

IN THE SUPREME COURT OF OHIO

Open Container, Ltd.,

Appellant,

v.

C.B. Richard Ellis, Inc., et al.,

Appellees.

Case No. 2015-623

On Appeal from the Tenth District
Court of Appeals

Tenth District Case No. 14-AP-133

**MEMORANDUM OF APPELLEE C.B. RICHARD ELLIS, INC.
IN OPPOSITION TO JURISDICTION**

Robert J. Tucker (0082205)
John H. Burtch (0025815)
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616
rtucker@bakerlaw.com
jburtch@bakerlaw.com

Counsel for Appellee
C.B. Richard Ellis, Inc.

Andrew W. Owen (0059646)
Carpenter Lipps & Leeland, LLP
280 Plaza, Suite 1300
Columbus, OH 43215
Telephone: 614.365.4149
Facsimile: 614.364.9145
owen@carpenterlipps.com

Counsel for Appellee Greater Ohio Leasing
Corporation

Marcell Rose Anthony (0026115)
Law Offices of Marcell Rose Anthony, LLC
155 West Main Street, Suite 100
Columbus, OH 43215
Telephone: 614.220.9081
Facsimile: 614.228.5058
Marrose50@aol.com

Keith E. Golden (0011657)
Adam H. Karl (0082103)
Golden & Meizlish Co., LPA
923 East Broad Street
Columbus, OH 43205
Telephone: 614.258.1983
Facsimile: 614.253.5071
keg@golmeiz.com
ak@golmeiz.com

Counsel for Appellee Open Container, Ltd.

TABLE OF CONTENTS

This Case Does Not Involve Any Constitutional Question And Is Not Of Great Public Or General Interest.....	1
Factual And Procedural History.....	3
I. Factual Background	3
A. The Lease Agreement And Offer To Purchase Between Greater Ohio And Open Container.....	3
B. The Listing Agreement Between Open Container And CBRE.	4
II. Procedural History	6
A. Prior Trial Court Action – 2006 CVH 08 11353	6
B. Refiled Trial Court Action – 2011 CVH 05 6683.....	7
C. Proceedings In The Tenth District	8
Argument On Appellant’s Propositions Of Law.....	9
I. <u>Proposition of Law No. I</u> : If Andrew’s listing contract is an unambiguous contract, the language of what property was being sold was clearly Andrew’s, namely, the upscale French furnished restaurant with its long term lease of a warehouse. If ambiguous, the appellate court used the wrong parol evidence, and relied on depositions which modified and altered Andrew’s listing contract, instead of using document such as the 1997 Lease and the 2006 listing contract with Natoli, to explain Andrew’s listing contract so that the Appellee’s motions for summary judgment should have been denied and remanded for jury trial	9
II. <u>Proposition of Law No. II</u> : Damages is not measured whether Natoli’s property (which included Andrew’s restaurant) sold, but whether within reasonable certainty, Andrew’s downtown upscale French restaurant would have sold within a year if CBRE had ethically used its best efforts, including advertising and marketing, to so sell that property, or market value of \$1.5 million, or costs expended which exceeded \$1 million.	12
III. <u>Proposition of Law No. III</u> : Summary judgment should not have been granted on, or the appellate court specifically sue sponte rule on, the eight tort claims contained in the Complaint when Appellees did not move for summary judgment, did not brief, not rid Andrew, on those eight tort claims in the Refiled Complaint.	12
IV. <u>Proposition of Law No. IV</u> : The Appellant's Motion to Certify the Case for Appeal should have been granted, there being at least four other appellate districts that have held that ambiguous contracts require a trial and/or cannot be decided on a motion for summary judgment, and other conflicts.	14

THIS CASE DOES NOT INVOLVE ANY CONSTITUTIONAL QUESTION AND IS NOT OF GREAT PUBLIC OR GENERAL INTEREST

This case involves no constitutional question. While Appellant Open Container, Ltd. (“Open Container”) argues that it was denied procedural and substantive due process, and equal protection, no constitutional claims were asserted in the Complaint, or raised in the trial court. To the contrary, Open Container was given every opportunity to prove its claim against Appellees in both lower courts, but failed to do so.

