IN THE TENTH DISTRICT COURT OF APPEALS

STATE OF OHIO ex rel. OHIO ATTORNEY GENERAL MIKE DeWINE, et al.	:	Case No 18-AP-000342
Plaintiffs-Appellees	:	Appeal from the Franklin County Court of Common Pleas
vs.	:	Case No. 2018 CV 001864
PRECOURT SPORTS VENTURES, LLC, et al.	:	**Accelerated Calendar**
Defendants-Appellants	:	

MOTION OF PLAINTIFFS-APPELLEES STATE OF OHIO AND CITY OF COLUMBUS TO DISMISS APPEAL FOR LACK OF JURISDICTION

Plaintiffs-Appellees the State of Ohio ex rel. Ohio Attorney General Mike DeWine ("State") and the City of Columbus ("City") move this Court to dismiss the above-captioned appeal. The Order that the Defendants-Appellants are attempting to appeal is not a final appealable order and this Court therefore lacks jurisdiction to review it.

A memorandum in support of this motion is attached and incorporated by reference.

Respectfully submitted,

MICHAEL DeWINE
Ohio Attorney General

/s/ Bridget C. Coontz
BRIDGET C. COONTZ (0072919)
Assistant Chief
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872
Fax: 614-728-7592
Bridget.Coontz@OhioAttorneyGeneral.gov

RANDALL W. KNUTTI (0022388)
Principal Assistant Attorney General
Court of Claims Defense Section
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215
Tel: 614-466-7447
Fax: 866-771-4236
Randall.Knutti@OhioAttorneyGeneral.gov

SAMUEL C. PETERSON (0081432)
Deputy Solicitor, Appeals
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
Tel: 614-466-4320
Samuel.Peterson@OhioAttorneyGeneral.gov

Counsel for Plaintiff, Ohio Attorney General

ZACH KLEIN
Columbus City Attorney

/s/ Joshua T. Cox
Joshua T. Cox (0029860)
Chief Counsel
Charles P. Campisano (0095201)
Assistant City Attorney
Office of the Columbus City Attorney
77 N. Front Street, 4th Floor
Columbus, Ohio 43215
Phone: (614) 645-7385
Fax: (614) 645-6949
jtcox@columbus.gov
cpcampisano@columbus.gov

/s/ Jennifer A. Flint
Drew H. Campbell (0047197)
Jennifer A. Flint (0059587)
Matthew W. Warnock (0082368)
Bryan M. Smeenk (0082393)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2316
Facsimile: (614) 227-2390
dcampbell@bricker.com
jflint@bricker.com
mwarnock@bricker.com
bsmeenk@bricker.com

Co-Counsel for the City of Columbus

MEMORANDUM IN SUPPORT

I. INTRODUCTION

"'It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.'" *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, ¶13 (citation omitted). As this Court has underscored, "Article IV, Section 3(B)(2), Ohio Constitution limits an appellate court's jurisdiction to the review of final orders. 'A final order … is one disposing of the whole case or some separate and distinct branch thereof.' … An appellate court must dismiss an appeal taken from an order that is not final and appealable." *Peppers v. Scott*, 2016-Ohio-8265, ¶10 (10th Dist), quoting *Noble v. Colwell*, 44 Ohio St.3d 92, 94 (1989) (further citation omitted). Because the May 8, 2018 order ("Order") that Defendants are attempting to appeal is not a final appealable order, this court lacks jurisdiction to review it and this appeal must be dismissed.

This case is at the motion to dismiss/case management stage below: Defendants have opposed all discovery to date, no facts have

been tested or adjudicated, a decision on the motion to dismiss has been deferred, and Defendants have sought additional time for filing their reply in support of dismissal. Defendants deny that the statute at issue even applies to them, and no claims have yet been determined.

Thus, an appeal of the Order is entirely premature. This is especially true here, where there is no factual record for review, much less any adjudication of whether the statutory notice period (that is temporarily tolled) even applies to the Defendants. Defendants' foot-dragging has ensured that no distinct branch of this case could be resolved or that a final appealable order could issue.

