself to the privileges of acting in Ohio, the court cited the following facts:

"\* \* \* RTI has alleged that Brown removed files, that allegedly contained trade secrets, from RTI's *Ohio-based* database. In doing so, Brown, reached the State of Ohio through her computer wires, removed the files from RTI's computer system, and returned them to California. Furthermore, Brown regularly received files from Ohio and accessed RTI's Ohio-based computer system."<sup>71</sup>

In the case of *Faurecia Exhaust Systems, Inc. v. Walker*, 464 F.Supp.2d 700 (N.D. Ohio 2006), also discussed earlier, the court found purposeful availment in a case involving a breach of contract between a nonresident defendant-employee and an Ohio employer-plaintiff. The first prong of the due process test was satisfied because the

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<sup>69</sup> (Emphasis original.) *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 70, quoting *Third Natl. Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989).

<sup>70</sup> There is no general jurisdiction over the defendant since he does not have continuous and systematic contacts with Ohio, such that he would feel at home in the State of Ohio.

<sup>71</sup> (Emphasis original.) *The Rightthing, LLC*, 2009 WL 249694 at \*5.

employee entered into an employment agreement with the Ohio employer and “subsequently accepted compensation and benefits through the Ohio entity.”<sup>72</sup>

In the present case, Hay entered into an employment relationship with a corporation based in Ohio. He participated in training sessions originating in Ohio, he regularly used email to contact customers that were routed through computer servers in Ohio, and he received his compensation from an Ohio bank. Hay deliberately entered into a substantial and continuing relationship with his Ohio-based employer, TQL, which lasted from September 2012 until February 2017, such that his actions would have consequences in Ohio. Hay argues that he did not reasonably expect to be haled into court in Ohio because the Agreement stated that the forum for litigation was Florida. As further discussed below, the forum selection clause was permissive, and therefore TQL had a right to conduct litigation in Florida, but it was not restricted only to litigating in Florida. Accordingly, the court finds that the purposeful availment requirement is satisfied.

Next, TQL’s causes of action must arise from the Hay’s activities in Ohio. The causes of action alleged against Hay, namely breach of contract and misappropriation of trade secrets, arises from Hay’s employment relationship with TQL. Among TQL’s allegations, TQL alleges that Hay stole TQL’s business with Brakebush, using confidential business information. That information was acquired by Hay through his employment with TQL, an Ohio employer. TQL also claims that Hay violated his non-competition

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<sup>72</sup> *Faurecia Exhaust Systems, Inc.*, 464 F.Supp.2d at 707. See *Coast to Coast Health Care Services, Inc. v. Meyerhoffer*, S.D. Ohio No. 2:10-cv-734, 2012 WL 169963, \*4 (Jan. 19, 2012) (in trade secret misappropriation case involving former employees, the court found purposeful availment where the nonresident employee negotiated her employment terms with an Ohio-based employer, creating a continuing obligation, and she then allegedly caused tortious injury to that employer, directly impacting the employer’s economic and business interests).

agreement with his Ohio-based employer by working for Brakebush within one year of terminating his employment with TQL. Thus, TQL's claims are substantially related to Hay's contacts with Ohio.

Finally, the court must consider whether the Hay's acts or any consequences he has caused bear a substantial enough connection with Ohio to make the exercise of jurisdiction over them reasonable. Ohio has an interest in providing a forum for relief for TQL because " \* \* \* where the injury is to a corporation headquartered in Ohio, Ohio's interest in providing a forum for relief is clear."<sup>73</sup> Although there is undoubtedly a burden on Hay to travel to Ohio to litigate this case, since the first two inquires in the three-part due process test are satisfied, the court finds this is not the rare case where the plaintiff and state's interest in maintaining this litigation in Ohio is not justified by the burden on the defendant.

The court thus finds that having an Ohio court exercise personal jurisdiction over Hay does not offend notions of fair play and substantial justice. Because Hay's due process rights are not infringed upon, and because the Ohio long-arm statute confers jurisdiction over Hay, the court finds it has personal jurisdiction over Hay.

### III. PROCESS OF SERVICE

Hay argues in his motion to dismiss that this action must be dismissed because TQL never completed service of process on him. "In order for a judgment to be rendered against a defendant when he is not served with process, there must be a showing upon

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<sup>73</sup> *Fern Exposition Servs., L.L.C.*, 2014-Ohio-3246 at ¶ 31.

the record that the defendant has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense."<sup>74</sup> The court can dismiss an action when "service of process has not been obtained after the passage of more than one year."<sup>75</sup>

When service is permitted under 4.3(A) on an out-of-state defendant, as it was with Hay, service must be made in the same manner as provided in Civ.R. 4.1(A)(1) through 4.1(A)(3). When TQL attempted service by certified mail on Hay, it was not completed because it was refused. Following that failure, TQL served Hay using ordinary U.S. Mail on May 25, 2017, and the ordinary mail was not returned.

