

ORIGINAL

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
	:	

**APPELLANT CEDAR FAIR, L.P.'S RESPONSE TO APPELLEE JACOB FALFAS'S
MOTION TO STRIKE APPELLANT'S MERIT BRIEF**

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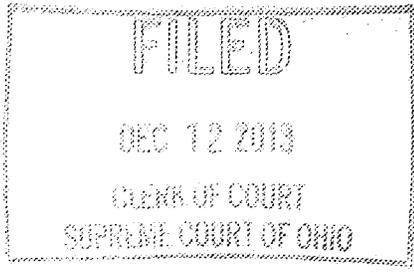


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INTRODUCTION

This case is about whether an arbitration panel, whose authority was expressly limited by contract to the bounds of Ohio law, could order Jacob Falfas reinstated as Chief Operating Officer of Cedar Fair, L.P. As Cedar Fair showed in its merit brief, Ohio law has long barred specific performance as a remedy in cases involving personal services contracts. This rule agrees with that of the vast majority of states, and it serves important public policy goals. Under this well-settled rule, the arbitrators erred in ordering that relief here.

Lacking any good response to Cedar Fair's arguments, Falfas instead seeks to suppress them, moving to strike Cedar Fair's brief in its entirety. In a revealing choice, Falfas elects to begin his motion with an *ad hominem* attack on Cedar Fair's counsel. Cedar Fair respectfully suggests that this case should be about *the law*, not the lawyers, and certainly not the contents of their *websites*. The reason for Falfas's attempt at misdirection is patently obvious—his substantive arguments are meritless. He claims that Cedar Fair committed “blatant” error by including in its brief a discussion of the proper remedy in this case if the Court agrees with Cedar Fair on the proposition of law presented. Falfas asserts that this discussion is outside the scope of the proposition that this Court accepted, but, of course, *every* case presents the question of the proper remedy. This Court does not write law review articles or treatises; it writes decisions providing relief in concrete disputes between adverse parties. That endeavor naturally, and necessarily, involves determinations on remedies. There is nothing inappropriate in a party arguing for its desired relief.

Separately, Falfas objects to several factual assertions in Cedar Fair's brief, including background information about the company and the fact that it has hired a new COO. But it has long been recognized that the courts may take judicial notice of adjudicative facts “not subject to reasonable dispute,” including facts found in public records such as the Securities and Exchange

Commission filings that Cedar Fair cited here. Other of Mr. Falfas's complaints involve challenges: (1) to matters that would be "generally known within the territorial jurisdiction" of the court, or (2) to assertions that logically follow from facts in the record. Importantly, in challenging these facts, Falfas does not claim that they are false, nor does he even try to show that they are "subject to reasonable dispute" or otherwise not a proper subject for judicial notice. He just claims that it was improper to put these facts before the Court. He is wrong. And even if he were not wrong, he overreaches. He does not ask this Court to strike those facts, but rather Cedar Fair's brief as a whole.

Falfas's motion finds no support in either law or fact, and his attacks on counsel skirt the edges of professionalism. The Court should deny Falfas's motion.

DISCUSSION

A. Falfas's Argument Directed at Opposing Counsel Is Meritless and Improper.

"Although civility is an amorphous concept in legal arenas, at a minimum it suggests proceeding without insult and ad hominem attacks when discussing those who hold an opposite view." *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶ 87 (O'Connor, J., concurring). *See also Springfield v. Palco Invest. Co., Inc.*, 2013-Ohio-2348, 992 N.E.2d 1194, ¶ 89 (2nd Dist.) ("We appreciate that this has been a lengthy and contentious dispute between the parties. However, this is no excuse for the ad hominem attacks and hyperbolic arguments that have come from counsel. The purpose of an appellate brief is to clearly and concisely present legal issues to the court and to fairly and professionally argue the law."). Falfas's brief here falls below that "minimum."

Falfas's motion, in which he complains that Cedar Fair has put matters outside the record before the Court, starts by attacking opposing counsel based on the contents of counsel's website. (*See Mot. at 3*). Not only is Falfas's attack unprofessional and gratuitous, it is

meritless. There is nothing wrong in an attorney expressing “an uncompromising, driving desire to win.” Indeed, so long as an attorney pursues that desire through appropriate and ethical channels, one would hope that most litigators would lay claim to a similar desire. Certainly, Falfas’s filing of a motion to strike Cedar Fair’s brief—a motion that Falfas’s counsel himself identifies as “anathema” (Mot. at 4)—strongly suggests that Falfas’s counsel has a driving desire to win. One difference, of course, is that Cedar Fair limits itself to arguing the law, not launching attacks on opposing counsel.