Moreover, this case is not of great public or general interest. Despite the long and convoluted procedural history of this case, the facts are fairly simple. Open Container listed property for sale with Appellee CB Richard Ellis, Inc. (“CBRE”) after indicating that it had an agreement with the owner, Appellee Greater Ohio Leasing Corp. (“Greater Ohio”), titled an “Offer to Purchase,” which gave Open Container the right to purchase the property for a stated price assuming it was able to obtain financing. Based upon the Offer to Purchase, Open Container claimed it had a right to sell the Property. Unbeknownst to CBRE at the time, that Offer to Purchase had expired by its terms and was eventually voided by Greater Ohio. Greater Ohio informed CBRE that Open Container did not have the authority to sell the property, and instructed CBRE to stop listing it on behalf of Open Container. Once CBRE was informed by Greater Ohio that Open Container was not authorized to list the property for sale, CBRE was required under the Ohio real estate licensing laws to terminate its listing agreement with Open Container, and did so.

Even after admitting in the trial court that its listing agreement with CBRE included the real property, in an attempt to circumvent the clear pitfalls with its claims, Open Container changed course and argued for the first time in the court of appeals that the listing agreement included only its restaurant and long-term lease. Both lower courts reviewed the listing

agreement, found it unambiguous, and concluded that it included the real property – which Open Container did not have the authority to sell.

As such, this case involves a simple matter of contract interpretation that is unlikely to spark any great public or general interest. Despite Open Container’s assertion otherwise, this Court has recently, and on numerous occasions, spoken about the law governing contract interpretation. *See, e.g., Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410 (stating law on interpreting terms of an insurance policy); *Transtar Electric, Inc. v. A.E.M. Electric Services Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645 (discussing “cardinal principle in contract interpretation is to give effect to the intent of the parties”); *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285 (interpreting the term “arrangement” in a MFN clause); *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452. Open Container simply disagrees with the lower courts’ interpretations of the contract at issue in this case, and wants this Court to give it another bite at the apple. The law in this area is well settled, and not in need of any further interpretation or clarification.

Likewise, this case does not involve any important issues of real estate law that need be resolved. Neither Open Container, nor its expert, has ever disputed that the law in Ohio requires a real estate broker/agent to have the consent of the owner of the property to list it for sale. Neither does Open Container dispute that it was not the owner of the property, and that CBRE was instructed by the owner that Open Container did have authority to list it for sale. Thus, the CBRE agents were complying with their legal and ethical obligations as licensed real estate agents when they terminated the listing agreement with Open Container – the tenant of the property. The law is clear and the actions of CBRE’s agents were in compliance with that law.

No review of the law surrounding the legal or ethical obligations of real estate brokers/agents is necessary either. For these reasons, this Court should decline to accept this appeal.

FACTUAL AND PROCEDURAL HISTORY

I. Factual Background.

A. The Lease Agreement And Offer To Purchase Between Greater Ohio And Open Container.

Open Container entered into a Lease Agreement (the “Lease”) with Greater Ohio on November 1, 1997 for real property located at 93-95 Liberty Street, Columbus, Ohio 43215 (the “Property”). (Compl. at ¶ 8, Dkt. No. 4). Open Container operated a restaurant at the Property that opened in 2000, but closed in 2001 for economic reasons. (Trans.¹ at 47-50, Dkt. No. 121).

On January 5, 2004, Andrew Cohodes (“Mr. Cohodes”), President and sole owner of Open Container, and Charles Natoli (“Mr. Natoli”), President of Greater Ohio, executed an Offer to Purchase whereby Open Container was given 45 days to obtain financing to purchase the Property for \$445,000. (Compl. at ¶ 26; Offer to Purchase, Ex. B. to CBRE MSJ, Dkt. No. 32). The Offer to Purchase stated that should Open Container “not receive satisfactory commitment of such financing within 45 days after the conclusion of [Open Container’s] due diligence period, at either parties [sic] option, this agreement may be declared null and void.” (*Id.*) The 45 day period expired before Open Container was able to secure financing. (Deposition of Andrew Cohodes at 146, initially filed with the trial court on October 6, 2011 and re-filed on February 3, 2014, Dkt. Nos. 33, 97-108²). (It should be noted that despite Open Container’s repeated assertions otherwise, there was no option to purchase in the Lease. Rather, under the Lease,

¹ “Trans.” refers to the Transcript of the hearing on CBRE’s motion pursuant to Civ.R. 11 in the previous case, 2006-CVH 08 111353, which was re-filed in the trial court in the current case on February 13, 2014. Excerpts were attached as Ex. A to CBRE’s MSJ, Dkt. No 32.