II. BACKGROUND FACTS

This case involves efforts by the State and City to ensure that Defendants-Appellants Precourt Sports Ventures, LLC, Columbus Crew SC, LLC, Team Columbus Soccer, LLC and Major League Soccer, LLC ("Defendants") live up to their end of the bargain they struck when they asked for and accepted taxpayer money in connection with their operation of the Columbus Crew soccer team. At the heart of this case lies R.C. 9.67, which provides:

> "No owner of a professional sports team that uses a tax-supported facility for most of its home games and receives financial assistance from the state or a political subdivision thereof shall cease playing most of its home games at the facility and begin playing most of its home games elsewhere unless the owner either:
>
> (A) Enters into an agreement with the political subdivision permitting the team to play most of its home games elsewhere;
>
> (B) Gives the political subdivision in which the facility is located not less than six months' advance notice of the owner's intention to cease playing most of its home games at the facility and, during the six months after such notice, gives the political subdivision or any individual or group of individuals who reside in the area the opportunity to purchase the team."

The City and the State have outlined why R.C. 9.67 applies to the Defendants, and the purpose of this case is to ensure that they comply with it. *See generally*, First Amended Complaint ("Complaint"). This appeal is Defendants' latest attempt to avoid doing just that.

In 1994 Major League Soccer, LLC ("MLS") awarded the City of Columbus a major league soccer team, which was founded as the Columbus Crew. Compl., ¶ 20. At the time, Lamar Hunt and his family were the operators/investors of the team and remained in that role until selling the team to Precourt Sports Ventures, LLC ("PSV") in 2013. *Id.* at ¶¶ 20, 25. In 1998 Crew Soccer, LLC entered into a lease with the

State to lease land owned by the Ohio Expo Commission at a below-market rate for a period of 25-years. *Id.* at ¶ 22. Mapfre Stadium, the first soccer-specific stadium in the United States, was built on the land and in 2006 Ohio granted the land and its improvements tax exempt status. *Id.* at ¶ 26. As a result, all taxes, penalties and interest paid by Crew Soccer from 1998 to 2006 were remitted back to it by the State and Crew Soccer has not any paid property taxes on the Mapfre Stadium land or its improvements since 2005. *Id.*

Over the years, the State and/or the City have provided financial assistance to Defendants in various forms, including but not limited to direct taxpayer assistance, State-funded improvements to parking facilities, storm sewer improvements, and construction of a water line to serve Mapfre Stadium. *Id.* at ¶ 10. Because Defendants sought and accepted these taxpayer-funded benefits, R.C. 9.67 applies to them. *Id.* at ¶ 37.

Since its formation in 1998, the Crew has experienced significant success on the soccer pitch and has developed a loyal and enthusiastic fan base in the process. *Id.* at ¶ 24. Nonetheless, in October of 2017 Anthony Precourt, chief executive officer of PSV, suggested that he was

considering moving the Crew to Austin, Texas. In light of this announcement, in December 2017 Ohio Attorney General Mike DeWine sent a letter to Mr. Precourt reminding him of his obligations under R.C. 9.67 and encouraging him to keep the Crew in Columbus. *Id.* at ¶ 3. Neither Mr. Precourt nor any of the other Defendants responded to the Attorney General and instead continued to explore a move to Austin. *Id.* at ¶ 32. Consequently, on March 9, 2018, the State and the City filed a complaint for declaratory and injunctive relief in the Franklin County Court of Common Pleas. *See State ex rel. Ohio Attorney General Mike DeWine, et al. v. Precourt Sports Ventures, LLC, et al.*, Franklin County CP Case No. 18 CV 1864. The Complaint seeks a declaration that R.C. 9.67 applies to the Defendants and seeks injunctive relief that requires compliance with the notice and "opportunity to purchase" requirements set forth in the Statute. *Id.*, Prayer for Relief.

With Defendants resisting discovery, none of the parties in this case has moved for preliminary injunctive relief or for summary judgment, nor has the trial court granted such relief *sua sponte*. *See generally* Docket, 18 CV 1864. Instead, after the Complaint was filed

the parties filed various other motions as outlined below. *Id.* It is the trial court's Order on these preliminary procedural motions and its initiation of settlement discussions that Defendants erroneously attempt to appeal here.

The City's Motion for Equitable Tolling

On April 9, 2018 the City filed a motion to equitably toll running of the sixth-month notice period set forth in R.C. 9.67. *See* City of Columbus Motion to Toll, filed April 9, 2018. The Defendants responded in opposition and the City replied in support. *See* Defendants Memorandum in Opposition to Plaintiff City's Motion to Toll R.C. 9.67, filed May 1, 2018; *see also* Plaintiff City's Reply in Support of Its Motion to Toll, filed May 1, 2018.

