Supreme Court of Ohio Clerk of Court - Filed November 08, 2023 - Case No. 2023-0631

IN THE SUPREME COURT OF OHIO

CASE NO. 2023-0631

PHOENIX LIGHTING GROUP LLC, *et al.*,
Plaintiff-Appellees,

-vs-

GENLYTE THOMAS GROUP LLC, *et al.*,
Defendant-Appellants.

ON APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
CASE NO. 30303

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable. The OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and promote public confidence in the legal system.

The OAJ submits this brief to offer its views as this Court again considers the issue of post-judgment activity by a trial court. Specifically, the Court has been asked to consider whether a trial court may rule on a motion filed after a superior court has issued a mandate that includes an order to enter a final judgment. For the following reasons, the Amicus urges the Court to find in favor of Appellees, uphold the unanimous courts below, and hold that a trial court possesses authority to award appellate attorneys' fees following a mandate to enter final judgment.

Of particular importance to this Court's review is the legal principle that after a final judgment is issued by a trial court in conformity with a higher court mandate, the trial court retains limited jurisdiction over the matter until the judgment is satisfied. There is no denying that a trial court must follow any directive issued by a higher court and may not rule in a manner that is inapposite to those instructions. There are actions, however, that a trial court must be able to undertake in the process of concluding a dispute past a final judgment so long as doing so does not conflict with the explicit mandate or the law of the case. The action at the center of this appeal—the award of appellate attorneys' fees—is one of those limited instances where a trial court may act.

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The OAJ submits this brief out of concern that categorically precluding a trial court's authority to award appellate attorneys' fees will abridge Ohioans' access to civil justice and undermine its citizens' confidence in that system. The individuals and families represented by members of the *Amicus* often depend upon the court's ability to award attorneys' fees, especially where the tortfeasor drives up the cost of achieving any resolution out of spite or to force a capitulation. Indeed, without the prospect of such additional compensation, the attorneys of OAJ will be financially unable to fully pursue or defend many legitimate appeals on behalf of deserving clients. It will be highly unlikely, moreover, that specialized appellate counsel can be retained if their fees cannot be recovered. The Ninth District's allowance of appellate fees to this plaintiff because of an underlying punitive award unburdens the prevailing plaintiff who has been victimized by malicious wrongdoing and prevents further abuses by vengeful defendants.

STATEMENT OF THE CASE AND FACTS

The OAJ adopts and incorporates the statement of the case and facts offered in the Merit Brief of the Plaintiff-Appellees, Phoenix Lighting Group LLC ("Phoenix"), filed November 7, 2023, but briefly emphasizes important points of the complicated procedural posture of this case for comparison with recent case law.

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I. THE FIRST PRE-JUDGMENT APPEAL

On June 19, 2018, the Ninth District Court of Appeals overruled Defendant-Appellant Genlyte Thomas, Group, L.L.C. dba Day-Brite|Capri|Omega ("DCO's") first appeal in its entirety and granted one of Phoenix's cross-assignments of error awarding Phoenix additional punitive damages. *Phoenix Lighting Grp. LLC v. Genlyte Thomas Grp. LLC*, 9th Dist. Summit No. 28082, 2018-Ohio-2393. Importantly, the opinion remanded jurisdiction of the entire case back to the trial court "for further proceedings

consistent with this opinion" and without any other conditions. *Id.* at ¶ 84. On October 10, 2018, this Court accepted jurisdiction of DCO's appeal only to address the enhancement portion of the pre-judgment fee award. *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 160 Ohio St.3d 32, 2020-Ohio-1056, ¶ 2-3 and 8 153 N.E.3d 30. Because this Court declined to review the other assignments of error, all other awards remained within the trial court's jurisdiction pursuant to the opinion of the Court of Appeals. *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 2023-Ohio-1079, ¶ 16. On March 25, 2020, this Certified Judgment Entry from this Court stated:

> [T]he judgment of the Court of Appeals is reversed for the portion of the Court of Appeals judgment affirming the award of attorney fees, and the cause is remanded to the trial court with instructions to issue a final judgment granting Phoenix Lighting Group, LLC, attorney fees in the amount of $1,991,507, consistent with the opinion rendered herein.

Apx. 0001. Appellate attorneys' fees were never considered in the first appeal.

II. THE REMAND

On April 2, 2020, after remand to the trial court, Phoenix filed a motion for appellate attorneys' fees as a part of its costs under the Ohio Uniform Trade Secrets Act ("OUTSA"), a claim that was awarded to it in the case. *R.C. 1333.64(C), Apx. 0002-16*. On May 4, 2020, the trial court, in compliance with this Court's Mandate, issued an amended Final Judgment Entry eliminating the enhancement and granting $1,991,507 in pre-judgment fees. *Apx. 00017*. In the same entry, it carefully and conspicuously retained jurisdiction over Phoenix's motion for appellate attorneys' fees, set the date for a hearing on the appellate fee motion, indicated the judgment entry did not address the appellate fee motion, and noted the motion remained under advisement:

> This Entry does not address the current motions before the Court regarding Plaintiffs' motion for post-judgment attorney

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> fees. A hearing regarding the motion for post-judgment attorney fees is scheduled for May 11, 2020 at 1:00 pm via video conference. However, in order to timely comply with the Supreme Court's March 25, 2020 directive regarding the prior granting of attorney fees, this Entry is filed. * * *. Plaintiffs' Motion for Post Judgment Attorney Fees still remains under advisement.

Id.

On May 11, 2020, the trial court heard argument on the appellate fee motion—including those relating to the mandates of the first appeal—and the law of the case. *Apx. 00018*. On June 19, 2020, the trial court granted Phoenix's motion pursuant to R.C. 1333.64(C) and set a hearing to determine the amount of fees. *Apx. 00018-00027, 00028-00029.*

On December 15, 2020, the trial court held the hearing to determine the amount of appellate fees and permitted the parties to brief any remaining issues by February 5, 2021. *Apx. 00030-00038*. On March 29, 2022, the trial court issued its decision awarding Phoenix appellate attorneys' fees in the amount of $1,079,716, expenses in the amount of $61,680, and a time value of money enhancement of $421,604. *Id.*

III. THE POST-JUDGMENT APPEAL

On April 28, 2022, DCO appealed the determination of the appellate attorneys' fee award to the Ninth District Court of Appeals. Following even more briefing and argument, the Ninth District affirmed the trial court's award of appellate fees under the OUTSA statutory fee-shifting provision. *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 9th Dist. Summit No. 30303, 2023-Ohio-1079, ¶ 33. DCO did not appeal these findings. The only issue DCO challenged is the appellate court's holding that the scope of this Court's earlier Mandate did not include the issue of appellate fees. *Id.* at ¶ 19.

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ARGUMENT

On August 2, 2023, this Court accepted one proposition of law for review:

> A superior court mandate remanding with instructions to enter final judgment does not leave open post-trial and appellate attorney fees and expenses, so a trial court may not alter the judgment that it was instructed to enter to add these fees and expenses. (Cruz v. English Nanny & Governess Sch., ___ Ohio St.3d ___, 2022-Ohio-3586, ¶ 15 n. 3, clarified; Transamerica Ins. Co. v. Nolan, 72 Ohio St.3d 320 (1995), followed.)

Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C., 170 Ohio St.3d 1512, 2023-Ohio-2600, 214 N.E.3d 575. For the following reasons, this Court should reject this request to deny trial courts the discretion to consider collateral and post-judgment attorneys' fees ("appellate attorneys' fees") following a mandate to enter final judgment. Instead, the unerring decision to affirm the common pleas court in *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 9th Dist. Summit No. 30303, 2023-Ohio-1079, should be upheld in all respects.

I. TRIAL COURTS HAVE CONTINUING JURISDICTION OVER POST-JUDGMENT PROCEDURES

Defendant DCO encourages the Court to adopt a rule that prohibits trial courts from taking any action in a matter after a final judgment is issued regardless of whether the court retains jurisdiction over such remaining issues. It agonizes that failing to do so will create a loophole to endless litigation, forgetting apparently that the prolonged proceedings in the instant matter persist only because of its refusal to accept responsibility for its now-confirmed malicious actions. After perpetrating torts with the objective of destroying a competitor's business, DCO's counsel promised to punish and—essentially—bankrupt Phoenix should it dare try to enforce its rights and seek redress. *Apx. 00039-49*. Sadly, refusal to accept punishment "without remorse" for bad acts is common in litigation and

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can be employed as a tactic by tortfeasors who have more “substantial resources” to bully their opponents into submission. *Id. at 00040 ¶ 2-3.* Trial courts must retain jurisdiction to protect aggrieved litigants by ensuring that judgments are enforced and followed and awarding attorneys’ fees when appropriate, even after judgments are final. After all, when else could appellate attorney fees be determined properly, except after a final judgment?

“It is well established that a ‘trial court los[es] its jurisdiction when [an] appeal [is] taken, and, absent a remand, it d[oes] not regain jurisdiction subsequent to the Court of Appeals’ decision.’ ” *Jay v. Massachusetts Cas. Ins. Co.*, 5th Dist. Stark No. 2009CA00056, 2009-Ohio-4519, ¶ 10, quoting *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 98, 378 N.E.2d 162 (1978). In contrast to *Jay*, the trial court in this case had been provided with subject matter jurisdiction by virtue of the remand. *Phoenix Lighting Grp. LLC v. Genlyte Thomas Grp. LLC*, 9th Dist. Summit No. 28082, 2018-Ohio-2393, ¶ 84. When appellate fees are recoverable, there is no law preventing the trial court from determining the proper amount. The *Jay* case simply stands for the unsurprising reality that if the appellate court does not remand, the trial court is devoid of subject matter jurisdiction over the concluded proceedings. *Accord State ex rel. O’Malley v. Russo*, 156 Ohio St.3d 548, 2019-Ohio-1698, 130 N.E.3d 256, ¶ 23.

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To answer whether a trial court possesses discretion and authority to include appellate fees as part of a jury’s award following an appellate mandate, this Court should build on the strong authority of *Cruz v. English Nanny & Governess School*, 169 Ohio St.3d 716, 2022-Ohio-3586, 207 N.E.3d 742. While Phoenix was entitled to statutory attorneys’ fees under OUTSA, it also qualified for common law attorneys’ fees due to the punitive findings in the trial court. Absent a statute empowering or precluding an award

of post-mandate appellate legal fees, the Court should further develop this doctrine within the common law and ensure that it fits within the jurisdictional principles at issue here. A condensed history of the development of the American Rule and its exceptions is necessary to extend the doctrine to the circumstances of this case.

The American rule is the "bedrock principle" of our adversarial system which generally recognizes that each side in litigation is responsible for the cost of their own attorney fees. *See Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 252-253, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010), quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (" 'Our basic point of reference' when considering the award of attorney's fees is the bedrock principle known as the ' "American Rule" ' "). The Revised Code does not alter this long-standing principle, as only the standards for an award of punitive damages to the prevailing plaintiff have been codified. *R.C. 2315.21(C)*. The Revised Code is generally silent as to attorney fees, other than to indicate that they are excluded from the definition of "Economic Loss" and make clear that they "shall not be considered for purposes of determining the cap on punitive damages." *R.C. 2315.18(A)(2)(c), R.C. 2315.21(D)(2)(c)*. As in this case, some statutory causes of action permit an award of attorneys' fees. *E.g., R.C. 1333.64(C)*. The Legislature, however, should not be expected to prescribe the remedies available for every theory of recovery under Ohio law. Silence in the Revised Code simply permits the common law to govern, and appellate attorney fees may be awarded pursuant to these principles after punitive damages have been assessed.

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The right to an award of the expenses incurred in defending against an appeal is rooted in the fundamental guarantee of a full and complete civil remedy provided to all citizens by Article I, Section 16 of the Ohio Constitution. *Williams v. Marion Rapid*

Transit, 152 Ohio St. 114, 117, 87 N.E.2d 334 (1949); *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 639 N.E.2d 425 (1994); *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 426, 644 N.E.2d 298, 302 (1994). "It is fundamental to the law of remedies that parties damaged by the wrongful conduct of others are entitled to be made whole." *Collini v. Cincinnati*, 87 Ohio App.3d 553, 556, 622 N.E.2d 724 (1st Dist.1993); *see also Pryor v. Webber*, 23 Ohio St.2d 104, 107, 263 N.E.2d 235 (1970), citing *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94 (1878), and *Mahoning Valley Ry. Co. v. De Pascale*, 70 Ohio St. 179, 71 N.E. 633 (1904) ("In Ohio, as elsewhere, it is a rule of universal application in a tort action, that the measure of damages is that which will compensate and make the plaintiff whole.").

Toward this laudable end, this Court has long recognized that "in cases where the act complained of is tainted by fraud, or involves an ingredient of malice, or insult, the jury, which has power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." *Roberts v. Mason*, 10 Ohio St. 277, 282 (1859); *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, 109 (1884); *see* Sedgwick, *Treatise on the Measure of Damages* 98 (2d Ed.1852) ("it may, on principle, I think, be considered clear that in cases proper for the infliction of exemplary or vindictive damages, the jury in estimating those damages, have a right to take into their consideration the probable expense of the litigation"). Pursuant to this punitive damages' exception to the American Rule, a Court may award attorneys' fees whenever such an exemplary recovery is approved. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 160 Ohio St.3d 32, 2020-Ohio-1056, 153 N.E.3d 30, ¶ 9. A plaintiff who has proven actual malice is entitled to recover fees because the tortfeasor's deliberate and conscious wrongdoing *caused* the legal proceedings to be necessary. Early in the

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development of this doctrine, this Court explained:

> [W]e have no doubt that when the court spoke of 'all the expenses,' the counsel fees of the injured party in the suit were intended to be included, though they are not in terms mentioned; indeed it must be so, for the court speaks of 'costs' and 'loss of time' as matters to be compensated, in addition to 'all the expenses'-'such as will make them whole.' The injured party would not be made whole as to all expenses, unless his counsel fees were covered and included.