² Relevant excerpts of Mr. Cohodes’ deposition were also attached as Ex. D to CBRE’s MSJ, Dkt. No. 32.

Open Container had only a right of first refusal, and that right was extinguished when the Lease was terminated by Greater Ohio. (Lease § 1.06, Compl. at Ex. A.)

On February 21, 2006, after Open Container continued to be in substantial default of the Lease for failure to pay rent, Greater Ohio terminated the Lease. (Feb. 21, 2006 letter from Charles Natoli to Andrew Cohodes, Ex. C to CBRE MSJ, Dkt. No. 32). At the same time, Greater Ohio informed Open Container that “[w]hile the [Offer to Purchase] has clearly expired by its terms, we are nevertheless giving you formal notice that the agreement is declared to be null and void.” (*Id.*).

B. The Listing Agreement Between Open Container And CBRE.

On February 3, 2006, Mr. Cohodes, as President of Open Container, executed an Exclusive Sales Listing Agreement (“Listing Agreement”) with CBRE to list the Property for sale for \$1.5 million for the period of February 3, 2006 through January 1, 2007. (OC Appx.³ Ex. F). Specifically, the Listing Agreement identified the Property as “A 10,000 SF restaurant/warehouse located at 93-95 Liberty St. Cols. OH 43215.” (*Id.*). At that time, CBRE requested that Mr. Cohodes provide evidence that he had a right to sell the Property. (Deposition of Todd Greiner at 16-18, originally filed with the trial court on October 6, 2011 and refiled on February 3, 2014, Dkt. Nos. 33, 109-119⁴). Mr. Cohodes indicated that Open Container had an Offer to Purchase in place with the owner of the Property that gave him the right to sell the Property. (Greiner Dep. at 16; Trans. at 80). Over the next several weeks, CBRE repeatedly requested to see a copy of the Offer to Purchase, but Mr. Cohodes never provided one. (Greiner Dep. at 18; Cohodes Dep. at 201).

³ “OC Appx.” refers to the Appendix filed by Appellant Open Container along with its merit brief in the Tenth District Court of Appeals.

⁴ Relevant excerpts of Mr. Greiner’s deposition were also attached as Ex. F to CBRE’s MSJ, Dkt. No. 32.

Notably, Mr. Cohodes admitted that Open Container was seeking to list the Property for sale by way of the Offer to Purchase, and not to list his long-term lease:

Q: Did you ever explore with CB Richard Ellis simply listing the property not for sale but for assignment of a lease?

A. Yes. You mean for the renting?

Q. Yes.

A. Yes, of course.

Q. Did you enter into a listing agreement with them for that purpose?

A. No. * * * But - - we entered the - - contract was for \$1.5 million for me to assign the purchasing agreement to the - - the - - you know, the prospect that they find.

* * *

Q. Did you ever enter into a listing agreement with CB Richard Ellis simply for the assignment of a long-term lease without any right to purchase the property?

A. No. No. That was after I had the - - I have the purchase agreement.

(Cohodes Dep. at 133-34). In fact, Open Container previously had the long-term lease listed with another broker and at one time contacted CBRE about listing that interest. (*Id.* at 99-100; Trans. at 59). CBRE declined to take that listing. (Deposition of Mike McNulty at 27, filed with trial court on January 13, 2012, Dkt. No. 52). In fact, had CBRE agreed to list Open Container's long-term lease instead of listing the Property for sale, CBRE would have required Open Container to execute its Exclusive *Subleasing* Listing Agreement instead of an Exclusive *Sales* Listing Agreement. (*See* Greiner Aff. at ¶ 4, Ex. A to CBRE Reply in Support of MSJ, Dkt. No. 53).

