

CONFIDENTIAL

In the
Supreme Court of Ohio

CEDAR FAIR, L.P.,	:	Case No. 13-0890
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Erie County
v.	:	Court of Appeals,
	:	Sixth Appellate District
JACOB FALFAS,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. E-12-015
	:	

MERIT BRIEF OF APPELLANT CEDAR FAIR, L.P.

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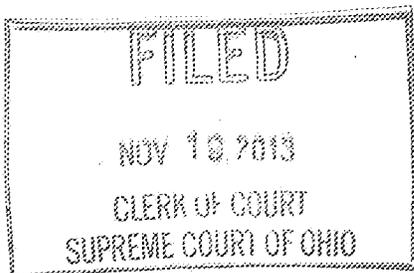


TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 2

 A. Cedar Fair Employed Falfas as Its Chief Operating Officer Pursuant to a Written
 Employment Agreement. 2

 B. Procedural History. 5

 1. The Arbitration Panel Ordered Cedar Fair to Specifically Perform Its
 Contract with Falfas. 5

 2. The Common Pleas Court Vacated the Arbitral Award’s Requirement that
 Cedar Fair Reinstate Falfas. 6

ARGUMENT 8

 A. Well-Established Ohio Law, Including This Court’s Decision in *Masetta*, Holds
 that Specific Performance Is Not Available as a Remedy in Cases Involving
 Personal Services Contracts. 9

 B. In Precluding the Use of Specific Performance for Personal Services Contracts,
 Masetta Simply Recognized a Long-Established and Widely Adopted Doctrine of
 Common Law that Reflects Sound Public Policy. 15

 1. The Parties Do Not Have Mutuality of Remedies. 21

 2. This Is Not a Relationship that Courts Should Force on Falfas, Cedar Fair,
 or the Public. 22

 3. Specific Performance Will Be Difficult to Enforce and Monitor. 24

 4. Money Damages Provide an Adequate Legal Remedy. 25

 C. Because the Principle Set Out in *Masetta* Controls Here, the Arbitrators’ Award
 Was Outside of the Power of Ohio’s Courts and Therefore Fails. 26

 1. The Sixth District Misread Ohio’s Well-Established Law. 27

 2. No Exceptions to This Principle Apply Here. 31

 3. If Allowed to Stand, the Sixth District’s Ruling Will Disrupt Settled
 Expectations and Create Uncertainty. 35

CONCLUSION 37

TABLE OF CONTENTS (CONTINUED)

	Page
LEGAL APPENDIX – FIFTY-STATE SURVEY.....	39
CERTIFICATE OF SERVICE.....	unnumbered
APPENDIX.....	A-1
Notice of Appeal.....	A-2
Decision and Judgment, Sixth Appellate District, Erie County.....	A-5
Judgment Entry, Common Pleas Court of Erie County.....	A-14
Findings and Award, Arbitration Panel.....	A-22

TABLE OF AUTHORITIES

Cases	Page
<i>Allbee v. Elms</i> , 93 N.H. 202, 37 A.2d 790 (1944)	43
<i>Am. Broadcasting Cos., Inc. v. Wolf</i> , 76 A.D.2d 162, 430 N.Y.S.2d 275	44
<i>Avitia v. Metro. Club of Chicago, Inc.</i> , 49 F.3d 1219 (7th Cir.1995)	23
<i>Barndt v. Cty. of Los Angeles</i> , 211 Cal.App.3d 397, 259 Cal.Rptr. 372 (1989)	16, 39
<i>Belote v. Brown</i> , 193 Md. 114, 65 A.2d 910 (1949)	42
<i>Bd. of School Trustees of S. Vermillion School Corp. v. Benetti</i> , 492 N.E.2d 1098 (Ind.App.1986)	41
<i>Bowling v. Natl. Convoy & Trucking Co.</i> , 101 Fla. 634, 135 So. 541 (1931)	33
<i>Bruso v. United Airlines, Inc.</i> , 239 F.3d 848 (7th Cir.2001)	20
<i>Bungardner v. Leavitt</i> , 35 W.Va. 194, 13 S.E. 67 (1891)	45
<i>Byrne v. Morley</i> , 78 Idaho 172, 299 P.2d 758 (1956)	41
<i>Chambers v. Davis</i> , 128 Miss. 613, 91 So. 346 (1922)	42
<i>Collado v. City of Albuquerque</i> , 132 N.M. 133, 2002-NMCA-048, 45 P.3d 73	47
<i>Collini v. Cincinnati</i> , 87 Ohio App. 3d 553, 622 N.E.2d 724 (1st Dist. 1993)	8, 28, 30-31
<i>De Rinafinoli v. Rossetti</i> , 4 Paige Ch. 264, 3 N.Y. Ch. Ann. 429 (1833)	11

TABLE OF AUTHORITIES (CONTINUED)

	Page
<i>Dickerson v. Deluxe Check Printers, Inc.</i> , 703 F.2d 276 (8th Cir.1983)	33
<i>Doe v. Adkins</i> , 110 Ohio App.3d 427, 674 N.E.2d 731 (4th Dist.1996).....	11, 19
<i>Duhon v. Slickline, Inc.</i> , 449 So.2d 1147 (La.App.1984).....	46
<i>Eddings v. Bd. of Educ. of City of Chicago</i> , 305 Ill.App.3d 584, 712 N.E.2d 902 (1999).....	41
<i>Edelen v. W.B. Samuels & Co.</i> , 126 Ky. 295, 103 S.W. 360 (1907).....	41
<i>Endress v. Brookdale Community College</i> , 144 N.J.Super. 109, 364 A.2d 1080 (1976).....	43
<i>Engelbrecht v. McCullough</i> , 80 Ariz. 77, 292 P.2d 845 (1956).....	39
<i>Ex parte Clark</i> , 1 Blackf. 122 (Ind. 1821).....	11
<i>Felch v. Findlay College</i> , 119 Ohio App. 357, 200 N.E.2d 353 (3d Dist.1963).....	12
<i>Felix A. Rodriguez, Inc. v. Bristol-Myers Co.</i> , 281 F.Supp. 643 (D.P.R.1968).....	46
<i>Gage v. Wimberley</i> , 476 S.W.2d 724 (Tex.Civ.App.1972).....	16, 45
<i>Goldfarb v. The Robb Report, Inc.</i> , 101 Ohio App.3d 134, 655 N.E.2d 211 (10th Dist.1995).....	12
<i>Govt. Guarantee Fund v. Hyatt Corp.</i> , 166 F.R.D. 321 (D.V.I.1996).....	46
<i>Gries Sports Ents., Inc. v. Cleveland Browns Football Co., Inc.</i> , 26 Ohio St.3d 15, 496 N.E.2d 959 (1986).....	24-25
<i>Hall v. Milham</i> , 225 Ark. 597, 284 S.W.2d 108 (1955).....	39

TABLE OF AUTHORITIES (CONTINUED)

	Page
<i>Hamblin v. Dinneford</i> , 2 Edw.Ch. 529 (N.Y.Ch. 1835)	11
<i>Henry v. Lennox Indus., Inc.</i> , 768 F.2d 746 (6th Cir.1985)	33
<i>Heth v. Smith</i> , 175 Mich. 328, 141 N.W. 583 (1913).....	42
<i>Hoffman Candy & Ice Cream Co. v. Dept. of Liquor Control</i> , 154 Ohio St. 357, 96 N.E.2d 203 (1950)	10, 19-21
<i>Hopper v. All Pet Animal Clinic, Inc.</i> , 861 P.2d 531 (Wyo.1993).....	45
<i>Jarett v. St. Joseph College</i> , Conn. Super. Ct. No. CV 990586168S, 1999 WL 482641 (June 24, 1999).....	40
<i>Johnson v. Johnson</i> , 125 Vt. 470, 218 A.2d 43 (1966).....	48
<i>Lake Ridge Academy v. Carney</i> , 66 Ohio St.3d 376, 613 N.E.2d 183 (1993)	26
<i>Local 28 of Sheet Metal Workers' Internatl. Assn. v. E.E.O.C.</i> , 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986).....	32
<i>Masetta v. Natl. Bronze & Aluminum Foundry Co.</i> , 159 Ohio St. 306, 112 N.E.2d 15 (1953)	passim
<i>Matter of Baby Boy C.</i> , 84 N.Y.2d 91, 638 N.E.2d 963 (1994).....	43
<i>McMenamin v. Philadelphia Transp. Co.</i> , 356 Pa. 88, 51 A.2d 702 (1947).....	44
<i>Mello v. Local 4408 C.I.O. United Steel Workers of Am.</i> , 82 R.I. 60, 105 A.2d 806 (1954).....	44
<i>Metro. Sports Facilities Comm. v. Minnesota Twins Partnership</i> , 638 N.W.2d 214 (Minn.App.2002).....	42
<i>Miller v. Kansas City Power & Light Co.</i> , 332 S.W.2d 18 (Mo.App.1960)	16, 42

TABLE OF AUTHORITIES (CONTINUED)

	Page
<i>New York Cent. RR. Co. v. City of Bucyrus</i> , 126 Ohio St. 558, 186 N.E. 450 (1933)	10-11
<i>Nicholas v. Pennsylvania State Univ.</i> , 227 F.3d 133 (3d Cir.2000).....	44
<i>Norton v. Herron</i> , 677 P.2d 877 (Alaska 1984).....	17, 46
<i>Ohio Dominican College v. Krone</i> , 54 Ohio App.3d 29, 560 N.E.2d 1340 (10th Dist.1990).....	34-35
<i>Ohio Dominican College v. Krone</i> , 10th Dist. Franklin No. 90AP-1164, 1992 WL 10298 (Jan. 23, 1992).....	35
<i>Oles v. Wilson</i> , 57 Colo. 246, 141 P. 489 (1914).....	39
<i>Pingley v. Brunson</i> , 272 S.C. 421, 252 S.E.2d 560 (1979)	44
<i>Piqua v. Fraternal Order of Police</i> , 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876 (2d Dist.)	7-8
<i>Port Clinton RR. Co. v. Cleveland & Toledo RR. Co.</i> , 13 Ohio St. 544 (1862).....	10-11, 24-25
<i>Rawlins v. Izuono Taisha Kyo Mission of Hawaii</i> , 36 Haw. 721 (1944)	40
<i>Rhodes v. Designer Distrib. Servs., LLC</i> , Nev. No. 55522, 2012 WL 642434 (Feb. 24, 2012)	43
<i>Robinson v. Sax</i> , 115 So.2d 438 (Fla.App.1959).....	34
<i>Roller v. Weigle</i> , 261 F. 250, 49 App.D.C. 102 (D.C.Cir.1919).....	45
<i>Romtec Utilities Inc. v. Oldcastle Precast, Inc.</i> , D.Or. No. 08-06297-HO, 2011 WL 690633 (Feb. 16, 2011)	47
<i>Rudolph v. Andrew Murphy & Son</i> , 121 Neb. 612, 237 N.W. 659 (1931).....	43

TABLE OF AUTHORITIES (CONTINUED)

	Page
<i>Rutland Marble Co. v. Ripley</i> , 77 U.S. 339, 19 L.Ed. 955 (1870).....	22, 25
<i>Samson Sales, Inc. v. Honeywell, Inc.</i> , 12 Ohio St.3d 27, 465 N.E.2d 392 (1984).....	26
<i>Sands v. Menard, Inc.</i> , 328 Wis.2d 647, 787 N.W.2d 384 (2010).....	33
<i>Sargent v. Tomhegan Camps Owners Assn.</i> , 2000 ME 58, 749 A.2d 143.....	42
<i>Schilling v. Moore</i> , 34 Okla. 155, 1912 OK 408, 125 P. 487.....	44
<i>Scott v. Southwest Grease & Oil Co.</i> , 167 Kan. 171, 205 P.2d 914 (1949).....	46
<i>SeaEscape, Ltd., Inc. v. Maximum Marketing Exposure, Inc.</i> , 568 So.2d 952 (Fla.App.1990).....	40
<i>Smith v. Ohio State Univ. Hosp.</i> , 110 Ohio App.3d 412, 674 N.E.2d 721 (10th Dist.1996).....	14
<i>Sokolowsky v. Antioch College</i> , 2nd Dist. Greene No. 863, 1975 WL 182223 (June 11, 1975).....	11, 21
<i>Sprunt v. Members of Bd. of Trustees of Univ. of Tennessee</i> , 223 Tenn. 210, 443 S.W.2d 464 (1969).....	45
<i>Standen v. Smith</i> , 9th Dist. Lorain No. 01CA007886, 2002 WL 242105 (Feb. 20, 2002).....	11-12
<i>State ex rel. Schoblom v. Anacortes Veneer, Inc.</i> , 42 Wash.2d 338, 255 P.2d 379 (1953).....	15, 45
<i>State ex rel. Wright v. Weyandt</i> , 50 Ohio St.2d 194, 363 N.E.2d 1387 (1977).....	12-13, 19, 32
<i>Stocker v. Brockelbank</i> , 5 Eng. L. & E. 67; 3 Mac. & G. 250.....	11
<i>Thurston v. Box Elder Cty.</i> , 892 P.2d 1034 (Utah 1995).....	47

TABLE OF AUTHORITIES (CONTINUED)

	Page
<i>Townsend v. Antioch Univ.</i> , 2nd Dist. Greene No. 2008 CA 103, 2009-Ohio-2552	11
<i>Walters v. Clark Cty. Health Care Ctr.</i> , 160 Wis.2d 45, 468 N.W.2d 30 (Wis.App.1990)	16, 48
<i>Weiss v. E.V.M.S. Academic Physicians & Surgeons Health Servs. Found.</i> , 68 Va. Cir. 433 (2005)	45
<i>W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC</i> , Del.Ch. No. CIV.A. 2742-VCN, 2007 WL 3317551 (Nov. 2, 2007)	40
<i>Williams v. Habul</i> , 724 S.E.2d 104 (N.C.App.2012)	44
<i>Wilson v. Airline Coal Co.</i> , 215 Iowa 855, 246 N.W. 753 (1933)	16, 41
<i>Worrell v. Multipress, Inc.</i> , 45 Ohio St.3d 241, 533 N.E.2d 1277 (1989)	8, 28-30
<i>Yellow Cab of Cleveland, Inc. v. Greater Cleveland Regional Transit Auth.</i> , 72 Ohio App.3d 558, 595 N.E.2d 508 (8th Dist.1991)	14, 31
<i>Zannis v. Lake Shore Radiologists, Ltd.</i> , 73 Ill.App.3d 901, 392 N.E.2d 126 (1979)	41

Statutes	Page
R.C. 124.327	32
R.C. 2711.10	6, 31
R.C. 4112.05	32
R.C. 4112.14	32
R.C. 4123.90	32
29 U.S.C. 626	32
42 U.S.C. 2000e-5	32

TABLE OF AUTHORITIES (CONTINUED)

	Page
Ala.Code 8-1-41.....	15, 39
Cal.Civ.Code 3390.....	15, 39
Ga.Code 9-5-7.....	15, 40
20 Guam Code 3225	16, 46
Mont.Code 27-1-412.....	15-16, 43
N.D.Century Code 32-04-12.....	16, 44
S.D.Codified Laws 21-9-2	16, 45

Other Authorities

Page

Cedar Fair, 2012 Form 10-K.....	2-3
26 Am. & Eng. Encyc. of Law (2d Ed.)	41
28 American Jurisprudence 285.....	21
31 American Jurisprudence 879.....	10
12 Corbin et al., <i>Corbin on Contracts</i> (Rev.Ed.1993).....	18
43A Corpus Juris Secundum, Injunctions.....	18, 20
3 Farnsworth, <i>Farnsworth on Contracts</i> (3d Ed.2003).....	17
2A Fletcher Cyclopedia of the Law of Corporations.....	14
Fry, <i>Treatise on the Specific Performance of Contracts</i> (1858).....	17-18
Fry et al., <i>Treatise on the Specific Performance of Contracts</i> (3d Ed.1881).....	17
Hunter, <i>Modern Law of Contracts</i> (Rev.Ed. 1993)	18
84 Ohio Jurisprudence 3d, Specific Performance.....	18
Restatement of the Law, Contracts	17
Restatement of the Law 2d, Contracts	17, 32

TABLE OF AUTHORITIES (CONTINUED)

	Page
25 Williston, <i>Williston on Contracts</i> (4th Ed.2013)	18-19, 21, 33-34

INTRODUCTION

This case asks the Court to reconfirm Ohio's well-established and long-settled rule that courts will not order specific performance of contracts for personal services. This Court made that principle clear, for example, in *Masetta v. National Bronze and Aluminum Foundry Company*, 159 Ohio St. 306, 112 N.E.2d 15 (1953), where it stated, "A court of equity will not, by means of mandatory injunction, decree specific performance of a labor contract existing between an employer and its employees so as to require the employer to continue any such employee in its service or to rehire such employee i[f] discharged." *Id.* at 306 (paragraph two of the syllabus). Ohio's established rule is in harmony with the vast majority of other states, treatises, and other authorities. It serves important policy goals, freeing parties from judicially mandated continuation of relationships that have grown bitter and acrimonious. It follows the equitable doctrine of mutuality, barring employees from obtaining a remedy that the Thirteenth Amendment forbids to employers. And it conforms to the settled principle that equitable relief should be denied when money damages provide an adequate remedy. Not surprisingly, the lower courts of this state have uniformly agreed that the rule described in *Masetta* applies to all personal services contracts, including ordinary employment contracts.