Finney v. Smith, 31 Ohio St. 529, 532, 27 Am.Rep. 524 (1877).

The next logical step was to extend these principles to the appellate process. A prevailing plaintiff has no choice but to defend an appeal of a punitive recovery, and such additional proceedings therefore arise from a continuation of the malicious conduct just as much as any underlying trial. In extreme circumstances, such as this case, the review proceedings will take longer and require more effort than the lower court litigation itself. Where a tortfeasor appeals from such a verdict, it is that defendant's decision not to accept the jury's findings that necessitates further proceedings. In this way, appellate fees result from a defendant's malice in the same way as fees spent on trial counsel.

This Court's decision in *Cruz* was the culmination of the extension of the American Rule to the appellate process:

> When parties are awarded punitive damages at trial, they may also recover reasonable attorney fees that they incur successfully defending their judgments on appeal. This rule is consistent with the punitive-damages exception to the American rule established at common law centuries ago, is not limited by statutory caps on punitive damages, and will make the lodestar calculation more accurate. Accordingly, we reverse the judgment of the Eighth District Court of Appeals with respect to the award of attorney fees for postverdict work and reinstate the trial court's judgment regarding the same.

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Cruz, 169 Ohio St.3d 716, 2022-Ohio-3586, 207 N.E.3d 742, at ¶ 51. "To fail to extend the doctrine as the Court did would conflict with the very purpose of permitting a jury to

award attorneys' fees, which is to make the successful plaintiff whole. After all, the purpose of a punitive award is 'to punish the guilty party and deter tortious conduct by others.' " *Digital & Analog Design Corp. v. N. Supply Co.,* 63 Ohio St.3d 657, 660, 590 N.E.2d 737 (1992), quoting *Detling v. Chockley*, 70 Ohio St.2d 134, 136, 436 N.E.2d 208 (1982); *see Neal-Pettit v. Lahman,* 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, at ¶ 16 (noting that while the punitive award is distinct from the award of attorney fees, the latter stems from the former).

Most recently, this Court declined to extend the doctrine under different circumstances in *State ex rel. Mather v. Oda*, __ Ohio St.3d __, 2023-Ohio-3907, __ N.E.3d __. In *Mather*, the Relator-Plaintiffs had appealed following an award that included attorneys' fees to numerous Defendant homeowners on their counterclaims in a dispute over the sale of residential properties. *Id.* at ¶ 3-4. In their merit brief, the appellee homeowners requested a remand for the trial court to award additional fees and expenses incurred in the appellate process. *Id.* at ¶ 4. The appellate court "remanded to the trial court for the limited purpose of issuing a nunc pro tunc order to reflect that [Peter Mather] is a party to this action and therefore liable for payment of the attorney fees awarded." *Id.* The trial court issued the *nunc pro tunc* entry as directed in August 2021. *Id.* Plaintiffs satisfied the judgment in January 2022. *Id.* In April 2022, the Defendant homeowners filed a motion with the trial court requesting additional fees and expenses that were incurred during the appeal. *Id.* at ¶ 5. When the trial court considered the matter, the Relator-Plaintiffs sought a writ prohibiting the court from taking further action in the case. *Id.* This Court issued a writ of prohibition, preventing further action in the case. *Id.*

Mather is easily distinguished from the instant case, as the timing of the motion

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matters. In *Mather*, the case had been concluded for months, final judgment had been entered, and *most* importantly, the judgment had been fully satisfied. "Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away * * * the right to appeal or prosecute error or even to move for vacation of judgment." *Wiest v. Wiegele*, 170 Ohio App.3d 700, 2006-Ohio-5348, 868 N.E.2d 1040, ¶ 12 (1st Dist.), quoting *Rauch v. Noble*, 169 Ohio St. 314, 316, 159 N.E.2d 451 (1959). Further, a party voluntarily satisfies a judgment by failing to seek a stay order while appealing that same order. *Id.* at ¶ 13. In the instant case, however, the motion for appellate attorneys' fees was filed prior to the entry of final judgment let alone before the judgment was satisfied. The trial court still holds some jurisdiction over the parties while the judgment is outstanding, and it specifically retained jurisdiction over the issue of appellate attorneys' fees in its final judgment entry.

It should go without saying that trial courts have inherent authority to enforce their final judgments and decrees. *Rieser v. Rieser,* 191 Ohio App.3d 616, 2010-Ohio-6227, 947 N.E.2d 222, ¶ 5 (2d Dist.); *In re Whallon,* 6 Ohio App. 80, 83 (1st Dist.1915); *Infinite Sec. Sols., L.L.C. v. Karam Properties, II, Ltd.,* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 27. If the judgment in this case were entered and pending, the Court would have jurisdiction to enforce the judgment through garnishment. Failure to comply with the court's orders in the collection proceedings could lead to contempt and the award of additional attorney fees. *See generally R.C. 2716.21*. To be sure, the trial courts are in the best position to take evidence and testimony and to determine an appropriate amount of attorneys' fees after appeal, unlike appellate courts, which rarely preside over live

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testimony and rule upon evidentiary objections. Streamlining this process across the state within the trial court will allow for uniform treatment of aggrieved plaintiffs.

II. POST-JUDGMENT PROCEEDINGS FOR FEES DO NOT CONFLICT WITH THIS COURT'S MANDATE AND THE LAW OF THIS CASE

There are numerous instances when further trial court action is necessary and appropriate even when the litigation and appeals appear to be complete. For example, a "trial court may retain jurisdiction to enforce a settlement agreement when it dismisses a civil case." *Infinite Sec. Sols., L.L.C.*, at ¶ 25. In determining the appropriateness of this ancillary procedure, this court found that it "provides the most efficient means of enforcing the agreement by keeping the matter in the court most familiar with the parties' claims." *Id.* The Court also considered not only the aspect of judicial economy, but of the convenience for the litigants. *Id.* It would be illogical to permit the retention of jurisdiction over some aspect of a case only if the tortfeasor agreed to a judgment but prohibit it in a case where the tortfeasor refuses responsibility for its conduct. Court intervention is clearly more important in the latter situation. After all, "[t]he purpose of a court is to resolve controversies, not to prolong them." *State v. Steffen*, 70 Ohio St.3d 399, 409, 639 N.E.2d 67 (1994). This principle should also be applied to the award of attorneys' fees in this and future cases.

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The Ninth District's opinion in the first appeal remanded jurisdiction of the entire case to the trial court "for further proceedings consistent with this opinion" and without any other conditions. *Phoenix Lighting Group LLC*, 2018-Ohio-2393, at ¶ 84. This Court remanded only its determination of the pre-trial attorneys' fees "with instructions to issue a final judgment * * * consistent with the opinion rendered herein." *Apx. 0001*. A trial court has jurisdiction to "consider and decide any matters left open" by the reviewing

court and "its decision of such matters can be reviewed by a new appeal only." *State ex rel. Heck v. Kessler*, 72 Ohio St.3d 98,101 (1995), quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256 (1895).

The award of appellate attorneys' fees is far from inconsistent with the opinion of either appellate court. Phoenix properly moved the trial court to make such a determination prior to the entry of final judgment. *Apx. 0002-00016*. "Appellate fees are divorced from the fees incurred at the trial level and an aggrieved party may obtain them either from the appellate court itself or from the trial court." *Ulrich v. Mercedes-Benz USA, LLC*, 9th Dist. Summit No. 25929, 2012-Ohio-1623, ¶ 10. The trial court faithfully followed the appellate mandates, issued a final judgment in the matter assessing appellate attorney fees as part of case costs due, but retained jurisdiction to hold a hearing to determine the amount.

III. DCO MUST PAY THE TOLL FOR THE LONG, DARK, AND VERY EXPENSIVE PATH IT HAS FORGED

Perhaps the most charitable way to describe DCO's behavior is remorselessly aggressive, even in the face of defeat. *Apx. 00040, ¶ 2*. At the outset of litigation, DCO pledged to punish Phoenix and its owner, Patrick Duffy, for any attempt to protect themselves and recover for the intentional, malicious, tortious conduct they had suffered:

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> [B]efore Duffy finds himself wandering down the long, dark, and very expensive path that will not only escalate the scope and expense of the Lawsuit, but also cause significant disruption to Duffy's business and business relationships, DCO Lighting extends this singular opportunity towards an amicable resolution, before the floodgates of litigation are thrown wide open. What follows is * * * a preview of what Duffy can expect to encounter if he opts to continue "playing hardball" with DCO Lighting.
>
> * * * DCO Lighting will move to strike and/or dismiss Duffy's baseless claims pursuant to Civil Rule 12 (B)(6). Failing that,

> DCO Lighting will file every available dispositive and evidentiary motion permitted by the Ohio Rules of Civil Procedure and Evidence, including, among other things, and without limitation, a motion for summary judgment, a motion for judgment on the pleadings, motions for directed verdict, and motions in limine. Rest assured that the Lawsuit will be litigated by DCO Lighting vigorously and with full utilization of all the substantial resources at DCO Lighting's disposal. Then, upon prevailing in the case, DCO Lighting will seek sanctions against Duffy and his counsel for the fees and expenses that DCO Lighting has been forced to incur, and will be forced to incur.* * *

Apx. 00041, 00048. DCO kept that promise and continues to make good on it. As the Court is aware, litigation in this matter has spanned more than fourteen years since the first filing of a complaint on April 1, 2009. Since then, there have been multiple proceedings in the higher courts in addition to the refiling of the complaint, a five-week-long trial, and post-judgment proceedings in the trial court. These seemingly endless maneuvers have forced the aggrieved plaintiff to continue to expend resources to protect its interests, which DCO maliciously injured. At the outset of litigation, DCO expected to be compensated for its legal fees had it been successful. *Apx. 00048, ¶ 3.* How is justice accomplished for Phoenix if it must spend millions of dollars to recover what was owed to it, particularly given that DCO has not challenged the substance of the award? If Phoenix is unable to recoup its legal fees for the ongoing injuries it suffered at the hands of DCO, then it truly will not have been made whole, and justice will not prevail.

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"The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." *Restatement (Second) of Torts § 1 (1965).* Plaintiffs who have been intentionally injured by maliciously motivated defendants must be guarded by our legal system, including in the appellate process. To deny recovery of legal fees they must expend to

preserve their interests on appeal, simply due to an ill-conceived jurisdictional technicality, will have a chilling effect on Ohio citizens' ability to pursue claims and hire counsel. Further, it creates no incentive for tortfeasors with "substantial resources" to settle or to accept judgments— especially in a David and Goliath situation as occurred in this case—thereby making the opportunity for redress hardest for those with the most limited resources. *Apx. 00039-00049.* This Court should recognize that a trial court retains limited jurisdiction to entertain motions for appropriate appellate attorney's fees prior to the satisfaction of judgment, regardless of whether such relief is mandated by a higher court, or if the trial court has retained jurisdiction to do so. If this Court decides to take a different path, it should give guidance as to how and when an undeniably valid claim for appellate attorney fees may be recovered. Any decision in this appeal should close loopholes rather than increasing them, and the use of technicalities to diminish complete remedies should be prevented.

CONCLUSION

For all the foregoing reasons, this Court should reject the proposition of law offered by the Defendant and affirm the Ninth District's unerring decision in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on November 8, 2023, upon:

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APPENDIX

Supreme Court of Ohio Judgment Entry, Mar. 25, 2020 0001

Phoenix's Motion for Appellate Attorney Fees, Apr. 2, 2020 0002

Trial Court Final Judgment Entry, May 4, 2020 00017

Trial Court Order granting Appellate Fee Motion, Jun. 19, 2020 00018

Trial Court Order setting Appellate Fee Hearing, Nov. 15, 2020 00028

Trial Court Order Awarding Appellate Fees, Mar. 29, 2022 00030

DCO's Letter to Phoenix Counsel, Jul. 10, 2010 00039

The Supreme Court of Ohio

FILED
MAR 25 2020
CLERK OF COURT
SUPREME COURT OF OHIO

Phoenix Lighting Group LLC	Case No. 2018-1076
v.	JUDGMENT ENTRY
Genlyte Thomas Group LLC	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed for the portion of the court of appeals judgment affirming the award of attorney fees, and the cause is remanded to the trial court with instructions to issue a final judgment granting Phoenix Lighting Group, LLC, attorney fees in the amount of $1,991,507, consistent with the opinion rendered herein.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Summit County and the Court of Common Pleas for Summit County.