Defendants' Motion to Stay Discovery;
The State's Opposition to a Discovery Stay, and Motion to Compel and Motion to Toll

Shortly after filing the Complaint, the State served the Defendants with discovery requests. *See* Notice of Service of Discovery, filed March 16, 2018. Rather than respond, the Defendants moved to stay discovery in its entirety until the trial court rules on the motion to

dismiss that the Defendants planned to file (and soon thereafter filed). Defendants' Motion to Stay Discovery filed April 16, 2018. In response, the State opposed the discovery stay, moved to compel the outstanding discovery, and moved to toll the R.C. 9.67 six month notice period. Plaintiffs' Memorandum in Opposition, filed April 23, 2018. The Defendants replied in support of their stay motion. *See* Defendants' Reply in Support of Motion to Stay Discovery, filed May 1, 2018.

Defendants' Motion to Dismiss

On April 19, 2018 Defendants moved to dismiss the Complaint. *See* Motion to Dismiss ("MTD"), filed April 19, 2018. The motion to dismiss argues that R.C. 9.67 does not apply to the Defendants by its terms and that the Statute is unconstitutional. *See generally* MTD. The State and the City timely filed their opposition. *See* Plaintiffs' Memorandum Contra Defendants' Motion to Dismiss, filed May 2, 2018. Shortly after being served with the Plaintiffs' memo in opposition, Defendants filed an unopposed motion for an additional two days to file their reply, which would have made it due May 11, 2018. Unopposed Motion of Defendants for Additional Time to File Their

Reply in Support of Motion to Dismiss, filed, May 4, 2018. But on May 11, 2018 Defendants sought an additional extension and have yet to file their reply brief. Motion of Defendants for Additional Time, filed May 11, 2018.

May 8, 2018 Order

The trial court addressed certain of those motions in its Order. The court: (1) paused the statutory notice period for the same 90 days during which Defendants are granted a partial stay on general discovery (thus granting in part the motions to toll and the Defendants' motion to stay discovery); (2) held in abeyance the State's motion to compel discovery; (3) deferred ruling on Defendants' motion to dismiss; (4) instructed the parties to propose to the Court their views on "what information and materials should be provided" to allow potential bona fide purchasers to make offers for the team; (5) directed the parties to submit suggested terms of a Non-Disclosure Agreement to protect such information; (6) indicated that it will rule on such issues if the parties do not agree; and (7) indicated that it will meet with the parties separately to "explore the

potential for resolution," directing that bona fide purchaser offers, if any, be submitted under seal. *See* Order at 12, 15-17.

Under the Order, Defendants thus have obtained a partial stay on discovery -- discovery designed in part to adduce facts "relevant to establishing whether R.C. 9.67 is applicable and to determining whether Defendants are in compliance with the statute's terms." Order at 13. Defendants continue to maintain here that "the statute … does not apply to Appellants by its terms," Defendants-Appellants' Motion for Expedited Consideration at 7, but the Order specifies that there has been no determination of that critical issue *at all*. Order at 5.

By the same token, Defendants also maintain here that they "are in full compliance with … the statute," Motion for Expedited Consideration at 7, but again the Order makes clear that the trial court at this motion to dismiss stage has not yet determined whether or when Defendants have given notice of an intent for the Crew not to play the majority of home games at Mapfre Stadium. Order at 7, n.8 ("The Court reiterates that the question of if and when notice has been given is reserved for ruling at a later time."). Similarly, Defendants continue to

assert that the statute is "unconstitutional" – and though Ohio and the City have rebutted those arguments in opposing the motion to dismiss, the Defendants have asked the trial court to postpone their reply until after the 90-day toll challenged here elapses. *See* Defendants' Motion for Additional Time to File their Reply Brief.

In sum, Defendants say that the statute containing the temporarily tolled notice clock does not apply to constrain their actions, and the trial court has not yet determined whether it does. The Order is not a ruling on the constitutionality of R.C. 9.67, a determination as to whether the statute applies to Defendants, or an adjudication as to whether or when statutory notice was properly given. *See* Order at 5. The questions that therefore remain to be decided by the trial court include:

- Whether the statute applies to Defendants because the Crew "uses a tax-supported facility for most of its home games and receives financial assistance from the state or a political subdivision thereof," R.C. 9.67;
- Whether the Crew has given "notice of the owner's intention to cease playing most of its home games at the facility," R.C. 9.67(B);
- When such notice was given (and Defendants have posited at least three possibilities, *see* Order at 6-7);

- Whether R.C. 9.67 is constitutional;
- What "information and materials [are] necessary for potential bon[a] fide purchasers to make a valuation and offer to purchase," *see* Order at 16; and
- Whether the State and the City are entitled to the relief they seek, including an injunction barring any Crew move absent statutory compliance.