Except for the Sixth District, that is. In the decision below, the court found that *Masetta* should be restricted to its facts—*i.e.*, to class-action suits involving collective bargaining agreements. According to the Sixth District, the rule in this state is not, as this Court has said repeatedly, "that a court of equity will not decree specific performance of a contract for personal services." *Id.* at 311. Rather the opposite is true: "reinstatement is not only an available remedy, it is the 'preferred remedy.'" (Appendix at A-6, ¶ 13). Thus, the court held that an arbitration panel—whose remedial authority under the arbitration provision at issue was expressly limited to

that provided by Ohio law—had the power to order specific performance of appellee Jacob Falfas’ employment agreement, thereby ordering him reinstated with full back pay as the Chief Operating Officer of Cedar Fair, a publicly-traded company with over one billion dollars of annual revenues.

The Sixth District was wrong. It misread *Masetta*, and in doing so it turned Ohio law on its head. If allowed to stand, the lower court’s decision here would put Ohio at odds with nearly every state in the country. More importantly, the Sixth District’s rule threatens to put courts and arbitrators in charge of corporations’ most important decisions: who to hire as their top executives. Such a rule would be bad for business, bad for the people of Ohio, and thus ultimately bad for the employees themselves.

Under the well-established law in this state, courts may not order specific performance of a personal services contract. That law has not changed since *Masetta*, and no exception applies here. As the arbitrators’ authority was expressly restricted to that provided by Ohio law, they could not order specific performance. Accordingly, they exceeded their authority, and under settled legal principles governing review of arbitral awards—principles that the Sixth District itself acknowledged—the arbitral award cannot stand.

STATEMENT OF FACTS

A. Cedar Fair Employed Falfas as Its Chief Operating Officer Pursuant to a Written Employment Agreement.

Cedar Fair is a publicly-traded limited partnership, trading under the ticker symbol “FUN” and headquartered in Sandusky, Ohio. *See* Cedar Fair, 2012 Form 10-K, at 3, 13, available at <http://www.sec.gov/Archives/edgar/data/811532/000081153213000018/cedarfair-10kx2012.htm> (accessed November 18, 2013). It owns and operates eleven amusement parks, five water parks, and five hotels throughout the United States and Canada, including Cedar

Point, Kings Island, and Wildwater Kingdom (formerly known as Geauga Lake). *Id.* at 3. In 2012, Cedar Fair had net revenues of over one billion dollars and its parks served over 23 million guests, making it one of the largest regional amusement park operators in the world. *Id.* at 3, 15.

On July 20, 2007, Cedar Fair appointed Jacob Falfas to be its Chief Operating Officer. As COO, Falfas would be “second in charge” of the company, responsible for managing the operations of Cedar Fair’s properties. (Falfas Appellate Brief, p.3). Falfas was paid well for his services. His base salary was set at “no less than” \$600,000 per year with the possibility of annual raises, and he was also eligible for executive-level “incentive compensation plans and equity incentive plans,” as well as various other benefits and perquisites. (Employment Agreement, Sections 4-5).¹ In 2010, this amounted to approximately \$1,121,000 in cash compensation for Mr. Falfas, not counting stock distributions and retirement plans. (Opposition to Jurisdiction at 3).

Falfas’s initial employment contract ran through November 30, 2009, but the contract provided for automatic three-year renewals thereafter unless a party gave advance notice of intent to terminate. (Employment Agreement, Section 2). Neither party gave notice prior to November 30, 2009, meaning the agreement automatically renewed through November 30, 2012.

Of particular relevance here, the contract also expressly addressed Cedar Fair’s ability to terminate Falfas’s employment during the pendency of the contractually specified term. More specifically, the agreement provided that Cedar Fair could terminate Falfas “at any time,” subject only “to the obligations to provide the benefits and make the payments provided herein.” (*Id.*). The extent of those “obligations” turned on whether or not Cedar Fair terminated Falfas for cause. If terminated for cause, the contract provided that Falfas would receive nothing more than

¹ Cedar Fair has included this Employment Agreement at page S-1 of its Supplement, filed along with this brief.

his base salary through the date of termination. (*Id.* at Section 10). On the other hand, if Cedar Fair terminated Falfas without cause, then the agreement provided that Falfas would continue to receive his salary, medical benefits, and dental insurance “for either one (1) year or the remaining Employment Term, whichever period of time is longer.” (*Id.* at Section 7(a)). In other words, Section 7 of the agreement expressly provided that termination without cause would entitle Falfas to at least one year, and at most three years (*i.e.*, the remaining term if Cedar Fair terminated Falfas without cause on the first day of a new three-year term), of salary and certain health benefits from Cedar Fair.

The employment agreement also included an arbitration provision. Section 19(a) of the agreement required arbitration of “any dispute, claim or controversy arising out of or relating to this Agreement.” (*Id.* at Section 19(a)). The contract provided that any such arbitration would follow the rules of the American Arbitration Association.

Of particular importance here, Section 19 also expressly limited the scope of the arbitrators’ general remedial authority under the contract. Specifically, the agreement provided that the arbitrators’ authority extended only to the “authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration.” (*Id.* at Section 19(c)).

Falfas remained COO of Cedar Fair for approximately three years. On June 10, 2010, he had a brief telephone conversation with Richard Kinzel, Cedar Fair’s CEO. The parties disagree about what happened during this call, but all agree that at the end of the call, Falfas was no longer a Cedar Fair employee. Cedar Fair contends that Falfas resigned on the call, while Falfas claims that he was terminated.

B. Procedural History.

1. The Arbitration Panel Ordered Cedar Fair to Specifically Perform Its Contract with Falfas.

Shortly after Falfas left the company, he submitted a demand to arbitrate the dispute as to whether he had quit or been fired. Pursuant to the arbitration provision in his agreement, the parties submitted the dispute to a panel of three arbitrators. By a 2-to-1 vote, the panel resolved the disputed issue in Falfas' favor, finding that Cedar Fair had terminated him without cause. (See Appendix at A-22 to A-23). Surprisingly, however, in their three findings, set forth in full below, the arbitrators made no reference to Section 7, which, as noted above, expressly provides the remedy in the event of termination without cause (*i.e.*, a minimum of one year salary and benefits). Instead of imposing the contractually mandated damages remedy, the arbitrators instead ordered Cedar Fair to specifically perform the employment contract by giving Falfas back pay *and reinstating him as COO*, "as if the employment relationship had not been severed":

1. We find that the facts establish that Mr. Falfas was terminated for reasons other than cause, and that the facts fail to establish resignation.

2. Pursuant to the authority vested in this Arbitration Panel, we find that equitable relief is needed to restore the parties to the positions they held prior to the breach of the Employment Agreement by the Employer. Accordingly, *we direct the Employer to reinstate Jacob "Jack" Falfas to the position he held prior to his wrongful termination*, and to pay back pay and other benefits he enjoyed under the Employment Agreement, as if the employment relationship had not been severed.

3. Additionally, we direct the Employer to reimburse Mr. Falfas "for reasonable costs, expenses, and attorney's fees" incurred by him in accordance with Section 19(c) of the Employment Agreement.

(*Id.* (emphasis added)).

2. The Common Pleas Court Vacated the Arbitral Award's Requirement that Cedar Fair Reinstate Falfas.

Both parties then filed suit in the Court of Common Pleas—Falfas to confirm the arbitrators' decision, and Cedar Fair to modify it. (*See* Appendix at A-14). Cedar Fair asserted that the arbitrators had exceeded their remedial powers under the contract, and so the decision must be vacated. (*See id.* at A-16, ¶ 15 (citing R.C. 2711.10(D) (“[T]he court of common pleas shall make an order vacating [an arbitration] award . . . if . . . [t]he arbitrators exceeded their powers.”))). Cedar Fair pressed two arguments in that regard. First, Cedar Fair argued that the arbitrators' decision violated Section 7, which, as noted above, specified the precise remedy that Falfas was to receive if Cedar Fair terminated him without cause. Second, Cedar Fair argued that even if Section 7 did not require a specific remedy, the arbitrators had still exceeded their general remedial powers under Section 19 because they had ordered relief that an Ohio court in the same situation could not have granted. (*See id.* at A-18, ¶ 31).

The Court of Common Pleas agreed with Cedar Fair on the second ground. More specifically, the court found that the arbitrators could ignore Section 7's express “termination without cause” provision in favor of Section 19(c)'s broader “any remedy or relief that an Ohio [court] could grant” provision. (*Id.* at A-17, ¶ 27). But even under the broader Section 19 power, the court found, the arbitrators' remedial power was still expressly limited to that afforded a court under Ohio law. (*Id.* at A-18, ¶ 37). And that power, the court held, did not include the power to require reinstatement.

Citing this Court's decision in *Masetta v. National Bronze and Aluminum Foundry Company*, 159 Ohio St. 306, 112 N.E.2d 15 (1953), along with a number of lower-court decisions, the Court of Common Pleas observed that “[t]he Ohio Supreme Court has held that a court of equity will not, by means of mandatory injunction, decree specific performance of a

labor contract existing between an employer and its employees so as to require the employer to continue any such employee in its service or to rehire such employee if discharged.” (*Id.* at A-19, ¶ 39). “Without revisiting all the cases again, case law demonstrates that – unless statutorily available – *reinstatement is not a remedy for a personal services contract.*” (Emphasis added). (*Id.*). Because there was no statute applicable here that specifically allowed for reinstatement, this “long standing and clear” law applied to Falfas just as it would to any other party to a personal services contract. (*Id.* ¶¶ 40-41). Accordingly, as the contract’s broadest grant of remedial authority was still limited that available under Ohio law, and as an Ohio court would lack the power to order reinstatement, the court found that the arbitrators’ reinstatement order exceeded their authority under the agreement. (*Id.* ¶¶ 41, 44). The court therefore vacated that aspect of the arbitral award, though it declined to also vacate the arbitrators’ order that Falfas be awarded back pay and benefits for the intervening period “as if the employment relationship had not been severed.” (*Id.* at A-19 to A-21, ¶ 44 and Order).

Falfas appealed the trial court’s ruling on two grounds. First, he argued that the court erred by modifying the arbitrators’ remedy at all. Second, he asserted that the court erred in not remanding to the arbitrators for a determination of “the exact amount” of damages. (Appendix at A-7, ¶ 6). Cedar Fair cross-appealed, arguing that the Court of Common Pleas “erred as a matter of law” in allowing the arbitrators to ignore the contractually specified damages remedy for termination without cause set forth in Section 7. (*Id.* ¶ 7).

The Sixth District reversed on Falfas’s first ground only, finding that the trial court erred in declining to enforce reinstatement. (*Id.* at A-12, ¶ 19). The appellate court acknowledged that “an arbitrator’s act in excess of his powers” is “grounds to vacate.” (*Id.* at A-8, ¶ 8 (quoting *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876 (2d

Dist.), ¶ 18)). But the panel disagreed with the trial court's view of Ohio law. In particular, it read *Masetta*'s prohibition on specific performance as "inapposite," reading that decision as "limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract." (*Id.* at A-10, ¶ 13). In fact, according to the Sixth District, this Court's more recent decision in *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 533 N.E.2d 1277 (1989), and the First District's decision in *Collini v. Cincinnati*, 87 Ohio App. 3d 553, 622 N.E.2d 724 (1st Dist. 1993), make reinstatement "not only an available remedy, [but] the 'preferred remedy.'" (*Id.*) Based solely on its determination that Ohio law would allow a court to order Falfas's reinstatement, the Sixth District found that the arbitrators' award did not exceed their power and so should be upheld in full. (*Id.* at A-12, ¶ 19).

The appellate court rejected Falfas's second assignment of error, as "the trial court is best situated" to calculate damages. (*Id.* at A-11, ¶ 16). It also rejected Cedar Fair's assignment of error. According to the court, even if the arbitration award "conflicted with the express and unambiguous terms of the employment agreement," that did not provide a basis for overturning the award. (*Id.* at A-11 to A-12, ¶ 17).

Cedar Fair sought discretionary review in this Court, which this Court granted. (Sept. 25, 2013 Order).

ARGUMENT

Proposition of Law: *The well-established Ohio law precluding use of specific performance as a remedy for breach of a personal services contract is not limited to cases seeking class-wide injunctive relief based on collective bargaining agreements, but rather applies to employment agreements generally.*

Ohio law is clear: Ohio courts may not award specific performance of personal services contracts. Contrary to the decision below, *Masetta* did not limit that rule to apply only to class actions involving collective bargaining agreements. And as the Sixth District's misreading of

Masetta was the court's sole basis for upholding the arbitral award, this Court should vacate the Sixth District's decision. Indeed, under the proper understanding of Ohio law, the arbitrators were required to impose the remedy that the parties had expressly agreed would govern in the event of termination without cause. This Court should thus order that relief, providing the parties the benefit of the contract to which they mutually agreed.

A. Well-Established Ohio Law, Including This Court's Decision in *Masetta*, Holds that Specific Performance Is Not Available as a Remedy in Cases Involving Personal Services Contracts.

Ohio law has long held that courts may not order specific performance of personal services agreements, including employment contracts. Indeed, while the court below relied on its reading of *Masetta v. National Bronze and Aluminum Foundry Company*, 159 Ohio St. 306, 112 N.E.2d 15 (1953), the rule at issue long pre-dates even that 60-year old case, and continues to be applied today.

In *Masetta*, this Court did not announce a new rule. There, Mr. Masetta had sued his former employer, nominally on behalf of several hundred of his fellow workers, who had been fired en masse in January 1948. *Id.* at 307-308. Masetta claimed that the layoffs had violated the workers' collective bargaining agreement, and he asked the courts to remedy that breach by, among other things, reinstating the workers to their old positions. *Id.* The trial court promptly dismissed the case for lack of subject matter jurisdiction. *Id.* at 310. The Court of Appeals disagreed, and the Supreme Court accepted jurisdiction. *Id.*

This Court unanimously reversed. It began its analysis by noting that while the case at issue there involved a collective bargaining agreement, that fact did not change the relevant legal principles. Rather, the collective bargaining agreement was subject to the same rules as any other employment contract. In this Court's words, "[t]he contract has no unusual features which distinguished it from an ordinary employment contract and this is true even though it may have

been negotiated by the union on behalf of a group of employees.” *Id.* at 311. Despite the number of parties involved, “it is still an employment contract and must be construed and enforced in accordance with the well established law relating to employment contracts.” *Id.*

That “well established law” was not favorable to Masetta’s request for reinstatement. “It has long been settled law that a court of equity will not decree specific performance of a contract for personal services. This court has recognized this principle of law whenever occasion arose.” *Id.* (citing *Port Clinton RR. Co. v. Cleveland & Toledo RR. Co.*, 13 Ohio St. 544 (1862); *New York Cent. RR. Co. v. City of Bucyrus*, 126 Ohio St. 558, 186 N.E. 450 (1933); *Hoffman Candy & Ice Cream Co. v. Dept. of Liquor Control*, 154 Ohio St. 357, 96 N.E.2d 203 (1950)). This Court went on to note that both treatises and courts in other states have recognized this principle, and then reiterated that the collective-bargaining nature of the contract did not change its analysis: “Since equity will not decree the specific performance of contracts for personal services, it will not decree specific performance of the provisions of a collective bargaining agreement as to seniority rights.” *Id.* at 312-313 (quoting 31 American Jurisprudence 879, Section 117; punctuation omitted). Thus, the Court held, Mr. Masetta could not bring a claim in equity, but only a claim at law, for money damages. *Id.* at 313.

As *Masetta* noted, the principle that courts cannot order specific performance of personal services contracts was already well settled in Ohio by 1953. Just three years earlier, this Court had denied another request for specific performance, finding that “[t]he authorities hold uniformly that no such injunction or specific performance will be granted.” *See Hoffman Candy & Ice Cream Co. v. Dept. of Liquor Control*, 154 Ohio St. 357, 362, 96 N.E.2d 203 (1950). Nor was this a new principle then. Almost ninety years before *Hoffman Candy*, this Court had likewise refused to order a railroad company to specifically perform its promise to run its

railroad cars on a specific line. *See Port Clinton RR. Co. v. Cleveland & Toledo RR. Co.*, 13 Ohio St. 544 (1862) (“In the case of a contract for personal service, it may be that, on a refusal to perform the contract, an action for damages would not afford adequate relief, and ***yet it is clear that a court of equity will not attempt to enforce specifically such a contract.***” (emphasis added)) (citing *Hamblin v. Dinneford*, 2 Edw.Ch. 529 (N.Y.Ch. 1835); *De Rinafinoli v. Rossetti*, 4 Paige Ch. 264, 3 N.Y. Ch. Ann. 429 (1833); *Ex parte Clark*, 1 Blackf. 122 (Ind. 1821); *Stocker v. Brockelbank*, 5 Eng. L. & E. 67; 3 Mac. & G. 250)); *see also New York Cent. RR. Co. v. City of Bucyrus*, 126 Ohio St. 558, 558-559, 186 N.E. 450 (1933) (refusing to order railroad to perform promise to continue operating machine shops in city).

