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2018 SEP 21 PM 2:39
BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

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

OHIO DEPARTMENT OF AGRICULTURE	:	
Plaintiff	:	CASE NO. 2017 CVH 00898
vs.	:	Judge McBride
DARRELL ENFINGER, ET AL.	:	DECISION/ENTRY
Defendants	:	

Office of the Ohio Attorney General, assistant attorneys general James R. Patterson, Angela M. Sullivan, and Lydia Arko Zigler, counsel for the plaintiff the Ohio Department of Agriculture, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215

Darrell Enfinger and Kara Enfinger, *pro se* defendants, 2217 Donald Road, Bethel, Ohio 45106

This cause is before the court for consideration of the motion for summary judgment on a request for a permanent injunction filed by the plaintiff Ohio Department of Agriculture on December 26, 2017. The court held an oral hearing on the motion on February 23, 2018, and at the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of the parties, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This case involves a dispute that began over the right of the plaintiff Ohio Department of Agriculture (hereinafter referred to as "ODA") to cut down and chip trees infested with the Asian longhorned beetle ("ALB") that were located on property owned by the defendants Darrell Enfinger and Kara Enfinger.

The ALB is an invasive insect that was brought to Ohio from Asia and attacks and destroys 13 types of Ohio hardwood deciduous trees, including maple, birch, poplar, and willow trees, among others.¹ The ALB is a large beetle of 1.0 to 1.5 inches in length.² The primary way in which the ALB spreads is by flying a short distance to a nearby tree or from human activity.³

The ALB harms trees at all of its life cycles, including the egg, larvae, and adult stages.⁴ It begins when an adult female chews tree bark and deposits eggs into the bark.⁵ Then the eggs hatch and the larvae eat the heartwood of the tree.⁶ After the larvae become adults, they eat their way out of the tree, leaving round holes in the tree measuring approximately .75 inches.⁷ The mature beetle will feed on the leaves and bark of the host tree before they are ready to reproduce.⁸ In time, the ALB will kill the host

¹ Beal Aff., ¶ 2.

² Beal Aff., ¶ 4.

³ Beal Aff., ¶ 4.

⁴ Beal Aff., ¶ 4.

⁵ Beal Aff., ¶ 4.

⁶ Beal Aff., ¶ 4.

⁷ Beal Aff., ¶ 4.

⁸ Beal Aff., ¶ 4.

tree.⁹ The uncontained spread of the ALB in Ohio would pose a serious and immediate threat to Ohio's hardwood forests, hardwood landscape trees, and nursery stock.¹⁰ Its uncontained spread would likely result in enormous economic and environmental harm.¹¹

The ALB was discovered in Ohio in June of 2011, and the ODA has been trying to eradicate it from Ohio since then.¹² To eradicate the ALB in Ohio and to prevent it from spreading further, the ODA works with the United States Department of Agriculture ("USDA").¹³ Specifically, the ODA works with the Animal and Plant Health Inspection Service within the USDA.¹⁴ The ODA follows the ALB Cooperative Eradication Program (the "Program"), designed by the USDA, to eliminate the presence and threat of the ALB in Ohio.¹⁵

Under Ohio statutory authority, the ODA quarantines certain areas of the state and specific properties in the state.¹⁶ When the ODA puts a quarantine in place, it prohibits property owners from moving certain regulated articles on the premises, such as hardwood lumber, infested with the ALB, which might provide a means of spread.¹⁷ Because of the life cycle and size of the ALB larvae and adult beetles, when the ODA places a property under quarantine, the ODA prohibits the property owners from cutting, moving, or removing any ALB-infested trees, firewood, or other regulated articles from their property.¹⁸

⁹ Beal Aff., ¶ 4.

¹⁰ Beal Aff., ¶ 2.

¹¹ Beal Aff., ¶ 2.

¹² Beal Aff., ¶ 3.

¹³ Beal Aff., ¶ 3.

¹⁴ Beal Aff., ¶ 3.

¹⁵ Beal Aff., ¶ 3.

¹⁶ Beal Aff., ¶ 3.

¹⁷ Beal Aff., ¶ 3.

¹⁸ Beal Aff., ¶ 6.