The Defendants' Premature Appeal

Defendants seek to frame the Order's 90-day tolling of the statutory notice clock as a preliminary "injunction." Motion for Expedited Consideration of Appeal at 1, 7. It is not (and a mislabeling would not make the Order appealable in any event). Instead, the Order, after partially granting the discovery stay Defendants sought, sets out a process through which the trial court will explore whether this case can be settled. Order at 17 ("Within 21 days of this Order, the court will conduct separate meetings with Plaintiffs and Defendants to explore the potential for resolution of this matter through a mutually agreed settlement."). The process allows bona fide purchase offers to be submitted to the Court under seal, *id.*, and requires the parties to confer and agree or seek future court rulings on what information bona fide

purchasers would need to make a valuation and offer to purchase. *Id.* at 16. Information exchanged during this process will be subject to a non-disclosure agreement, *id.*, and the trial court has not yet ruled as to what those agreements will say. *Id.* Those are matters for future orders not yet drafted or issued, let alone before this Court on this appeal.

III. LAW AND ARGUMENT

"'An appellate court, when determining whether a judgment is final, must engage in a two-step analysis. First, it must determine if the order is final within the requirements of R.C. 2505.02. If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ. R. 54(B) language is required.'" *Walburn*, 2009-Ohio-1221 at ¶13 (citation omitted). Here, the analysis can end after step one, because the order Defendants seek to appeal is not a final order under either section they invoke. *See* Defendants' Notice of Appeal (citing R.C. 2505.02(B)(2) and (4)).

"To be final and appealable, a court order must satisfy the requirements of R.C. 2505.02." *Smith v. McBride,* 2010-Ohio-1222, ¶ 9 (10th Dist.). Here, those requirements have not been met.

A. The Order is not appealable under 2505.02(B)(2): factual adjudications for relief remain unresolved and appropriate relief in the future is not foreclosed.

Defendants' assertion that the Order is appealable under R.C. 2505.02(B)(2) finds no support in law. R.C. 2505.02(B)(2) provides that an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is "an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment[.]" R.C. 2505.02(B)(2).

First, by its plain language, R.C. 2505.02(B)(2) applies only to orders in special proceedings or summary applications after judgment. It does not apply to preliminary injunctions, which is how Defendants (incorrectly) characterize the May 8th Order. *See generally* Expedition Motion. Preliminary injunctions are provisional remedies, *see E. Galbraith Nursing Home, Inc. v. Ohio Dept. of Jobs and Fam. Servs.*, 2002-Ohio-3356, ¶ 10 (10th Dist.) (stating that a preliminary injunction is a provisional remedy pursuant to R.C. 2505.02(A)(3)), and provisional remedies are appealable, if at all, pursuant to R.C. 2505.02(B)(4), not

pursuant to (B)(2). Defendants' attempt to appeal the Order pursuant to R.C. 2505.02(B)(2) is thus defeated by their own argument.

Leaving aside Defendants' mischaracterization, the Order does not otherwise satisfy R.C. 2505.02(B)(2). As this Court recited in *Tinker v. Oldaker*, 2004-Ohio-3316 (10th Dist.), if an action is not fully adjudicated, an order "does not 'affect' a substantial right" under R.C. 2505.02(B)(2) where the would-be appellant "still has appropriate relief available to it in the future, in the form of another appeal." *Id.* at ¶ 14. Thus, where damages were sought but only the question of liability determined, "the trial court's decision … [was] not a final appealable order and we lack jurisdiction." *Id.*

The Supreme Court cited *Tinker* approvingly in *Walburn* and again found that "a declaration that an insured is entitled to coverage but [that] does not address damages does not affect a substantial right…." 2009-Ohio-1221 at ¶26. The Court stated that "as a general rule, even where the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order

even if Rule 54(B) language was employed." *Id.*, citing, *Noble v. Colwell*, 44 Ohio St.3d 92, 96 (1989).

In short, a final order "is one disposing of the whole case or some separate and distinct branch thereof." *Eng.'g Excellence Inc. v. Northland Assocs., LLC*, 2010-Ohio-6535, ¶ 10 (10th Dist.), quoting *Lantsberry v. Tilley Lamp Co.*, 27 Ohio St.2d 303, 306 (1971). An order that "affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Kenneth's Hair Salons & Day Spas, Inc. v. Braun*, 2018-Ohio-186, ¶ 13 (10th Dist.), quoting, *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993), *modified on other grounds, Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994). An order does not "affect a substantial right" unless the appellant is foreclosed from challenging it later. *See Leonard v. Georgesville Ctr., LLC*, 2013-Ohio-5713, ¶11 (10th Dist.).