(Summit County Court of Appeals; No. 28082)

Maureen O'Connor
Chief Justice

The official case announcement, and opinion if issued, can be found at http://www.supremecourt.ohio.gov/ROD/docs/

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

PHOENIX LIGHTING GROUP, LLC, et. al. **Plaintiffs,** **-vs-** **GENLYTE THOMAS GROUP, LLC, et. al.** **Defendants,**	))))))))))))	**Case No. CV 2012 08 4444** **Judge: ALISON MCCARTY** **PLAINTIFF, PHOENIX LIGHTING GROUP, LLC'S MOTION FOR POST-JUDGMENT ATTORNEY FEES, COSTS AND EXPENSES AND REQUEST FOR EVIDENTIARY HEARING**

***

Now comes Plaintiff, Phoenix Lighting Group, LLC ("Phoenix"), by and through its undersigned counsel, and pursuant to the Ohio Uniform Trade Secrets Act (OUTSA), specifically, RC 1333.64(C), hereby moves against Genlyte Thomas Group, LLC (DCO) for an award of attorney's fees, costs and reasonable expenses, incurred defending and maintaining Phoenix's awards against DCO's post-trial motions and appeals; and (2) the prosecution of a successful cross appeal to achieve and maintain an additional punitive damage award in the amount of $203,000 for the conspiracy to misappropriate trade secrets claim under RC 1333.63(B).

Phoenix hereby requests an evidentiary hearing, or, if agreed to by DCO and given the situation with the Coronavirus Stay at Home Order, a stipulated briefing schedule in lieu of a hearing, to determine each of the post judgment attorney fee, cost, and expense amounts. Further grounds for this Motion are set forth in the below memorandum. Phoenix will submit its invoices

under seal with the Court in the event of a stipulated briefing in lieu of a hearing. A proposed order granting this motion is attached as Exhibit A.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

I. Introduction:

Almost 6 years ago the jury in this case rendered a verdict in Phoenix's favor on its claims for (1) tortious interference with business relations; (2) misappropriation of trade secrets under the OUTSA; and (3) civil conspiracy for: (a) tortious interference with business relations, (b) breach of duty of loyalty and (c) misappropriation of trade secrets under the OUTSA. The aggregate amount of the jury award was $1,680,970, representing Phoenix's lost business value.

This Court then conducted a punitive damage hearing on June 18, 2014 before the same jury. The jury found DCO's conduct was malicious and awarded Phoenix $7 million in punitive damages on the tortious interference and conspiracy claims, including the conspiracy to misappropriate trade secrets. Additionally, the trial court found DCO's conduct was malicious and awarded $600,000 of punitive damages on the claim of direct trade secret misappropriation, pursuant to R.C. § 1333.63(B). However, pursuant to R.C. 2315.21(D), this Court capped the jury's $7 million punitive damage award at $2,761,940, eliminating $4,238,060 of the jury's punitive damage award.

Phoenix proved its right to recover its prejudgment attorney fees, costs and expenses. This Court held a hearing on July 18, 2014 to determine prejudgment interest, reasonable attorney fees, court costs, and litigation expenses. The Court issued its Final Judgment Entry on September 29, 2014 (the "Final Judgment Entry") awarding prejudgment interest of $328,319[1], litigation expenses and costs of $147,106.39, and prejudgment attorney fees of $3,983,014 (the "Original Prejudgment Attorney Fee Award"). The Original Prejudgment Attorney Fee award was

[1] The Court issued an amendment on December 4, 2014 granting an additional $10,085.68 of prejudgment interest due to a calculation error in the original award.

calculated using a lodestar amount of $1,991,507 and an enhancement multiplier of 2. In issuing the Original Prejudgment Attorney Fee Award, this Court specifically pointed out the causes of action, including the misappropriation of trade secrets claims, were inextricably intertwined. It stated: "***the causes of action in this matter all stem from a common core of operative facts and so all of the hours of attorney fee time are recoverable." September 29, 2014 Final Judgement Entry at 5.

DCO filed post-trial motions raising numerous issues. After extensive briefing of the issues, this Court denied all DCO's motions on December 16, 2015. DCO filed an appeal to the Ninth District Court of Appeals, raising seven assignments of error six of which involved Phoenix's claims for, evidence related to, or damages caused by, DCO's misappropriation of trades secrets under the OUTSA. Phoenix cross-appealed, raising two assignments of error both relating to application of the higher punitive damage cap under the OUTSA, specifically R.C. 1333.63(B). The Court of Appeals issued its decision on June 20, 2018, overruling all DCO's assignments of error. It granted Phoenix's cross-assignment of error, awarding Phoenix an additional $203,000 of punitive damages under OUTSA's R.C. 1333.63(B).

On August 2, 2018, DCO filed an appeal to the Ohio Supreme Court related to the substantive claims and the enhancement portion of the Original Pre-Judgment Attorney Fee Award. On October 10, 2018, the Ohio Supreme Court denied jurisdiction related to all assignments of error but allowed jurisdiction **solely and exclusively** to address the enhancement included in the Original Prejudgment Attorney Fee Award. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group*, L.L.C., Slip Opinion No. 2020-Ohio-1056, ¶8. On March 25, 2020, the Supreme Court entered its decision changing Ohio law and eliminating the enhancement. Id. at ¶28. However, it specifically affirmed $1,991,507 of the Original Prejudgment Attorney Fee

Award representing the lodestar amount (the "Affirmed Prejudgment Attorney Fee Award"). Id. Phoenix now submits application to this Court for its post-judgment attorney fees necessary to maintain and defend its awards since September 29, 2014, the date of the Final Judgment Entry.

II. Law Supporting the Post-Judgment Attorney Fee Award.

The OUTSA has a statutory fee shift for malicious misappropriation of trade secrets. R.C. 1333.64(C) states in pertinent part: "The court may award reasonable attorney's fees to the prevailing party, if any of the following applies: *** (C) Willful and malicious misappropriation exists." The jury and this Court found malice. Both granted punitive damages for the trade secret misappropriations under the OUTSA. Therefore, the R.C. 1333.64(C) fee shift can be used to support the attorney fee awards in this case, whether prejudgment, post-judgment or both. The instant motion does not address and has no impact on the Affirmed Prejudgment Attorney Fee Award. That award is finally determined by the Ohio Supreme Court and is expected to be paid by DCO soon.

Phoenix now requests post-judgment attorney fees only. Where there is a statutory fee shift and "there is no limiting language in the statute that precludes a trial court from considering fees incurred at the appellate level *** **the trial court has the authority to tax as costs the attorney fees incurred at the appellate level.**" (Emphasis added) *Klein v. Moutz* (2008), 118 Ohio St. 3d 256 at ¶13. See also, *Royster v. Toyota Motor Sales, U.S.A., Inc.* (2001), 92 Ohio St. 3d 327, 332. The R.C. 1334.64(C) fee shift has no language limiting its application to prejudgment fees or limiting when a request may be made. With such statutory fee shifts, trial courts routinely grant attorney fee awards for post-trial and appeal work defending awards stemming from remedial statutes. *Tanner v. Tom Harrigan Chrylser Plymouth, Inc.* (1991), 82 Ohio App. 3d 764, 766 (the post-trial work was "***part of the legal process of achieving and maintaining the judgment for

the consumer.") (Emphasis added); and *Gibney v. Toledo Bd. of Edn.* (1991), 73 Ohio App. 3d 99, 108 ("the trial court is in the best position to resolve factual issues regarding appellate fees through pretrial conferences, evidentiary hearings, and discovery").

In *Sprovach v. Bob Ross Buick, Inc.* (1993), 90 Ohio App. 3d 117, 123, the court found it appropriate for the trial court to consider and grant attorney fees for both trial work and post-trial work and to do so after the appeal process itself was completely concluded. In *Sprovach* the applicant, *after* the appeal was complete, sought its attorney fees from the "initial client consultations to the final stages of the appeal process." Id. The court concluded:

> ***we have recently held that attorney fees may be sought and won for work done on appeal as well as work done at the trial level. *Tanner I*, supra, 82 Ohio App. 3d at 766, 613 N.E. 2d at 650. **Naturally, it would be appropriate for the prevailing party to make its motion for attorney fees after the appeal process was completed if he meant to include appellate work in the calculation.** (Emphasis added). Id.

Nevertheless, more often, where post-judgment fees are appropriate, attorney fees are granted twice, once towards the end of the trial court matter for prejudgment fees and then again, upon separate application, after the appeal process is complete for post-judgment fees.

In *Ulrich v. Mercedes Benz, USA, LLC*, 2012-Ohio-1623 (9th Dist. 2012), our Ninth District Appellate Court held that although a trial court generally lacks jurisdiction to award attorney fees expended on appeal while defending a judgment, "An aggrieved party may recover appellate attorney fees, however, when his **cause of action stems from certain remedial statutes**." (Emphasis and underlining added). See, also, *LaFarciola v. Elbert*, 2009-Ohio-4615 (9th Dist. 2009) ("Ohio appellate courts have held that a trial court award of appellate attorney fees may be appropriate when the **cause of action is brought under certain remedial statues**"). (Emphasis added). In *Jay v. Massachusetts Casualty Ins. Co.*, 2009-Ohio-4519, three judges from the Ninth District, sitting on assignment in the Fifth District, held the attorney fees would not be

granted, but only because in that case there was no statutory authority for the grant of attorney fees. These judges stated: "***the *Klein* Court stressed that permitting a trial court to award attorney fees for **causes of action brought under a remedial statute** 'furthers an important objective of the statute,' that is, **ensuring that a prevailing party need not incur the expense of defending the judgment on appeal**." Id. at ¶11. (Emphasis added).[2]

Here, Phoenix won significant portions of its compensatory and punitive awards on its claims for violation of the OUTSA (RC Chapter 1333.61 et. seq.), a remedial statute. Then, on appeal to the Ninth District Appellate Court, 6 of the 7 assignments of error asserted by DCO and both cross assignments of error assert by Phoenix directly related to claims for evidence related to, or damages caused by DCO's misappropriation under the OUTSA. Additionally, it should be remembered, this Court in granting prejudgment attorney fees found the causes of action including the trade secret misappropriation claims "all stem from a common core of operative facts and so all of the hours of attorney fee time are recoverable." September 29, 2014 Final Judgement Entry at 5.

The Uniform Trade Secret Act (UTSA), after which the OUTSA was modeled, is a remedial statute for misappropriation of trade secrets. *CaremarkPCS Health, LLC. v. New Hampshire Dept. of Admin. Serv.*, 167 N.H. 583, 590, 116 A.3d 1054 (2015) (recognizing the remedial nature of the UTSA). Indeed, the OUTSA expressly provides its remedies in R.C. 1331.63 (A). Importantly, as indicated above, where malice is found, it also contains statutory fee shift authority [ORC 1331.64(C)] for the grant of attorney fees. Here, both the jury and this Court

[2] Even where a statute is not remedial, but it allows for a fee shift and is intended to benefit the prevailing party, courts have allowed the recovery of post-trial and appellate fees. In *McHenry v. McHenry*, 2017-Ohio-1534 (5th Dist. 2017) the Court found that although the fee shift statute (RC 5810.04) was not remedial, it was meant to protect a trust and its beneficiaries. The court stated: "Thus, the statute is designed to protect the trust and the beneficiaries of the trust. We therefore hold that pursuant to this statute, the trial court has authority to award attorney fees incurred on appeal." Id. at ¶ 68.

found malice (they both granted significant punitive damages). Equally important, R.C. 1333.64 (C) contains no language limiting its attorney fee-shift to work occurring pre-judgment. Because of this all fees needed to defend and maintain the intertwined awards or prosecute the cross-appeals under the OUTSA are appropriate. *Klein*, 118 Ohio St. 3d 256 at ¶13.

Finally, in *Ulrich*, the court also held that where the final trial court judgment incorporated an award of prejudgment attorney fees, attorney fees for work performed at the trial court level would not be available unless they occurred *after* issuance of the final judgment, otherwise, it would amount to a modification of the final judgment. Id. at ¶ 11. Here, while this Court's Final Judgment Entry did grant attorney fees, Phoenix now only seeks appellate fees and fees incurred at the trial court level *after* September 29, 2014, the date of the Final Judgment Entry.

III. Addressing DCO's Expected Contention.

A. The Ohio Supreme Court's Decision Affirming the Lodestar Portion of the Original Attorney Fee Award Does Not Prevent a Post-Judgment Attorney Fee Award.

In light of recent communications with DCO's counsel, it is anticipated that DCO will argue the Supreme Court's affirmance of the lodestar portion of the prejudgment attorney fees, i.e. the Affirmed Prejudgment Attorney Fees, and its remand to this Court "with instructions to issue a final judgment granting Phoenix attorney fees in the amount of $1,991,507" (*Phoenix*, at ¶28) somehow constitutes a mandate which prevents this Court from awarding post-judgment attorney fees. DCO's counsel recently stated to Phoenix's counsel the trial court "is to issue a final judgment with attorney fees of $1,991,507. No more, no less." DCO's counsel ignores the fact that the Supreme Court accepted and held jurisdiction on one and only one issue, to wit: the amount of *prejudgment* attorney fees.[3] Its decision spoke, and could only speak, to the issue before it:

[3] Actually, the Supreme Court accepted jurisdiction only on the issue of the enhancement portion of the Original Prejudgment Attorney Fee Award. The lodestar portion of the award was not appealed and was never in jeopardy.

prejudgment attorney fees. Phoenix is not requesting this award be modified, changed or affected in any manner. However, the Supreme Court's affirmance of the lodestar portion of Phoenix's prejudgment attorney fees certainly was not intended to preclude Phoenix's clear right, as explained above, to seek a post-judgment attorney fee award after completion of the appeal process.