Under the Program, the ODA works with a state surveying contractor, The Davey Tree Export Company (“Davey”), to inspect quarantined areas and identify trees infested with the ALB.¹⁹ When trees are identified as being infested with the ALB, then Beach’s Trees Selective Harvesting, LLC (“Beach’s”) cuts and removes the infested trees, pursuant to a contract it has with the USDA.²⁰ To destroy the ALB at all life stages, infested host trees are chipped so that none of the chips measure larger than one inch, in at least two dimensions.²¹ The ODA prefers to chip the trees on site the same day that they are cut down so as to reduce the risk that the ALB may infest new trees.²² Sometimes, however, the infested tree is too large for an onsite chipper and must be driven to a chipping yard.²³ In such a case, the tree is covered in a tarp to prevent the ALB from escaping and is chipped offsite within 24 hours.²⁴ All of these actions in the Program are important to effectively contain and eradicate the ALB before it can spread and cause much more wide spread damage.²⁵

The ODA began surveying the trees on the defendants’ property in May of 2017.²⁶ The defendants own property at 2217 Donald Road, in Bethel, Ohio.²⁷ On June 1st, the defendants’ property was inspected, which revealed that the ALB had infested trees on the property, and the ODA placed the property under a quarantine.²⁸ On May 31st, the ODA sent a legal notice to the defendants informing them that the ALB had infested trees

¹⁹ Beal Aff., ¶ 3.

²⁰ Beal Aff., ¶ 3.

²¹ Beal Aff., ¶ 6.

²² Beal Aff., ¶ 6.

²³ Beal Aff., ¶ 6.

²⁴ Beal Aff., ¶ 6.

²⁵ Beal Aff., ¶ 3.

²⁶ Beal Aff., ¶ 4; Zaborski Aff., ¶ 3.

²⁷ Beal Aff., ¶ 4.

²⁸ Beal Aff., ¶ 4; Zaborski Aff., ¶ 4.

on their property.²⁹ It further advised that the ODA was quarantining their property.³⁰ The letter also informed the defendants that tree removal contractors would develop a site-specific work plan prior to any tree removal on the property.³¹ The defendants were informed that they were legally required to prevent the further spread of the ALB.³² The letter advised the defendants that they must adhere to the following:

“(1) Do not cut, move, or remove any infested trees, firewood, or other regulated articles from your property;

(2) Regulated trees include all species of the following genera: Acer (maple), Aesculus (buckeye), Albizia (mimosa), Betula (birch), Celtis (hackberry), Cercidiphyllum (katsura), Fraxinus (ash), Koelreuteria (golden raintree), Platanus (sycamore), Populus (polar), Salix (willow), Sorbus (mountain ash), and Ulmus (elm). Movement or removal of these trees, firewood, or other parts of the regulated trees on your property is a violation of this quarantine.”³³

Brian Zaborski, ODA Plant Health Inspector, met with the defendant Darrell Enfinger two times in early June.³⁴ In his role at the ODA, Zaborski regularly conducts inspections in Clermont County to identify trees infested with the ALB and works with affected property owners to obtain their cooperation on behalf of the Program.³⁵ On June 13th, Zaborski informed Darrell Enfinger that the ODA had identified several infested trees on his property and explained the Program to him.³⁶ Zaborski informed Darrell Enfinger that any host material was quarantined within his property.³⁷ At Darrell Enfinger's request,

²⁹ Beal Aff., ¶ 4; Pls. Ex. A-2 to Beal Aff.

³⁰ Beal Aff., ¶ 4; Pls. Ex. A-2 to Beal Aff.

³¹ Pls. Ex. 1; Pls. Ex. A-2 to Beal Aff.

³² Pls. Ex. 1; Pls. Ex. A-2 to Beal Aff.

³³ Pls. Ex. A-2 to Beal Aff.

³⁴ Zaborski Aff., ¶ 1.

³⁵ Zaborski Aff., ¶ 1.

³⁶ Zaborski Aff., ¶ 5.

³⁷ Zaborski Aff., ¶ 5.