Indeed, this principle is so well ensconced in Ohio law that some later decisions have felt no need even to cite *Masetta* or any other case for support. *See Sokolowsky v. Antioch College*, 2nd Dist. Greene No. 863, 1975 WL 182223, *1 (June 11, 1975) (“In general, specific performance does not lie to enforce the provisions of a contract for the performance of personal services.”); *Doe v. Adkins*, 110 Ohio App.3d 427, 437, 674 N.E.2d 731 (4th Dist.1996) (“It is long-settled law that a court of equity will not decree specific performance of a contract for personal services.”).

In fact, aside from the Sixth District decision below, Ohio’s courts have uniformly held that the rule articulated in *Masetta* applies to ***all*** cases involving personal services contracts, not just to class actions involving collective bargaining agreements. *See, e.g., Townsend v. Antioch Univ.*, 2nd Dist. Greene No. 2008 CA 103, 2009-Ohio-2552, ¶ 19 (“[I]n the absen[ce] of a statute entitling a former employee to reinstatement, Ohio courts do not decree specific performance of such contracts.”); *Standen v. Smith*, 9th Dist. Lorain No. 01CA007886, 2002 WL 242105, *4 (Feb. 20, 2002) (“The general rule is that a personal services contract cannot be enforced through

specific performance.”); *Goldfarb v. The Robb Report, Inc.*, 101 Ohio App.3d 134, 146, 655 N.E.2d 211 (10th Dist.1995) (“[S]pecific performance is not available in a contract for services.”). These courts have not read into *Masetta* any artificial limitations or false distinctions. Instead, they have taken *Masetta* to mean what it says: specific performance is not allowed for personal services contracts. See, e.g., *Felch v. Findlay College*, 119 Ohio App. 357, 358, 200 N.E.2d 353 (3d Dist.1963) (“*Masetta* . . . held that ‘[a] court of equity will not, by means of mandatory injunction, decree specific performance of a labor contract . . . ’ and in Judge Middleton’s opinion, unanimously concurred in, it was stated, . . . ‘It has long been settled law that a court of equity will not decree specific performance of a contract for personal services.’”).

Indeed, this Court has itself acknowledged the breadth of the principle recognized in *Masetta*. In *State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 363 N.E.2d 1387 (1977), the Court was presented with a mandamus action filed by several deputy sheriffs. The Summit County Sheriff had fired these deputies, who appealed their discharges to the State Personnel Board of Review. *Id.* at 194. After the Board ordered the deputies reinstated, as the civil-service laws expressly allowed, the parties signed a settlement agreement releasing their claims in exchange for “immediate reinstatement” and \$57,535.51 in back pay. *Id.* at 194-195, 198. The deputies then filed suit, asking the court to order the Sheriff to follow through on his promises. *Id.* at 195.

By the time it reached the Supreme Court, the only issue in *Weyandt* was whether the deputies had an adequate remedy “in the ordinary course of the law”; if they did, then mandamus was not proper. *Id.* at 196. The deputies argued that under *Masetta*, they had no such remedy, because the courts could not order specific performance of the settlement’s reinstatement

provision. *Id.* The Court acknowledged this principle: under traditional contract law, the courts would not order specific performance of personal service contracts. *Id.* at 197. But this was not the typical case. Instead, this case involved the settlement of a dispute under the civil-service laws. The courts try to encourage settlement, the Court noted, and denying force to the parties' agreement here would do the opposite. *Id.* at 197. Further, the civil-service laws specifically created a reinstatement remedy, "reflect[ing] legislative judgment that the employment rights of civil servants should be regulated by more than common-law contract principles." *Id.* at 198. "The legislative decision that civil servants may be awarded reinstatement under certain circumstances outweighs the common law 'lack of mutuality' objection to specific performance of personal service contracts," the Court found. *Id.* at 199. Thus, under these circumstances, *i.e.*, where a statute expressly provided for reinstatement, specific performance was available. *Id.* The deputies therefore had a remedy in the ordinary course of the law, and so they lacked grounds for a writ of mandamus. *Id.*

If the Sixth District's decision below were correct, however, the *Weyandt* Court's decision would have been nowhere near so complex. If *Masetta* applied only to collective-bargaining cases—if indeed specific performance is preferred, as the Sixth District would have it—the Court simply could have said so and rejected the deputies' argument without further discussion. But it did not. Instead, the Court acknowledged that under the common-law rule, specific performance was not a proper remedy for breach of a personal services contract. It therefore had to distinguish the deputies' case from the common-law rule in order to find that their settlement could be specifically performed. In short, like the lower courts of this state, this Court's decision in *Weyandt* understood *Masetta* to state a foundational principle of equity

jurisprudence: “a court of equity will not decree specific performance of a contract for personal services.” *Masetta*, 159 Ohio St. at 311, 112 N.E.2d 15.

That principle controls this case, as there can be no meaningful dispute that Falfas’ employment agreement to serve as Cedar Fair’s Chief Operating Officer constitutes a personal services contract. A personal services contract is “one in which the offeree is vested with discretion in accomplishing the assigned tasks because his skills, knowledge, experience and expertise are unique to the area and could not be duplicated by others not similarly qualified.” *Yellow Cab of Cleveland, Inc. v. Greater Cleveland Regional Transit Auth.*, 72 Ohio App.3d 558, 563, 595 N.E.2d 508 (8th Dist.1991); *see also Smith v. Ohio State Univ. Hosp.*, 110 Ohio App.3d 412, 416, 674 N.E.2d 721 (10th Dist.1996) (“Reduced to its essence, a personal services contract suggests a degree of control exercised by the purchaser over the services to be performed by a chosen individual or individuals.”). By its very nature, the position of Chief Operating Officer fits this definition. A company’s Board of Directors hires top-level executives specifically to run the day-to-day operations of the company without involving the Board in each decision. *See* 2A Fletcher Cyclopedia of the Law of Corporations, Section 665 (“In all but the smallest companies . . . the board delegates managerial responsibilities to subordinate officers or agents”). As “second in charge” of Cedar Fair, Falfas regularly had to make significant managerial decisions, decisions informed by his skills, knowledge, experience and expertise. This was not a job that just anyone could perform, and Cedar Fair had chosen Falfas to exercise the discretionary authority that the job entailed.

Falfas was therefore working under a personal services contract, and the longstanding rule against specific performance of such contracts applied to his contract with full force. Even if, as the arbitration panel found, Cedar Fair breached that agreement, the courts may not force

Cedar Fair to re-hire Falfas in that position and pay him for the entire intervening period “as if the employment relationship had not been severed.” Because the courts may not order this relief, the arbitration panel may not do so either. The panel thus exceeded their authority under the employment agreement, and their award must be vacated.

B. In Precluding the Use of Specific Performance for Personal Services Contracts, *Masetta* Simply Recognized a Long-Established and Widely Adopted Doctrine of Common Law that Reflects Sound Public Policy.

It is not just Ohio’s courts that refuse to order specific performance of personal services contracts. The vast majority of other states and the settled view of treatise writers both concur with the principle this Court recognized in *Masetta*. Moreover, this rule is based on sound policy concerns—concerns which apply even more strongly to this case than to the average employment dispute.

Forty other states, along with the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, have explicitly adopted the no-specific-performance of personal services contracts rule.² *See, e.g., State ex rel. Schoblom v. Anacortes Veneer, Inc.*, 42 Wash.2d 338, 341, 255 P.2d 379 (1953) (finding that the rule that “the contract for personal services is still one which equity will not specifically enforce by decree . . . is supported by case authority from thirty-eight jurisdictions.”). Indeed, seven of these jurisdictions have enshrined the principle in statute.³ Though particular formulations of the rule differ somewhat from state to state, these

² The results of Cedar Fair’s 50-state survey on this issue are collected at the end of this brief.

³ Those seven jurisdictions are Alabama, California, Georgia, Montana, North Dakota, South Dakota, and Guam. *See* Ala.Code 8-1-41 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service.”); Cal.Civ.Code 3390 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service.”); Ga.Code 9-5-7 (“Generally an injunction will not issue to restrain the breach of a contract for personal services unless the services are of a peculiar merit or character and cannot be performed by others.”); Mont.Code 27-1-412 (“The following obligations cannot be specifically enforced: (1) an obligation to render personal service or to employ another therein

jurisdictions are all, as Missouri put it, “in harmony with the general law on the subject.” *Miller v. Kansas City Power & Light Co.*, 332 S.W.2d 18, 20 (Mo.App.1960) (“Unaided by federal statute (if that would aid in this kind of case) equity will not, in Missouri, compel specific performance of the seniority provisions of a labor contract. . . . The question is ably discussed and ruled by the Supreme Court of Ohio, in *Masetta . . .*”); *see also Barndt v. Cty. of Los Angeles*, 211 Cal.App.3d 397, 403, 259 Cal.Rptr. 372 (1989) (“It has long been established that a contract to perform personal services cannot be specifically enforced, regardless of which party seeks enforcement.”); *Gage v. Wimberley*, 476 S.W.2d 724, 731 (Tex.Civ.App.1972) (“[E]quity will not enforce a contract for purely personal service.”); *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N.W. 753, 755 (1933) (“Specific performance of contracts for personal services may not be enforced in equity.”).

Even as to the remaining nine states, there is no support for the Sixth District’s decision below. Some of the nine, such as Wisconsin, simply have not decided the question. *See Walters v. Clark Cty. Health Care Ctr.*, 160 Wis.2d 45, 468 N.W.2d 30 (Wis.App.1990) (“We have not previously reached the question of whether reinstatement is available in employee manual wrongful discharge cases.”). And even among the few remaining states, such as Alaska, where the general rule grants discretion to the trial court to award specific performance, Cedar Fair has found no decision in the state actually finding specific performance to be the appropriate remedy for an employment agreement, outside of collective bargaining agreements or statutory

. . . .”); N.D. Century Code 32-04-12 (“The following obligations cannot be enforced specifically: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service.”); S.D. Codified Laws 21-9-2 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service”); 20 Guam Code 3225 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service[.]”).

provisions specifically authorizing the remedy. *See, e.g., Norton v. Herron*, 677 P.2d 877, 883 (Alaska 1984) (“The decision to specifically enforce a contract is within the discretion of the trial court.”). Ultimately, the best Falfas could say is that some of these nine states have not yet expressly rejected the Sixth District’s position. And it must be remembered, of course, that 41 states have.

Treatise writers have also long acknowledged that specific performance is not available as a remedy for breach of personal services contracts. This principle was recognized as early as 1858 by Sir Edward Fry in his *Treatise on the Specific Performance of Contracts*:

The relation established by the contract of hiring and service is of so personal and confidential a character that it is evident such contracts cannot be specifically enforced by the court against an unwilling party with any hope of ultimate and real success ; and accordingly the court now refuses to entertain jurisdiction in regard to them.

Fry, Treatise on the Specific Performance of Contracts, Section 56 (1858); *see also* Fry et al., *Treatise on the Specific Performance of Contracts*, Section 87 (3d Ed.1881) (concluding similarly under American law). The Restatement of Contracts acknowledged the rule in 1932, and the Second Restatement reiterated it in 1981. *See* Restatement of the Law, Contracts, Section 379, Illustrations 1 and 2 (“A promise to render personal service or supervision will not be specifically enforced by an affirmative decree”; “If B is wrongfully discharged, he cannot get a decree compelling A to keep him employed at the work specified in the contract.”); Restatement of the Law 2d, Contracts, Section 367(1) (“A promise to render personal service will not be specifically enforced.”).

Modern treatises continue to acknowledge the rule’s force. Farnsworth states, “A court will not grant specific performance of a contract to provide a service that is personal in nature.” 3 Farnsworth, *Farnsworth on Contracts*, Section 12.6 (3d Ed.2004). Williston notes the “firm

three-sided foundation” of “[e]quity’s denial of specific performance of contracts requiring personal services.” 25 Williston et al., *Williston on Contracts*, Section 67:102 (4th Ed.2013). Hunter’s *Modern Law of Contracts* states that “[a] court of equity generally will not order specific performance of a personal service contract.” Hunter, *Modern Law of Contracts*, Section 13:17 (Rev.Ed.1993). Corbin concludes that “[i]t is almost universally held that a contract for personal services will not be specifically enforce, either by an affirmative decree or by an injunction.” 12 Corbin et al., *Corbin on Contracts*, Section 65.25 (Rev.Ed.1993). And both Ohio Jurisprudence and the *Corpus Juris Secundum* concur. 84 Ohio Jurisprudence 3d, Specific Performance, Section 9 (“[I]t is clear that a court of equity will not attempt to compel the performance of personal services.”); 43A *Corpus Juris Secundum*, Injunctions, Section 158 (“Regardless of contract, a court will not compel an employer to continue in his or her employ a servant or agent distasteful to the employer or be bound by the acts of an agent whom the employer no longer desires to represent him or her.”).

Courts and commentators have put forward a number of policy reasons behind the rule denying specific performance of personal services contracts. The first, often referred to as “lack of mutuality of remedies,” relates back to the historical function of the courts of equity. Equity is a doctrine of fairness, and so any remedies available to one party should also be available to the other party. See 25 *Williston on Contracts*, Section 67:102 (“Mutuality of performance is a doctrine of equity for the protection of defendants by insuring to them when performance is exacted of them that they get the counter-performance due them.”). Where one party could not receive a certain remedy, such as specific performance, the courts denied that remedy to the other party as well. See Fry et al., *Treatise on the Specific Performance of Contracts*, Section 440 (3d Ed.1881).

The specific performance of personal services contracts is a standard example of a lack of mutuality, for though it is well established that courts will not force one to employ people against his will, it is even more firmly established that courts will not force a person to work for an employer for whom he does not wish to work. *See State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 199, 363 N.E.2d 1387 (1977). In the United States, the Thirteenth Amendment's prohibition on involuntary servitude has arguably enshrined this principle in the Constitution. *See Corbin on Contracts*, Section 65.25. In short, when an employee breaches his employment contract, the employer cannot use the courts to force him to remain at work. Thus, when the tables are turned, the courts likewise limit the employee's remedies in equity, to avoid giving the employee powers that the employer lacks. *See Weyandt* at 199; *Masetta v. Nat'l Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 312, 112 N.E.2d 15 (1953).

A second reason for refusing to order specific performance of personal services contracts is "the court's repugnance to the idea of compelling the continuance of a close personal relationship now grown hostile and bitter as a result of the controversy and resulting litigation." 25 *Williston on Contracts*, Section 67:102; *see Doe v. Adkins*, 110 Ohio App.3d 427, 437, 674 N.E.2d 731 (4th Dist.1996) ("[T]he mischief likely to result from an enforced continuance of the relationship after it has become personally obnoxious to one of the parties is so great that the interests of society require the remedy be denied."). By their very nature, personal services contracts involve close personal relations and positions of trust and reliance. These relationships cannot be managed by fiat, and no court can reinstate goodwill. Forcing such a relationship to continue is bad not only for the parties, but for the public as well. As this Court put it in 1950:

[I]f the relationship of principal and agent is to be of value or profit to either, it must be accompanied by mutual confidence, loyalty and satisfaction. *When these are gone and their places are taken by dislike and distrust, it is to the advantage of both principal and*

agent and of the public that the relationship of principal and agent be severed. (Emphasis added).

Hoffman Candy & Ice Cream Co. v. Dept. of Liquor Control, 154 Ohio St. 357, 360, 96 N.E.2d 203 (1950). Thus, the courts decline to impose personal relationships that the parties are no longer inclined to pursue on their own. See 43A Corpus Juris Secundum, Injunctions, Section 158 (Sept. 2013) (“Regardless of contract, a court will not compel an employer to continue in his or her employ a servant or agent distasteful to the employer or be bound by the acts of an agent whom the employer no longer desires to represent him or her.”).

Relatedly, authorities often cite the difficulty of enforcement as a reason for refusing to order specific performance of personal services contracts. See *Hoffman Candy*, 154 Ohio St. at 363, 96 N.E.2d 203 (“[I]t would be inconvenient or even impossible for a court to conduct and supervise the operations incident to and requisite for execution of a decree for specific performance of such a contract.”). This remedy would put a judge in the position of monitoring parties’ ongoing performance of what is typically an open-ended contract. The courts may be called on to judge whether an employee is working to the best of his ability, whether his job performance is satisfactory, or whether the job provided by the company is sufficiently similar to the employee’s former job to be properly considered reinstatement. See *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 861-862 (7th Cir.2001) (“Reinstatement in such situations could potentially cause the court to become embroiled in each and every employment dispute that arose between the plaintiff and the employer following the plaintiff’s reinstatement.”). A company ordered to re-hire a former employee must significantly disrupt its business to accommodate that employee. The company may have already hired a replacement or restructured its business to do without the position. If the company wishes to institute new, improved processes, it must weigh the benefit of those improvements against the costs of litigating any dispute that arises. Even in

the best of circumstances, the company must reallocate money, space, and time to the new employee, taking resources away from other initiatives. Further problems arise when an employee is reinstated to an “at will” position, which can be terminated at any time. But this is a problem with all personal services contracts:

It is not enough that the plaintiff offers to perform and expresses a willingness and intention to perform entirely in accordance with the provisions of the contract. *A court of equity should not expend its time . . . in determining whether the agent, to whom it has granted specific performance, is from time to time continuing to furnish the services which he has agreed to give* (Emphasis added).

Hoffman Candy, 154 Ohio St. at 364, 96 N.E.2d 203.