When pressed further DCO contends that this Court's Final Judgment Entry did not indicate this Court supported the *pre*-judgment attorney fee award with R.C. 1333.64(C), the OUTSA fee shift. Even if true, how this Court intended to support the prejudgment award is inapposite and irrelevant to the current *post*-judgment request. This is now a separate request for a distinctly different category of attorney fees clearly allowed on its own merits ."[A]ppellate fees are divorced from the fees incurred at the trial level and an aggrieved party may obtain them either from the appellate court itself or from the trial court." *Ulrich* at ¶ 10. As explained above, Phoenix sought to maintain and defend a post-judgment award that emanated from a remedial statute, namely the OUTSA/misappropriation cause of action, there is no language in the OUTSA fee shift [ORC 1333.64(C)] limiting it to prejudgment fees or limiting the time when the request is made, and all the awards were inextricably intertwined with the OUTSA/misappropriation cause of action giving Phoenix the right to collect fees for defending and maintaining *all* of the causes of action and prosecuting the argument for a higher punitive damage cap.

Finally, DCO contends that the Supreme Court's affirmance of the prejudgment attorney fees "with instructions to issue a final judgment granting Phoenix attorney fees in the amount of $1,991,507" is a narrow mandate constituting "law of the case" preventing a post-judgment attorney fee award. DCO argues what is commonly referred to as the "mandate rule." DCO has completely misconstrued and misapplied this rule. "Under the 'mandate rule' a lower court must

'carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest.'" *Fitzgerald v. City of Cleveland Civil Service Commission* (8th Dist.) 2017 – Ohio 7086 ¶ 25. It is a concept rooted in the "law of the case" doctrine. 5 Ohio Jur. 3d Appellate Review § 622, *Law of the case rule in trial court as part of mandate*. However, the law of the case doctrine only prevents relitigating the same issues already decided on appeal. Id. Phoenix is not requesting consideration of questions which the Supreme Court's decision laid to rest. Post-judgment attorney fees were not within the accepted jurisdiction of the Supreme Court. In fact they haven't been decided by any court yet. Phoenix hasn't even requested them until now.

Under the law of the case doctrine, where on remand "***a trial court is confronted with **substantially the same facts and issues as were involved in the prior appeal**, the court is bound to adhere to the appellate court's determination of the applicable law." 5 Ohio Jur. 3d Appellate Review § 622 *Law of the Case Rule in Trial Court as Part of Mandate*. (Emphasis added). "A lower court may, however, rule on issues left open by the mandate." *Fitzgerald* at ¶ 25. Referring to the "mandate rule" one court stated: "the premise of the rule does indicate trial courts are permitted to rule on issues unresolved by our decision." *Smith v. Somerville*, (7th Dist.) 2017 – Ohio 8919, ¶ 31. "The trial court 'may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." *Jones v. Lewis*, 950 F. 2d to 60, 262 (6th Cir. 1992). "While the appellate court's mandate is completely controlling as to all matters within its compass, **the lower court is free on remand to pass upon any issue that was not expressly or impliedly disposed of on appeal**." (Emphasis added,)5 Am Jur. 2d Appellate Review §689 *Effect of whether appellate court decided issue in appellate mandate*. "***The rule of mandate allows a lower court to decide anything not foreclosed by an appellate court's mandate." 5 Am. Jur. 2d Appellate Review §684. The issue of post-judgment attorney fees has not yet been addressed or passed upon

by any court in this case and the Supreme Court's mandate relating to the only matter before it – prejudgment attorney fees - did not foreclose this Court's consideration of post- judgment attorney fees.

Without question, this Court has jurisdiction to issue an award for post-judgment attorney fees. First, all the other awards won by Phoenix were already remanded by the appellate court back to this Court. The appellate court's remand was a general remand stating: "this matter is remanded for further proceedings consistent with this opinion." *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 2018 WL 3096587, ¶ 84. Second, in its Merit Brief with the Supreme Court, Phoenix requested remand for purposes of determining post-judgment fees. The Supreme Court's decision did not address the request specifically but nevertheless remanded the case to this Court for entry of the Affirmed Prejudgment Attorney Fee Award instead of entering judgment itself. A trial court re-establishes jurisdiction to issue post-judgment attorney fee awards in one of three ways: (1) a procedural rule; (2) a remedial statutory provision; or (3) a remand. *LaFaricola* at ¶13; *Jay* at ¶9-12; and *Klein* at ¶17 ("if the case is being remanded to the trial court for additional proceedings, it may be more efficient for the lower court to assess attorney fees***"). Here, as explained above, the Court has jurisdiction by statutory provision (R.C. 1334.64(C)) and remand from both the appellate court and the Supreme Court.

B. The New Law to Be Applied to Determine Reasonable Post-Judgment Attorney Fees.

To be clear, now, in determining its *post*-judgment attorney fees, Phoenix will honor the law of the case. In its March 25, 2020 *Phoenix* decision, the Ohio Supreme Court set forth new law regarding attorney fee award calculations. The Court departed from its long-standing holding in *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991), which allowed a

trial court to modify a lodestar calculation based upon application of the factors listed in Prof. Cond. R. 1.5(a)]," *Bittner* at syllabus. Instead it found:

> There is a strong presumption that the reasonable hourly rate multiplied by the number of hours worked, which is sometimes referred to as the "lodestar," is the proper amount for an attorney-fee award. Enhancements to the lodestar should be granted rarely and are appropriate when an attorney produces objective and specific evidence that an enhancement of the lodestar is necessary to account for a factor not already subsumed in the lodestar calculation. (*Perdue v. Kenny A.*, 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010), followed; *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991), modified.) 2. A trial court has discretion to modify the presumptive calculation of attorney fees—the reasonable hourly rate multiplied by the number of hours worked—but any modification must be accompanied by a rationale justifying the modification. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group*, L.L.C., Slip Opinion No. 2020-Ohio-1056, at syllabus.

Under this new law, instead of applying the factors listed in Prof. Cond. R. 1.5(a) to determine whether a lodestar calculation should be enhanced the party seeking an enhancement must present evidence to establish that an adjustment to the lodestar amount is appropriate based on a factor not already subsumed within the lodestar. *Phoenix*, at ¶¶20, 29, Kennedy, J., concurring). Consequently, trial courts must still take account of the factors set forth in Prof. Cond. R. 1.5(a) in determining the reasonableness of the attorney's hourly rate and time expended and evaluating whether a factor is not included within the lodestar. Where attorneys are not reasonably compensated based on the Prof. Cond. R. 1.5(a) factors, a court can provide an enhancement to the lodestar amount if the Court provides "rationale justifying the modification". Id. at ¶20.

With regard to determining the reasonable hourly rate for purposes of a lodestar calculation, the Court reaffirmed the law it set forth in *State ex rel. Harris v. Rubino*, 156 Ohio St.3d 296, 2018-Ohio-5109, 126 N.E.3d 1068, ¶ 4, wherein it held that "a reasonable hourly rate is the prevailing market rate in the relevant community, *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), given the complexity of the issues and the experiences of the

attorney ***." *Phoenix*, at ¶11, quoting *Harris at* ¶ 4. The Court explained that "the prevailing market rate can often be calculated based on a firm's normal billing rate because, in most cases, billing rates reflect market rates, and they provide an efficient and fair short cut for determining the market rate." *Phoenix*, at ¶11, quoting *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 414, 422 (3d Cir.1993).

In this case, the rate Phoenix's counsel has charged its client throughout this litigation including the post-trial litigation- $240/hour – has not been Phoenix's attorneys' hourly rate charged to other clients since 2012. Additionally, it does not take into account several of the factors set forth in Prof. Cond. R. 1.5(a), namely Prof. Cond. R. 1.5(a) "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"; (3) "The fee customarily charged in the locality for similar legal services; (4) "The amount involved and the results obtained"; (7) "The experience, reputation, and ability of the lawyer or lawyers performing the services"; and (8) "Whether the fee is fixed or contingent". Additionally, the time value of money, advanced costs, and the "true market value" of Phoenix's counsel "as demonstrated in part during the litigation" should also be considered. *Phoenix*, at ¶s 17 and 38.

Therefore, instead of the below-market, frozen rate of $240/hour used by this Court in its calculation of the lodestar for Phoenix's pre-trial and trial attorney fee award, which the Ohio Supreme Court previously viewed as an "initial estimate" of a reasonable fee (*Phoenix*, at ¶16, quoting *Bittner*, 58 Ohio St.3d at 145, 569 N.E.2d 464), the rate used in the lodestar for Phoenix's post-trial attorney fees will be calculated using the "prevailing market rate in the relevant community". Phoenix will present evidence that its $240 hourly rate should be adjusted based on the Prof. Cond. R. 1.5(a) factors and the other factors mentioned above, not already included in

that rate. Id. Notably, this hourly rate will be substantially higher than the rate used in the calculation of the lodestar for Phoenix's pre-trial and trial fees. Finally, Phoenix, pursuant to *Peppers v. Barry*, 718 F. Supp. 23, 24 (N.D. Ohio 1989); and; *Horne v. Clemens*, 25 Ohio App. 3d 44, 46, 495 N.E.2d 441, 444 (1985), will be seeking its attorney fees necessary to collect its attorney fees.

IV. Conclusion.

All of Phoenix's requests for post-judgment fees were incurred to defend the OUTSA and common law intertwined awards, increase the cap on the OUTSA award, and maintain the awards. They all meet the above requirements and should be granted. Phoenix respectfully requests that this Court set a hearing and briefing schedule at its earliest convenience, wherein Phoenix will present its request for the substantial attorney fees it incurred defending its judgment under the new law created by the Supreme Court. Alternatively, in lieu of a hearing, Phoenix's counsel will seek agreement from DCO's counsel to submit the matter via briefs. A proposed order is attached hereto as Exhibit A for the Court's convenience.

Respectfully submitted,

\s\Jeffrey T. Witschey__________
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ATTORNEYS FOR PHOENIX LIGHTING GROUP, LLC, JACK DUFFY AND ASSOC., INC., AND JOHN PATRICK DUFFY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following this 2th day of April, 2020 via e-mail, pursuant to Civil Rule 5(B)(2)(f).

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Attorneys for Defendant Genlyte Thomas Group LLC (dba Day-Brite/Capri/Omega)

\s\ Jeffrey T. Witschey________________
One of the Attorneys for Plaintiffs

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

PHOENIX LIGHTING GROUP LLC, et al.	)	CASE NO. CV-2012-08-4444
	)	
Plaintiff	)	JUDGE ALISON McCARTY
-vs-	)	
	)	
GENLYTE THOMAS GROUP LLC ET AL, et al.	)	**FINAL JUDGMENT ENTRY**
	)	
	)	
Defendant		

\- - -

This Final Judgment Entry regards this Court's prior Order of December 16, 2015 granting attorney fees to Plaintiffs. This Entry does not address the current motions before the Court regarding Plaintiffs' motion for POST-JUDGMENT attorney fees. A hearing regarding the motion for post-judgment attorney fees is scheduled for May 11, 2020 at 1:00 pm via video conference. However, in order to timely comply with the Supreme Court's March 25, 2020 directive regarding the prior granting of attorney fees, this Entry is filed.

Therefore, in accordance with the Supreme Court's Opinion of March 25, 2020, this Court hereby amends its Entry of December 16, 2015 and awards attorney fees to Plaintiffs in the amount of $1,991,507.00.

Plaintiffs' Motion for Post Judgment Attorney Fees still remains under advisement.

IT IS SO ORDERED.

Alison McCarty

JUDGE ALISON McCARTY

CC: ATTORNEY JEFFREY T. WITSCHEY
ATTORNEY BETSY L.B. HARTSCHUH
ATTORNEY BRUCE J. L. LOWE
ATTORNEY JULIE CROCKER

2020 JUN 19 PM 4:16
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

PHOENIX LIGHTING GROUP LLC, et al.	)	CASE NO. CV-2012-08-4444
	)	
Plaintiff	)	JUDGE ALISON McCARTY
-vs-	)	
	)	
GENLYTE THOMAS GROUP LLC ET AL, et al.	)	**ORDER**
	)	
Defendant	)	

- - -

Before this Court is Plaintiff Phoenix Lighting Group LLC's (hereinafter, Phoenix) Motion for Post-Judgment Fees filed April 2, 2020. Defendant Genlyte Thomas Group, LLC (hereinafter, DCO), filed its Brief in Opposition and Phoenix was permitted to file a Reply. Thereafter, the parties participated in a hearing by way of video conference which was agreed to by all parties.

The recent and relevant history of this case is that after a jury found for the plaintiff and awarded punitive damages and attorney fees, the Ninth District Court of Appeals affirmed all issues with the exception of a punitive damages recalculation which was resolved after remand. The Ohio Supreme Court accepted jurisdiction regarding the limited appellate issue considering whether an enhancement of the attorney fees following a lodestar calculation was appropriate in light of the United States Supreme Court's decision in *Perdue v. Kenny A.*, 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed.2d 464 (2010). The Court's acceptance of jurisdiction stated:

> Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal on Proposition of Law No. III.

The Memorandum of Jurisdiction filed by Defendant/Appellant Genlyte detailed Proposition of Law No. III as follows:

> Because there is a strong presumption that the lodestar method yields a sufficient attorney fee, enhancements should be granted rarely and only where the applicant seeking the enhancement can produce objective and specific evidence that an enhancement is necessary to compensate for a factor not already subsumed within the Court's lodestar calculation. (*Perdue*, supra).

Thereafter, a review of the parties' filings reveal that each party's arguments to the Supreme Court solely regarded the calculation of the attorney fees awarded by this Court. Likewise, during the oral arguments, the parties focused on whether the enhancement of the previously calculated lodestar was appropriate considering the *Perdue* decision[1].