B. Cedar Fair’s Merit Brief Did Not Exceed the Scope of this Court’s Jurisdictional Grant.

The reason that Falfas is forced to such lengths in his efforts to poison the well is that his substantive attacks are meritless. For example, his claim that Cedar Fair’s brief should be stricken for including argumentation on the appropriate remedy in this matter is flat wrong.

Cedar Fair’s Memorandum in Support of Jurisdiction presented three propositions of law for this Court’s consideration. The first proposition, which this Court accepted for review, asserted that “[t]his Court’s holding in *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306 (1953), barring specific performance as a remedy for a personal services contract under Ohio law, is not limited to cases seeking class-wide injunctive relief based on collective bargaining agreements, but rather applies to employment agreements generally.” (Jur. Mem. at 10). This issue arose because an arbitration panel had ordered Cedar Fair to reinstate Jacob Falfas, the company’s former Chief Operating Officer, after finding that he was terminated without cause. Cedar Fair asked the courts below to vacate that ruling, arguing that it exceeded the arbitrators’ authority, which under the parties’ contract was limited to that of Ohio’s courts. The trial court agreed with Cedar Fair, but the Sixth District reversed, holding that under Ohio

law, specific performance was not just an acceptable remedy, but the “preferred” one. (Merit Brief Appendix, at A-6, ¶ 13).

The Sixth District erred in so holding. As Cedar Fair has discussed at length in its merit brief, specific performance of Mr. Falfas’s personal services agreement is not an available remedy under Ohio law (and thus not available to the arbitrators under the agreement). *Masetta* itself made this clear, holding 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 i[f] discharged.” *Id.* at 306, paragraph two of the syllabus. That rule is “well established” in Ohio law. *Id.* at 311 (“This court has recognized this principle of law whenever occasion arose.”) (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)). It serves important policy goals, freeing both parties and the courts from the forced 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. Accordingly, at least 40 states, as well as the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, also bar the specific performance of personal services contracts. (*See* Merit Brief, at 15-17, 39-48).

If the Court were to agree that Cedar Fair’s view on this proposition of law is correct, and that the Sixth District erred in holding otherwise, then the Court must determine how to remedy that error. Cedar Fair’s merit brief addressed that question as well, arguing that because the

arbitration panel exceeded its power under the contract, the court must “make an order vacating the award.” R.C. 2711.10(D). This result follows directly from the Court’s resolution of the proposition of law that it accepted.

Falfas, however, objects to any argument about remedy, claiming that it treads on forbidden ground. As he notes, when this Court accepted Cedar Fair’s first proposition of law, it declined two others, both related to Cedar Fair’s remedy. This, according to Falfas, was an “explicit rejection” of any argument “that the arbitrators[] exceeded their authority.” (*See* Mot. at 7).

In pressing this argument, Falfas misunderstands the Supreme Court’s role and the meaning of its order accepting jurisdiction. If, as Falfas argues, the Court cannot consider the appropriate *remedy*, then the Court’s decision on the proposition of law that it accepted for review would merely be an abstract discussion of the legal principles governing specific performance. But in that event, the Court’s decision would run astray of another “well-settled precedent”: that this Court “will not indulge in advisory opinions.” *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18.

Thankfully, the Court’s order accepting jurisdiction did not create the quandary that Falfas claims. That the Court declined Cedar Fair’s second and third propositions of law does not render the issue of remedy somehow irrelevant. Rather, it simply means that the Court did not see those propositions as presenting “question[s] of public or great general interest.” S.Ct.Prac.R. 5.02(A). Perhaps the Court determined that there was no split of authority on those questions that required the Court to step in. Perhaps, as Cedar Fair has pointed out, the Sixth District’s decision already implicitly accepts that, if specific performance is not proper, the arbitrators’ decision must be vacated. Perhaps the Court declined these propositions because

Ohio law already unambiguously establishes that a decision that exceeds the arbitrators' authority must be vacated, rendering this Court's review of those propositions unnecessary.