A final reason to deny specific performance is the principle that equitable relief is only available where legal remedies are unavailable. *See 25 Williston on Contracts*, Section 67:102 (“[Specific performance] is denied because . . . an adequate legal remedy is available.”). In employment disputes, an employee can be made whole with monetary damages, and so there is no need for specific performance as a remedy. *See Masetta*, 159 Ohio St. at 312, 112 N.E.2d 15 (“The remedy at law in such cases is generally adequate to furnish relief”) (quoting 28 American Jurisprudence 285, Section 93; punctuation omitted); *Sokolowsky v. Antioch College*, 2nd Dist. Greene No. 863, 1975 WL 182223, *1 (June 11, 1975).

Those reasons all apply here. Indeed, some of them have even more force under the facts of this case than they do in the ordinary employment dispute.

1. The Parties Do Not Have Mutuality of Remedies.

“The absence of mutuality of equitable remedy in the instant case is manifest. It is not, and could not be, argued that the defendant could force the plaintiff to continue in the service of defendant against plaintiff’s will.” *Masetta*, 159 Ohio St. at 312, 112 N.E.2d 15. What was true in *Masetta* is equally true here. If Falfas were reinstated but failed to perform his duties, a court

would not order him to work harder or to do a better job. *See id.* Principles of equity therefore hold that Falfas should not be granted the very relief indisputably denied to Cedar Fair. *See Rutland Marble Co. v. Ripley*, 77 U.S. 339, 356, 19 L.Ed. 955 (1870) (“[I]t is a general principle that when . . . a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other.”).

2. This Is Not a Relationship that Courts Should Force on Falfas, Cedar Fair, or the Public.

Further, the arbitrators’ remedy of specific performance would force the parties to continue a relationship that has become irrevocably rancorous and spiteful. Nothing about the situation here suggests that the parties would be able to work together effectively on a going-forward basis. Falfas claims that he was summarily dismissed from his job through a 43-second telephone call—itsself hardly a sign of a good working relationship. In response, he initiated more than three years of litigation and now claims more than \$10.5 million in damages, plus his old job back. (*See* Bober Affidavit, Ex. A to Falfas’s Brief in Opposition to Cedar Fair’s Motion to Stay Pending Appeal, ¶ 11). Cedar Fair disputes that Falfas was fired. But whatever the reason for his original departure, it is clear that Cedar Fair no longer wants him around. The company confirmed this in November 2011, and again in February 2012, when the Chairman of the Board of Directors told Falfas that, subject to Cedar Fair’s legal arguments on appeal, Cedar Fair intended to terminate for all time Falfas’s employment.

Maintaining the confidence and trust of one’s peers and subordinates is particularly important for high-level executives, whose effectiveness is heavily dependent on maintaining good personal relationships, both with subordinates and with the Board of Directors. As the Chief Operating Officer of Cedar Fair, Falfas would be heavily involved in all aspects of Cedar Fair’s business, and he would have to work closely with the many other people helping to run

that business. Poor relationships with those people, including the board members who have repeatedly confirmed he is no longer welcome as COO, would make him significantly less able to do his job.

The public also has an interest in ensuring that Cedar Fair's executive officers work well together. Cedar Fair is a publicly-traded limited partnership. Both Cedar Fair's public investors (in a limited partnership they are referred to as "unitholders" rather than "shareholders") and its employees stand to suffer if Falfas's reinstatement hurts the company. As Judge Posner has put it:

Equitable remedies usually and here are costly to administer because they do more than transfer a lump sum from defendant to plaintiff, the standard "legal" remedy. The costs include not only the time and money of litigants and judges devoted to administering a continuing remedy as opposed to the one-time remedy of a lump-sum award of damages, but also the costs in reduced productivity caused by locking parties into an unsatisfactory employment relation, which is the industrial equivalent of a failed marriage in a regime of no divorce. Just as a divorce can hurt third parties (the children), so a reduction in an enterprise's productivity can hurt third parties, namely workers and consumers.

Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1231 (7th Cir.1995) (Posner, J.).

Not only would specific performance potentially harm Cedar Fair's employees, customers and investors, but it also directly invades the province of the Board. Corporate law assigns to the Board the responsibility for managing the entity on the investors' behalf.⁴ The Board's decisions in hiring top-level executives to manage the entity's operations is one of its most important duties, and the principal way that investors (through the Board) are able to maintain control over the entity they own. Mandating that particular persons serve as CEO or

⁴ Technically, a limited partnership is managed by a general partner. Here, Cedar Fair's general partner is a corporation. Under the limited partnership agreement, the board of that general partner essentially acts as the board for the limited partnership. Accordingly, this is the group that the brief refers to as Cedar Fair's Board.

COO against the will of the Board countermands that authority and effectively puts the courts—or here, an arbitration panel—in charge of the company, rather than its investors.

Yet despite these facts, Falfas continues to seek—and the court below authorized—specific performance of his employment contract. This in and of itself reveals the depth of the problems here. Falfas has been away from Cedar Fair—and from the industry as a whole—for more than three years. The company has hired a new COO and has made numerous changes to its business since Falfas left. Surely Falfas understands that a compelled return to Cedar Fair would significantly disrupt the company and cause it harm. Yet still he pursues that remedy. No entity, let alone a publicly traded one, should be forced to retain a top-level executive whose personal interests so outstrip his concern for the company's best interests.

3. Specific Performance Will Be Difficult to Enforce and Monitor.

Personal services contracts are notoriously difficult to enforce. This one will be particularly so. “When . . . the act involves the continuous exercise of skill, judgment or discretion, the manner and mode of which are, from its very nature, undetermined, the difficulty of a specific performance seems almost insuperable.” *Port Clinton RR. Co. v. Cleveland & Toledo RR. Co.*, 13 Ohio St. 544, 552 (1862). A Chief Operating Officer does little other than exercise skill, judgment, and discretion. There are few objective benchmarks for a COO's duties, and one's performance is often difficult to assess with any degree of accuracy. This difficulty, and others like it, underlies the business judgment rule. *See Gries Sports Ents., Inc. v. Cleveland Browns Football Co., Inc.*, 26 Ohio St.3d 15, 19-20, 496 N.E.2d 959 (1986) (“If the directors are entitled to the protection of the [business judgment] rule, then the courts should not interfere with or second-guess their decisions.”). By deliberately putting itself (or the courts) in the position of having to evaluate Falfas's performance and second-guess the decisions of Cedar Fair's Board—as will almost certainly happen if Falfas is reinstated as COO—the arbitration

panel has violated the basic assumption behind that rule: that a company's Board is "better equipped than the courts to make business judgments." *Id.*

Further, the panel put itself in this position not just once, but indefinitely. "If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine" whether a party's performance is sufficient. *Rutland Marble Co. v. Ripley*, 77 U.S. 339, 358-359, 19 L.Ed. 955 (1870) (citing *Port Clinton RR.*, 13 Ohio St. 544). Here, the panel may find itself having to set the terms of the parties' contract before it can decide whether those terms were satisfied. Falfas's employment contract has long since expired, both its original time span and any automatic renewal, as Cedar Fair has given him notice of its intent to terminate. By what terms should his new going-forward employment be governed? Even if most provisions carry over from the expired contract, questions may still arise regarding the contract's start date and duration. Disputes regarding compensation are also likely, given the changes in other executives' compensation since Falfas last worked at the company. Finally, the panel must be prepared to determine, in the future, when the Board can decide to replace Falfas.

Though these issues are not unique to this case, they become particularly important—and particularly difficult—under these facts. Even if they were not, however, the point remains. The arbitrators had before them a single dispute, and they chose to resolve it by sending the parties off across a minefield.

4. Money Damages Provide an Adequate Legal Remedy.

As in the vast majority of contracts for personal services, money damages are an adequate remedy here. Falfas can be made whole with a monetary award; indeed, he has had no trouble calculating the award he claims to be owed. Falfas has not shown that money damages would be insufficient, and no decision-maker has so held. Even the arbitration panel found only that "equitable relief is needed to restore the parties to the positions they held prior to the breach

of the Employment Agreement,” not that money damages would be inadequate to compensate Falfas for any loss he suffered. (Arbitrators’ Decision, at 1-2). For that reason alone, specific performance was not a proper remedy here.

The very language of the contract further evidences this point. The parties *expressly agreed* what the remedy would be in the event that Cedar Fair terminated Falfas without cause. He was to receive salary and certain specified health benefits for the longer of (1) a year, or (2) the remaining term of this then-existing agreement. Here, at the time Falfas’ employment ended, *i.e.*, the June 10, 2010 telephone call, exactly 30 months remained on his then-current contractual term. Thus, even assuming that the arbitrators were correct that he was terminated without cause, he was entitled to only 30 months of salary and certain health benefits. By instead ordering specific performance—that is, reinstatement on a going-forward basis plus pay and benefits for the entire intervening period—the arbitrators thus not only awarded Falfas a remedy greatly in excess of their powers under the agreement (which were expressly limited to those available under Ohio law), but a windfall far exceeding anything that the contract contemplated. Indeed, not only does Ohio law preclude specific performance, but it also requires judges to abide by the parties’ contractual choice of a specific remedy, absent circumstances not present here. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), at paragraph one of syllabus; *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 382, 613 N.E.2d 183 (1993). Thus, any award beyond that to which the parties agreed under Section 7 exceeded the arbitrators’ power.

C. Because the Principle Set Out in *Masetta* Controls Here, the Arbitrators’ Award Was Outside of the Power of Ohio’s Courts and Therefore Fails.

The law here is clear, longstanding, and well-established: “[A] court of equity will not decree specific performance of a contract for personal services.” *Masetta*, 159 Ohio St. at 311,

112 N.E.2d 15. Ohio's courts recognize this principle. Treatise writers and the majority of other states recognize it as well. And the policy concerns behind this rule confirm its wisdom. As the authority discussed above makes clear, the arbitration panel had no basis for ordering Falfas reinstated to Chief Operating Officer of Cedar Fair, and in so doing, they exceeded their authority under Ohio law.

The Sixth District understood this well-established law differently, however. It not only found *Masetta* irrelevant to this case, but it also held that reinstatement is the “*preferred remedy*” here. (Emphasis sic). (Appendix at A-9 to A-10, ¶¶ 12-13). That decision is based on a misunderstanding of both *Masetta* and Ohio law more generally. The Sixth District mistakenly took cases discussing *statutory* reinstatement remedies and applied them to this common-law dispute. But no statute provides for reinstatement here, and no exception applies to the rule set out in *Masetta*. If allowed to stand, the Sixth District's opinion would disrupt long-established understandings and create substantial uncertainties for anyone thinking about hiring in Ohio.

1. The Sixth District Misread Ohio's Well-Established Law.

Against the virtually universal understanding of this state's courts, the Sixth District stands alone as the *only* court to have limited *Masetta*'s principle to class-action, collective-bargaining cases. But it did so only by ignoring the case's actual holding and much of its reasoning. The lower court's analysis of *Masetta* began and ended with the first paragraph of the syllabus, which stated that in a class action, the courts will not specifically enforce collective bargaining agreements. This is correct as a statement of law. But that holding followed from the broader principle discussed above, as the next paragraph of the syllabus makes clear:

2. A court of equity will not, by means of mandatory injunction, decree specific performance of a labor contract existing between an employer and its employees so as to require the employer to continue any such employee in its service or to rehire such employee i[f] discharged.

Masetta, 159 Ohio St. at 306, 112 N.E.2d 15, at paragraph two of the syllabus. The Court’s decision in *Masetta* was not based on any features specific to a class action or a collective bargaining agreement. Indeed, the Court specifically *rejected* any such argument, finding that the agreement should be “enforced in accordance with the well established law relating to employment contracts.” *Id.* at 311. That well-established law held that courts will not order specific performance of personal services contracts. *Id.* at 311-312. The *Masetta* Court simply reaffirmed that principle and applied it to the case before it. This Court did not intend to limit the longstanding rule only to cases involving class actions or collective bargaining agreements, and the Sixth District was wrong to conclude otherwise.

Moreover, the Sixth District’s error here did not stop in wrongly limiting *Masetta* to class-action, collective-bargaining cases. The court also went on to find that, outside of that context, reinstatement is not only an *available* remedy, but in fact the “*preferred remedy*.” (Emphasis sic). (Appendix at A-10, ¶ 13). As support, it cited two cases, this Court’s decision in *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 533 N.E.2d 1277 (1989), and the First District’s decision in *Collini v. Cincinnati*, 87 Ohio App. 3d 553, 622 N.E.2d 724 (1st Dist. 1993). But neither *Worrell* nor *Collini* changed the settled law recognized in *Masetta*. Instead, both cases dealt with *statutory schemes* that expressly provided for reinstatement as a remedy. The Sixth District’s failure to consider this background caused it to read too much into these cases, mistakenly applying them to Falfas’s common-law claim.

Worrell involved a claim for breach of employment contract. 45 Ohio St.3d at 242, 533 N.E.2d 1277. The case went to trial, and the jury awarded damages. *Id.* On appeal, the Tenth District largely upheld the lower court, though it denied certain aspects of the award—most importantly, the portion of the award representing “future damages”—as too speculative. *Id.* at

242-243. The Supreme Court accepted jurisdiction. *Id.* at 243. This Court began its discussion of future damages by surveying another situation where future damages are awarded—federal age-discrimination claims:

“Front pay” is the term given to the remedy created under federal statutory authority to compensate wrongfully discharged employees under the Age Discrimination in Employment Act of 1967, Section 626(b), Title 29, U.S. Code. The remedy has not been granted consistently as some federal courts do not permit a discharged employee to recover front pay under any circumstances. But from our review of the decisions of those [federal] courts that have permitted the award of front-pay damages, several points are clear.

First, front pay is an equitable remedy designed to financially compensate employees where “reinstatement” of the employee would be impractical or inadequate. In such circumstances an award of front pay enables the court to make the injured party whole, although reinstatement is the preferred remedy. Second, as an equitable remedy, it is left to the sound discretion of the trial court to determine whether front pay is appropriate under the circumstances of the case. If it is determined that front pay is an appropriate remedy, then the jury should determine the amount of damages. Third, it is apparent that front-pay damages are temporary in nature, as they are designed to assist the discharged employee during the transition to new employment of equal or similar status.

Id. (citations omitted). These principles were not directly applicable to Mr. Worrell, however, and the Court ultimately found that Worrell could recover only a more limited form of front pay than that allowed under the age-discrimination laws. *Id.* at 247 (“Plaintiff did not plead age discrimination as the basis for his wrongful discharge, and the issue is therefore what standard should be used in determining damages for breach of an employment contract.”).

In its decision below, the Sixth District emphasized *Worrell’s* comment that reinstatement is “the preferred remedy.” But it took this quote out of context, treating it as a statement about remedies for breach-of-contract suits in Ohio, rather than a summary of federal law under the ADEA. Further, in claiming that reinstatement is “preferred,” the Sixth District

ignored the Court's statement three paragraphs earlier: "[T]he usual remedy in breach of contract cases for wrongful discharge is to pay the injured party the difference between any wages due under the contract from the date of discharge until the contract term expires, and that amount is to be reduced by any wages the employee earned in subsequent employment." *Id.* at 246. In any case, *Worrell's* claims about reinstatement were dicta; the propriety of that remedy was not even before the Court. *See id.* at 243 ("We therefore restrict our review to the damages awarded for the wrongful discharge, the transfer of stock, the jury instructions regarding libel, and the plaintiff's cross-appeal claiming that he was wrongfully denied prejudgment interest."). *Worrell* thus did not affect the common-law rule set out in *Masetta*.

The Sixth District's treatment of *Collini* was similarly flawed. In *Collini*, a group of firefighters sued various government entities under the civil service laws and won a declaratory judgment finding them entitled to various forms of relief. 87 Ohio App. 3d at 554. The only issue on appeal was whether they were entitled to certain seniority-related benefits. *Id.* The First District found the benefits proper. In so doing, it too misread *Worrell*, mixing up that decision with cases applying broader remedies under the civil-service laws:

In employment disputes specifically, the court may use equitable remedies to make the injured party whole. For example, the Supreme Court of Ohio expressly held that an employee could recover back pay and seniority when a promotion was delayed due to the bad faith of a municipality. *Morgan v. Cincinnati* (1986), 25 Ohio St.3d 285, 25 OBR 337, 496 N.E.2d 468, syllabus. There, as here, the court focused on the wrongful conduct of the municipality in fashioning a remedy to make the wronged police officers whole. *Id.* *Similarly, when a corporation wrongfully discharged an employee, reinstatement and "front pay" were proper remedies available to the court. See, generally, Worrell v. Multipress, Inc. (1989), 45 Ohio St.3d 241, 246, 543 N.E.2d 1277, 1282.* Finally, when a city violated state civil service laws by improperly abolishing two positions in the police force, the wronged officers were entitled to recover back pay and seniority.

Hungler v. Cincinnati (1986), 25 Ohio St.3d 338, 345, 25 OBR 392, 398, 496 N.E.2d 912, 918. (Emphasis added).

Id. at 557. *Collini* was a civil-service suit, not a common-law employment-contract dispute. In any case, it did not involve reinstatement. In short, it has no relevance to this case aside from the fact that it too misread *Worrell*. But repeating an error does not make it any less wrong.