After listing the Property *for sale* on behalf of Open Container, CBRE received a telephone call from Greater Ohio's counsel informing CBRE that Open Container did not have the authority to sell the property and instructing them to take down the sign and cease marketing

the Property. (Greiner Dep. at 27-28). Because Open Container failed to provide any evidence it had the right to sell the Property, on April 24, 2006, CBRE sent Mr. Cohodes a letter indicating that it was terminating the Listing Agreement. (April 24, 2006 letter from Robert Click to Andrew Cohodes, Ex. G to CBRE MSJ, Dkt. No. 32; Trans. at 71-72, Ex. Y). Mr. Cohodes had not received a single written purchase offer during the time he was attempting to sell the Property. (Cohodes Dep. at 161). The Property was relisted on May 1, 2006 by CBRE on behalf of Greater Ohio – the owner of the Property. (OC Appx. Ex. G). The Property did not sell until 6 years later on June 21, 2013. (*See* CBRE Supp. Memo in Support of MSJ filed on June 25, 2013, Dkt. No. 71).

II. Procedural History.

A. Prior Trial Court Action – 2006 CVH 08 11353.

This matter originally began in August 2006 when Greater Ohio initiated an eviction action against Open Container in the Franklin County Municipal Court, but the case was moved to the Franklin County, Ohio Court of Common Pleas following a counterclaim by Open Container. (Franklin Cty C.P. No. 2006 CVH 08 11353). CBRE was eventually added as a party via a third party complaint by Open Container on May 4, 2009. The basis of the claims in the third party complaint was CBRE's termination of the Listing Agreement. The trial court dismissed Open Container's third party complaint against CBRE pursuant to Civ.R. 11 finding that CBRE was required to terminate the Open Container Listing Agreement under the Ohio real estate licensing laws once it was informed by the owner of the Property that Open Container did not have the right to sell it, and awarded CBRE its fees incurred in preparing the motion. (Trans. at 101-03; OC Appx. at Ex. B).

The Tenth District Court of Appeals reversed holding that because the trial court did not

find that Open Container’s counsel knew the third party complaint was frivolous *at the time it was filed*, it was improper to strike it under Civ.R. 11. (Emphasis added). *Greater Ohio Leasing Corp. v. Open Container, Ltd.*, 10th Dist. No. 10AP-629, 2011-Ohio-1258, at ¶ 19-20. In reversing, the Court of Appeals specifically stated that nothing in its decision constituted a finding on the merits of the claims against CBRE or on the finding of frivolous conduct. *Id.* at ¶ 20.

B. Refiled Trial Court Action – 2011 CVH 05 6683.

After remand, Open Container voluntarily dismissed its claims and re-filed the instant case on May 31, 2011 asserting claims against CBRE for (1) implied-in-fact contract, (2) promissory estoppel, (3) conspiracy, (4) breach of fiduciary duty, (5) breach of contract, and (6) tortious interference with contract. (Dkt. No. 4). Once again, the allegations against CBRE related to its termination of the Listing Agreement. (*Id.*).

CBRE filed its motion for summary judgment on October 6, 2011 arguing that for the same reasons Open Container’s claims were frivolous, CBRE was entitled to judgment as a matter of law under Civ.R. 56. (Dkt. No. 31). Open Container filed its opposition on December 23, 2011. (Dkt. No. 47). Nowhere in its opposition did Open Container argue that the Listing Agreement was ambiguous, or that it was *only* for the restaurant and long-term lease. (*Id.*). Rather, it argued that the Listing Agreement was for the “property, restaurant, and the long-term lease.” (*Id.* at 2-3). Thus, Open Container’s opposition was not based upon any alleged ambiguity in the Listing Agreement, but based upon arguments that CBRE was required to list its long-term lease separately even if it couldn’t list the Property for sale on behalf of Open Container. (*Id.* at 7-8).

On September 30, 2013, the trial court issued its decision and entry granting CBRE’s

motion for summary judgment. (Appx. A). Specifically, the trial court held that “CBRE had little choice but to end the agreement with Open Container, since Open Container had no right to sell the property and Greater Ohio did not give its consent to Open Container to sell the property.” (*Id.* at 4). For CBRE “to continue to list the property under the agreement with Open Container would have been to violate R.C. 4735.18(A)(20).” (*Id.*). Moreover, the trial court rejected the opinions of Open Container’s expert on the duties and promises related to the listing of the long-term lease: “that duty existed relative to the leasehold estate IF Mr. Cohodes wanted the leasehold estate marketed. He did not.” (*Id.* at 5). As such, the trial court granted summary judgment in favor of CBRE on all of the claims against CBRE in the Complaint.