Regardless of the Court's reasons for declining those propositions, the question of the appropriate remedy based on the proposition the Court *did* accept is still very much at issue in this case. Indeed, remedy is *always* at issue in this Court's decisions. When the Court affirms a lower court's decision or dismisses an appeal without deciding its merits, that order itself resolves the matter. But in virtually all other cases, the Court must direct *some* further action, whether that action consists of reinstating a trial court's decision, ordering the court below to enter judgment, remanding with specific instructions, or something else. *See, e.g., Internatl. Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 104, 766 N.E.2d 139 (2002) (“[W]e conclude that the decision is not rationally derived from the terms of the agreement and that the arbitrator exceeded his powers. Accordingly . . . we reverse the judgment of the court of appeals and vacate the arbitration decision.”); *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 23 (“We reverse the judgment of the court of appeals and remand the cause to the appellate court with instructions to apply *Galatis* and enter judgment in favor of Lumbermens.”); *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762, 902 N.E.2d 984, ¶¶ 30-34 (vacating Board of Tax Appeals decision and remanding for hearing and reconsideration, directing Board to take into account certain factors); *Greenspan v. Third Fed. Savings & Loan Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, ¶¶ 24-25 (declining to remand for additional proceedings, despite failure of court of appeals to convene en banc, and instead reinstating trial court's order). This Court issues *judgments*, and judgments command people to do things—they provide *remedies*.

By discussing the proper remedy for the Sixth District's error, Cedar Fair is not impermissibly arguing propositions of law that this Court has rejected. Rather, Cedar Fair is addressing the necessary question of what should happen *once this Court resolves the proposition of law that it did accept*. This is not improper. Indeed, determining the appropriate remedy is the very essence of what this Court does. Thus, Falfas's first argument lacks merit.

C. Cedar Fair's Factual Assertions Are Adequately Supported.

Falfas's complaints about various factual statements in Cedar Fair's brief are likewise meritless. First, Falfas objects that Cedar Fair cited its 10-K filing. But Ohio law, like that in virtually every other jurisdiction, whether state or federal, has long allowed its courts to take judicial notice of facts "not subject to reasonable dispute" that are either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned." Evid.R. 201(B). As numerous courts have confirmed, such facts include statements of basic facts made in SEC filings. *See, e.g., Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001) ("[T]his Court may consider the full text of the SEC filings, prospectus, analysts' reports and statements 'integral to the complaint,' even if not attached"); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) ("a district court may take judicial notice of the contents of relevant public disclosure documents required to be filed with the SEC as facts 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'").

Here, Falfas apparently objects to the Court knowing that Cedar Fair owns and operates amusement parks, and that it has net revenues over one billion dollars. (*See Mot.* at 8). Both of these are facts that are "capable of accurate and ready determination" by resort to Cedar Fair's 10-K. So is the fact that Cedar Fair "has hired a new COO and made numerous changes to its

business since Falfas left,” another factual assertion to which Falfas objects. (*See* Mot. at 9). Again, this readily confirmable fact comes straight from Cedar Fair’s security filings. *See, e.g.*, Cedar Fair, 2012 Form 10-K, at 7, available at <http://www.sec.gov/Archives/edgar/data/811532/000081153213000018/cedarfair-10kx2012.htm> (accessed December 9, 2013) (identifying the new Chief Operating Officer and the date on which he assumed that responsibility).

Falfas further objects to the assertions that a COO’s effectiveness turns on “the confidence and trust of one’s peers and subordinates,” and depends “on maintaining good personal relationships” with subordinates and the Board. (*See* Mot. at 8). He likewise objects to Cedar Fair’s observations that, for example, a COO “would be heavily involved in all aspects of Cedar Fair’s business” (*id.* at 8), and that forcing Cedar Fair to re-appoint Falfas as COO “would significantly disrupt the company and cause it harm.” (*Id.* at 9). These are not “facts” per se, but are conclusions that follow directly and necessarily from a basic understanding of the role that a COO plays in a publicly-traded company, as should be evident from the fact that they appear in Cedar Fair’s legal argument and not its statement of facts. Moreover, while Falfas claims that the Court may not consider these facts and assertions, Falfas does not dispute their underlying truth. Without any such argument, he cannot say that simply by citing these facts and making these assertions, Cedar Fair has “blatant[ly]” violated the rules of this Court.