The Sixth District's decision was based solely on these two cases and its misreading of *Masetta*. But those cases are irrelevant to Falfas's claim, and *Masetta*'s ruling is not as cramped as the Sixth District believed. As discussed above, Falfas's employment agreement is undisputedly a personal services contract. *See Yellow Cab of Cleveland, Inc. v. Greater Cleveland Regional Transit Auth.*, 72 Ohio App.3d 558, 563, 595 N.E.2d 508 (8th Dist.1991) (defining "'personal services' contract as one in which the offeree is vested with discretion in accomplishing the assigned tasks because his skills, knowledge, experience and expertise are unique to the area and could not be duplicated by others not similarly qualified"). Ohio law forbids specific performance of personal services contracts. The Ohio courts therefore could not have ordered Cedar Fair to specifically perform Falfas's contract, and neither could the arbitrators. They thus exceeded their authority, and their decision must be vacated. *See R.C. 2711.10(D)* ("[T]he court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if . . . [t]he arbitrators exceeded their powers . . ."). For these reasons, the Sixth District's decision upholding the award must be vacated.

2. No Exceptions to This Principle Apply Here.

To be sure, as *Worrell* and *Collini* suggest, the no-specific-performance rule is not universal. Courts have occasionally ordered the specific performance of an employment contract. But these are not exceptions to the common-law rule. Rather, they are narrow

exceptions to that rule, specifically created by the legislature to serve separate goals. *See* Restatement of the Law 2d, Contracts, Section 367, Comment b. And none of them apply here.

The Age Discrimination in Employment Act, for example, expressly grants courts the power to order reinstatement in cases of age discrimination. 29 U.S.C. 626(b). Title VII provides the same for other instances of discrimination, as do Ohio's equivalents. *See* 42 U.S.C. 2000e-5(g); R.C. 4112.14(B) (age discrimination); R.C. 4112.05(G)(1) (other forms of discrimination). Ohio also provides for reinstatement in its civil-service laws and where a company retaliated against an employee for filing a workers' compensation claim. *See* R.C. 124.327 (civil service); R.C. 4123.90 (workers' compensation). While these statutes specifically authorize reinstatement, however, they do so only for particular classes of cases. Indeed, Title VII goes a step further, specifying that its remedy applies only where discrimination was the "but for" cause of an adverse employment action. *See* 42 U.S.C. 2000e-5(g)(2)(A) ("No order of the court shall require the admission or reinstatement of an individual . . . if such individual was . . . discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin."); *Local 28 of Sheet Metal Workers' Internatl. Assn. v. E.E.O.C.*, 478 U.S. 421, 447, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). By expressly allowing reinstatement as a remedy, these statutes implicitly acknowledge the general rule *against* reinstatement. *See State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 198, 363 N.E.2d 1387 (1977) ("That body of [civil-service] legislation reflects legislative judgment that the employment rights of civil servants should be regulated by more than common-law contract principles.").

No such statute is at play here. Falfas does not fall under Ohio's civil-service or workers' compensation laws. Nor did he claim that Cedar Fair discriminated against him. Instead, he

argued only that he was terminated without cause. This is a contractual claim, not a statutory one, and it does not entitle him to specific performance.

In any case, even if such statutes did apply here (and they do not), it is far from clear that these statutes would allow reinstatement for a top-level executive, such as Falfas, on the facts here. Courts often refuse reinstatement, even in the face of statutory authorization, when policy considerations make reinstatement particularly unappetizing. For example, courts have declined to exercise their statutory authority for specific performance “when the employee served in a managerial or unusually high-level role.” *See Sands v. Menard, Inc.*, 328 Wis.2d 647, 787 N.W.2d 384, ¶¶ 42-46 (2010); *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir.1983) (collecting cases). That is true of Falfas here—there are few more “high-level role[s]” than COO of a publicly-traded company. Courts likewise have denied reinstatement in Title VII cases “where the plaintiff has found other work or could have, where reinstatement would require displacement of a non-culpable employee or where hostility would result.” *Henry v. Lennox Indus., Inc.*, 768 F.2d 746, 753 (6th Cir.1985) (collecting cases; citations omitted); *see also Sands*, 328 Wis.2d 647, 787 N.W.2d 384, ¶¶ 36-41 (collecting cases). Here, Cedar Fair has a new COO, and given the circumstances, there can be little doubt that Falfas’ reinstatement would result in hostility between the parties.

A few sources suggest that a separate exception to the no-specific-performance rule exists for employees who have an “obligation to purchase and hold stock of the employing corporation.” 25 Williston, *Williston on Contracts*, Section 67:103 (4th Ed.2013); *see also Bowling v. Natl. Convoy & Trucking Co.*, 101 Fla. 634, 638, 135 So. 541 (1931) (exception for where there is an “agency coupled with an interest”). The theory here is that “discharge of the employee would irreparably injure the stock interest,” and so reinstatement is necessary for the

employee's stock to retain any value. 25 *Williston on Contracts*, Section 67:103. Ohio courts have never recognized this exception, however. And in any case, "contrary to such holdings are those in which the employee's stock interest has been held 'severable' from any interest as an employee and therefore, not jeopardized by the employee's discharge." *Id.* Falfas's interest here, if he still owns any Cedar Fair shares, is just such a severable interest. Cedar Fair is a large, publicly traded company, and Falfas did not face any barriers to selling his units on the open market. He thus did not have an "obligation to purchase and hold" stock in Cedar Fair, and his agency was not "coupled with" any interest in the company in the sense required by this hypothetical exception. Mr. Falfas stands in a position no different than any other unitholder, and so his ownership should not grant him any special rights here. *See Robinson v. Sax*, 115 So.2d 438, 441 (Fla.App.1959) (distinguishing the "agency coupled with an interest" doctrine on grounds that "[t]he dominant fact [in the case establishing that doctrine in Florida] is that the very corporation which Bowling was directing was the result of his own invention. Bowling was no mere executive of the corporation. He, in effect, was the corporation. Without him, there was nothing.").

Finally, in the proceedings below, Falfas cited *Ohio Dominican College v. Krone*, 54 Ohio App.3d 29, 560 N.E.2d 1340 (10th Dist.1990), as evidence that this state's courts have found reinstatement a proper remedy for breach of ordinary employment agreements. But that case does nothing to salvage the decision below. *Krone* involved a tenured college professor who claimed she had been fired in breach of her contract. *Id.* at 29. The trial court dismissed Krone's claim, and she appealed. *Id.* at 31. The appellate panel reversed, finding that "the evidence overwhelmingly supports the conclusion that ODC breached its tenure agreement." *Id.* at 34. Without discussing the issue of damages, the court then remanded to the trial court "to

institute appellant's reinstatement or, in the alternative, to determine the amount of damages." *Id.* at 34. The court said nothing about the rule set out in *Masetta*. It did not distinguish that case—or any other, for that matter. It cited no authority for its order. Even then, it treated reinstatement as only one option, not a necessary or preferred remedy. Ultimately the trial court read the order similarly, choosing to award money damages. See *Ohio Dominican College v. Krone*, 10th Dist. Franklin No. 90AP-1164, 1992 WL 10298, *7 (Jan. 23, 1992). Without stronger authority than this, Falfas has no ground to argue that this state's courts have adopted anything other than the rule set out in *Masetta*.

3. If Allowed to Stand, the Sixth District's Ruling Will Disrupt Settled Expectations and Create Uncertainty.

Before the Sixth District held below that *Masetta* was limited to its facts, no court in Ohio had *ever* held that the parties to a personal services contract could obtain specific performance, let alone that this remedy was "preferred" to money damages—and certainly not for a high-level executive officer of a publicly-traded company. For decades, employers and employees in Ohio had been negotiating and drafting contracts against this shared background understanding.

The Sixth District's decision upends those assumptions. Employees find themselves with an unexpected windfall, while employers suddenly find that every layoff and every reorganization can be overridden by the courts. Though terminated employees may welcome the newfound leverage they hold over their former employers, the uncertainty this new rule brings to a company's power to run its business could well deter entrepreneurs from hiring new employees in Ohio. Even if the Sixth District stood alone in its position, its novel ruling would contradict the settled law of the rest of the state. This lack of uniformity would create further uncertainty for companies doing business, or thinking about doing business, in Ohio.

There is significant benefit to a bright-line rule here, as companies must consider the potential for litigation each time they decide to hire an employee. The threat of money damages is significant, to be sure. But the possibility of being ordered to reinstate an employee, and the associated disruption to the company's business, is much more concerning. If allowed to stand, the Sixth District's ruling would swap out Ohio's settled rule—a long-established rule uniformly shared across virtually the entire country—for an unpredictable regime of courts and arbitrators deciding when and where to annul business decisions about who a company will employ for its top executives. Such a rule ultimately benefits neither employers nor the people of Ohio they hope to employ.

It has long been settled law in Ohio that the courts will not order specific performance of contracts for personal services, except where the legislature has expressly authorized that remedy in a statute. This Court has recognized that rule, not just in *Masetta* but “whenever occasion arose.” *Masetta v. Natl. Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 311, 112 N.E.2d 15 (1953). The lower courts in this state agree, as do treatise writers and the vast majority of other states. This rule serves important policy goals by keeping courts from having to make business decisions, avoiding the forced continuation of poisoned relationships, and maintaining the longstanding equitable doctrines of mutuality of remedies and adequacy of legal relief.

When the Sixth District upheld the arbitral award, it did so based solely on its misreading of Ohio law as stated in *Masetta*. The panel did not dispute that Section 19(c) of the employment agreement limited the arbitrators' power to that held by Ohio's courts. Nor did it dispute that the arbitrators' award should be vacated or modified if they exceeded that power. (See Appendix at A-8, ¶¶ 8-9 (noting that an arbitration award should be vacated when “the

arbitrators exceeded the powers conferred upon them by the arbitration agreement”)). Falfas does not challenge that principle, and this Court declined to accept jurisdiction on that point.

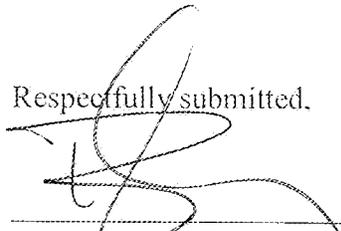
Thus, the only question before this Court is whether the Sixth District misread Ohio law. The answer to that question is clearly “yes.” Because an Ohio court resolving this dispute after *Masetta* could not have ordered specific performance, the arbitrators could not have done so either. The arbitration remedy therefore fails, and this Court should reverse the decision below and order the arbitrators’ award replaced with the remedy that the agreement expressly provides: money damages under Section 7 representing salary and certain specified benefits for a 30-month period. Any other award exceeds the arbitrators’ power under the employment agreement.

CONCLUSION

For the above-stated reasons, Cedar Fair respectfully urges the Court to vacate the Sixth District’s decision and order the lower courts to award damages as Section 7 of the Employment Agreement provides.

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Respectfully submitted,



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LEGAL APPENDIX – FIFTY-STATE SURVEY

Jurisdictions that Deny Specific Performance of Personal Services Contracts (44 out of 53 jurisdictions surveyed, not including Ohio)

Alabama: Ala.Code 8-1-41 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service.”).

Arizona: *Engelbrecht v. McCullough*, 80 Ariz. 77, 79, 292 P.2d 845 (1956) (“A contract for personal services will not be specifically enforced.”)

Arkansas: *Hall v. Milham*, 225 Ark. 597, 600, 284 S.W.2d 108 (1955) (“[E]quity will not decree specific performance of an executory contract to perform personal services, for the obvious reason that there is no method by which its decree could be enforced.”).

California: Cal.Civ.Code 3390 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service.”); *Barndt v. Cty. of Los Angeles*, 211 Cal.App.3d 397, 403, 259 Cal.Rptr. 372 (1989) (“It has long been established that a contract to perform personal services cannot be specifically enforced, regardless of which party seeks enforcement.”).

Colorado: *Oles v. Wilson*, 57 Colo. 246, 264, 141 P. 489 (1914) (“Contracts for personal care and attention or personal services cannot usually be enforced specifically. However, when personal care and attention or personal services have been fully performed, and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages, equity will grant a specific performance of the remaining provisions of the contract.”).

Connecticut: *Jarett v. St. Joseph College*, Conn. Super. Ct. No. CV 990586168S, 1999 WL 482641 (June 24, 1999) (“Contracts of personal service are not specifically enforceable.”) (quoting *Burns v. Gould*, 172 Conn. 210, 374 A.2d 193 (1977)).

Delaware: *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, Del.Ch. No. CIV.A. 2742-VCN, 2007 WL 3317551 (Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del.2009) (“[P]erformance of a contract for personal services, even of a unique nature, will not be affirmatively and directly enforced. This is so, because . . . the difficulties involved in compelling performance are such as to make an order for specific performance impractical.”).

Florida: *SeaEscape, Ltd., Inc. v. Maximum Marketing Exposure, Inc.*, 568 So.2d 952, 954 (Fla.App.1990) (“The contracts at issue here are ordinary contracts for employment or personal services. Such contracts are not enforceable by injunction or specific performance.”).

Georgia: Ga.Code 9-5-7 (“Generally an injunction will not issue to restrain the breach of a contract for personal services unless the services are of a peculiar merit or character and cannot be performed by others.”); *Quadron Software Internatl. Corp. v. Plotseneder*, 256 Ga.App. 284, 289, 568 S.E.2d 178 (2002) (refusing to award specific performance of employment contract).

Hawaii: *Rawlins v. Izumo Taisha Kyo Mission of Hawaii*, 36 Haw. 721, 726 (1944) (“The right to compel performance of a contract for personal labor or services or to maintain any suit for a breach of such a contract, other than a civil suit instituted solely to recover damages for a breach thereof, is prohibited . . .”).

Idaho: *Byrne v. Morley*, 78 Idaho 172, 176, 299 P.2d 758 (1956) (“Generally an executory contract for personal services cannot be specifically enforced.”).

Illinois: *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill.App.3d 901, 904, 392 N.E.2d 126 (1979) (“It is well settled that, with reference to [personal services] contracts, when specific performance is sought, a court should not compel an employee to work for his employer, nor compel an employer to retain an employee in his service.”); *see also Eddings v. Bd. of Educ. of City of Chicago*, 305 Ill.App.3d 584, 591, 712 N.E.2d 902 (1999) (“It is well settled that, with reference to such contracts, when specific performance is sought, a court should not compel an employee to work for his employer, nor compel an employer to retain an employee in his service.”).

Indiana: *Bd. of School Trustees of S. Vermillion School Corp. v. Benetti*, 492 N.E.2d 1098, 1104 (Ind.App.1986) (“Generally, specific performance of personal service contracts is not favored by the law.”).

Iowa: *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N.W. 753, 755 (1933) (“Specific performance of contracts for personal services may not be enforced in equity.”).

Kentucky: *Edelen v. W.B. Samuels & Co.*, 126 Ky. 295, 103 S.W. 360 (1907) (“The general rule is that equity will refuse to decree specific performance of a contract for personal services involving the exercise of skill, judgment, taste, or discretion, particularly if the terms of the contract or the nature of the services to be rendered are vague and uncertain, or if the contract is to continue through a considerable period of time, and would require the constant supervision of the court.”) (quoting 26 Am. & Eng. Encyc. of Law (2d Ed.) p. 102).

Maine: *Sargent v. Tomhegan Camps Owners Assn.*, 2000 ME 58, 749 A.2d 143, ¶ 6 (“It is the rule in Maine, and the majority of jurisdictions, that the measure of damages from an employer’s breach of an employment contract is the amount of wages that would be due the employee under the contract, less any amount of wages actually earned by the employee or that could have been earned by reasonable diligence.”).

Maryland: *Belote v. Brown*, 193 Md. 114, 124, 65 A.2d 910 (1949) (“Contracts for personal service . . . will not be specifically enforced.”).

Michigan: *Heth v. Smith*, 175 Mich. 328, 337-38, 141 N.W. 583 (1913) (“Contracts for affirmative personal service consisting of a succession of acts, the performance of which cannot be consummated in one transaction, but must continue for a time, definite or to become definite, and which involve special knowledge, skill, judgment, integrity, or other like personal qualities, the performance of which rests in the individual will and ability, and involving continuous duties which a court of equity could not well regulate, are not, as a rule, enforceable by decree for specific performance.”).

Minnesota: *Metro. Sports Facilities Comm. v. Minnesota Twins Partnership*, 638 N.W.2d 214 (Minn.App.2002) (“[P]ersonal-services contracts generally are not enforceable . . .”).

Mississippi: *Chambers v. Davis*, 128 Miss. 613, 91 So. 346 (1922) (“The contract which the appellees here seek to have specifically performed is one for personal services, and it is well settled that equity will not decree the specific performance of such a contract.”).

Missouri: *Miller v. Kansas City Power & Light Co.*, 332 S.W.2d 18, 20 (Mo.App.1960) (“Unaided by federal statute (if that would aid in this kind of case) equity will not, in Missouri, compel specific performance of the seniority provisions of a labor contract. Our rule is in harmony with the general law on the subject. The question is ably

discussed and ruled by the Supreme Court of Ohio, in *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15, where a decision by the Ohio Court of Appeals, 107 N.E.2d 243 in the same case, was overruled.”).

Montana: Mont.Code 27-1-412 (“The following obligations cannot be specifically enforced: (1) an obligation to render personal service or to employ another therein . . .”).