C. Proceedings in the Tenth District.

On October 11, 2013, Open Container filed a notice of appeal of the trial court’s summary judgment decision. (Dkt. No. 85). The Tenth District dismissed the appeal, however, for lack of a final appealable order because Greater Ohio still had a counterclaim pending. (Dkt. No. 91). Upon remand to the trial court, Greater Ohio dismissed its counterclaim and Open Container re-filed its appeal. (Dkt. Nos. 94 & 122).

On appeal to the Tenth District, Open Container argued, for the first time, that the Listing Agreement was clearly and unambiguously not for the real estate, but was only for the restaurant and long-term lease. (OC Merit Br. at 36-37, 42). In the alternative, Open Container argued that if the Tenth District found the Listing Agreement ambiguous, it should remand the issue of what was being listed for a jury trial – despite the fact it never argued to the trial court that the Listing Agreement did not include the real property. (*Id.* at 44). Open Container appears to have abandoned its position that despite the fact that the Listing Agreement included the real property, CBRE should have still listed the long-term lease separately.

On January 13, 2015, the Tenth District affirmed the decision of the trial court. (Appx. B). Specifically, it found that the Listing Agreement including everything on the Property, including the real property. (*Id.* ¶ 14). As the Tenth District held: “It is clear that once CBRE became aware that Open Container was not the owner’s authorized agent, it would need to terminate the contract or face possible disciplinary sanctions. It was also clear from Andrew Cohodes’ deposition that CBRE was in a contract to sell the property and not merely the long-term lease.” (*Id.* ¶ 16). Open Container moved for reconsideration en banc and requested an order to certify a conflict to this Court, which were both denied on March 12, 2015. (Appx. C). In its decision, the Tenth District re-iterated that it agreed with the trial court that the Listing Agreement was clear and not ambiguous as to what was being sold. (*Id.* ¶ 6, 14). Open Container filed its notice of appeal to this Court on April 17, 2015.

ARGUMENT ON APPELLANT’S PROPOSITIONS OF LAW

- I. **Proposition of Law No. I: If Andrew’s listing contract is an unambiguous contract, the language of what property was being sold was clearly Andrew’s, namely, the upscale French furnished restaurant with its long term lease of a warehouse. If ambiguous, the appellate court used the wrong parol evidence, and relied on depositions which modified and altered Andrew’s listing contract, instead of using documents such as the 1997 Lease and the 2006 listing contract with Natoli, to explain Andrew’s listing contract so that the Appellee’s motions for summary judgment should have been denied and remanded for jury trial.**

The first half of Open Container’s first proposition of law argues that the Listing Agreement was unambiguous and was only for the long-term lease and restaurant. But the trial court could not have erred in failing to reach such a finding because Open Container did not make this argument to the trial court. In opposition to CBRE’s motion for summary judgment, Open Container stated that it “entered into a brokerage agreement with CBRE to sell the property, restaurant, and long-term lease.” (OC Opp. to CBRE MSJ at 2, Dkt. No. 47). Further, it stated that “Open Container also made CBRE aware of the partnership agreement it had with

Natoli/Greater Ohio about the joint venture to sell the building and restaurant and distribution of the proceeds of sale.” (Emphasis added). (*Id.* at 3). Continuing, Open Container stated that “CBRE * * * told Open Container that pursuant to the listing agreement executed on February 3, 2006, that they would sell the entire property.” (Emphasis added). (*Id.*). Indeed, as the Tenth District pointed out, these statements come directly from Mr. Cohodes’ affidavit submitted with Open Container’s opposition, and not any testimony of CBRE agents. (Appx. B at ¶ 14, *citing* Cohodes Aff.).

Thus, although CBRE disputes that the Listing Agreement included the long-term lease, there was and is no ambiguity that it included the real property; which CBRE could not list without the consent of the owner. It was only in the court of appeals that Open Container for the first time asserted that the Listing Agreement did not include the real property at all. Thus, the lower courts did not err in holding that the Listing Agreement was unambiguous and included everything on the property, including the real property. On this basis, the lower courts properly held that CBRE did not wrongfully terminate the Listing Agreement once it was instructed by the owner that Open Container did not have the authority to sell it.