Thus, for example, this Court has rejected a property owner's attempt to appeal an order approving a receiver's listing price of the owner's property. *See Leonard*, 2013-Ohio-5713. The Court

recognized that, though the owner had a substantial right to receive fair value for the property, the order setting the listing price did not "affect" that substantial right because the appellants could challenge the fairness of any future sale price. *Id.* at ¶ 10. *Leonard* demonstrates that a substantial right can be implicated by an order, but not *affected* such that the order becomes appealable. Here, the Order does not affect a substantial right, and R.C. 2505.02(B)(2) does not apply.

In *Peppers*, this Court further observed that "'piecemeal adjudication does not become appealable merely because [it is] cast in the form of a [special proceeding under R.C. 2505.02(B)(2)]'." 2016-Ohio-8265 at ¶15 (multiple citations omitted). The Court cited approvingly to *Knox Co. Comm'rs v. Knox Co. Eng'r*, 2010-Ohio-4099 (5th Dist.), where the trial court had gone so far as to grant declaratory judgment but had not ruled on the requested enforcement mechanism: "In *Knox* … [t]he court reasoned that without ruling on the request for injunctive relief, there was no judgment that could be enforced to require payment." *Id.* Similarly in *Peppers*, "[l]acking a ruling on the request for injunctive relief, there was no judgment that could be enforced ….

For this reason," the Court said, "we find [despite the trial court's having made a Rule 54(B) certification] that … the decision did not affect a substantial right, and thus, the decision was not a final, appealable order." *Id.* at ¶16.

Here, too, there is as yet no judgment that the State or the City can enforce against Defendants, as there has not been a determination of liability that R.C. 9.67 applies and that Defendants have breached it. To the contrary, the Order explicitly states that "[t]he Court saves the ultimate resolution of the applicability…and the constitutionality questions for a later time[,]" Order at 12, and cautions that it should not be "inferred in any way from the Court's rulings that the statute necessarily applies to Defendants or that any statutory notice—if indeed given—was done properly." *Id.* at 5. The Order specifically recites, too, that a "[d]etermination of the date upon which … Defendants [may have] provided the requisite statutory 'notice,' is saved for another time." *Id.* at 12.

Defendants do not appear to argue that they will be precluded from appeal at an appropriate juncture after such adjudications are made, or

that they somehow are precluded from asking the trial court to enjoin operation of the statute now (if that is their concern). Simply put, the trial court has yet to decide pivotal issues in this case, and Defendants are asking that this Court do so instead. And they are doing so after having not filed a reply supporting their motion to dismiss, and opposing the discovery that will facilitate determinations of the statute's application and breach. At their behest, "factual adjudication of relief is unresolved," *cf. Walburn*, 2009-Ohio-1221 at ¶31. No branch of this case is disposed of; the entire tree remains standing.

The Order also does not foreclose the Defendants' future ability to obtain meaningful relief in this case. As then-Judge French wrote for this Court in *Epic Props.v. OSU LaBamba, Inc*., 2007-Ohio-5021 (10th Dist.), where an order below has not "determined the action or any discreet claim therein," leaving "a factual determination of relief … unresolved," even a finding of liability generally "is not a final appealable order." *Id.* at ¶¶ 16-17 (also noting at ¶ 14 that the order is not final because would-be appellant "would still have appropriate relief available in the form of another appeal," and emphasizing at ¶ 10 that

"we must sua sponte dismiss an appeal that is not from a final appealable order"). So too here, nothing has been determined and the Order is not appealable. Once dispositive issues *are* decided nothing in the Order prevents the Defendants from returning to this court for a proper appeal.

B. The Order is not appealable pursuant to R.C. 2505.02(B)(4) because Defendants would have a meaningful or effective remedy by appeal following a final judgment as to all issues and claims.

The Order similarly fails as a final appealable order under R.C. 2505.02(B)(4). An order is appealable under R.C. 2505.02(B)(4) if it satisfies each element of a three part test. *Bennett v. Martin*, 186 Ohio App. 3d 412, 2009-Ohio-6195, ¶31 (10th Dist.). *First*, it must either grant or deny a provisional remedy. *Id. Second*, the order must both determine the action with respect to the provisional remedy and prevent judgment in favor of the appealing party with respect to the provisional remedy. *Id. Third*, the reviewing court must decide that the party appealing the order would not be afforded a meaningful or effective remedy by an appeal following final judgment. *Id.*, citing, *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶16.