Zaborski met with him again on June 15th. At that time, Zaborski told him that he would be in contact if any other infested trees on his property were identified.³⁸

On June 26th, a live ALB was found on the defendants' property, which indicated an active and ongoing ALB infestation.³⁹ Zaborski walked with Darrell Enfinger and his father through the property to show them where the live ALB had been found.⁴⁰ Zaborski showed the defendants the beetle, as well as other evidence of damage from the ALB.⁴¹

On June 27th, Zaborski received a phone call from a surveyor on the defendants' property reporting that one of the marked trees was cut.⁴² All that remained was a stump.⁴³ The next day, another marked tree on the property was inexplicably cut down. That particular tree was left where it fell.⁴⁴

That same day, on June 28th, Zaborski received a voicemail from Darrell Enfinger requesting that he return his call.⁴⁵ Although Zaborski tried to call Enfinger back several times over the next week, Darrell Enfinger did not answer or return the calls.⁴⁶

On July 10th, Ken Reed, Agriculture Inspection Manager for the Program at ODA, met with the defendants to explain the Program.⁴⁷ Reed is responsible for the supervision of the Division of Plant Health's pest control responsibilities, specifically in the eradication of the ALB.⁴⁸ At the time, Reed was accompanied by Jonathan Shields, an ODA Plant

³⁸ Zaborski Aff., ¶ 6.

³⁹ Zaborski Aff., ¶ 7.

⁴⁰ Zaborski Aff., ¶ 7.

⁴¹ Zaborski Aff., ¶ 7.

⁴² Zaborski Aff., ¶ 8.

⁴³ Zaborski Aff., ¶ 8; Exs. B-1 and B-2 to Zaborski Aff.

⁴⁴ 1st Winterod Aff., ¶ 3; Ex. C-1 to 1st Winterod Aff.

⁴⁵ Zaborski Aff., ¶ 9.

⁴⁶ Zaborski Aff., ¶¶ 10-12.

⁴⁷ Reed Aff., ¶¶ 1, 3.

⁴⁸ Reed Aff., ¶ 1.

Health Supervisor.⁴⁹ A deputy sheriff accompanied Reed to the property because he had learned from other ODA employees' prior contact with Darrell Enfinger that he openly carried a firearm.⁵⁰

Reed went to the property to follow up with the defendants about cutting down two trees that were either painted for removal or flagged for further inspection, and to learn of the location of the cut logs.⁵¹ Reed spoke to Kara Enfinger, and she confirmed that she had received the legal notice letter from the ODA and that she understood the property was under quarantine.⁵² Reed gave her a copy of that same letter.⁵³ Kara Enfinger stated that she knew that marked trees were being cut.⁵⁴ She further stated that if the ODA did not pay for the trees, the defendants would not let the ODA take them.⁵⁵

Darrell Enfinger came out openly carrying a firearm and told Reed that the ODA would not take his trees, that the Program was not an option, and that Reed needed to leave their property.⁵⁶ Darrell Enfinger stated that he could cut the trees down if he wanted to.⁵⁷ Reed then left the property.⁵⁸ Because the defendants would not give the ODA permission to move forward with the Program on their property, the ODA halted survey work there and considered legal options. As of July 19th, the defendants' property had seven trees infested with the ALB.⁵⁹

⁴⁹ Reed Aff., ¶ 3.

⁵⁰ Reed Aff., ¶ 3.

⁵¹ Reed Aff., ¶ 3.

⁵² Reed Aff., ¶ 4.

⁵³ Reed Aff., ¶ 4.

⁵⁴ Reed Aff., ¶ 4.

⁵⁵ Reed Aff., ¶ 4.

⁵⁶ Beal Aff., ¶ 7; Reed Aff., ¶ 5.

⁵⁷ Reed Aff., ¶ 5.

⁵⁸ Reed Aff., ¶ 5.

⁵⁹ Reed Aff., ¶ 2.

On September 6th, Brandon Winterod, a Plant Health Inspector at the ODA, went to the defendants' property.⁶⁰ He found another tree marked with paint had been cut down overnight and dragged a short distance.⁶¹ The words "FUCK YOU" had been carved into it.⁶²

On September 13th, Adam Koch, a survey technician with the ODA, went to the defendants' property to monitor the contractors associated with the Program who were removing trees.⁶³ Accompanied by two deputy sheriffs, they met Darrell Enfinger, and let him know that they were with the ODA and USDA to continue to remove trees as part of the Program.⁶⁴ Darrell Enfinger responded by saying, "no, you're not cutting today."⁶⁵ He stated that the ODA could cut infested trees, but not any collateral trees, or non-infested trees, which needed to be cut in order to provide access to the necessary equipment for the removal of infested trees.⁶⁶ Koch explained that only approved collateral trees would be removed to gain access to the infested trees, as stated in the work plan.⁶⁷ Darrell Enfinger stated that he did not care and wanted a new work plan in which no collateral trees would be cut and infested trees would be cut one piece at a time.⁶⁸

That same day, Darrell Enfinger admitted that he cut down the positive, infested tree that Winterod discovered earlier in September.⁶⁹ He stated that it was "an eye for an

⁶⁰ 2nd Winterod Aff., ¶ 3.