Even assuming, however, that the lower courts should have found an ambiguity (as now argued by Open Container), it would not have created a disputed issue for trial. *See, e.g., Lewis v. Mathes*, 161 Ohio App.3d 1, 2005-Ohio-1975, at ¶ 25 (4th Dist.) (“if the extrinsic evidence demonstrates that no genuine issue of material fact exists, we conclude that summary judgment may still be appropriate”). The second half of Open Container’s first proposition of law is based on the fact that the lower courts relied upon the wrong parol evidence. Whenever interpreting an ambiguous contract, however, the first step is always to determine the intent of the parties. *See*

Graham v. Drydock Coal Co., 76 Ohio St.3d 311, 314, 1996-Ohio-393, 667 N.E.2d 949. Here, there was no dispute about the intent of the parties.

As discussed above, the lower courts needed to look no further than Mr. Cohodes' own admissions (not just at his deposition but in his affidavit submitted in opposition to CBRE's motion for summary judgment) to determine that he intended to include the real property in the listing, and not merely the lease. Thus, the lower courts did not err in finding that Open Container intended to list the real property warehouse based on the Offer to Purchase.

Moreover, whether Mr. Cohodes intended to also list Open Container's interest in the long-term lease is irrelevant. If any part of the Listing Agreement contained the real property that Open Container did not own, CBRE was required to terminate it under the Ohio real estate licensing laws. *See* R.C. 4735.18(A)(20) (requiring consent of owner to list property for sale).

Significantly, even if it has been engaged to do so, CBRE could not have continued to list Open Container's long-term lease because the Lease had been terminated by Greater Ohio. Thus, Open Container's claims would *still* fail even if the lower courts had determined that the Listing Agreement included the long-term lease. Regardless, since Open Container failed to raise in the court of appeals the argument that CBRE should have continued to list the long-term lease separately (which would have required CBRE to enter into an Exclusive Subleasing Listing Agreement with Open Container), Open Container has waived that issue.

As such, this case involves nothing more than the lower courts' interpretation of an unambiguous contract, and does not involve any issue requiring this Court's further review.

II. Proposition of Law No. II: Damages is not measured whether Natoli's property (which included Andrew's restaurant) sold, but whether within reasonable certainty, Andrew's downtown upscale French restaurant would have sold within a year if CBRE had ethically used its best efforts, including advertising and marketing, to so sell that property, or market value of \$1.5 million, or costs expended which exceeded \$1 million.

Open Container has never previously raised this theory of damages. As such, it cannot raise it now, and this argument is waived. *McGhan v. Vettel*, 122 Ohio St.3d 227, 2009-Ohio-2884, 909 N.E.2d 1279, at ¶ 26. Regardless, Open Container never submitted any evidence in the trial court to support this theory of damages, or any other theory of damages. It did not submit any expert testimony that had CBRE used its best efforts, the Property would have sold within a year, and for an amount that would have resulted in some payment to Open Container. As the Tenth District recognized on its de novo review, the evidence that was submitted to the trial court proved to the contrary. Despite the fact that CBRE had the Property listed with Open Container for two and a half months, and had numerous showings, Open Container received no offers on the Property. (Cohodes Dep. at 161). Indeed, even though the Property was re-listed with Greater Ohio shortly after, and CBRE did not use its best efforts to market the Property for sale on behalf of Greater Ohio, the Property did not sell until six years later in June 2013. Thus, the Tenth District properly held that Open Container has not suffered damages; a require element for each of its claims. (Appx. B at ¶ 27-28). There is no need for this Court to review this finding.

III. Proposition of Law No. III: Summary judgment should not have been granted on, or the appellate court specifically sue sponte rule on, the eight tort claims contained in the Complaint when Appellees did not move for summary judgment, did not brief, not rid Andrew, on those eight tort claims in the Refiled Complaint.

CBRE is at a loss for why counsel for Open Container continues to assert that CBRE did not move for summary judgment on Open Container's other tort claims. This is blatantly false, a

complete misrepresentation of the record, and counsel was corrected to this fact multiple times during the briefing in the court of appeals.