1. Defendants mischaracterize the Order as a preliminary "injunction".

Defendants go to some lengths in their Motion for Expedited Consideration to mischaracterize the Order as a preliminary "injunction." It is not. Neither the State nor the City sought a preliminary injunction, and the Court did not issue one on its own accord. But the distinction is of little consequence because R.C. 2505.02(B)(4) does not afford appellate jurisdiction over preliminary injunction orders that fall outside its scope. *See, e.g., City of Columbus v. Show & Tell, Inc.*, 1979 Ohio App. Lexis 12548, 1979 WL 209427 (10th Dist.) (dismissing preliminary injunction order for lack of jurisdiction, and noting that even such orders that alter the status quo are not appealable; citing *Jones, Treas., et al., v. First Nat. Bank of Bellaire*, 123 Ohio St. 642 (1931) for proposition that temporary injunction in suit seeking permanent injunction "is neither a judgment nor a final order which may be reviewed …."); *Empower Aviation, LLC v. Butler Co. Bd. Of Comm'rs*, 185 Ohio App.3d 477, 2009-Ohio-6331, ¶21 (1st Dist.) (Ohio "courts have held that an immediate appeal from a provisional

remedy is not appropriate where the lack of an immediate appeal does not bar a later judgment involving an appropriate remedy").

To begin, Defendants cannot credibly claim to be subject to an "injunction" tolling part of a statute that they vigorously dispute applies to them, where (as here) the trial court expressly reserved ruling on that very issue. *See* Expedition Motion at 7 ("the statute…does not apply to Appellants by its terms"); Order at 5. Further, the Order comes nowhere close to fitting the mold of an injunction. Civ. R. 65(D) provides in relevant portion that "[e]very order granting an injunction and every restraining order shall set forth the reasons for issuance, shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Civ. R. 65(D). "The functions of an injunction are ordinarily to restrain motion and enforce inaction…" *State ex rel. Gadell-Newton v. Husted*, 2018-Ohio-1854, ¶ 10, citing, *State ex rel. Smith v. Industrial Comm.*, 139 Ohio St. 303 (1942), citing, 25 Ohio Jur., 979, Sec. 6.

"A prohibitory injunction preserves the status quo by enjoining a defendant from performing the challenged acts in the future[]", whereas

"[a] mandatory injunction… compels the defendant to restore a party's rights through affirmative action." *State ex rel. GMC v. Indus. Comm'n*, 117 Ohio St.3d 480, 2008-Ohio-1593 ¶ 12, (further citations omitted).

The May 8, 2018 Order pausing the statutory notice period does not—of its own operation—restrain or enforce anything against Defendants. A preliminary injunction that presupposes R.C. 9.67's applicability would be needed to accomplish that. And if the position of Defendants is that the statute obviously and legally applies to them in light of the facts as they know them to be, and that they must adhere to its terms upon penalty of court, then they must also concede those facts to the trial court and here before complaining that an injunction has been issued. Instead, they persist even now in asserting that "the statute … does not apply to Appellants by its terms. … [and is] unconstitutional." Motion for Expedited Consideration of Appeal at 7. They have not prevailed on those arguments (and indeed have worked to delay their resolution) and the trial court has not adjudicated those matters.

The Order similarly does not compel the Defendants to affirmatively restore rights to the State or the City. *State ex rel. GMC*,

2008-Ohio-1593. To the contrary, the Order temporarily *relieves* the Defendants of their obligation to produce various discovery, *see* Order at 15, and requires both parties to confer and attempt to agree on materials and information to be provided under a non-disclosure agreement. *Id.* at 16. The Order contemplates that future orders may issue on these subjects, further signaling that appeal is not ripe. *Id.* ("If the parties are unable to reach agreement, the Court will decide" what information is to be adduced; "If the parties cannot agree upon the terms" of a Non-Disclosure Agreement, they shall submit options to the trial court "for its consideration").

Case management orders and court-authorized attempts to determine whether there may be common ground for settlement do not generally constitute preliminary injunctions, let alone final appealable orders. Defendants' appeal is nothing, if not premature. *See, e.g., State v. Turner*, 2015-Ohio-2203, ¶5 (11th Dist.) (R.C. 2505.02 applies equally to civil and criminal cases; on its face, the trial court's order "merely rules on appellant's pending motions and contains a case

management order. [It] is thus interlocutory in nature and not a final appealable order.").