On March 25, 2020, the Supreme Court issued its Opinion along with a Judgment Entry stating the following:

> This case, here on appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the award of attorney fees, and the cause is remanded to the trial court with instructions to issue a final judgment granting Phoenix Lighting Group, LLC, attorney fees in the amount of $1,991,507, consistent with the opinion rendered herein.

The Supreme Court's Opinion provided a historical analysis of the calculation of attorney fees following an award of punitive damages. The Court noted that its prior decisions were guided by decisions issued by the United States Supreme Court such as *Hensley v. Eckhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Those decisions had held that enhancements such as the "results obtained" could be considered by a court when deciding whether to enhance the lodestar. Therefore, the Ohio Supreme Court, in *Bittner v.*

[1] Notably, the parties did not argue the *Perdue* decision and its application to this Court either through briefing or oral argument prior to the calculation of attorney fees.

Tri-County Toyota, Inc. 58 Ohio St.3d 143, 569 N.E.2d 464 (1991), held that the lodestar could be modified.

However, in 2010, the United States Supreme Court issued its decision in *Perdue*, supra, which stated that the lodestar was "presumptively reasonable and that enhancements to the lodestar should be rarely granted" and allowed only in very specific situations. See, *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group L.L.C.*, Slip Opinion, 2020-Ohio-1056. Accordingly, after an analysis regarding this court's calculation of the enhancement in accordance with *Bittner*, the Ohio Supreme Court stated as follows:

> "The only Prof.Cond.R. 1.5(a) factor not directly included in the hourly rate charged by Phoenix's attorneys was Prof.Cond.R. 1.5(a)(4)—the results obtained. This factor is relevant only when the lodestar does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. Phoenix's expert considered Prof.Cond.R. 1.5(a)(4) when stating his opinion that a $1.9 million attorney-fee award was a "reasonable fee," testifying that one of the factors that he considered when arriving at his opinion was "the result that was achieved" by Phoenix's attorneys. It follows that Phoenix's attorneys were reasonably compensated based on the Prof.Cond.R. 1.5(a) factors, so there should have been no enhancement to the lodestar. **We therefore reverse the portion of the court of appeals' judgment affirming the award of attorney fees, and we remand the cause to the trial court with instructions to issue a final judgment granting Phoenix attorney fees in the amount of $1,991,507**.
>
> Judgment reversed in part and cause remanded."
>
> *Phoenix*, supra, at ¶ 28. (Emphasis added)

Following the Supreme Court's remand, Phoenix filed its motion for post-judgment attorney fees citing to the fact that pursuant to the Ohio Uniform Trade Secrets Act (OUTSA) and specifically, ORC 1333.64(C), it is entitled to post-judgment attorney fees. Phoenix points out that they were forced to expend fees and costs in order to defend and maintain its awards against DCO as well as the prosecution of its cross appeal. In response, DCO argues that the Supreme Court mandated that this Court issue a final

judgment regarding the attorney fees and therefore, this Court lacks jurisdiction to award any additional attorney fees. In addition, DCO claims that since Phoenix did not request attorney fees pursuant to OUTSA during the initial phase of this case, they are precluded from doing so now.

LAW AND ANALYSIS

Jurisdiction

The first issue this Court must address is whether it has jurisdiction to award post-judgment attorney fees considering the Supreme Court's March 25, 2020 Opinion and Judgment Entry. DCO argues that under the "Law-of-the-Case Doctrine" this Court lacks jurisdiction to consider post-judgment attorney fees. DCO relies upon the Supreme Court's instruction that this Court "issue a final judgment granting Phoenix attorney fees in the amount of $1,991,507." Based upon this instruction, DCO argues this Court can issue no further orders, nor consider any further matters, regarding attorney fees. DCO claims that since the Supreme Court had "the full record before it", the Supreme Court was aware of all issues when it issued its directive regarding attorney fees. DCO also relies, in part, upon *Jay v. Massachusetts Cas. Ins. Co.*, 5th Dist. Stark No. 2009CA00056, 2009-Ohio-4519. DCO points out that in *Jay*, supra, the Fifth District Court of Appeals held that a trial court cannot consider post-judgment attorney fees "absent a remand" since the trial court does not regain jurisdiction after the Court of Appeals' decision. *Id.*, quoting *State ex. Rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 98 (1978).

To the contrary, Phoenix claims that the Supreme Court's directive was limited to prejudgment attorney fees since that was the only issue before it on appeal. Phoenix notes that the Supreme Court only accepted jurisdiction regarding Proposition of Law No. III which was limited to the "prejudgment" attorney fees following the jury's award of

punitive damages and reasonable attorney fees. Moreover, post-judgment attorney fees were not contemplated by the Supreme Court since that issue was not before it and post-judgment fees had never been, nor could they have been at that point, requested by Phoenix.

The Supreme Court only had before it the limited issue of whether the enhancement of the lodestar previously granted by this Court was appropriate. After a discussion regarding the Court's following of United States' Supreme Court precedent and a reversal of its decision in *Bittner*, the Supreme Court found that Phoenix failed to present the necessary evidence in support of an enhancement. Therefore, the Supreme Court, in accordance with *Perdue*, supra, directed this Court to issue a final judgment regarding attorney fees in the amount of the lodestar or, $1,991,507.

However, prior to DCO's appeal to the Supreme Court, the Ninth District Court of Appeals had issued its opinion wherein it stated:

> DCO's first, second, third, fourth, fifth, sixth, and seventh assignments of error are overruled. Phoenix's first assignment of error is overruled. Phoenix's second assignment of error is sustained. Therefore, the judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this opinion.
>
> *Phoenix Lighting Group LLC v. Genlyte Thomas Group LLC*, Summit County App. No. 28082, (2018).

In response, this Court issued a Judgment Entry dated December 19, 2018, to align with the Ninth District Court of Appeals' determination regarding whether the punitive damages cap applied. As such, the punitive damages previously awarded to Phoenix were increased by $203,000, plus interest, in accordance with the statute and the appellate court's decision.

At that point, and as noted in the December 19, 2018 Judgment Entry, the Ohio Supreme Court had accepted the *limited issue* regarding the enhancement of the lodestar. The appellate procedure had not concluded and Phoenix was unable, at that time, to request post-judgment attorney fees.

The facts in *Jay*, supra, are distinguished from this case as the *Jay* appellate court had not remanded the matter back to the trial court. Instead, the Fifth District had issued its own "final order on the one issue it reversed on appeal (the proper rate of pre-judgment interest) rather than remanding the case to the trial court to do so." Such is not the case in this matter. The Ninth District remanded the case back to this Court regarding the proper amount of punitive damages. Likewise, the Supreme Court remanded the case back to this Court to issue the final judgment entry regarding the proper amount of attorney fees following the jury's award of punitive damages and reasonable attorney fees (the lodestar), only. The Supreme Court did not accept jurisdiction over any other issue.

The matter of post-judgment attorney fees did not become ripe until the Supreme Court issued its Opinion regarding the enhancement. Indeed, Phoenix concedes that since it was unsuccessful in the Supreme Court, it is not requesting attorney fees for its defense of that portion of the appeal. Instead, now that the Supreme Court has issued its decision, Phoenix is only claiming post-judgment attorney fees for the defense of its judgment in the Ninth District Court of Appeals and up through the filing of the memorandum in response to jurisdiction with the Supreme Court.

The Supreme Court only accepted for review the very limited topic of enhancement of the lodestar. DCO, it its jurisdictional memorandum, specifically requested that the Supreme Court address whether an enhancement of the lodestar was appropriate in accordance with *Perdue*. Following its analysis, the Supreme Court stated in the last

paragraph of the majority opinion: "**We therefore reverse the portion of the court of appeals' judgment affirming the award of attorney fees, and we remand the cause to the trial court with instructions to issue a final judgment granting Phoenix attorney fees in the amount of $1,991,507**." The Supreme Court specifically reversed the court of appeals' judgment affirming the award of attorney fees, those being the prejudgment attorney fees awarded by this Court in response to the jury's award of punitive damages. The issue of post-judgment attorney fees had not been brought before any court, and certainly not the Supreme Court, at that time. Accordingly, this Court finds that it has jurisdiction to consider an award for post-judgment, or appellate, attorney fees and that such an award, if granted, would not be inconsistent with the Supreme Court's March 25, 2020 Opinion regarding the enhancement of the lodestar.

Ohio Uniform Trade Secrets Act

Next, this Court must determine whether Phoenix is precluded from requesting appellate fees pursuant to Ohio Uniform Trade Secrets Act (OUTSA). During the trial in this matter, Phoenix requested attorney fees in conjunction with an award of punitive damages. DCO claims that Phoenix is now precluded from requesting appellate fees pursuant to OUTSA. DCO argues that since Phoenix initially decided not to pursue attorney fees, whatever the kind, under the fee shifting paradigm of OUTSA, it has forever foreclosed its ability to now seek appellate fees under those statutes. DCO states at page 7 of its brief: "Phoenix did not seek fees under the OUTSA when it had the opportunity to do so, which means Phoenix has forever forfeited the OUTSA as a basis for any attorney fees." DCO relies upon the fact that attorney fees have already been reviewed by the court of appeals and therefore, Phoenix's new request under OUTSA is belated.

To the contrary, Phoenix points out that appellate attorney fees are appropriate under the remedial OUTSA statutes. Moreover, the plaintiff does not believe it is precluded from requesting attorney fees pursuant to OUTSA since there is no time limitation to do so. Phoenix also focuses on various arguments such as pre- and post-judgment attorney fee awards being "divorced" from each other, that the post-judgment fees could not have been contemplated by the jury since no one knew whether Phoenix would be successful on appeal, and that this Court noted that attorney fees were appropriate for all stages of the litigation in light of the fact that the OUTSA and punitive damages claims arose from the same nucleus of operative facts.

Notably, this Court was not presented with any case law that suggests an award of pre-judgment attorney fees pursuant to one theory of law precludes a party from requesting appellate attorney fees under another. Ohio Revised Code § 1333.64 states in its entirety:

> The court may award reasonable attorney's fees to the prevailing party, if any of the following applies:
>
> (A) A claim of misappropriation is made in bad faith.
> (B) A motion to terminate an injunction is made or resisted in bad faith.
> (C) Willful and malicious misappropriation exists.

The statute is silent as to a time limitation, it does not state that a request for attorney fees must be brought during the trial in order to be recovered, or that a failure to request attorney fees under the statute in the alternative to other remedies, renders a party incapable of requesting them at a later time.

Ohio Courts have routinely awarded appellate attorney fees pursuant to various remedial statutes. In *Klein v. Moutz* (2008), 118 Ohio St.3d 256, 2008-Ohio-2329, the Supreme Court noted a conflict between the Ninth and Sixth District Courts of Appeal

regarding whether the trial court could tax as costs the appellate attorney fees incurred by a party who has successfully defended their judgment under the remedial statutes. The *Klein* court concluded that a trial court was vested with the ability to award as costs the appellate fees pursuant to the remedial statute at issue and then noted that the purpose of the remedial statute was to compensate the wronged party for the acts of the defendant. *Tanner v. Tom Harrigan Chrysler Plymouth, Inc.* (1991), 82 Ohio App.3d 764, when addressing an award of appellate fees pursuant to the Ohio Consumer Sales Practice Act, held: "The work of the attorney on appeal is part of the legal process of achieving and maintaining the judgment for the consumer. Disallowing attorney fees for appellate work undermines the purpose of the Act."

While Phoenix may have initially requested attorney fees following an award of punitive damages, this Court does not believe Phoenix is precluded from now seeking an award of appellate fees under OUTSA. Phoenix successfully defended its judgment in the Court of Appeals. This Court's prior order contemplated violations of OUTSA when it initially awarded attorney fees for the underlying action.

Accordingly, after review of the briefs and in consideration of the arguments made by the parties at the hearing in this matter, this Court has determined that Phoenix is entitled to appellate attorney fees pursuant to ORC 1333.63(B). A hearing will be set at a later date to determine a reasonable amount of attorney fees to be assessed as costs for the defense of Plaintiff's award on appeal.

IT IS SO ORDERED.

JUDGE ALISON McCARTY

CC: ATTORNEY JEFFREY T. WITSCHEY
ATTORNEY BETSY L.B. HARTSCHUH
ATTORNEY BRUCE J. L. LOWE
ATTORNEY JULIE CROCKER

KML

APX 00027

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

PHOENIX LIGHTING GROUP LLC, et al. Plaintiff -vs- GENLYTE THOMAS GROUP LLC ET AL, et al. Defendant	))))))))	CASE NO. CV-2012-08-4444 JUDGE ALISON McCARTY **ORDER**

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A HEARING on Motion for Post Judgment Attorney Fees is set for **December 15, 2020 at 10:00 a.m.** The hearing will be conducted via video. The Court will email the link for the video conference to the attorneys in advance of the hearing. Counsel is responsible for forwarding the link to any witnesses who will testify remotely.

Counsel shall email all exhibits they intend to utilize during the hearing to klewis@cpcourt.summitoh.net, as well as all opposing counsel, on or before December 11, 2020. All exhibits shall be marked and be submitted with a corresponding exhibit list. A paper copy does not need to be delivered to the Court. A complete copy of all exhibits shall be sent to all remote witnesses in advance of the hearing.

IT IS SO ORDERED.