⁶¹ 2nd Winterod Aff., ¶ 3.

⁶² 2nd Winterod Aff., ¶ 3; Exs. 1-A through 1-G of 2nd Winterod Aff.

⁶³ A. Koch Aff., ¶ 3.

⁶⁴ A. Koch Aff., ¶ 4.

⁶⁵ A. Koch Aff., ¶ 4.

⁶⁶ A. Koch Aff., ¶ 4.

⁶⁷ A. Koch Aff., ¶ 5.

⁶⁸ A. Koch Aff., ¶ 5.

⁶⁹ A. Koch Aff., ¶ 6.

eye."⁷⁰ Darrell Enfinger added that he cut that tree down because he was told that positive trees are state property, and the ODA had cut one of his trees.⁷¹

Koch then asked Darrell Enfinger about the marked tree that was found cut down on June 27th.⁷² Darrell Enfinger responded that he had cut it down, dragged it to his camper, cut it into lumber, and used it for corner posts for his cabin.⁷³ Darrell Enfinger stated that the ODA was not taking the posts.⁷⁴

Matthew Beal is the Chief of Plant Health Division at ODA.⁷⁵ Beal is responsible for supervising the division's plant pest control responsibilities.⁷⁶ In order to protect the other properties in the vicinity of the defendants' property, the ODA is seeking to complete its survey and inspection of the property to determine whether any other trees are currently infested so that appropriate action can be taken to protect the environment.⁷⁷ Per Beal, the ODA needs to survey and inspect three acres of the property, and due to the fact that the ALB has already been identified on the property, more infested trees may be found.⁷⁸ This effort is extremely important to the ALB eradication effort and is necessary to identify infested trees that require removal.⁷⁹ Prompt removal of infested trees protects neighboring properties and the remaining non-infested hardwood trees on the defendants' property.⁸⁰ The ODA has been impeded by the defendants from

⁷⁰ A. Koch Aff., ¶ 6.

⁷¹ A. Koch Aff., ¶ 6.

⁷² A. Koch Aff., ¶ 7.

⁷³ A. Koch Aff., ¶ 7.

⁷⁴ A. Koch Aff., ¶ 7.

⁷⁵ Beal Aff., ¶ 1.

⁷⁶ Beal Aff., ¶ 1.

⁷⁷ Beal Aff., ¶ 9.

⁷⁸ Beal Aff., ¶ 9.

⁷⁹ Beal Aff., ¶ 10.

⁸⁰ Beal Aff., ¶ 10.

conducting this work.⁸¹ Based on the defendants' conduct to date, Beal believes that it will be impossible for the ODA, USDA, Davey, and Beach's to conduct essential surveying work and possible follow-up tree removal on the defendants' property unless the defendants are permanently enjoined from interfering with their work.⁸²

On July 20, 2017, the ODA filed a complaint against the defendants asking for relief in the form of a temporary restraining order and preliminary and permanent injunctions. That same day, the ODA filed a motion for a temporary restraining order and a preliminary injunction against the defendants.

The court held a hearing on the ODA's motion for a temporary restraining order on July 21st. That same day, the court granted the temporary restraining order prohibiting the defendants from violating the provisions of R.C. 927.69, R.C. 927.70, and R.C. 927.71.⁸³

On July 26th, the ODA moved to have the preliminary injunction hearing consolidated with the trial. The ODA later withdrew that motion. The court held a hearing on a preliminary injunction on August 11th and granted a preliminary injunction on August 29th.

On September 19th the ODA filed a motion for a show cause order and contempt, alleging that Darrell Enfinger should show cause why he should not be punished for violating the temporary restraining order and preliminary injunction. The ODA cited the incident from September in which Darrell Enfinger cut an infested tree and carved expletives into the fallen tree. Ultimately, the parties reached an agreed order in which

⁸¹ Beal Aff., ¶ 10.

⁸² Beal Aff., ¶ 11.