In reality, any legal preconditions to a Crew move arise under R.C. 9.67, not under the Order. Said differently, it is the statute—not the Order—that may affect the Defendants' potential move to Austin. And though the Defendants assert that the Statute does not apply to them and is unconstitutional, they are going out of their way to avoid any decisions from the trial court on both fronts. Simply resisting discovery and seeking a three month extension to file a reply brief does not evidence a desire on the part of the Defendants to obtain a decision on those issues any time soon.

Because the Order does not restrain the Defendants and does not compel them to do anything, it is not an injunction. *Inrex Home Care, LLC v. Ohio Dept. of Dev. Disabilities*, 2016-Ohio-7986 (10th Dist.), upon which the Defendants rely, does not alter that conclusion. *Cf.* Expedition Motion at 8. Procedurally, *Inrex* is markedly different from this attempt to appeal. There, the appellants sought an injunction from this Court of an administrative order pending appeal after the trial court

declined to extend a statutory stay, *id.* at ¶ 5; here, the Defendants make no such attempt (nor did they seek in the trial court to enjoin application of the statute). In deciding the *Inrex* motion for injunction, this Court necessarily reviewed the factors necessary for injunctive relief. Defendants here seize upon and wrest out of context the phrase "irreparable harm" in seeking to justify this appeal where neither this Court nor the court below has been called upon to enjoin anything. *See* Expedition Motion at 8. And in *Inrex*, this Court *denied* the request for an injunction after assessing the claimed harm in the context of all the injunction factors. *Id.* at ¶ 14.

Indeed, there is nothing in the record here to establish that Defendants have suffered, or risk suffering, any such harm, much less the harm asserted in *Inrex*. The Defendants have not only actively resisted discovery, but when given the chance to do so, they failed to present any evidence as to how the Order would create a risk of business loss. Specifically, Defendants opposed the City's motion to toll the statutory notice period. *See* Defendants' Memorandum in Opposition to Plaintiff City's Motion to Toll, filed, April 24, 2018. When they did,

they attached affidavits and other purported evidence to their brief in opposition regarding efforts to provide potential purchasers of the Crew with non-disclosure agreements. *See id.*, Exhibits. None of Defendants' evidence established—or even addressed—the purported risk of harm to their business they now assert that tolling presents. These vague allegations are entirely unsupported by the record.

2. Defendants will have an opportunity to appeal for meaningful and effective relief once the trial court rules on the merits of the law and the facts.

However the Order is characterized, the trial court has not granted *either* side relief as to the merits of the case, and the Order does not prevent future appeals once such relief is either granted or denied.

This Court reached a similar conclusion in *Galbraith*, where a review of the appealed preliminary injunction showed that the trial court did not make a final determination on the merits of the action. *Galbraith*, 2002-Ohio-3356 at ¶ 12. Instead, that trial court issued "interim orders" and evidenced a desire to retain jurisdiction over the subject matter while the preliminary injunction was in effect. *Id.* at ¶ 13. Given these facts, this Court noted that the "record shows that appellants would have a

meaningful or effective remedy by appeal following a final judgment as to all proceedings, issues, claims, and parties in [the] action…and that the court did not consider its order a final and appealable order and intended to retain jurisdiction over the matter." *Id.* at ¶ 16.

As in *Galbraith,* here the trial court expressly stated that it was not making a final determination on *any* of the merits of this case. Further, it rejected the notion that the State or the City had moved for a preliminary injunction, or that that the court was making any merits-based decisions. *See* Order at 11. Here, as there, "the record shows that issues still remain before the trial court that have not been resolved." *See Galbraith* at ¶ 15. As in *Galbraith*, the Defendants here are attempting to appeal that which is not final or appealable. *See also, e.g., Terpenning v. Comfortrol, Inc.*, 2009-Ohio-6418 (10th Dist.) (Dismissing appeal of a preliminary injunction where the order neither determined the action nor deprived the defendant of a meaningful and effective remedy on appeal following final judgment.).

As explained above, the issues in this case remain to be resolved by the trial court. All sides will have the opportunity for meaningful and

effective relief once determinations are made regarding the applicability and effect of R.C. 9.67 to the facts to be made of record and once the trial court rules on whether Defendants must comply with the Statute before the Crew stops playing most of its home games at Mapfre stadium.

Defendants' implicit suggestion that R.C. 9.67 applies to control their conduct even while they contest that baseline proposition (and before the trial court has adjudicated the issue) does not vest this Court with jurisdiction over the Order. And the trial court's announced intention to issue future rulings does not alter that conclusion. That the trial court will *later* decide what sorts of information will be relevant to assessing the statutory "opportunity to purchase" issue and establishing non-disclosure/confidentiality protections for exchanges of such information does not make this a final appealable order.