JUDGE ALISON McCARTY

CC: ATTORNEY JEFFREY T. WITSCHEY
ATTORNEY BETSY L.B. HARTSCHUH
ATTORNEY JULIE CROCKER
ATTORNEY BRUCE J. L. LOWE

KML

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

PHOENIX LIGHTING GROUP LLC, et al. Plaintiff -vs- GENLYTE THOMAS GROUP LLC ET AL, et al. Defendant	))))))))	CASE NO. CV-2012-08-4444 JUDGE ALISON McCARTY **O R D E R**

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On June 19, 2020, this Court issued its Order finding that Plaintiff Phoenix Lighting Group, LLC (hereinafter, Phoenix) is entitled to Post-Judgment Fees. Following that Order, Defendant Genlyte Thomas Group, LLC (hereinafter, DCO), filed for Alternative Writ and Writs of Prohibition and Mandamus in the Ohio Supreme Court which was dismissed by that Court. Following the dismissal, this Court set a hearing for December 15, 2020 to receive evidence regarding the amount of post-judgment fees. That hearing proceeded forward via Ring Video Conference wherein counsel presented testimony and evidence regarding those fees. At the conclusion of the hearing, defense counsel, Julie Crocker, orally moved for a post-hearing briefing schedule which this Court granted. Both parties filed their respective briefs along with a copy of the transcript from the December 15, 2020 hearing.

At the outset, DCO again argues in its post-hearing brief against Phoenix receiving any post-judgment attorney fees. This Court has already held a hearing regarding that matter and issued the aforementioned June 19, 2020 order wherein it found that post-judgment attorney fees were appropriate. As such, this Entry is limited to the topic of the amount of fees pursuant to statute and case law.

Recoverable Fees

Phoenix has requested a lodestar figure of $1,079,716 and expenses of $61,680 for fees/expenses incurred from September 30, 2014 to November 30, 2020. Beyond this base

figure, Phoenix also requests an "adjustment" of those fees for the "time-value of money at the market rate of return for investments during the applicable timeframe." Finally, Phoenix alleges it is entitled to interest at a rate of 3.25% per annum on all amounts due from December 1, 2020 through February 4, 2021, plus an additional rate of 3.25% per annum or a per diem amount of $144.03 until the date of this entry, plus post judgment interest.

Genlyte contends that Phoenix it is not entitled to any post-judgment fees due to its failure to segregate fees it incurred in connection with its OUTSA claim and all other work. In the alternative, Genlyte encourages this Court to require Phoenix to segregate its fees to remove those entries relating to non-OUTSA related claims. As a final alternative, Genlyte suggests that this Court should reduce any award of post-judgment fees proportionally to the compensatory damages awarded to Phoenix on its claim for misappropriation of trade secrets under OUTSA.

The Court will first address Genlyte's argument against any attorney fees. When submitting the reasonableness of attorney fees for consideration by the Court, a party may present evidence in the "form of testimony, affidavits, answers or other forms of sworn evidence. *Cleveland v. CapitalSource Bank*, 8th Dist. Cuyahoga No. 103231, 2016-Ohio-3172, ¶ 13, quoting *R.C.H. Co. v. 3-J Machining Serv.*, 8th Dist. Cuyahoga No. 82671, 2004-Ohio-57, ¶ 25. "As long as sufficient evidence is presented to allow the trial court to arrive at a reasonable attorney fee award, the amount of the award will not be disturbed absent an abuse of discretion.' " *Id*. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents. Inc. v. River Place Community Urban Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A trial court also acts unreasonably and abuses its discretion when 'the amount of fees determined is so high or so low as to shock the

conscience.' " *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991).

In this case, Genlyte accuses Phoenix, on one hand, of submitting block billing, and on the other, of submitting billing unrelated to the OUTSA claims. According to Genlyte, Phoenix should not be permitted to recover any attorney fees since it failed to segregate its fees. However, this Court is unable to find any support in case law or statutes for such a proposition. Moreover, Phoenix presented the testimony of Attorney Witschy and Attorney Hartschuh regarding how the fees were billed, expert testimony regarding the reasonableness of the fees, affidavits, as well as pages upon pages of billing entries which this Court does not deem "block billing" in the common use of that term. Indeed, Genlyte provided to this Court almost three pages of entries it was able to "segregate out" regarding items Genlyte believes are not related to the OUTSA claim, thus suggesting the Witschy firm did not exclusively block bill.

In the alternative, Genlyte requests that this Court require Phoenix to segregate out those entries that do not relate solely to the OUTSA claims[1]. However, this Court has previously found that all of the claims stemmed from a singular core of operative facts. A review of the briefing, arguments and the multiple hearings over the past six years does not change this Court's opinion.

Calculation of the lodestar necessarily requires the trial court to exclude any hours that were unreasonably expended, e.g., hours that were redundant, unnecessary or excessive in relationship to the work done. *Gibney v. Toledo Bd. of Edn.* (1991), 73 Ohio App.3d 99, 108, 596 N.E.2d 591, citing *Hensley v. Eckerhart* (1983), 461 U.S. 424, 434, 103 S.Ct. 1933, 76

[1] Phoenix previously agreed it was not entitled to fees regarding the singular issue that was accepted by the Ohio Supreme Court, *to wit*: the enhancement of the lodestar figure for the underlying litigation attorney fees. Accordingly, other than fees for the jurisdictional memorandum, Phoenix is not seeking any recovery for fees in connection with the original Supreme Court appeal.

L.Ed.2d 40. However, is it not necessary for Phoenix to segregate out billing regarding items Genlyte believes are peripheral or unrelated to the OUTSA claims (see, pages 6-8 of Defendant's Post Hearing Brief). A review of the items suggested by Genlyte as being unrelated to the OUTSA claim, suggests that these items are intrinsically entwined with the OUTSA matters.

Likewise, the Court finds that work the Phoenix counsel performed regarding their cross appeals are also recoverable. While it is true that a trial court must award fees "only for the amount of time spent pursuing the claim for which fees may be awarded," this is only so where it is *possible* to separate claims in such a manner. *Bittner,* 58 Ohio St.3d at 145, 569 N.E.2d 464. As the United States Supreme Court has recognized:

> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> *Hensley,* 461 U.S. at 435, 103 S.Ct. at 1940, 76 L.Ed.2d 40.

This case is similarly situated to *Luft v. Perry County Lumbar & Supply Co*., 10th Franklin App. No. 02AP-559, 2003-Ohio-2305. In *Luft,* the court upheld attorney fees awarded for multiple claims, although fees were only allowable for claims brought under the Consumer Sales Practices Act ("CSPA"). That Court stated:

> We acknowledged the general rule that 'attorney fees should not be awarded for services on unsuccessful claims that are distinct from successful claims,' [internal citations omitted], but recognized the exception to this rule: '[W]hen it is not possible to divide claims in this fashion, such as when claims not covered under the CSPA involve a common core of facts with claims arising under the CSPA, then the court may award attorney fees for all time reasonably spent pursuing all claims.'
>
> *Luft* at ¶ 34, citing *Parker v. I & F Insulation Co., Inc.* (Mar. 27, 1998), 1st Dist. No. C–960602, 1998 WL 144510.

The Ninth District Court of Appeals faced a similar issue in *Fleischer v. George*, 9th Medina App. No. 09CA0057-M, 2010-Ohio-3941. That case also centered upon a CSPA claim as well as claims for fraud and breach of contract. Appellant argued that the appellee was not entitled to attorney fees for the other matters. However, that Court held:

> In the instant matter, Fleischer asserted claims for fraud, breach of contract and CSPA violations. All claims related to George's contract to complete a pool house and other renovations to Fleischer's home. Each of the claims dealt with a common set of facts: that George misrepresented the degree of completion of the project and did not bill according to the contract terms, that he did not submit lien waivers as required, that the lien waivers he did submit were inaccurate, and that he did not timely pay subcontractors. George's expert testified on cross-examination that George's CSPA violations were related to the broader issues concerning the construction project. Given the common core of facts of this case, it was permissible for the trial court to find that the entirety of the attorney's fees claimed were reasonable to award to Fleischer.
>
> *Fleischer*, supra.

Likewise, this Court previously determined in relation to Phoenix's request for pre-judgment attorney fees that all claims dealt with a common core of facts:

> "The Court finds that the causes of action in this matter all stem from the same common core of operative facts, and so all of the hours of attorney fee time are recoverable."
>
> Order filed September 29, 2014.

In reviewing the work that was completed post judgment, coupled with the testimony of counsel, the claims on appeal, like the claims below, all stem from the same core of operative facts.

Finally, Phoenix is entitled to recover fees for work performed to recover their counsels' fees. *See Bales v. Forest River, Inc.*, 8th Dist. Cuyahoga No. 107896, 2019-Ohio-4160, 2019 WL 5079626, ¶ 43 (awarding portion of fees and costs incurred in seeking recovery of attorney fees, including fees related to expert costs). "It is well established that the time spent in establishing entitlement to an amount of attorney fees is compensable. Counsel is also

entitled to fees for his representation during the appellate process." (Citations omitted.) *Turner v. Progressive Corp.*, 140 Ohio App.3d 112, 117-118, 746 N.E.2d 702 (8th Dist.2000).

This Court is also not persuaded that the post-judgment attorneys' fees should be reduced to an amount that is somehow comparable to the jury award. The fees that are now in dispute relate to *post*-judgment work by the attorneys and while that work was done in order to secure the jury's award, it is not in any way otherwise tied to that figure.

For the foregoing reasons, this Court finds that Phoenix is entitled to recover all of its attorney fees, as submitted, regarding post-judgment matters. The Court hereby awards $1,079.716.00 in attorneys' fees and $61,680.00 in expenses.

The Court also awards attorneys' fees for work performed for the hearing on this matter, preparation for the hearing, attendance at the hearing, and post-hearing matters. The Court further awards the expenses associated with the hearing. This work is subsumed in the post-judgment attorneys' fees request.

Adjustment of the Lodestar

Next, Phoenix argues that it is entitled to an adjustment of its attorney fees to compensate Phoenix under the theory of the "time value of money". In short, the Witschey Firm claims this Court should adjust or enhance its attorney fees since they had lost the value of the attorney fees and other associated costs and expenses over the past six years this matter has been pending in the Court of Appeals and then again with this Court.

According to Phoenix and the Witschey Firm, the attorney fees should be adjusted in order to accommodate the various losses the firm sustained over the past six years in the form of "use, investment, borrowing opportunity, etc." of the attorney fees they could have received during that time frame. As noted by the Ohio Supreme Court in Perdue, supra, an enhancement may be appropriate where "an attorney's performance involves exceptional delay in the

payment of fees." The US Supreme Court went on to hold that an "enhancement amount must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard interest rate to the qualifying expense outlays." Perdue, supra.

Phoenix argues that its attorneys are entitled to the enhancement for a multitude of reasons, including the significant delay in receiving the initial attorney's fees and the ongoing litigation in this matter. Genlyte counters that Phoenix is not entitled to an enhancement under the time value of money approach since that method for an enhancement was proposed in Justice Fischer's concurring opinion. Genlyte further argues none of the Perdue enhancement factors are present in this current situation.

As an initial matter, while the method was proposed in the concurring opinion, this Court does not read the Ohio Supreme Court's decision as not permitting such an enhancement. Instead, the Phoenix decision notes that enhancements may be warranted and Justice Fischer provided a method in which to calculate it. As previously noted, the US Supreme Court in Perdue specifically stated that any enhancement must be calculated using a "reasonable, objective" method that must be capable of being reviewed on appeal.

This Court also finds that this case does indeed fit into at least one of the Perdue factors in that the appellate matters stretched from 2014 through today. That is not an insubstantial amount of time. The Court also does not agree with Genlyte's position that Phoenix failed to present testimony and/or evidence that the litigation was exceptionally protracted. Much of the testimony presented during the hearing regarding the attorney's fees centered on the fact that seven years have passed since the original judgment and that there was seven years of appellate work. Indeed, the Witschy Firm hired an expert to discuss the amount of money that was lost over that seven year period.

Jeffrey Rovnak, a financial advisor, testified as an expert on behalf of the Plaintiff regarding a model to determine the time value of money. Regarding the concept of the time value of money, Mr. Rovnak explained, in layman's terms, that the time value of money means that money today, equals more money in the future. Moreover, the time value calculation represents earnings you forgo by not having access to those monies.

Mr. Rovnak discussed two different models when considering a calculation for the time value of money: prime rate and market analysis. In his opinion, Mr. Rovnak considered the market rate analysis a better model to utilize when calculating the time value of money. The market rate analysis is a reflection of both the bond and the stock market while the prime rate is ultra conservative and connected with the prime interest rate. Mr. Rovnak explained that actual numbers are able to be reached by utilizing the market data analysis since historical data is able to be utilized. It is not a hypothetical approach. The witness further differentiated between the two models by explaining while the prime rate provides an average of what the interest rate may have been over the timeframe, the market data analysis model is a better indicator of the earnings potential over that same time.

In reviewing Mr. Rovnak's testimony and the exhibits utilized to better explain the two models, this Court finds that the market data analysis is an appropriate model to account for the time value of money since 2014. The Court hereby further awards $421,604.00 as an enhancement of Witschy Firm's attorneys' fees. The Court declines to enhance the fees relative to the hearing.

WHERERFORE, the Court hereby awards the following:

1. Attorneys' fees of $1,079,716.00 (the lodestar amount);
2. Expenses of $61,680.00;
3. Enhancement of the lodestar in the amount of $421,604.00;

4. Attorneys' fees from December 2020 through February 4, 2021 of $89,714 plus interest at the prime rate of 3.25% per annum;
5. Additional reasonable expenses related to the hearing totaling $23,939.91 plus interest at the prime rate of 3.25% per annum.

IT IS SO ORDERED.