Nebraska: *Rudolph v. Andrew Murphy & Son*, 121 Neb. 612, 237 N.W. 659, 659 (1931) (“An action for damages is ordinarily the only remedy for the breach of an agency contract, for it is well settled, as a general rule, that courts will not undertake to enforce the specific performance of contracts for personal service.”).

Nevada: *Rhodes v. Designer Distrib. Services, LLC*, Nev. No. 55522, 2012 WL 642434, *4 (Feb. 24, 2012) (“[I]t is a fundamental rule that specific performance is not available to enforce a contract for personal services.”).

New Hampshire: *Allbee v. Elms*, 93 N.H. 202, 203, 37 A.2d 790 (1944) (“Specific performance of an executory contract for personal services is not ordinarily decreed even when the party to render the services is the plaintiff.”).

New Jersey: *Endress v. Brookdale Community College*, 144 N.J.Super. 109, 130, 364 A.2d 1080 (1976) (“It is settled law, of course, as the trial judge here readily acknowledged, that personal service contracts are generally not specifically enforceable affirmatively.”).

New York: *Matter of Baby Boy C.*, 84 N.Y.2d 91, 101, 638 N.E.2d 963 (1994) (“[C]ourts will rarely if ever grant specific performance of a contract for personal services. ‘It has long been a principle of equity that the performance of contracts for personal services depends upon the skill, volition and fidelity of the person who was engaged to perform such services and that it is impracticable, *if not impossible*, for a court to supervise or secure

the proper and *faithful* performance of such contracts.” (Emphasis sic)) (quoting *Am. Broadcasting Cos., Inc. v. Wolf*, 76 A.D.2d 162, 430 N.Y.S.2d 275, *aff’d*, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981)).

North Carolina: *Williams v. Habul*, 724 S.E.2d 104, 111 (N.C.App.2012) (“[T]his Court recognizes the Restatement’s policy against specific enforcement of personal services contracts.”).

North Dakota: N.D.Century Code 32-04-12 (“The following obligations cannot be enforced specifically: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service.”).

Oklahoma: *Schilling v. Moore*, 34 Okla. 155, 1912 OK 408, 125 P. 487, 488 (holding that specific performance is inappropriate where contract did not create agency coupled with an interest).

Pennsylvania: *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 146 (3d Cir.2000) (“[U]nder Pennsylvania law, a court of equity will not grant specific performance of a contract for personal services.”) (quoting *McMenamin v. Philadelphia Transp. Co.*, 356 Pa. 88, 91, 51 A.2d 702 (1947)).

Rhode Island: *Mello v. Local 4408 C.I.O. United Steel Workers of Am.*, 82 R.I. 60, 65, 105 A.2d 806 (1954) (“Equity will not enforce by decree of specific performance a contract calling for personal services.”).

South Carolina: *Pingley v. Brunson*, 272 S.C. 421, 423, 252 S.E.2d 560 (1979) (“Courts of equity will not ordinarily decree specific performance of a contract for personal services.”).

South Dakota: S.D.Codified Laws 21-9-2 (“The following obligations cannot be specifically enforced: (1) An obligation to render personal service; [or] (2) An obligation to employ another in personal service”).

Tennessee: *Sprint v. Members of Bd. of Trustees of Univ. of Tennessee*, 223 Tenn. 210, 214, 443 S.W.2d 464 (1969) (“This is an alleged contract for personal services and such is not a proper case for specific performance.”).

Texas: *Gage v. Wimberley*, 476 S.W.2d 724, 731 (Tex.Civ.App.1972) (“[E]quity will not enforce a contract for purely personal service.”).

Virginia: *Weiss v. E.V.M.S. Academic Physicians & Surgeons Health Servs. Found.*, 68 Va. Cir. 433 (2005) (“In Virginia, courts will not order specific performance of an employment contract.”).

Washington: *State ex rel. Schoblom v. Anacortes Veneer, Inc.*, 42 Wash.2d 338, 341, 255 P.2d 379 (1953) (“[T]he contract for personal services is still one which equity will not specifically enforce by decree.”).

West Virginia: *Bumgardner v. Leavitt*, 35 W.Va. 194, 13 S.E. 67, 69 (1891) (“[I]t is a rule almost universal that a contract for personal services cannot be enforced against the party promising such services, and hence for the want of the requisite mutuality specific execution will not be enforced against the opposite party . . .”).

Wyoming: *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 546 (Wyo.1993) (noting that “no court would enforce” the “specter” of “specific performance of the employment agreement.”).

District of Columbia: *Roller v. Weigle*, 261 F. 250, 252, 49 App.D.C. 102 (D.C.Cir.1919) (“[E]quity will not decree specific performance of a contract for [personal] services.”).

Puerto Rico: *Felix A. Rodriguez, Inc. v. Bristol-Myers Co.*, 281 F.Supp. 643, 646 (D.P.R.1968)

(“Obligations to ‘do’ (‘hacer’) will not be specifically enforced if . . . ‘personal services are required.’”) (quoting Szladits, *The Concept of Specific Performance in Civil Law*, 4 *American Journal of Comparative Law*, 208 (1955)).

Guam: 20 Guam Code 3225 (“The following obligations cannot be specifically enforced: (1)

An obligation to render personal service; [or] (2) An obligation to employ another in personal service[.]”).

U.S. Virgin Islands: *Govt. Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 329 (D.V.I.1996),

aff’d sub nom. Govt. Guarantee Fund of Republic of Finland v. Hyatt Corp., 95 F.3d 291 (3d Cir.1996) (“[T]he Management Agreement was a personal services contract which cannot be specifically enforced.”).

**Jurisdictions that Have Not Prohibited the Specific Performance
of Personal services Contracts**
(9 out of 54 jurisdictions surveyed)

Alaska: Alaska’s courts have not addressed this particular question. The general rule in the state is that “[t]he decision to specifically enforce a contract is within the discretion of the trial court and will be reversed on appeal only where it is against the clear weight of the evidence.” *Norton v. Herron*, 677 P.2d 877, 883 (Alaska 1984).

Kansas: *Scott v. Southwest Grease & Oil Co.*, 167 Kan. 171, 175, 205 P.2d 914 (1949)

(upholding reinstatement of salesperson pursuant to oral contract).

Louisiana: *Duhon v. Slickline, Inc.*, 449 So.2d 1147, 1153 (La.App.1984) (“A party who

establishes a breach of his employment contract due to wrongful dismissal, is entitled to

either damages or specific performance of the contract, or to dissolution of the contract.”).

Massachusetts: Massachusetts does not appear to have addressed this particular question.

New Mexico: *Collado v. City of Albuquerque*, 132 N.M. 133, 139, 2002-NMCA-048, 45 P.3d

73 (“We acknowledge that reinstatement or promotion may not be the appropriate remedy in every case. However, the converse is equally true, and such relief may be most appropriate in a given case.”).

Oregon: *Romtec Utilities Inc. v. Oldcastle Precast, Inc.*, D.Or. No. 08-06297-HO, 2011 WL

690633, *3 (Feb. 16, 2011) (“While it is well established that mutuality is generally required for an equitable order of specific performance, it is also clear that Oregon law permits specific performance where a trier of fact is satisfied either by the past conduct of the party seeking relief or, because that party’s economic interest in carrying out the contract is sufficiently strong that default is highly improbable. * * * In this instance where both Bogan and Sheldon have indicated their intent to perform and where their economic interests would be deleteriously affected by their nonperformance, their personal service contracts would not, under Oregon law, preclude an equitable order of specific performance.”).

Utah: *Thurston v. Box Elder Cty.*, 892 P.2d 1034, 1040 (Utah 1995) (“Traditionally, reinstatement has been denied as a remedy for breach of an employment contract under the generally accepted rule that contracts for personal services should not be specifically enforced,” but “[t]he circumstances of a particular case may . . . make reinstatement an inappropriate remedy, and ordinarily, it should be left to the trial court’s careful discrimination to determine its application in each case.”).

Vermont: Vermont does not appear to have addressed this particular question. The general rule in the state is that a court may order specific performance in its discretion, taking into account “[t]he sufficiency of the consideration, the mutuality, certainty, and clarity, completeness, and fairness of the contract, its capability of proper enforcement by decree, and the presence or absence of any showing that it is tainted or impeachable, or that its enforcement would be unconscionable.” *Johnson v. Johnson*, 125 Vt. 470, 473, 218 A.2d 43 (1966).

Wisconsin: *Walters v. Clark Cty. Health Care Ctr.*, 160 Wis.2d 45, 468 N.W.2d 30 (Wis.App.1990) (“We have not previously reached the question of whether reinstatement is available in employee manual wrongful discharge cases.”). Wisconsin has allowed reinstatement only in the narrow set of situations where an at-will contract is terminated in violation of clear public policy and the company does not refuse reinstatement. See *Kempfer v. Automated Finishing, Inc.*, 211 Wis.2d 100, 120, 564 N.W.2d 692 (1997) (“Reinstatement [for termination in violation of public policy] is not feasible if the employee cannot be placed in the same or a similar position or if the company refuses to reinstate the employee.”).

APPENDIX

In the
Supreme Court of Ohio

13-0890

CEDAR FAIR, L.P.,

Plaintiff-Appellant,

v.

JACOB FALFAS,

Defendant-Appellee.

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Case No. _____

On Appeal from the
Erie County
Court of Appeals,
Sixth Appellate District

Court of Appeals Case
No. E-12-015

NOTICE OF APPEAL OF APPELLANT CEDAR FAIR, L.P.

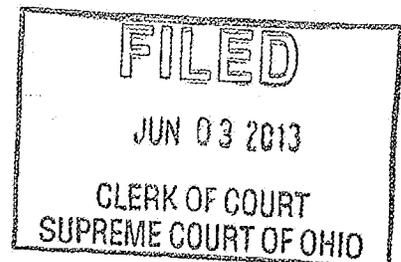
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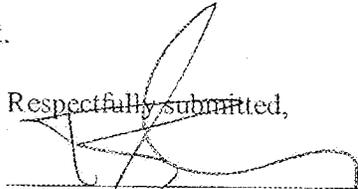
NOTICE OF APPEAL OF APPELLANT CEDAR FAIR, L.P.

Appellant Cedar Fair, L.P. hereby gives notice of its discretionary appeal to this Court from the Decision and Judgment of the Erie County Court of Appeals, Sixth Appellate District, entered on April 19, 2013, in *Cedar Fair, L.P. v. Jacob Falfas*, Court of Appeals case No. E-12-015. A date-stamped copy of the Sixth District's Decision and Judgment is attached as Exhibit A to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Dated: June 3, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 3, 2013, a copy of the foregoing was served by regular U.S. mail upon the following:

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FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2013 APR 19 AM 11:17
LUDWIG A. ALBURN
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Cedar Fair, L.P. Court of Appeals No. E-12-015
Appellee/Cross-Appellant Trial Court Nos. 2011-CV-0217
2011-CV-0218
v.

Jacob Falfas DECISION AND JUDGMENT
Appellant/Cross-Appellee Decided: April 19, 2013

Dennis E. Murray, Jr., Dennis E. Murray, Sr., Susan C. Hastings
and Joseph C. Weinstein, for appellee/cross-appellant.

Richard D. Panza, William F. Kolis, Jr. and Joseph E. Cirigliano,
for appellant/cross-appellee.

OSOWIK, J.

{¶ 1} This is an appeal and cross-appeal from a judgment of the Erie County Court
of Common Pleas that vacated in part an arbitration award that ordered appellant Jacob
Falfas reinstated with back pay as chief operating officer of appellee, Cedar Fair, L.P.

1.

J33/332
4/19/13

For the reasons set forth below, the judgment of the trial court is affirmed in part and reversed in part.

{¶ 2} Appellant/cross-appellee (“appellant”) was employed by appellee/cross-appellant (“appellee”) for 39 years. On June 20, 2007, appellant was promoted to appellee’s chief operating officer, subject to the terms of an employment agreement which would expire on November 30, 2012. On or about June 10, 2010, after a brief telephone conversation with Richard Kinzel, appellee’s chief executive officer, appellant’s employment with appellee came to an immediate end. The parties had differing interpretations of the effect of the telephone conversation, with appellee claiming appellant resigned and appellant claiming he was terminated.

{¶ 3} The relevant employment agreement into which appellant and appellee entered contains a mandatory, final and binding arbitration provision. Pursuant to that provision, the parties arbitrated their dispute. On February 28, 2011, the arbitration panel issued its award finding that appellant “was terminated for reasons other than cause” and that “the facts fail to establish resignation.” In addition, the panel found that “equitable relief was needed to restore the parties to the positions they held prior to the breach” of the employment agreement by appellee. The panel directed that appellant be reinstated to his former position with back pay and all other benefits to which he was entitled under the employment agreement.

{¶ 4} On March 21, 2011, appellee filed an action to vacate, modify or correct the arbitration award. On March 22, 2011, appellant filed a separate action to confirm the arbitration award. The two actions were consolidated in the trial court.

{¶ 5} On February 22, 2012, the trial court confirmed the award as it related to the award of back pay, benefits, reasonable costs, expenses and attorney fees, but also modified the award in part by determining that appellant should not be reinstated to his position. Appellant filed a timely appeal, which was followed by appellee's cross-appeal.

{¶ 6} Appellant sets forth the following assignments of error:

1. The trial court erred as a matter of law when it vacated that portion of the award ordering reinstatement of appellant/cross-appellee Jacob Falfas as being in excess of the arbitrators' authority because such relief was not available under Ohio law absent statutory authority.
2. The trial court erred as a matter of law in not remanding the case to the arbitrators for a determination of the exact amount of back pay and benefits, and reasonable costs, expenses and attorneys' fees to which appellant/cross-appellee Jacob Falfas was entitled as a result of appellee/cross-appellant Cedar Fair L.P.'s breach of contract.

{¶ 7} Appellee sets forth the following single cross-assignment of error:

The trial court erred as a matter of law in affirming an arbitration award that conflicted with the express and unambiguous terms of the employment agreement.

{¶ 8} Like court decisions, arbitration awards are presumptively valid. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 551 N.E.2d 186 (1990). Judicial review of arbitration awards is limited in order to encourage parties to resolve disputes through arbitration. *Kelm v. Kelm*, 68 Ohio St.3d 26, 27, 623 N.E.2d 39 (1993). Once arbitration has taken place, a trial court has no jurisdiction except to confirm, vacate, modify or enforce the award pursuant to statute. The trial court may not consider the merits or substantive aspects of the arbitration award. *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876 (2d Dist.). That is, the trial court must not review whether the arbitrators made factual or legal errors. "In reviewing an arbitrator's award, the court must distinguish between an arbitrator's act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate, the latter is not." *Id.* at ¶ 18.

{¶ 9} R.C. 2711.10 sets forth the statutory grounds under which a trial court may vacate or modify an arbitration award. The trial court in this case determined that the only arguable basis herein was R.C. 2711.10(D), which authorizes disturbing an arbitration award if the arbitrators exceeded the powers conferred upon them by the arbitration agreement. The court found that the arbitrators in this matter had in fact exceeded their powers by reinstating appellant to his former position, and vacated that portion of the award.

{¶ 10} It is well-settled that, absent evidence of material mistake or extensive impropriety, an appellate court cannot extend its review to the substantive merits of the

arbitration award but is limited to a review of the trial court's order. *Cooper v. Secs. Serv., Inc.*, 6th Dist. No. L-09-1127, 2010-Ohio-463, ¶ 11. The standard of review on appeal is whether the trial court erred as a matter of law. *Union Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112*, 146 Ohio App.3d 456, 766 N.E.2d 1027 (12th Dist. 2001).

{¶ 11} We note that the trial court herein rejected appellee's claim that the arbitrators exceeded their authority in ordering reinstatement because it conflicts with the express terms of the employment as well as appellee's argument that the order of reinstatement violates public policy. Instead, the trial court cited Section 19 of the employment agreement, which states at paragraph (c) that "[t]he arbitration panel shall have authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration." Appellee, in support of its motion to vacate the arbitrators' decision, claimed that the award was beyond the scope of authority of Section 19(c).

{¶ 12} The trial court found that the arbitrators exceeded their authority because reinstatement is not a remedy for a personal services contract. In support, the trial court cited *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953). *Masetta*, however, is inapposite to the case before us. *Masetta* is limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract as can be seen from paragraph one of the syllabus: "1. A court of equity will not in a class action, by means of mandatory injunction, decree specific performance of

an employment contract negotiated between an employer and a union representing its employees, where the issue involves the respective rights of seniority of the employees.”

{¶ 13} The arguments made by appellee and relied upon by the trial court as a basis for vacating the arbitration award ignores Ohio case law precedent as set forth in *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 533 N.E.2d 1277 (1989) and *Collini v. Cincinnati*, 87 Ohio App.3d 553, 622 N.E.2d 724 (1st Dist.1993). In *Worrell*, addressing the details of a breach of employment contract claim, including whether a financial award was considered front pay or back pay, the Ohio Supreme Court stated that “in [certain] circumstances an award of front pay enables the court to make the injured party whole, *although reinstatement is the preferred remedy.*” *Worrell* at 246. (Emphasis added.) Clearly, in *Worrell*, the Supreme Court recognized that reinstatement is not only an available remedy, it is the “preferred remedy.” A similar conclusion was reached in *Collini, supra*, wherein the court cited *Worrell* and stated that “[i]n employment disputes specifically, the court may make equitable remedies to make the injured party whole. For example, the Supreme Court of Ohio expressly held that * * * when a corporation wrongfully discharged an employee, *reinstatement and ‘front pay’ were proper remedies available to the court. See generally, Worrell v. Multipress, Inc. * * **” (Emphasis added.) *Collini* at 557.