Civ.R. 4.6(D) sets forth the procedure for when a complaint sent via certified mail is returned.<sup>76</sup> In such a case, the clerk shall notify the party attempting service, who may then request service by ordinary mail.<sup>77</sup> If such a request is made, then service is deemed complete when the fact of the mailing is entered of record, provided that the ordinary mail is not returned by postal authorities with an endorsement showing failure of delivery.<sup>78</sup> Here, TQL served Hay by requesting ordinary mail service on Hay, which was not returned for a failure of delivery. As such, service is deemed complete as of May 25, 2017, and the court will not dismiss this case for lack of service.

#### IV. VENUE

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<sup>74</sup> *Maryhew v. Yova*, 11 Ohio St.3d 154, 157-158, 464 N.E.2d 538 (1984).

<sup>75</sup> *Maryhew*, 11 Ohio St.3d at 157, citing *Lash v. Miller*, 50 Ohio St.2d 63, 362 N.E.2d 642 (1977).

<sup>76</sup> *In re B.P.H.*, 12th Dist. Butler No. CA2006-04-090, 2007-Ohio-1366, ¶ 12.

<sup>77</sup> Civ.R. 4.6.

<sup>78</sup> *In re B.P.H.*, 2007-Ohio-1366 at ¶ 12.

Finally, Hay argues that he is entitled to dismissal because the venue in Ohio is improper. He highlights the forum selection clause in the Agreement, which reads:

**"16. CONSENT TO JURISDICTION AND VENUE – WAIVER OF JURY TRIAL.** The Employee hereby consents to jurisdiction and venue for any action brought by the Company arising out of a breach or threatened breach of this Agreement in the United States District Court for the Middle District of Florida, Tampa Division, or in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida \* \* \*.

**20. RULES OF CONTRUCTION \* \* \***

(c) Governing Law. This Agreement shall be governed and construed in accordance with the statutory and decisional law of the State of Florida."

Hay posits that, under the above provisions, venue is only proper in Florida. However, forum selection clauses can be either mandatory or permissive, and this forum selection clause is of the latter variety.

"Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum. In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere."<sup>79</sup> If a forum selection clause uses mandatory language to specify a venue, then the clause will be enforced.<sup>80</sup> If there is no language evidencing the parties' intent to make the jurisdiction exclusive, then the provision will not be enforced.<sup>81</sup>

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<sup>79</sup> *EI UK Holding, Inc. v. Cinery UK, Inc.*, 9th Dist. Summit No. 22326, 2005-Ohio-1271, ¶ 20, quoting *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Atiegnsgesellschaft*, 314 F.3d 494, 498 (10th Cir. 2002).

<sup>80</sup> *EI UK Holding, Inc.*, 2005-Ohio-1271 at ¶ 21, citing *John Boutari & Son Wine & Spirits, S.A. v. Attiki Importers & Dist. Inc.*, 22 F.3d 51, 53 (2d Cir. 1994).

<sup>81</sup> *EI UK Holding, Inc.*, 2005-Ohio-1271 at ¶ 22, citing *John Boutari & Son Wine & Spirits, S.A.*, 22 F.3d at 52.

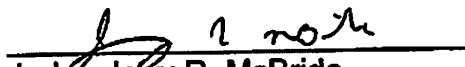
In turning to the present case, the forum selection clause in the Agreement does not contain any language to indicate an intent on behalf of the parties to make the jurisdiction exclusive. Although the forum selection clause at issue indicates that Hay "consents" to United States District Court for the Middle District of Florida, Tampa Division, or in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, it does not indicate that those courts are the exclusive venues for any future litigation involving the Agreement. Accordingly, the court finds that the forum selection clause is permissive, and it need not dismiss this case due to improper venue.

#### CONCLUSION

For the foregoing reasons, the court finds the defendant Brakebush's motion to dismiss for lack of personal jurisdiction is well-taken and the court hereby grants it. However, Hay's motion to dismiss for lack of personal jurisdiction is not well-taken and the court hereby denies it.

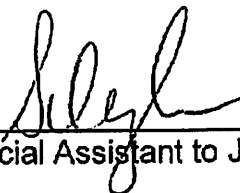
**IT IS SO ORDERED.**

DATED: 1-5-18

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Decision/Entry were served on this 5<sup>th</sup> day of January 2018 by e-mail on Barry F. Fagel, attorney for the plaintiff, at [bfagel@lindhorstlaw.com](mailto:bfagel@lindhorstlaw.com), and on Katherine A. Clemons, at [kclemons@wgmlpa.com](mailto:kclemons@wgmlpa.com), and C. Joseph McCullough, at [jmccullough@wgmlpa.com](mailto:jmccullough@wgmlpa.com), attorneys for the defendants.

  
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Judicial Assistant to Judge McBride