CBRE moved for summary judgment on all claims asserted against it in the re-filed Complaint. (Dkt. No. 31). All of Open Container's claims against CBRE hinged upon the alleged wrongful termination of the Listing Agreement. Because CBRE was required by law to terminate the Listing Agreement, all of the other "tort" claims failed as well. Therefore, aside from the breach of contract claim, CBRE demonstrated that Open Container likewise has no valid claim for implied-in-fact contract, promissory estoppel, conspiracy, breach of fiduciary duty, or tortious interference. (CBRE Memo in Support of MSJ at 11, Dkt. No. 32). CBRE further demonstrated in that motion that all of these claims fail because Open Container has not demonstrated it suffered any damages – a necessary element for each of Open Container's tort claim. (*Id.* at 11-13). Moreover, in its reply in support of summary judgment, CBRE further articulated additional reasons that it was entitled to summary judgment on each of the other tort claims. (CBRE RIS of MSJ at 4-7, Dkt. No. 53). The trial court then granted summary judgment to CBRE. (Appx. A).

Even if the trial court did not expressly address the arguments on these claims in its opinion, Open Container ignores the fact that the court of appeals can and did address these claims on appeal under a de novo review, and affirm the trial court's decision if any grounds raised by the moving party at the trial court are found to support the trial court's decision. (Appx. A at ¶ 25). The Tenth District recognized, as argued by CBRE in the trial court, that Open Container had not proven it suffered any damages. Open Container submits no proposition of law or argument that the appellate court improperly reviewed CBRE's other grounds for

granting it judgment on the other claims. It simply disagrees with the Tenth District's decision, and wants this Court to second guess it.

IV. Proposition of Law No. IV: The Appellant's Motion to Certify the Case for Appeal should have been granted, there being at least four other appellate districts that have held that ambiguous contracts require a trial and/or cannot be decided on a motion for summary judgment, and other conflicts.

The Tenth District's decision is not in conflict with the law of any other appellate district. First, as the Tenth District clarified in its decision denying Open Container's motion to certify a conflict, the Listing Agreement was not found to be ambiguous. (Appx. C at ¶ 6). Thus, its decision is not in conflict with the cases cited by Open Container regarding ambiguous contracts, and the Tenth District properly denied Open Container's motion.

Moreover, the statement that ambiguous contracts require a trial and cannot be decided on a motion for summary judgment is an overbroad statement of the law in Ohio. "Ordinarily, summary judgment is inappropriate when contractual language is ambiguous because a question of fact remains. But, if the extrinsic evidence demonstrates that no genuine issue of material fact exists, * * * summary judgment may still be appropriate." (Internal citation omitted). *Lewis*, 161 Ohio App.3d 1, 2005-Ohio-1975, at ¶ 25; *see also Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 175 Ohio App.3d 266, 2007-Ohio-5576, 886 N.E.2d 876 (1st Dist.) (holding that the policies' terms were ambiguous but finding trial court did not err in granting summary judgment). Thus, even if the lower courts found the Listing Agreement ambiguous on any material issue, which they did not, they still properly granted summary judgment based upon the clear extrinsic evidence, including the admissions of Open Container's owner and President, that the Listing Agreement included the real property. There was and is no conflict in case law that this Court needs to review or clarify.

CONCLUSION

For these reasons, this Court should decline to accept jurisdiction of this appeal.

Dated: May 15, 2015

Respectfully submitted,

/s/ Robert J. Tucker

Robert J. Tucker (0082205)
rtucker@bakerlaw.com
John H. Burtch (0025815)
jburtch@bakerlaw.com
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616

Counsel for Appellee
C.B. Richard Ellis, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Marcell Rose Anthony, Law Offices of Marcell Rose Anthony, LLC, 233 South High Street, Suite 300 Columbus, Ohio 43215; Adam H. Karl, Keith E. Golden, Golden & Meizlish Co., LPA, 923 East Broad Street, Columbus, OH 43205; and, Andrew Owen, Carpenter Lipps & Leland LLP, 280 Plaza, Suite 1300, 280 North high Street, Columbus, OH 43215, by electronic and ordinary mail delivery this 15th day of May, 2015.

/s/ Robert J. Tucker
Robert J. Tucker (0082205)