JUDGE ALISON McCARTY

CC: ATTORNEY JEFFREY T. WITSCHEY
ATTORNEY BETSY L.B. HARTSCHUH
ATTORNEY BRUCE J. L. LOWE
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July 9, 2010

VIA E-MAIL & REGULAR U.S. MAIL
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PRIVILEGED & CONFIDENTIAL - SUBJECT TO EVIDENCE RULE 408

Timothy McKinzie, Esq.
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Re: *Phoenix Lighting Group, LLC, et al. v. Jason Brown, et al.*
Summit County Common Pleas Court, Case No. 2009 04 2557

Gentlemen:

As you are well aware, over the last 15 months your clients, Patrick Duffy ("Duffy"), Phoenix Lighting Group, LLC ("Phoenix"), and Jack Duffy & Associates, Inc. ("JDA")[1] have pursued a series of baseless and meritless claims against Intelligent Illuminations ("II") and its principals, Jason Brown and Guy Day (collectively, "Brown/Day"). Through such claims Duffy has forced our client, Genlyte Thomas Group, LLC (dba Day-Brite|Capri|Omega) ("DCO Lighting"), to direct significant resources toward dissolving Phoenix's wrongfully-obtained injunction and to otherwise defend DCO Lighting's interests in the above-captioned case (the "Lawsuit"). The wrongfully-obtained injunction has also significantly impacted DCO Lighting's ability to freely sell its products through its sales agent, II, and to lawfully compete in the commercial lighting market, thereby creating substantial Counterclaims on behalf of DCO Lighting.

[1] JDA, Phoenix, and Duffy may be collectively and alternatively referred to herein as "Duffy".

71413547.1

You, on behalf of your client, are now attempting to amend your Complaint to bring claims directly against DCO Lighting. This provocative act by Duffy has only further entrenched DCO Lighting in its desire to prevail in this litigation and to ensure that justice is done, which includes Duffy being held fully accountable for the substantial harm that he has caused to DCO Lighting, Brown/Day, and II. Thus, if Duffy continues his foolhardy pursuit of this Lawsuit, rest assured that his unlawful and morally-bankrupt conduct will soon become a matter of public record, and he will be forced to rectify the significant economic injury that he has inflicted upon DCO Lighting. This should be a source of considerable and continuing concern for Duffy. We therefore strongly suggest that you review this letter with Duffy and explain to him the gravity of the claims now pending against him, as well as the evidence that DCO Lighting has already adduced and will continue to accumulate against him.

The purpose of this letter is to inform you of the magnitude of your mistake and to offer you one chance to resolve the Lawsuit amicably before the floodgates of litigation are thrown wide open. More specifically, you are advised that, in the unlikely event that Duffy's Motion to Amend is granted, not only will DCO Lighting vigorously defend, without limit, Duffy's frivolous "claims", but DCO Lighting will also aggressively pursue, without remorse, its own substantial Counterclaims against Duffy.

You should understand that DCO Lighting has committed its substantial resources to vigorously pursue all available discovery, including, without limitation, significant discovery from Duffy's manufacturers, including, among others, Lithonia, in order to determine the nature of their relationship with Duffy and what role(s) they played in Duffy's ill-conceived and bad faith conduct in obtaining a sham injunction based upon a fraudulent verified complaint, all of which has interfered with DCO Lighting's ability to conduct its business and sell its product, resulting in substantial damage to DCO Lighting. DCO Lighting will also pursue all available procedural and evidentiary remedies that are available, including, without limitation, a motion to dismiss and/or strike Duffy's proposed "amendment by interlineation", a motion for summary judgment, motions in limine, and ultimately, motions for sanctions against Duffy arising out of Duffy's bad faith and frivolous conduct.

Notwithstanding the foregoing, and as outlined more fully below, DCO Lighting is willing to give Duffy one last opportunity to resolve the Lawsuit amicably. In the event that Duffy foolishly elects to continue with the Lawsuit, Duffy will have embarked upon a long, dark path from which there will be no return. We therefore trust that you will share this letter with Duffy, as you are ethically required to do, and advise Duffy accordingly in light of the gravity and magnitude of what faces Duffy if he persists with the Lawsuit - in what can only be described as a foolhardy venture.

The Choices Going Forward

Duffy's persistence in asserting his baseless claims, despite overwhelming adverse evidence, shows a certain pluckiness, which in some contexts might be construed as somewhat admirable, but which here will ultimately prove foolhardy. As this Lawsuit proceeds, and as described in greater detail below, Duffy's legal and financial exposure will increase exponentially, and his circumstances will become more dire and difficult if he opts to proceed on his current course. The financial consequences and reputational damage to Duffy arising from his wrongfully-acquired injunction and his efforts to damage DCO Lighting and put II and its principals, Brown/Day, out of business will be substantial.

However, as noted above, before Duffy finds himself wandering down the long, dark, and very expensive path that will not only escalate the scope and expense of the Lawsuit, but also cause significant disruption to Duffy's business and business relationships, DCO Lighting extends this singular opportunity towards an amicable resolution, before the floodgates of litigation are thrown wide open. What follows is DCO Lighting's brief response to a number of baseless issues raised by Duffy, as well as a preview of what Duffy can expect to encounter if he opts to continue "playing hardball" with DCO Lighting.

Response to Various Issues Raised by Duffy

Duffy Was and Has Been Fully Aware Of Brown/Day's Desire To Own A Lighting Agency. When Brown returned to work for Duffy in 2008, after a one-year hiatus (in spite of Duffy's usual "one-way door" policy), Brown informed Duffy - in no uncertain terms - that he was returning specifically because he wanted to buy Phoenix. Moreover, Brown made it clear to Duffy that if the purchase of Phoenix did not happen, Brown would start his own sales agency. Brown/Day's "Plan A" was thus to purchase Phoenix and to become the exclusive Northeast Ohio sales agency for the undisputed number one lighting company in the country: Lithonia. For Brown/Day, building a sales agency for DCO Lighting, the fourth largest lighting manufacturer in the country, was a very distant and less desirable alternative "Plan B". Indeed, becoming a sales agency for DCO Lighting did not even enter into the equation until Brown/Day realized that Duffy had no intention of selling Phoenix. Duffy was never under any illusions, and Brown/Day never misled him about their intentions.

In fact, when Guy Day first contacted Mark Hughes of DCO Lighting in the late fall of 2008, Mr. Day made abundantly clear to Mr. Hughes that purchasing Phoenix and becoming a Lithonia sales agency was Brown/Day's first, foremost, and only goal. Indeed, serving as DCO Lighting's sales agency was a less desirable secondary alternative to which Brown/Day did not initially give much thought. This was made abundantly clear to DCO Lighting as late as January of 2009; it was only after the standard DCO Lighting interview process in Tupelo, Mississippi took place that Brown/Day began to seriously consider becoming DCO Lighting's sales agents. Duffy

certainly cannot feign shock or ignorance at the notion that Brown/Day began (or would have begun) considering an alternative "Plan B" – forming a new agency for a different conglomerate manufacturer – in the face of Duffy's stall tactics and apparent reluctance/refusal to sell Phoenix.[2]

Brown/Day Acted In Good Faith In Attempting A Purchase of Phoenix. The fact that Brown/Day acted in good faith in their diligent efforts to purchase Phoenix is apparent from their actions, including:

1. Hiring an accountant to conduct due diligence and provide an appraisal of Phoenix in order to assist Brown/Day in determining an appropriate purchase price;

2. Providing Duffy with a letter of intent offering to purchase Phoenix for $385,000, consistent with the independent advice of their accountant;

3. Consulting with National City Bank to obtain financing for the purchase of Phoenix;

4. Preparing to use substantial amounts of their own money (even out of their own retirement funds) to purchase Phoenix;

5. Preparing a business plan for Duffy and National City Bank in support of their efforts to purchase Phoenix;[3] and

6. Obtaining financing to purchase Phoenix.

Moreover, the meeting with Duffy's employees at the Winking Lizard in Macedonia in February of 2009 was anything but a "hostile takeover," as Duffy curiously continues to insist. Basic due diligence mandates that the purchaser of a company ensure, before paying substantial value, that the employees will continue in their employment after the change in ownership. Without taking this integral step, Brown/Day could not possibly ensure that they would reap the full value of their purchase. Regardless, the meeting in Macedonia was conducted without DCO Lighting's participation and indeed without DCO Lighting's knowledge or consent. Nothing in the record evidences a contrary conclusion. The same objectively-reasonable due diligence concerns and considerations apply relative to any communications that Brown/Day had with Duffy's

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[2] Duffy's unrealistic perception of the value of his own "good will" and the resulting outrageous purchase price demands that he made - in the millions of dollars - certainly did not facilitate a good faith attempt by Duffy to sell his business. Indeed, inasmuch as Duffy was an absentee owner, and not even a member of any professional lighting organizations, any "good will" value associated with Duffy's involvement with the business would have been negligible at most.

[3] This business plan eventually formed the template for the business plan that Brown/Day submitted to DCO Lighting.

manufacturers. Despite Duffy's desperate efforts to concoct some sort of a "conspiracy," the facts establish quite the contrary.

It was only after Brown/Day realized that Duffy had no intention of selling Phoenix that they terminated their employment and began seriously negotiating with DCO Lighting about startup capital for their new venture, II. Shortly thereafter, and on the eve of a significant trade show in Northeast Ohio, Duffy obtained the injunction based on his sham, fraudulent, and verified pleading. The injunction directly and severely impacted DCO Lighting. Duffy did so without naming DCO Lighting in the Complaint and without otherwise notifying DCO Lighting, except to name a "John Doe" defendant (an alias that Duffy only recently admitted – for his own selective convenience – as being DCO Lighting).

Duffy's response in early 2009, upon learning of Brown/Day's intent to create their own sales agency, was an ill-advised and hasty maneuver, inasmuch as Duffy never bothered to conduct any serious investigation of what Brown/Day had been doing leading up to their termination from Phoenix. Now, even after the truth has been revealed through depositions and other discovery, Duffy stubbornly refuses to accept that his initial reaction was irresponsible and based upon false and incomplete information. Instead, he seeks to amend his Complaint by re-asserting/reiterating the same tired and untrue allegations that have already been proven false. Rest assured that as long as Duffy continues to insist on proceeding in this fashion, DCO Lighting will pursue every available course to defend against it and defeat it.

DCO Lighting And Brown/Day Negotiated At Arms-Length. Discovery completed thus far completely undermines Duffy's "conspiracy" theories against DCO Lighting, and instead merely demonstrates the existence of an arms-length evaluation and negotiation process among DCO Lighting and Brown/Day, including an extensive standard two-day interview process in Mississippi and Texas. In addition, Stu Eisenberg's involvement fully supports this conclusion, inasmuch as his presence was needed to "sell" the high-ranking DCO Lighting executives on the skill and virtues of Brown/Day. Brown/Day's business plan was likewise necessary for this purpose. Brown/Day's retention of an attorney to represent their interests in negotiating with DCO Lighting, the formal promissory note and personal guarantees that Brown/Day executed, and DCO Lighting's eventual unilateral decision to cease any further lending to Brown/Day, all fully support the arms-length nature of the relationship between Brown/Day and DCO Lighting. Moreover, DCO Lighting used a standard form contract with II, and DCO Lighting refused to accept changes to that contract suggested by Brown/Day's counsel.

If DCO Lighting and Brown/Day intended to engage in a conspiracy for the alleged nefarious purpose of "stealing" Duffy's company or putting Duffy out of business, they certainly undertook a strange and illogical manner of doing so. Indeed, if a "conspiracy" between DCO Lighting and Brown/Day existed, the significant formal and arms-length steps that they took to develop and form their relationship would have been

completely unnecessary. Put simply, to contend, as Duffy is attempting to do now, that some sort of conspiracy existed between DCO Lighting and Brown/Day is absurd and defies logic. It is also not supported by any evidence.

Brown/Day and DCO Lighting Never "Stole" Phoenix From Duffy. Review of the deposition transcripts of Brown, Day, and Hughes, as well as the other witnesses deposed thus far, establishes that there is not a scintilla of evidence to support any claim that DCO Lighting conspired to "steal" Phoenix or to otherwise put Duffy out of business. As a result, Duffy's claims are completely meritless and will not withstand scrutiny on a motion to dismiss, at summary judgment, or trial (if this case gets that far). It is in Duffy's best interest to cease his present course of conduct in this Lawsuit before DCO Lighting's response to this litigation is significantly amplified, as described below.

Duffy's insistence that DCO Lighting and/or Brown/Day caused Phoenix to shutdown is completely untrue and unsupported by any evidence. Whether or not Phoenix continues to operate as a separate and distinct entity, its operations fully continue and Duffy remains very much in business, with JDA continuing to be the exclusive sales agency for Lithonia and Duffy's other manufacturers in the territories originally served by JDA and Phoenix. As Duffy himself testified, the distinction between Phoenix and JDA has always been ambiguous, and the consolidation of Phoenix's business into one operation was nothing more than an administrative convenience and cost-saving measure that had no material impact upon Duffy's total sales or earnings. Indeed, Duffy testified that well prior to the events in question, and in consultation with Lithonia, he had already contemplated merging the two separate businesses into one operation. As noted, this all occurred well *before* any alleged problems with Brown/Day had surfaced. Duffy cannot – after the fact – conveniently spin his own unilateral business decision into an allegation that DCO Lighting and/or Brown/Day somehow forced Phoenix out of business or otherwise "stole" Phoenix; the facts and evidence simply do not bear it out. If Duffy persists with his baseless claims, DCO Lighting will pursue all avenues of discovery in the Lawsuit in order to fully expose Duffy's guile and bad faith conduct to the Court and, if necessary, the jury, all of which will become a matter of public record.