⁸³ The court filed a *nunc pro tunc* entry on July 31, 2017, correcting a clerical error in the temporary restraining order.

Darrell Enfinger agreed to not interfere with the Program, to avoid contact with representatives in the Program, and to refrain from cutting or moving any restricted material, among other conditions. The order, which was entered by the court on October 30th, allowed the defendants to keep all collateral, non-infested trees.

On December 26th, the ODA filed a motion for summary judgment, requesting that the court enter a permanent injunction restraining the defendants from interfering with, hindering, or delaying the Program. On January 2, 2018, the court entered a briefing/argument schedule on the motion. The deadline for the defendants to file a memorandum in opposition and evidence in opposition was January 23rd. The defendants did not file any memorandum or evidence pursuant to this order.

The court heard oral argument on the motion on February 23rd, at which time both sides were present. The defendants submitted photos of the property for the court's review. The court indicated that it cannot consider the photographs as evidence, pursuant to the Rules of Civil Procedure, as well as the briefing schedule. Upon the conclusion of the hearing, the court took the motion under advisement.

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."⁸⁴

The court must view the evidence in a light most favorable to the nonmoving party.⁸⁵ 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.⁸⁶ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."⁸⁷

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"?⁸⁸ 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."⁸⁹

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.⁹⁰ This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

⁸⁴ *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).

⁸⁵ *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).

⁸⁶ *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).

⁸⁷ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

⁸⁸ *Id.* at 251-52.

⁸⁹ *Id.* at 250.

⁹⁰ *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).

order to allow the opposing party a meaningful opportunity to respond.”⁹¹ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.⁹²

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.⁹³ The duty of the nonmoving party is more than that of resisting the motion’s allegations.⁹⁴ 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.”⁹⁵ The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.⁹⁶ It may not rely on the pleadings or unsupported allegations.⁹⁷

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.”⁹⁸ The trial court maintains the sound discretion to admit or exclude relevant evidence.⁹⁹ When a document falls outside the enumerated categories

⁹¹ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

⁹² *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

⁹³ *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

⁹⁴ *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

⁹⁵ (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).

⁹⁶ *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).

⁹⁷ *Id.*

⁹⁸ 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.”).

⁹⁹ *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.

in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.¹⁰⁰

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.¹⁰¹ "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."¹⁰² "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."¹⁰³ 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."¹⁰⁴

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."¹⁰⁵ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).¹⁰⁶

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

¹⁰⁰ *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).

¹⁰¹ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

¹⁰² *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

¹⁰³ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

¹⁰⁶ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

referenced in the affidavit “must be attached to the affidavit.”¹⁰⁷ 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.”¹⁰⁸

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.¹⁰⁹ Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.¹¹⁰

LEGAL ANALYSIS

“Injunctive relief is an equitable remedy that is available only where there is no adequate remedy at law.”¹¹¹ “It is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot.”¹¹² The trial court has sole discretion in determining whether to grant or deny an injunction.¹¹³

¹⁰⁷ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

¹⁰⁸ *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).

¹⁰⁹ *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

¹¹⁰ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

¹¹¹ *Dunning v. Varnau*, 2017-Ohio-7207, 95 N.E.3d 587, ¶ 26 (12th Dist.), citing *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 510, 584 N.E.2d 704 (1992).

¹¹² *Hartkemeyer v. Ventling*, 12th Dist. Butler No. CA2007-03-074, 2009-Ohio-93, ¶ 28, quoting *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988).

¹¹³ *Dunning*, 2017-Ohio-7207 at ¶ 27, citing *Battelle Mem. Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 2011-Ohio-793, 948 N.E.2d 1019 (12th Dist.). See *Hartkemeyer*, 2009-Ohio-93 at ¶ 29, citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604, 653 N.E.2d 646 (1995) (holding same).