{¶ 14} Considering such precedent, the trial court’s finding that the arbitrators’ decision “[f]lies in the face of clearly established legal precedent” or otherwise exhibited

a “manifest disregard” for the law in granting reinstatement to appellant is without merit and wrong as a matter of law.

{¶ 15} Based on the foregoing, we find appellant’s first assignment of error well-taken.

{¶ 16} In his second assignment of error, appellant asserts that the trial court erred by not remanding the case to arbitration for a determination of the exact amount of back pay, benefits, costs, expenses and attorneys’ fees to which he is entitled. Appellant asserts that a remand to arbitration is required because the trial court’s judgment entry does not quantify the award of damages. We note, however, that the arbitrators clearly stayed silent on the issue of exact amounts to be awarded appellant, leaving that determination for the trial court. Likewise, this court finds that the trial court is best situated to resolve this issue and, accordingly, this matter is remanded to that court for further hearing on “back pay and other benefits he enjoyed under the 2007 Amended Restated Employment Agreement as if the employment relationship had not been severed” as well as “any reasonable costs, expenses and attorney’s fees incurred by him * * *,” to which he is entitled pursuant to the trial court’s order. Accordingly, appellant’s second assignment of error is not well-taken as to his argument that this matter should be remanded to arbitration for resolution of the amounts awarded.

{¶ 17} In support of its cross-appeal, appellee asserts that the arbitration award conflicted with the express and unambiguous terms of the employment agreement. Once the parties have authorized an arbitrator to give meaning to the language of an agreement,

a court should not reject an award on the ground that the arbitrators misread the contract. *Stow Firefighters v. City of Stow*, 193 Ohio App.3d 148, 2011-Ohio-1559, 951 N.E.2d 152 (9th Dist.) Appellee suggests that the trial court should have vacated the award on that basis. “Contracting parties who agree to submit disputes to an arbitrator for final decision have chosen to bypass the normal litigation process. If parties cannot rely on the arbitrator’s decision (if a court may overrule that decision because it perceives factual or legal error in the decision), the parties have lost the benefit of their bargain.” *Id.* at ¶ 24, citing *Automated Tracking Sys. Inc. v. Great Am. Ins. Co.*, 130 Ohio App.3d 238, 243, 719 N.E.2d 1036 (9th Dist.1998).

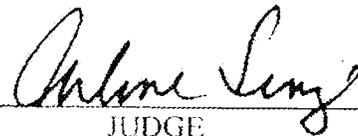
{¶ 18} Based on the foregoing, appellee’s cross-assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed as to its modification of the arbitrators’ award reinstating appellant’s employment, and affirmed as to its order regarding appellant’s back pay and other benefits, reasonable costs, expenses and attorney fees. This matter is remanded to the trial court for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed in part
and affirmed in part.

Cedar Fair, L.P. v.
Falfas
C.A. No. E-12-015

Arlene Singer, P.J.



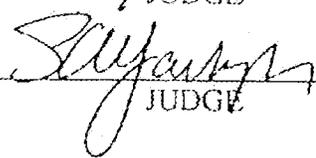
JUDGE

Thomas J. Osowik, J.



JUDGE

Stephen A. Yarbrough, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdl/?source=6>.

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

COPY

Cedar Fair, L.P. : Case No. 2011-CV-0217
 Plaintiff :
 vs : Judge Roger E. Binette
 Jacob Falfas : JUDGMENT ENTRY
 Defendant ::::

FILED
 COMMON PLEAS COURT
 ERIE COUNTY, OHIO
 2012 FEB 22 PM 2:38
 LUYADA S. WILSON
 CLERK OF COURTS

This matter is before this Court on cross-motions relative to an Arbitration Award. Cedar Fair, L.P. ("Plaintiff") seeks to have that portion of the Arbitration Award Ordering Jacob Falfas ("Defendant") reinstated as Chief Operating Officer ("COO") vacated, modified or corrected. Defendant, in turn, seeks to have the Arbitration Award confirmed.

This Court has carefully considered Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award ("Motion to Vacate") (filed on or about May 20, 2011); Jack Falfas' Brief In Opposition To Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award And In Support Of Jack Falfas' Application To Confirm Arbitration Award ("Motion to Confirm") (filed on or about June 10, 2011); Cedar Fair's Reply Brief In Support Of Motion To Vacate Or Modify/Correct Award And Brief In Opposition To Jacob Falfas' Application to Confirm Award (filed on or about June 24, 2011); the record, including, but not limited to, the Employment Agreement, and applicable law.

This Court FINDS and HOLDS:

1. Jacob "Jack" Falfas ("Defendant") was a long time employee of Cedar Fair, L.P. ("Plaintiff"), having worked his way up Plaintiff's corporate ladder to Chief Operating Officer ("COO"). Defendant was employed pursuant to a 2007 Amended and Restated Employment Agreement ("Employment Agreement");
2. The Employment Agreement was effective July 20, 2007 and ran for a period ending November 30, 2009, with an automatic renewal for three (3) years, commencing December 1, 2009 and on every three (3) year anniversary of December 1, 2009, unless one of the parties provided advance written notice of intent to terminate¹;
3. On or about June 10, 2010, after a very short telephone conference with Richard Kinzel, Plaintiff's Chief Executive Officer, Defendant's employment with Plaintiff ceased. The parties had differing positions on the effect of that telephone conversation and subsequent events. Plaintiff took the position Defendant resigned, while Defendant deemed he was terminated;
4. The Employment Agreement has a mandatory, final and binding Arbitration provision. The Arbitration was to be conducted by a panel of three (3) arbitrators in accordance with the American Arbitration Association rules ("AAA");
5. Pursuant to the Arbitration provision, the parties did arbitrate this dispute. On February 28, 2011, in a 2-1 decision, the Arbitration Panel ("Arbitrators") issued its award finding that Defendant "was terminated for reasons other than cause" and "the facts fail to establish resignation." In addition, the Arbitrators found "that equitable relief was needed to restore the parties to the positions they held prior to the breach of the Employment Agreement by the Employer". Further, they directed that Defendant be reinstated to his former position with back pay and other benefits Defendant enjoyed under the Employment Agreement. In addition, the Arbitrators awarded Defendant his reasonable costs, expenses and attorney fees, per the Employment Agreement²;
6. Plaintiff filed this action to vacate, modify or correct the Arbitration Award. Defendant filed a separate action (Erie Co. Common Pleas Case No. 2011 CV 0218) to confirm the Arbitration Award. This Court consolidated the two actions and they proceed in this case (Erie Co. Common Pleas Case No. 2011 CV 0217);

¹ This type of continuing contract for successive terms, terminable through advance notice before the succeeding term begins is frequently referred to as an "Evergreen Contract."

² The parties have deferred resolution of the amount of attorney fees while the underlying dispute proceeds.

7. In Plaintiff's *Motion To Vacate*³ they contend that the Arbitrators "exceeded their authority" by awarding reinstatement. This argument has two (2) components: 1) the award conflicted with the express and unambiguous terms, and 2) the award was beyond the scope of their authority in Section 19(c). Plaintiff's other contention is that the award violates Public Policy;

8. This Court will address individually all of these issues. However, the analysis necessarily begins with a discussion of the role of this Court and the legal standards which apply in reviewing an Arbitration Award;

"Arbitration in General and a Reviewing Court's Role"

9. Arbitration is strongly encouraged by Ohio and Federal Courts to settle disputes. *Kelm v Kelm* (1993), 68 Ohio St. 3d 26, 27; *ABM Farms, Inc. v. Wood* (1998), 81 Ohio St. 3d 498, 500; *Southland Corp. v. Keating* (1984), 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1, 12. Judicial review of arbitration awards is limited in order to encourage parties to resolve disputes through Arbitration. *Kelm supra* at 27; *Piqua v. Fraternal Order of Police* 2009-Ohio-6591, ¶ 16; 185 Ohio App. 3d 496. This is long standing Ohio public policy. See e.g., *Springfield v. Walker* (1885), 42 Ohio St. 543, 546 ("Arbitration is favored.") Arbitration avoids needless and expensive litigation. It "provides parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets." *Mahoning Cty. Bd. of MRDD v. Mahoning Cty. Trainable Mentally Retarded, Edn. Assn.* (1986), 22 Ohio St. 3d 80, 83. Trial courts must be careful not to exceed the scope of their review, lest "[a]rbitration, which is intended to avoid litigation, would instead merely become a system of 'junior varsity trial courts' offering the losing party complete and rigorous de novo review." *Dayton v. Internat. Assn. Of Firefighter, Local No. 136* 2007-Ohio-1337; ¶ 13 quoting *Motor Wheel Corp. v. Goodyear Tire & Rubber* (1994), 98 Ohio App. 3d 45, 52. This would frustrate the purpose and intent of Arbitration. Therefore, the scope of a Trial Court's review is strictly limited;

10. Arbitration is a creature of private contracts. Where sophisticated parties enter into an arms length transaction to have disputes between them determined by Arbitration, in order to value and honor freedom of contract, reviewing courts must be deferential to the mechanism the parties freely and voluntarily chose. By agreeing to Arbitration, the parties implicitly agree to resolve their disputes and be bound by mistakes the arbitrators make while carrying out their duties;

11. As succinctly stated in *In The Matter of Jefferson Cty. Sheriff*, (7th Dist.) 2009-Ohio-6758 at 66:

"This Court may not necessarily agree with the arbitrator's decision to modify Scott's termination... However, that is not the standard that we must apply. [A]s long as the arbitrator is even arguably Construing or applying the contract and acting within the scope of his authority, that a Court is Convinced he committed serious error does not suffice to overturn his decision." *United Paperworks Intl. Union, AFL-CIO v. Misco, Inc.* (1987) 484 US 29, 38. Here, the arbitrator acted within the scope Of his authority and did not exceed his power... Consequently, the trial court should not have vacated The arbitrator's award even though it disagreed with the arbitrator's decision."

12. Once Arbitration has completed, a trial court has no jurisdiction except to confirm, vacate, modify or enforce the award pursuant to statute. In general, several key principles limit court review. Courts are to strive to uphold an Arbitration Award whenever possible to do so. *Hillsboro v. Fraternal Order of Police* (1990), 52 Ohio St. 3d 174, 178; *Mahoning Cty. Bd. MRDD v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St. 3d 80, 84 (courts "will make every reasonable indulgence to avoid disturbing an arbitration award.") There is a presumption of validity of Arbitration Awards. *Piqua supra* at ¶ 17. The trial court may not consider the merits or substantive aspects. *Id* That is, the trial court must not review whether the arbitrators made factual or legal errors. "Because the parties contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does reviewing decisions of lower courts. To resolve disputes about the application of a [collective-bargaining] agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract." *Southwest Ohio Regional Transit Auth. (SORTA) v. Amalgamated Transit Union, Local 627* (2001), 91 Ohio St. 3d 108, 110, quoting *United Paperworkers Internat. Union, AFL-CIO v. Misco, Inc.* (1987), 484 U.S. 29, 37-38, 108 S. Ct. 364, 98 L. Ed. 2d 286;

³ In reality its a motion to modify.

13. "These principles of law, however, do not completely insulate an arbitrator's award from modification or vacation by a reviewing court. As the Supreme Court of the United States said: 'an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of justice'". *Clark Co Sheriff Gene Kelley v. FOP* (2nd Dist), No. 94-CA-53, 1995 Ohio App. LEXIS 558 citing *United Steel Workers of America v. Enterprise Wheel & Car Corp* (1960) 363 U.S. 593;
14. "[I]n reviewing an arbitrator's award, the court must distinguish between an arbitrator's act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate; the later is not." *Piqua* supra at ¶ 18;
15. The grounds upon which a trial court may vacate or modify an Arbitration Award are narrow and few. R.C. §2711.10 sets forth the statutory grounds for doing so. The only arguable basis here is R.C. §2711.10 (D), which authorizes disturbing an Arbitration award if "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." If a common pleas court finds that the arbitrators 'exceeded the powers' conferred upon them by the arbitration agreement, the award may be vacated or modified;
16. "The essential function of paragraph (D) is to ensure that the parties get what they bargained for by keeping the arbitration within the bounds of the authority they gave him." *Piqua* supra at ¶ 21. *Stow Firefighters Iaff Local 1662 v. City of Stow* (9th Dist.) 2011-Ohio-1559 at 157. The authority conferred comes from, "is limited in and rooted in the arbitration agreement." *Id*
17. The trial court's inquiry into whether the arbitrators exceeded their powers is also limited. *Bd. of Educ. Of Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St. 3d 129, syllabus; *Piqua* supra at ¶ 22;
18. R.C. §2711.10 (D) is not violated if the arbitration award 'draws its essence from' the collective bargaining agreement and is not unlawful, arbitrary or capricious. *Findlay* supra, syllabus; *SORTA* supra at 110; *Hillsboro* supra at 176. Generally, if the arbitration award is based on the language and requirements of the agreement, the arbitrators have not exceeded their powers. *Miami Twp. Bd. Trustees v. FOP, Ohio Labor Council, Inc.* (1998), 81 Ohio St. 3d 269, 273;
19. An Arbitrator's Award draws its essence from an agreement when (1) the award does not conflict with the express terms of the agreement and (2) the award has rational support or can be rationally derived from the terms of the agreement. *Ohio Office of Collective Bargaining v. Ohio Civil Emps. Assn., Local 11, AFSCME, AFL -- CIO* (1991), 59 Ohio St. 3d 177, syllabus; *Findlay* supra at 132, *Miami City School BOE v. Miamisburg Teachers Assoc.* (2nd Dist.) 2010-Ohio-4759 at 16-17, *Lowe v. Oster Homes aka Oster Construction* (9th Dist.) 2006-Ohio-4927 at 7.

"The Employment Agreement"

20. With these standards and principals in mind, this Court turns to the Employment Agreement itself;
21. The Employment Agreement includes several provisions relevant to the substantive dispute. Specifically, Section 7 is entitled "Termination by Cedar Fair Other Than for Cause." It provides, in relevant part:
 - (a) If, other than pursuant to Section 10 or Section 12⁴ hereof, Cedar Fair shall terminated Executive's employment ..., then, subject to Sections 7 (b), 7 (c) and 7 (d):
 - (1) Executive's Base Salary shall be continued for either one (1) year or the remaining Employment Term, whichever period of time is longer, payable in accordance with Cedar Fair's then effective payroll practices, and

⁴ Neither Section 10 (Termination for Cause) or Section 12 (Change in Control) apply here.

(2) Executive shall continue to receive medical and dental insurance coverage during such Base Salary continuation period...

All other benefits provided by Cedar Fair shall end as of the last day of Executive's active employment.