In any event, to what end does Falfas object to these assertions? He first claims that, without these assertions, Cedar Fair could not establish that it “no longer wants Mr. Falfas around.” (*Id.* at 10). If the record of this case shows anything, however, it is that Cedar Fair is determined to fight the order requiring it to reinstate Falfas.

Falfas’s only other real complaint about these assertions is that they allegedly “are being advanced . . . to convince this Court that Mr. Falfas’ reinstatement is not feasible when, in fact, at

the time of the arbitrators' ruling it was feasible." (*Id.* at 10-11). This complaint, however, misunderstands Cedar Fair's argument. Under Ohio law, reinstatement—that is, specific performance of Falfas's employment agreement—is simply prohibited as a remedy in a breach of contract action. This conclusion is not based on a multi-factor balancing test that looks to whether Cedar Fair has hired a new COO, or to the exact amount of hostility that exists between Falfas and Cedar Fair's executives. Rather, it is a bright-line rule, set out clearly in *Masetta*, and based on longstanding precedent and sound public policy. To be sure, the underlying facts of this case prove the wisdom of that rule, but the rule itself holds regardless of whether Mr. Falfas was, as he claims, "the acknowledged successor" to Cedar Fair's former CEO. (*Id.* at 10).

Falfas's complaints do not improve when he shifts to attacking the filing of a supplement that contained the contract. (*Id.* at 9-10). As he acknowledges, the filing of a supplement is permitted under the Court's rules to put portions of the record of special importance before the Court. (*See id.* at 9 (citing S.Ct.Prac.R. 16.09)). At its core, this case is a breach of contract action, and that same contract also sets forth the scope of the arbitrators' powers. Cedar Fair can hardly be faulted for determining that the contract itself may be a document of interest to the Court. Falfas is correct that Cedar Fair's counsel did not consult with Falfas's counsel on the contents of the supplement. Counsel perhaps should have done so (*see* S.Ct.Prac.R. 16.09(A) (encouraging parties to consult)), and apologizes for the oversight, but there is no prejudice to Falfas, as he is free to prepare his own supplement if he believes additional documents would be helpful to the Court.

Finally, even if Falfas's arguments had any merit, the problems that Falfas complains of would not be grounds to strike a party's brief in full, as he requests. Falfas has not cited any authority supporting that result. Indeed, the very case that Falfas cites for support (*see* Mot. at 7)

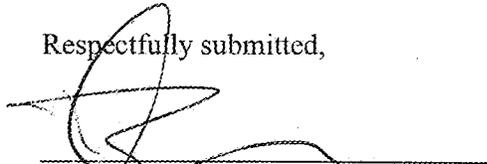
shows that, when faced with extraneous issues, the Court simply declines to consider them. See *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, 868 N.E.2d 968, ¶ 7. Even if the Court were to determine that portions of Cedar Fair's brief or argument are unacceptable for some reason (and, as explained above, there is no reason the Court should do so), the Court can always decline to consider that portion of the brief. There is no need, nor any reason, to strike the brief in its entirety as Falfas demands.

CONCLUSION

The Court has accepted jurisdiction over this case to determine whether Ohio law provides, as the Sixth District held, that specific performance is an available remedy (indeed, the "preferred remedy") for breach of a personal services contract. In the event the Court answers that question "no" (as it should), the Court must decide what remedy is appropriate on the facts here. Cedar Fair has appropriately put before the Court the law and facts relevant to answering that question. Accordingly, Cedar Fair respectfully urges the Court to deny Appellee Jacob Falfas's motion to strike Appellant's merit brief.

Dated: December 12, 2013

Respectfully submitted,



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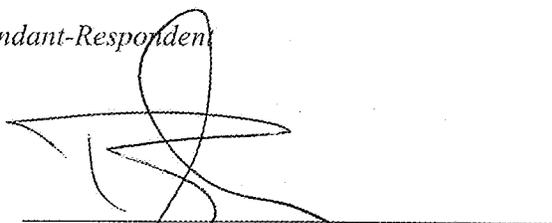
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 12, 2013, a copy of the foregoing was served by regular U.S. mail upon the following:

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