This is especially true here, where Defendants have voluntarily and repeatedly assured the trial court of their intention to willingly provide "access to the team and league's financial information" so long as "potential investors signed a nondisclosure agreement," *see* Exhibit D to

Defendants' Memorandum Opposing City's Motion to Toll (quoting league attorney Kessler). The trial court simply took Defendants at their word. They cannot attempt to appeal interim, interlocutory orders—whether issued now or later—issued in reliance on their own representations. *See also, e.g.,* Defendants' Memorandum Opposing City's Motion to Toll at 8 (asserting that Defendants already "are providing opportunities for interested parties to seek to purchase … operating rights to Crew SC"); *id.* at Exhibit E (Defendants submit email from league attorney Kessler reiterating that "we are prepared to provide pertinent [financial] information to bona fide offerors, subject to an appropriate Non-Disclosure Agreement"). There is no final appealable order giving this Court immediate jurisdiction and this appeal must be dismissed.

IV. CONCLUSION

Ohio's Supreme Court emphasizes that "an appellant must affirmatively establish that an immediate appeal is necessary in order to afford a meaningful and effective remedy. … This burden falls on the party who knocks on the courthouse doors asking for interlocutory

relief." *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, ¶8. Defendants cannot begin to meet that burden with regard to the May 8 Order. For all the reasons outlined above, the Court lacks jurisdiction over this appeal and it should be dismissed.

Respectfully submitted,

MICHAEL DeWINE
Ohio Attorney General

/s/ Bridget C. Coontz
BRIDGET C. COONTZ (0072919)
Assistant Chief
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872
Fax: 614-728-7592
Bridget.Coontz@OhioAttorneyGeneral.gov

RANDALL W. KNUTTI (0022388)
Principal Assistant Attorney General
Court of Claims Defense Section
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215
Tel: 614-466-7447
Fax: 866-771-4236
Randall.Knutti@OhioAttorneyGeneral.gov

ZACH KLEIN
Columbus City Attorney

/s/ Joshua T. Cox
JOSHUA T. COX (0029860)
Chief Counsel
CHARLES P. CAMPISANO (0095201)
Assistant City Attorney
Office of the Columbus City Attorney
77 N. Front Street, 4th Floor
Columbus, Ohio 43215
Phone: (614) 645-7385
Fax: (614) 645-6949
jtcox@columbus.gov
cpcampisano@columbus.gov

/s/ Jennifer A. Flint
DREW H. CAMPBELL (0047197)
JENNIFER A. FLINT (0059587)
MATTHEW W. WARNOCK (0082368)
BRYAN M. SMEENK (0082393)

SAMUEL C. PETERSON
(0081432)
Deputy Solicitor, Appeals
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
Tel: 614-466-4320
Samuel.Peterson@OhioAttorneyGeneral.gov

Counsel for Plaintiff, Ohio Attorney General

Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2316
Facsimile: (614) 227-2390
dcampbell@bricker.com
jflint@bricker.com
mwarnock@bricker.com
bsmeenk@bricker.com

Co-Counsel for the City of Columbus

CERTIFICATE OF SERVICE

I certify that on May 22, 2018 the foregoing was filed electronically and sent via U.S. mail and via email to the following:

Dan Cvetanovich
James G. Ryan
Jolene S. Griffith
BAILEY CAVALIERI, LLC
One Columbus
10 W. Broad St., Suite 2100
Columbus, Ohio 43215
dcvetanovich@baileycav.com
jryan@baileycav.com
jgriffith@baileycav.com

Counsel for Defendants Precourt Sports Ventures, LLC, Crew Soccer Stadium, LLC and Team Columbus Soccer, LLC

Marc J. Kessler
Jeffrey A. Yeager
HAHN LOESER & PARKS LLP
65 E. State St., Suite 1400
Columbuys, Ohio 43215
mkessler@hahnlaw.com
jyeager@hahnlaw.com

Bradley I. Ruskin
Mark D. Harris
Jennifer E. Tarr
PROSCKAUER ROSE, LLP
11 Times Square
New York, New York 10036
bruskin@proskauer.com
mharris@proskauer.com
jtarr@proskauer.com
Counsel for Defendant Major League Soccer, LLC

Counsel entering an appearance in this matter will also receive service via the Franklin County Clerk of Courts electronic filing system.

/s/ Bridget C. Coontz
Bridget C. Coontz (0072919)
Assistant Chief, Constitutional Offices Section
Counsel for the Ohio Attorney General's Office