22. In effect, Section 7 provides for damages if termination was "for other than cause". Hence, if that the only relevant language (i.e., Section 7), this Court's task would be easy. Under this provision, a termination without just cause (which the Arbitrators found) would result in a compensatory award of Defendant's base salary for the longer period of time on the remaining term of employment (i.e. from June 11, 2010 until December 1, 2012) plus continuation of medical and dental insurance coverage. However, that is not the case. There is another provision in the Employment Agreement that exist concerning Arbitration and the authority to award relief;
23. Section 19 of the Employment Agreement which is entitled "Arbitration". That paragraph includes a provision which appears to be in contrast to Section 7. Specifically, subparagraph (c) states:
- The arbitration panel shall have authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration.
24. In looking at the Employment Agreement, the critical question then, is whether the Arbitrators exceeded their authority by Ordering Defendant reinstated;
25. Plaintiff makes three arguments in support of its *Motion To Vacate*: 1) the Award Conflicts with the Express and Unambiguous Terms of the Agreement; 2) the Award is beyond the Scope of Authority of Section 19 (c) and 3) the Award violates public policy;

"The Award Conflicts with the Express and Unambiguous Terms of the Agreement"

26. Under this argument, Plaintiffs argue that the Arbitrators exceeded their authority by Ordering reinstatement under Section 19 (c) instead of awarding damages via Section 7. In general, they assert Section 7 is specific, as compared to Section 19 (c), as to what award can be given when a termination occurs as it did with Defendant (i.e., 'termination other than for cause'). Section 7 is the expressed and unambiguous terms of the Employment Agreement, and therefore the only award available is the damages award -- not reinstatement;
27. As previously noted, the Employment Agreement is not clear and unambiguous. Section 7 could reasonably be interpreted to conflict with Section 19 (c). While Section 7 sets forth remedies for termination based on "other than for cause" (which the Arbitrators held), Section 19 (c) is an "omnibus provision". Which, arguably provides broader remedies than the more narrow remedy called for in Section 7;
28. Where disputes arise from ambiguous provisions in a contract, which is submitted for Arbitration, deference is given to the decision of the Arbitration. *supra Hillsboro v. Fraternal Order of Police* at 177, *New Par aka Verizon v. Misuraca* (9th Dist.) 2007-Ohio-3300. Further, said 'where the provisions of the written agreement are susceptible of more than one reasonable interpretation and the parties have agreed to Arbitration, the arbitrator's interpretation of the contract and not that of the Trial Court governs. *Hillsboro*, *supra* at 177- 178; *in the Matter of Jefferson Cty. Sheriff* *supra* at 54. Additionally, a Trial Court may not reject an arbitrator's interpretation of a contract simply because it disagrees with the interpretation. *Southwest Ohio* *supra* at 110. Thus, this Court will give proper deference to the Arbitrators decision that Section 19 (c) afforded remedies which otherwise do not exist under Section 7.
29. If Plaintiff wanted it clear that Section 7 was the only remedies available for "other than for cause" termination, it could've drafted the Employment Agreement differently. Instead, pursuant to the written Employment Agreement, the Arbitrators found that Plaintiff had agreed to give them (the Arbitrators) additional authority under Section 19 (c).⁵ This Court defers to their interpretation, and thus the Arbitrators decision did not exceeded its powers by interpreting Section 19 (c) as controlling (versus Section 7);

⁵ "authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in arbitration;"

30. Assuming arguendo that the Arbitrators "got it wrong," about contract interpretation law, it is the Arbitrators' interpretation of the contract, and not this Courts, which governs the parties. Their interpretation prevails regardless of whether that interpretation is the most reasonable under the circumstances. *New Par aka Verizon supra* at 11;

"The Award is beyond the Scope of Authority of Section 19(c)"

31. Plaintiff's second argument is that reinstatement could not be Ordered pursuant to Section 19 (c) because Ohio law does not authorize reinstatement of employees. More specifically, Plaintiff argues that it is well settled Ohio law that "a court of equity will not decree specific performance of a contract for personal services." *Masetta v. National Bronze & Aluminum Foundry Co.* (1953) 159 Ohio St. 306, 311; *Port Clinton Railroad Co. v. Cleveland & Toledo Railroad Co.* (1862), 13 Ohio St. 544, 552; *Townsend v. Antioch Univ.* 2009-Ohio-2552, ¶ 19;
32. Defendant counters arguing that reinstatement is an available remedy. *Worrell v. Multipress, Inc.* (1989), 45 Ohio St. 3d 241; *Collini v. Cincinnati* (1993), 87 Ohio App. 3d 553. Defendant also cites the general rule that the duty of a tribunal in cases where it is found there was wrongful discharge is to make the injured party whole. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.* (2005), 105 Ohio St. 3d 476, 481;
33. Each side attempts to distinguish, degrade or criticize the cases cited by the other. This Court has reviewed each case cited by both parties. Additionally, this Court has done its 'own independent research' of this issue. Specifically, whether reinstatement is an available remedy, given the Arbitrators' authority pursuant to Section 19 (c) of the Employment Agreement;
34. As previously stated, to determine if the Arbitrators exceeded their power in granting the award, this Court must first determine whether the Arbitrators award "draws its essence from the Employment Agreement". Accordingly, there must be a rational nexus between the Employment Agreement and the award, and the award cannot be arbitrary, capricious or unlawful. The Arbitrators award departs from the essence of the Employment Agreement when it conflicts with the expressed terms of it and/or is without rational support or cannot be rationally derived from the terms of it. Finally, although the Arbitrators may construe ambiguous terms, they are not allowed to disregard or modify the plain unambiguous provisions of it. Finally, in order to vacate the Arbitrators award, their decision must fly in the face of clearly established legal precedent. Further, the Arbitrators powers are limited by the Employment Agreement. In sum, this is what the parties bargained for when pursuing Arbitration. *City of Portsmouth v. FOP Scioto Lodge 33* (4th Dist.) 2006-Ohio-4387 at 18 - 19, *Lowe supra* at 7, *Bennett v. Swanwood Land Development* (9th Dist.) 2007-Ohio-2154 at 11, *Association of Cleveland Fire Fighters #93 v. City of Cleveland* (8th Dist.) 2004-Ohio-3608 at 11, *Stow Firefighters supra* at 157;
35. The expressed terms of the Arbitrators authority, concerning awards in Section 19 (c), is:
- "The arbitration panel shall have authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration."
36. This Court has already held that it would not interfere with the Arbitrators' finding that they were empowered to grant more relief under Section 19 (c) than was available under Section 7. However, the expressed language in the Employment Agreement under that section has to be taken in toto;
37. Section 19 (c) requires that the award / remedy had to be what "an Ohio or federal court in Ohio could grant in conformity with applicable law." That is what the parties bargained for and nothing else. The parties did not bargain for Arbitrators to have authority to award any remedy at all. Instead, their bargain contained the restrictive language that the Arbitrators' authority had to be limited to those that an Ohio or Federal Court could grant in conformity with applicable law. It was even more definitive is stating that it had to be an Ohio or Federal Court 'in Ohio'. That is the allowable remedies that the parties explicitly bargained for in the Employment Agreement. Therefore, to fashion an award that contravenes this expressed restrictive language would usurp what the parties bargained for in the Employment Agreement;
38. The question then is 'according to applicable law can an Ohio or Federal court in Ohio Order reinstatement on a personal services contract -- especially when there is an adequate remedy by way of damages are available;

39. Without revisiting all the cases again, case law demonstrates that - unless statutorily available - reinstatement is not a remedy for a personal services contract. "The Ohio Supreme Court has held that a court of equity will not, by means of mandatory injunction, decree specific performance of a labor contract existing between an employer and its employees so as to require the employer to continue any such employee in its service or to rehire such employee if discharged". Further, "a court of equity will not decree specific performance of a contract for personal services". Additionally, "this rule is based upon the fact that the mischief likely to result from an enforced continuance of the relationship after it has become personally obnoxious to one of the parties is so great that the interests of society require the remedy be denied." *Masetta* supra at syllabus; *Townsend v. Antioch* supra at 19, *Sokolowsky v. Antioch College* (2nd Dist.) No. 863 1975 Ohio App. LEXIS 5951, *Felch v. Findlay College* 119 Ohio App. 357, 358 - 361, *Standen v. Smith* (9th Dist.) 2002-Ohio-760 at 36-37; and *Podlesnick v. Airborne Express, Inc.* 627 F. Supp. 1113 (Jan. 13, 1986) at 1115 - 1121;
40. Herein there is no statutory basis in which to rely on reinstatement. Moreover, in Section 7 there is an adequate remedy available for damages. By virtue of the Arbitrators' own language that it was based on 'equity' that Defendant be reinstated, they implicitly confirm that no statutory authority. There decision to reinstate was based on equity principles, which case law demonstrates is not an available remedy that a 'an Ohio or federal court in Ohio could grant in conformity with applicable law'. Which again, is the remedy(s) that the parties bargained for in Section 19 (c) of the Employment Agreement. Consequently to grant this award or remedy - even under equity principles - is to undermine what the parties bargained for;
41. Because the law in this area is so long standing and clear, the Arbitrators decision is not a mere error in the interpretation or application of the law, but rather it "Flies in the face of clearly established legal precedent" *Bennett* supra at 11, *Lowe* supra at 7, *New Par aka Verizon* at 11;
42. The Arbitrators' decision conflicts with the express terms of the Employment Agreement, and it is not rationally support/ nor rationally derived from the terms of the Employment Agreement. In effect, the Arbitrators' Order of reinstatement fails to be drawn from the essence of the Employment Agreement. *City of Stow* supra at 106 -161;
43. Finally, although the principles of law regarding arbitration limit this Court's review, they do not completely insulate the award from modification or vacation. The Arbitrators were confined to interpretation and application of the Employment Agreement they could not dispense their own brand of justice, which included the reinstatement. *Clark Co. Sheriff* supra at 18-19, *City of Portsmouth* supra at 20.
44. Therefore, this Court finds that the Arbitrators exceeded their authority when they Ordered reinstatement of the Defendant pursuant to Section 19 (c);

"The Award Violates Public Policy"

45. Plaintiff's final argument is that the Arbitration Award reinstating Defendant should be vacated on the grounds it violates public policy. In addition to the basis provided in R. C. §2711.10, a Court may also vacate an Arbitration Award when it is contrary to the well-defined and dominant Public Policy of Ohio or the United States. *Southwest Ohio* supra at 112; *Cleveland Bd. of Edn. v. Intl. Bhd of Firemen & Oilers Local, 701* (1997), 120 Ohio App. 3d 63, 69. However, this power is narrowly limited and does not sanction broad judicial power to set aside arbitration awards. *Southwest Ohio* supra at 112 quoting *Misco* supra at 43. Furthermore, the Public Policy "must be well defined and dominant and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.*
46. In addition to the previous discussion of case law relating to whether the Arbitrators exceeded their power, this Court has reviewed a wealth of case law and Ohio statutes;
32. On the one hand, the Revised Code is peppered with statutes specifically authorizing reinstatement of employees. See e.g. R.C. §124.327 (B) (reinstatement rights for laid off classified public employees); R.C. §4123.90 (reinstatement for employees wrongfully terminated for making Worker's Compensation claim); R.C. §4112.05 (6); R.C. 4112.14 (B); (discrimination); R.C. §4113.52 (E) (reinstatement for employees who report violations of federal, state or local law); R.C. §5903.02 (those absent from work due to military service); R.C. §4167.13 (employees retaliated against for reporting employee risk reduction); R.C. §4117.12 (B) (3) (unfair labor practice); R.C. §1513.39;

33. Yet, on the other hand, case law has been long standing and clear that -- absent statutory authority - reinstatement is not a (equitable) remedy for a personal services contract, especially when another remedy in damages is available;
33. One argument could be made that the enactment of such statutes was needed because otherwise there'd be no protection from unscrupulous employment actions. Therefore, where the legislature hasn't acted there's no Public Policy precluding discharge (i.e.. and in effect not requiring reinstatement);
34. However, a counter argument can be made that since the General Assembly has acted in so many circumstances to afford reinstatement and yet has never specifically passed legislation that generally precludes reinstatement, there is no dominant, explicit, well defined Public Policy which precludes a Court of law, or an arbitration panel, from Ordering reinstatement;
35. In instances where Arbitration Awards were vacated on this basis, the Public Policy was clear and by reinstatement there'd be a clear violation of that policy. See e.g. *Firemen & Oilers Local, 701* supra (reinstatement undermined "zero tolerance" policy of illegal drug use by transportation employees); *City of Ironton v. Rist* 2010-Ohio-5292 (reinstatement of police officer who falsified a police report violates Public Policy); *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St. 3d 40 (reinstatement of deputy sheriff who engaged in off duty vigilante activity could bring disrepute on department and violates Public Policy). Cf. *City of Cleveland v. Cleveland Assoc. of Firefighters* 2011-Ohio-4263 (not violative of Public Policy to reinstate paramedic accused of sexual contact with patients which arbitration panel found the acts not proven); *Rough Brothers, Inc. v. Bischel* 2011-Ohio-2005 (rejection of argument arbitration award against Public Policy because it eliminates competition); *Piqua* supra (reversed Trial Court's finding that reinstatement of police officer with checkered past history violated Public Policy when the employee did nothing wrong);
36. Based on this comprehensive review, it is apparent that there is legal precedent on both sides of this issue, both for and against reinstatement. Specifically, statutes and cases that allow/require reinstatement -- especially when the employee had been terminated without cause. Albeit, in some of these cases which required reinstatement the CBA contained a reinstatement provision. Yet, on the other side there is long standing case precedent that holds reinstatement is not the remedy for personal services contracts, especially if there is an adequate damages remedy as there is in the instant case;
37. Therefore, it is apparent that 'by reference to the laws and legal precedents and not from general considerations of supposed public interests', 'there is no clear, well-defined and dominant Public Policy of Ohio or the United States' regarding reinstatement;
38. Again, this Court's 'power is narrowly limited and does not sanction broad judicial power to set aside arbitration awards.' If this Court would vacate the Award in this instant case it would require this Court to step beyond the bounds of its function; ignore established law; undermine the strong Public Policy behind arbitration and dishonor freedom of contract. That is something this Court is not willing to do.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the foregoing, Plaintiff *Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award* (filed on or about May 20, 2011) is GRANTED in part and DENIED in part. Accordingly,

- 1) As to Plaintiff's basis that the Arbitrators exceeded their authority in Ordering reinstatement because it conflicts with the express and unambiguous terms of the Employment Agreement it is DENIED.
- 2) As to Plaintiff's basis that the Arbitrators exceeded their authority in Ordering reinstatement because it was beyond the scope of their authority in Section 19(c) it is GRANTED.
- 3) As to Plaintiff's basis that the Arbitrators Order of reinstatement violates Public Policy it is DENIED.

IT IS FURTHER ORDERED that Jack Falfas' Brief In Opposition To Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award And In Support Of Jack Falfas' Application To Confirm Arbitration Award (filed on or about June 10, 2011) - in accordance with and consistent with this Court's Decision /Order regarding Plaintiff Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award (filed on or about May 20, 2011) as contained herein - is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that the Arbitration Award dated February 28, 2011 is VACATED and/or MODIFIED in favor of Plaintiff Cedar Fair L. P. and against Defendant Jacob Falfas as to award of "reinstatement of his employment".

IT IS FURTHER ORDERED that Defendant Jacob Falfas shall be awarded his back pay and other benefits he enjoyed under the 2007 Amended and Restated Employment Agreement as if the employment relationship had not been severed (pursuant to Arbitration Award paragraph 2).

IT IS FURTHER ORDERED that Defendant Jacob Falfas shall be awarded any reasonable costs, expenses and attorney's fees incurred by him in (pursuant to Arbitration Award paragraph 3).

IT IS FURTHER ORDERED that Defendant Jacob Falfas shall be awarded the benefits set forth under Section 7 of the 2007 Amended and Restated Employment Agreement.

IT IS FURTHER ORDERED that each party shall bear their own 'costs' of this action.

IT IS SO ORDERED.



JUDGE

"The Erie County Clerk Of Courts is ORDERED to enter this Judgment Entry on its journals, and shall serve upon all parties not in default for failure to appear Notice of this Judgment Entry and its date of entry upon the journal. Within 3 days of journalizing this Judgment Entry, the Clerk shall serve the parties. Civ. R. 58(B) & 5(B)"

Susan C. Hastings/Joseph C. Weinstein
Dennis E. Murray, Jr./ Dennis E. Murray, Sr.
Richard D. Panza/William F. Kolis, Jr./ Joseph E. Crigliano/ Matthew W. Nakon

PRIVATE ARBITRATION PROCEEDINGS
James J. McMonagle, Panel Chair
David L. Beckman, Panel Member
J. Michael Monteleone, Panel Member

In the Matter of Arbitration Between:

CEDAR FAIR, L.P.)
Employer)
)
)
)
)
JACOB "JACK" FALFAS)
Employee)

FINDINGS AND AWARD

IN ACCORDANCE with Section 19 of the applicable Employment Agreement of 2007 which automatically renewed for a period of three years commencing December 1, 2009, the undersigned arbitrators make the following findings and award:

WHEREAS, the undersigned arbitrators have duly entered upon their duties and have heard the proofs and allegations of the parties, and

WHEREAS, Employer claims that Employee voluntarily resigned his position as Chief Operations Officer of the Employer, and

WHEREAS, Employee claims that he did not resign, nor was he terminated in accordance with the terms of the agreement, and further claims that the Employer breached the covenant of good faith and fair dealing implicit in the Employment Agreement,

NOW, THEREFORE, IN ACCORDANCE WITH THE APPLICABLE LAWS AND THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, THE ARBITRATION PANEL MAKES THE FOLLOWING FINDINGS AND AWARDS AS FOLLOWS:

1. We find that the facts establish that Mr. Falfas was terminated for reasons other than cause, and that the facts fail to establish resignation.

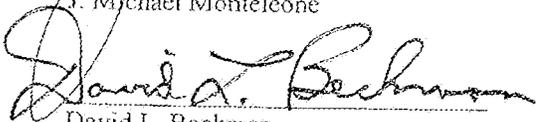
2. Pursuant to the authority vested in this Arbitration Panel, we find that equitable relief is needed to restore the parties to the positions they held prior to the breach of the Employment Agreement by the Employer. Accordingly, we direct the Employer to reinstate Jacob "Jack" Falfas to the position he held prior to his wrongful termination, and to pay back pay and other benefits he enjoyed under the Employment Agreement, as if the employment relationship had not been severed.

3. Additionally, we direct the Employer to reimburse Mr. Falfas "for reasonable costs, expenses, and attorney's fees" incurred by him in accordance with Section 19 (c) of the Employment Agreement.

FOR THE ARBITRATION PANEL:



J. Michael Monteleone



David L. Beckman

I dissent:



James J. McMonagle, Chair

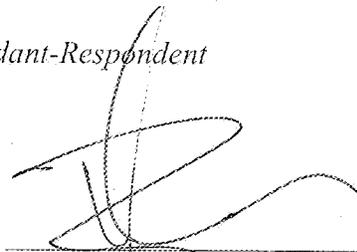
DATE: February 28, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 19, 2013, a copy of the foregoing was served by regular U.S. mail upon the following:

Richard D. Panza
William F. Kolis, Jr.
Joseph E. Cirigliano
Matthew W. Nakon
WIKENS, HERZER, PANZA, COOK & BATISTA CO.
35765 Chester Road
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*Attorneys for Defendant-Respondent
Jacob Falfas*

A handwritten signature in black ink, appearing to be 'J. Falfas', written over a horizontal line.

One of the Attorneys for Plaintiff-Appellant
Cedar Fair, L.P.