Brown/Day did not and could not "steal" any of Duffy's business. Phoenix and JDA served as sales agencies for a specific set of manufacturers and were the purchasers' access point for those manufacturers in this area. That has not changed since Brown/Day's departure. While Phoenix and JDA may have combined operations as a matter of convenience for Duffy and in order for Duffy to reap cost savings arising from consolidated operations, Duffy continues to serve substantially the same manufacturers, and Duffy is by no means "out of business". To suggest otherwise is untrue.

Moreover, Brown/Day and II are not now, and never have been, sales agents for Lithonia products, Duffy's conglomerate manufacturer. Instead, Brown/Day started from scratch, representing DCO Lighting, as they were entitled to do. Indeed, Brown/Day

had no line card whatsoever when they started II, with DCO Lighting as their sole manufacturer and conglomerate. It goes without saying that Duffy had no relationship whatsoever with DCO Lighting so as to warrant an injunction to prevent Brown/Day from doing business with DCO Lighting. Duffy remains very much in business and continues to sell Lithonia products in the same territories, and any allegation that Duffy has somehow suffered losses as a result of DCO Lighting and Brown/Day's relationship is disingenuous at best and, in any event, unavailing.

DCO Lighting Cannot Be Vicariously Liable For Brown/Day's Acts. Whether or not Brown/Day breached any duty of loyalty to Duffy (which DCO Lighting does not concede), DCO Lighting is not and cannot be legally implicated. There is not (and never has been) a legal agency relationship between DCO Lighting and/or II and Brown/Day. Therefore no vicarious liability, pursuant to the theory of respondeat superior, or liability pursuant to a "ratification" theory, can or ever will attach against DCO Lighting. *See, e.g. Comer v. Risko* (2005), 106 Ohio St.3d 185,189 (holding that "an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior, but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work"). Like all sales agent-manufacturer relationships in the lighting industry (of which Duffy and his counsel have been and are fully aware), Brown/Day and II were merely independent contractors working at the behest of DCO Lighting. There was no employment or principal-agency relationship that could possibly warrant the imposition of vicarious liability upon DCO Lighting. Once again, Duffy fails to plead any viable legal theories against DCO Lighting. Two baseless, bad faith pleadings in one case is more than enough!

DCO Lighting Does Not Compete with Duffy. In addition to the fact that DCO Lighting cannot be vicariously liable for any alleged wrongdoing by Brown/Day, Duffy's allegations of fierce, cutthroat competitive actions by DCO Lighting, with an intent to injure Duffy, are just plain ridiculous and nonsensical. DCO Lighting is not a competitor of Duffy. DCO Lighting competes against *Lithonia*, among other manufacturers, not Duffy. DCO Lighting would gain nothing from "putting Duffy out of business." To suggest such a conspiratorial motive is ridiculous. As such, even if DCO Lighting had Duffy's "trade secret" information (which it does not), such information would be totally useless and of absolutely no commercial value to DCO Lighting. DCO Lighting's chief goal is to sell more of its *own* products. Details about Duffy's sale of Lithonia's (or other manufacturers') products is of absolutely no concern or interest to DCO Lighting. Indeed, it is completely unfathomable how or why Duffy's alleged (and non-existent) historical "trade secret" information would be or could be of any use to DCO Lighting. Once again, Duffy's constant allegations of wrongdoing by DCO Lighting, based on its alleged motivation to injure Duffy as its "competitor", are fundamentally illogical and not grounded in any facts.

DCO Lighting's Loans to Brown/Day Are Not Evidence of Wrongdoing. Rather, they are a stark reflection of the injury that Duffy has caused to Brown/Day and DCO Lighting as a result of his wrongfully-obtained injunction. It is not at all unusual in the lighting industry for a manufacturer to provide "seed money", or start up capital, in the form of enhanced commissions or loans, to a fledgling sales agency. Regardless, if Duffy is concerned about the amount of the loan extended by DCO Lighting to Brown/Day (who personally guaranteed the loan with their own assets), Duffy need only look at himself in the mirror to find the cause. As Mr. Hughes testified, DCO Lighting was forced to significantly increase the amount of the loan as a *direct result* of Duffy's wrongfully-obtained injunction, which severely hampered Brown/Day's ability to meet DCO Lighting's sales requirements during the pendency of the injunction.[4] By the time Duffy had obtained the injunction, DCO Lighting had already invested resources into making II its sales agent, and the additional money was intended to keep Brown/Day "afloat" during the litigation. DCO Lighting has since refused to provide Brown/Day with additional funding. Duffy's attempt to ascribe a conspiracy from this simple arrangement – which was exacerbated and necessitated by Duffy's own spiteful and unlawful actions – is completely unfounded.

Eisenberg's Involvement Is Irrelevant. Duffy cannot "bootstrap" Stu Eisenberg's non-competition agreement to somehow support his other "claims" as proof that DCO Lighting acted illegally by hiring Brown/Day. The evidence conclusively establishes that Eisenberg was not a part of the new enterprise that Brown/Day eventually formed. At best, he was an unpaid "mentor" to Brown/Day. Regardless of whatever "mentoring" that Eisenberg may have provided to Brown/Day, DCO Lighting was never a party to it. DCO Lighting never communicated with Eisenberg (except briefly during the Tupelo interview) nor encouraged him to violate the terms of his non-competition agreement. Eisenberg's non-competition agreement with Duffy was at all times fully respected. Now Duffy is attempting to circumvent the release he gave to Eisenberg, his failure to join Eisenberg in the Lawsuit, and his failure to obtain non-competition agreements from Brown/Day (and pay Brown/Day sufficient consideration therefore), by seeking redress from innocent third-parties, including DCO Lighting. Such conduct is legally improper and frivolous, and will be remedied through DCO Lighting's Counterclaims against Duffy.

There Is No Conspiracy. The foregoing facts are supported by sworn testimony and cannot be disputed by any information contained in the record. If a "conspiracy" can be said to exist under circumstances such as these, then the entire definition of "conspiracy" should be turned on its head. There is no evidence whatsoever of any "conspiracy" among DCO Lighting, Brown/Day, and/or II. As counsel for Duffy, you full well know this. Duffy's attempts to conjure up such claims are and will be proven futile,

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[4] For present purposes, this letter will not address Duffy's commercial defamation of Brown/Day, and even perhaps DCO Lighting, in the Northeast Ohio lighting industry. These matters will be fully explored and more fully uncovered in discovery. Such defamation also hampered sales of DCO Lighting's products.

and DCO Lighting will hold Duffy accountable, to the fullest extent of the law, for the fees and expenses that he has forced, and will force, DCO Lighting to incur in disproving his patently baseless claims.

DCO Lighting's Discovery Plan and Disposition of the Lawsuit

If this case is not otherwise resolved promptly, and if Duffy's motion to amend is granted, DCO Lighting will vigorously pursue substantial discovery in order to defend against the meritless claims contained in Duffy's frivolously-amended and procedurally-infirm Complaint, and DCO Lighting will prosecute its own claims against Duffy to the fullest extent of the law. Among other things (and without limitation to other discovery and procedural mechanisms that DCO Lighting will pursue), DCO Lighting will vigorously undertake the following discovery:

Subpoena Of Multiple Manufacturers On Duffy's Former And Current Line Cards, Including Lithonia. DCO Lighting will subpoena Duffy's former and current manufacturers – including Lithonia – listed on Phoenix and JDA's line cards to determine, among other things, the extent of Duffy's business relationships with those manufacturers and the extent to which the manufacturers are subject to the industry-wide standard of thirty-day termination clauses.

DCO Lighting will specifically subpoena Lithonia, Duffy's conglomerate manufacturer, in order to determine: the extent of any monetary or other assistance provided by Lithonia to facilitate Duffy's hiring of DCO Lighting's former sales agents, Parsons and Ghezzi; Lithonia's interests and concerns with being represented by DCO Lighting's former sales agents; and the extent of Lithonia's involvement in Duffy's filing of this baseless Lawsuit and wrongfully obtaining the injunction in order to thwart lawful competition in the market by DCO Lighting. It may also be necessary for DCO Lighting to join Lithonia in this Lawsuit as a third-party defendant.

Subpoena Of Kormos & Bajec And/Or Its Principals. DCO Lighting will depose Ghezzi and Parsons, as well as any other principals of Kormos & Bajec, in order to determine: how their relationship with JDA and/or Lithonia developed; their discussions with Duffy and/or Lithonia about joining JDA; when such discussions occurred; the extent of any financial or material assistance Lithonia provided; what information (especially DCO Lighting's information) they revealed to Duffy or Lithonia; and how their knowledge of DCO Lighting's information has affected their sales of Lithonia and other manufacturers' products on behalf of JDA to the detriment of DCO Lighting.

Subpoena Of Duffy's Present And Past Employees. DCO Lighting will depose all of these individuals to establish that: Duffy repeatedly failed to maintain the confidentiality of his non-existent "trade secret" information, including his failure to enter into non-competition agreements with his employees; and employees regularly came to work for Duffy and/or left Duffy's employ without any objection from, or concern on the part of, Duffy relative to their possession of "trade secret" information (whether

belonging to Duffy or to Duffy's competitors). This is of particular importance, given that many of these employees were taken by Duffy from competitors or manufacturers without any qualms whatsoever on Duffy's part. Such testimony will demonstrate that Duffy's reaction to Brown/Day's departure has been motivated by spite and retribution, rather than a sincere effort to prevent alleged illegitimate competition.

Subpoena Of Duffy's "Customers". DCO Lighting will also seek discovery from architects, distributors, and project administrators with whom Duffy has worked and with whom he is currently working, in order to explain the bidding process and how Phoenix and/or JDA were awarded contracts. These depositions will establish the fact that neither Phoenix, nor any other sales agency in Northeast Ohio, "owns" an exclusive relationship with these so-called "customers" (who are, in reality, specifiers). Rather, it is the skill, experience, and relationships between and among individual sales agents and specifiers that are important and that determine which sales agency's products will be utilized. The depositions will demonstrate that Duffy has no exclusive right to get business from any specifier or with respect to any particular job or project.

Finally, as noted above, if this case is not otherwise resolved, and if Duffy is permitted to amend his Complaint, DCO Lighting will move to strike and/or dismiss Duffy's baseless claims pursuant to Civil Rule 12(B)(6). Failing that, DCO Lighting will file every available dispositive and evidentiary motion permitted by the Ohio Rules of Civil Procedure and Evidence, including, among other things, and without limitation, a motion for summary judgment, a motion for judgment on the pleadings, motions for directed verdict, and motions in limine. Rest assured that the Lawsuit will be litigated by DCO Lighting vigorously and with full utilization of all the substantial resources at DCO Lighting's disposal. Then, upon prevailing in the case, DCO Lighting will seek sanctions against Duffy and his counsel for the fees and expenses that DCO Lighting has been forced to incur, and will be forced to incur, as a result of Duffy's fraudulent and legally-baseless conduct in this case.

Conclusion

All of the foregoing having been said, DCO Lighting has no desire to expend the substantial amount of time, money, and effort that will be required to pursue all of the foregoing significant discovery and procedural filings that will become necessary. However, should Duffy persist with his frivolous claims and his disruption of DCO Lighting's ability to conduct its business, lawfully sell its products, and lawfully compete in the lighting market, DCO Lighting will not hesitate in the least to proceed to defend and prosecute this Lawsuit with full and unabated vigor and zealousness, utilizing all of its substantial resources.

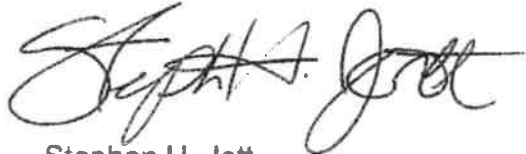
However, in order to avoid the long, dark road for Duffy described above, DCO Lighting is offering Duffy this final opportunity to amicably resolve the Lawsuit. To this end, DCO Lighting hereby offers to dismiss its own Counterclaims in exchange for a dismissal by Duffy of any and all claims, causes of action, damages, expenses, costs,

rights, and/or remedies asserted in or associated with the Lawsuit, together with the facts and/or circumstances connected with the same. In exchange, all parties to this Lawsuit will execute a mutual release of any and all claims that exist, may exist, or that may have existed, from the beginning of time up to the date of the release. In addition, all claims in the above-captioned case will be dismissed with prejudice, costs to be borne by Duffy. Confidentiality and non-disparagement provisions will also be included as part of the settlement.

This offer will remain open through and including Friday, July 16, 2010, after which it will expire, and will be deemed withdrawn by DCO Lighting. In that event, DCO Lighting will commence vigorous prosecution of its claims against Duffy and defense of Duffy's putative claims against DCO Lighting. We trust that you will share this letter with your client and discuss it with him, particularly given the serious nature of the situation and our good faith attempt at settlement. Once again, we hope that this matter can be resolved amicably without the inevitable expense and consternation that will result from continued litigation. It is therefore our sincere hope that Duffy will seriously, and in good faith, consider the offer set forth above.

This correspondence should be construed to constitute a good faith offer of compromise, which is subject to Evidence Rule 408.

Sincerely yours,



Stephen H. Jett

SHJ/lll
cc: John P. Susany, Esq.
Bruce J. L. Lowe, Esq.
Hema Steele, Esq.

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