In order to receive a permanent injunction, the plaintiff must show by "clear and convincing evidence that immediate and irreparable injury, loss, or damage will result to the applicant."¹¹⁴ "Irreparable harm is an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete."¹¹⁵ "An injunction is improper where there is an adequate remedy at law."¹¹⁶ Whether the court should grant an injunction depends on the case's facts.¹¹⁷

In determining whether to grant a permanent injunction the "trial court must engage in a balancing test designed to weigh the equities between the parties in determining whether or not injunctive relief is appropriate."¹¹⁸ "This analysis involves considering and weighing 'the relative conveniences and comparative injuries to the parties which would result from the granting or refusal of injunctive relief.'"¹¹⁹ "However, it is not necessary to balance the equities and 'put relative hardship into the reckoning in cases where the defendant had acted willfully, and the hardship likely to result if injunction were granted was of his own making.'"¹²⁰

"In granting an injunction, a court of equity may attach thereto terms and conditions designed to serve the ends of justice and to protect the rights of all parties in interest."¹²¹

¹¹⁴ *Dunning*, 2017-Ohio-7207 at ¶ 26, citing *McNamara v. Wilson*, 12th Dist. Butler No. CA2013-12-239, 2014-Ohio-4520.

¹¹⁵ *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.

¹¹⁶ *Hartkemeyer*, 2009-Ohio-93 at ¶ 28, citing *Haig*, 62 Ohio St.3d at 510.

¹¹⁷ *Hartkemeyer*, 2009-Ohio-93 at ¶ 30, citing *Restivo v. Fifth Third Bank of Northwestern Ohio, N.A.*, 113 Ohio App.3d 516, 520, 681 N.E.2d 484 (6th Dist. 1996).

¹¹⁸ *Skinkiss v. Gleeson*, 12th Dist. Warren Nos. CA2006-12-143 and CA2006-12-147, 2008-Ohio-356, ¶ 12, citing *Busch v. Vosler*, 12th Dist. Preble No. CA96-09-014, 1997 WL 277271 (May 27, 1997).

¹¹⁹ *Skinkiss*, 2008-Ohio-356 at ¶ 12, quoting *Miller v. City of West Carrollton*, 91 Ohio App.3d 291, 296 (2d Dist. 1993).

¹²⁰ *Busch*, 1997 WL 277271 at *2, quoting *Miller*, 91 Ohio App.3d at 298.

¹²¹ *Hartkemeyer*, 2009-Ohio-93 at ¶ 30, quoting *Village of Richmond Hts. v. Bd. of Cty. Commrs. of Cuyahoga Cty.*, 112 Ohio App. 272, 283, 166 N.E.2d 143 (8th Dist. 1960).

"Thus, in addition to ordering an injunction, a trial court also retains broad discretion when it frames the terms of its injunctive order."¹²²

In weighing the equities of the parties, the court will consider whether the Program is applicable to the defendants and whether the ODA has the right to include the defendants' property in the Program. Pursuant to R.C. 927.71, the director of agriculture is empowered to quarantine any portion of the state "when the director determines that such action is necessary to prevent or retard the spread of a pest into, within, or from this state * * *."¹²³ Furthermore, once a quarantine is established, R.C. 927.71 mandates that "no person shall move any regulated article described in the quarantine, or move the pest against which the quarantine is established, within, from, into, or through this state contrary to rules adopted by the director without prior permission or order of the director."¹²⁴

Similarly, under R.C. 927.70, "[n]o person shall knowingly permit any plant pest that has been determined to be destructive or dangerously harmful by the director of agriculture * * * to exist in or on the person's premises."¹²⁵

A "pest" is defined in R.C. 927.51(K) as "any insect, mite, nematode, bacteria, fungus, virus, parasitic plant, or any other organism or any stage of any such organism that causes, or is capable of causing, injury, disease, or damage to any plant, plant part, or plant product." Under R.C. 927.52, the director of agriculture is enabled to "adopt and enforce rules that are necessary to carry out sections 927.51 to 927.73 of the Revised

¹²² *Hartkemeyer*, 2009-Ohio-93 at ¶ 30, citing *Restivo*, 113 Ohio App.3d at 520.

¹²³ R.C. 927.71(A)(1).

¹²⁴ R.C. 927.71(C).

¹²⁵ R.C. 927.70(A).

Code."¹²⁶ In turn, the ODA has specially adopted a definition of "pest" to mean "the destructive insect known as Asian longhorned beetle (*Anoplophora glabripennis*) in any living stage of development."¹²⁷

Under R.C. 927.69, authorized representatives of the director of agriculture are empowered to effectuate R.C. 927.51 to 927.73 by making a " * * * reasonable inspection of any premises in this state and any property therein or thereon."¹²⁸ Moreover, when an ODA representative finds

"any article or commodity to be infested or has reason to believe it to be infested, or finds that a host or pest exists on any premises * * * the director may: (1) Upon giving notice to the owner or the owner's agent in possession thereof, seize, quarantine, treat, or otherwise dispose of the pest, host, article, or commodity in such a manner as the director determines necessary to suppress, control, eradicate, or to prevent or retard the spread of a pest * * *."¹²⁹

To summarize the above provisions, the ODA has various powers under R.C. Chapter 927 that allow it to facilitate the eradication of plant pests, which specifically include the ALB. The ODA may inspect premises, quarantine parts of the state or specific premises, restrict the movement of quarantined items, and dispose of pests or infected host plants.

The defendants presented no arguments or legal support, either oral or written, which would result in the court finding that the above provisions are unconstitutional or inapplicable as applied to them. The court notes, however, that the law has long recognized that the state holds the police power to destroy private property in order to

¹²⁶ R.C. 927.51(A).

¹²⁷ Ohio Adm.Code 901:5-57-01(D).

¹²⁸ R.C. 927.69(A).

¹²⁹ R.C. 927.70(B)(1).

abate a public nuisance.¹³⁰ Permissible examples of this power include the state's destruction of private cedar trees to prevent the spread of the fungus cedar rust from destroying apple orchards¹³¹ and the destruction of private wheat crops in order to prevent the spread of the insect the corn borer.¹³²

The court concludes that, under R.C. Chapter 927, the ODA has the power to quarantine the defendants' property due to the infestation of the ALB on it,¹³³ to inspect, e.g. survey, the property for the ALB,¹³⁴ and to destroy the ALB and its infected host trees.¹³⁵ Moreover, the defendants are prohibited from moving any "regulated article described in the quarantine" and from moving "the pest against which the quarantine is established, within, from, into, or through this state * * *."¹³⁶ Despite the ODA's right to include the defendants' property in the Program to carry out these powers, the undisputed facts show that the defendants did cut down three marked trees, one of which was cut down after this court issued a preliminary injunction.

Additionally, the defendants are prohibited from knowingly permitting the ALB to be on their property.¹³⁷ They have prevented the ODA from executing the Program on their property to eradicate the ALB on multiple occasions by telling ODA representatives that they could not take the trees, they would not cooperate with the Program, and that the ODA representatives needed to leave. In doing so, the defendants are permitting the

¹³⁰ *Mugler v. Kansas*, 123 U.S. 623, 658, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

¹³¹ *Miller v. Schoene*, 276 U.S. 272, 279, 48 S.Ct. 246, 72 L.Ed. 568 (1928).

¹³² *Van Gunten v. Worthley*, 25 Ohio App. 496, 504, 159 N.E. 326, 5 Ohio Law Abs. 518 (6th Dist. 1927).

¹³³ R.C. 927.71(A)(1).

¹³⁴ R.C. 927.69(A).

¹³⁵ R.C. 927.70(B)(1).

¹³⁶ R.C. 927.71(C).

¹³⁷ R.C. 927.70(A).

ALB to remain on their property. In short, the ODA has the right to include the defendants' property in the Program, and the defendants' do not have viable legal reasons for excluding their property from the Program.

Second, the ODA will suffer irreparable harm if a permanent injunction is not granted.¹³⁸ The ODA presented clear and convincing evidence in the form of an affidavit that the success of the Program will be greatly impaired if it is unable to combat the ALB infestation on the defendants' property. If the ALB are left untreated and able to thrive in the defendants' trees, then they will inevitably spread and enlarge the quarantine area. An uncontained spread would likely result in enormous economic and environmental harm by destroying Ohio's hardwood forests, hardwood landscape trees, and nursery stock. Furthermore, because the defendants have already cut marked and quarantined trees and moved parts of them, including one which they used for building materials, it is possible that the defendants may spread the ALB beyond the confines of their property unless enjoined from doing so.

The defendants had received a legal notice informing them that their trees were quarantined, they understood it, and they had the Program and the ALB problem explained to them in person multiple times. Yet they still cut down marked trees in contravention of the notice. Moreover, even following the court's preliminary injunction mandating their compliance with the Program, the defendants continued to prevent ODA representatives from executing the Program on his property. Darrell Enfinger told ODA representatives that they could not take any more trees and they had to leave. Most egregiously, he cut a third tree that had been marked as infested and carved "FUCK YOU"

¹³⁸ *AK Steel Corp.*, 2016-Ohio-3285 at ¶ 9, citing *DK Prods., Inc.*, 2009-Ohio-436 at ¶ 6.

into it. He did all of this after having been present at the preliminary injunction hearing, at which he heard testimony from many of the same individuals who testified via affidavit for this motion explaining the perils of hindering the Program and cutting infested trees. And having heard, yet again, why the Program is essential to the environment and economy, he still chose to disregard the court's preliminary injunction by thwarting the Program in a deliberate manner.

The defendants' actions indicate that they continue to have a disregard for the Program and its seriousness, which could lead to the spread of the ALB if they are not stopped from cutting and moving the trees themselves. The undisputed facts show that the defendants will not comply with the Program unless forced to. If the Program fails, then 13 types of the hardwood deciduous trees in Ohio would become imperiled. This could damage the environment, the economy, and the defendants' neighbors' properties. In sum, the ODA has the legal right to move forward with the Program, and the irreparable harm that will result from its inability to do so is great.

As part of the balancing process, the court must examine the conveniences and comparative injuries to the defendants. The defendants submitted no evidence on summary judgment to demonstrate any hardships they have suffered from inclusion in the Program thus far. The only argument they make is the Program has led to the destruction of their property and the ODA has left behind debris from the tree removal. As stated, this statement was not supported by any evidence. The court recognizes that the defendants are acting *pro se*. "However, 'pro se litigants are bound by the same rules

and procedures as litigants with retained counsel,' and therefore, must 'accept the results of their own mistakes and errors, including those related to correct legal procedures.'"¹³⁹

Even if there is some debris on the defendants' properties, and even if they have lost some collateral trees, the law indicates that the ODA has a right to include the defendant's property in the Program, and the undisputed facts demonstrate that the potential irreparable injury to the ODA and broader community is great should the Program fail.

Further, during oral argument, counsel for the ODA indicated that, at this juncture, the ODA would only need to revisit the defendants' property in a year or more from now to survey it for the return of the ALB. If there is no sign of infestation, then the ODA plans to take no further action on the property, aside from future surveys. If there is a sign of infestation, then the ODA would need to survey the property again and begin felling and destroying the infected trees. The ODA's request, at this point, is unlikely to cause the defendants great hardship or inconvenience. The court finds that reasonable minds can come to but one conclusion, that being that the equities in this case greatly favor an order permanently enjoining the defendants' from interfering with the Program.

CONCLUSION

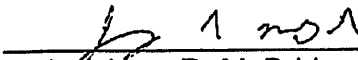
For the foregoing reasons the court finds that the ODA's motion for summary judgment for a permanent injunction is well-taken and is hereby granted.

¹³⁹ *McCaully Court Assn. v. Baker*, 12th Dist. Butler No. CA2014-06-126, 2015-Ohio-969, ¶ 13, quoting *Cat-The Rental Store v. Sparto*, 12th Dist. Clinton No. CA2001-08-024, 2002 WL 237359, *2 (Feb. 19, 2002) and *In re M.D.D.*, 12th Dist. Butler No. CA2009-06-170, 2010-Ohio-326, ¶ 7.

The defendants, and any of their agents and employees, are immediately restrained from any violation of the provisions of R.C. 927.69, R.C. 927.70, and R.C. 927.71. The defendants, and any of their agents and employees, shall not interfere with, hinder, or delay the ODA's agents, the USDA's agents, the Davey Tree Expert Company, or Beach's Tree Selective Harvesting, LLC from implementing the ALB Program. This order is immediately effective and shall remain in effect indefinitely. Failure to comply with the order may be addressed through the powers of the court as to contempt.

IT IS SO ORDERED.

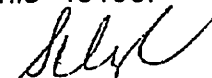
DATED: 9-21-18



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Order were sent on this 21st day of September 2018 by e-mail to James Patterson at james.patterson@ohioattorneygeneral.gov, Angela Sullivan at angela.sullivan@ohioattorneygeneral.gov and Lydia Arko Zigler at Lydia.zigler@ohioattorneygeneral.gov, Assistant Attorneys General and counsel for the Plaintiff, and by regular U.S. Mail to Darrell Enfinger, Defendant, c/o Clermont County Jail, Defendant, 2217 Donald Road, Bethel, Ohio 45106, and Kara Enfinger, Defendant, 2217 Donald Road, Bethel, Ohio 45106.



Judicial Assistant to Judge McBride