

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

ENQUIP TECHNOLOGIES GROUP, INC. :
et al.

Plaintiffs-Appellees : C.A. CASE NOS. 2009 CA 42
2009 CA 47

v. : T.C. NO. 2008 CV 1276

TYCON TECHNOGLASS, S.R.L., et al. : (Civil appeal from
Common Pleas Court)

Defendants-Appellants :

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OPINION

Rendered on the 8th day of January, 2010.

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FROELICH, J.

{¶ 1} This is a consolidated appeal from three orders of the Greene County Court of

Common Pleas.

{¶ 2} In Greene App. No. 2009 CA 42, Pfaudler, Inc. (“Pfaudler”), Tycon Technoglass S.r.l. (“TyTg”), and Robbins & Myers, Inc. (“R&M”) appeal from two April 23, 2009, orders. The first order granted the motion of Counterclaim Defendant QA Technologies Corporation (“QA”) to dismiss for lack of personal jurisdiction, and the second order granted the motion of Plaintiff EnQuip Technologies Group, Inc. (“EnQuip”), “to Strike the Counterclaims Against the New Party Counterclaim Defendants and Denying the Motion for Separate Trials.”

{¶ 3} Greene App. No. 2009 CA 47 involves an appeal from the trial court’s June 24, 2009, order, which held that Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (“the Privacy Directive”) did not preclude or otherwise limit discovery in this litigation.

{¶ 4} For the following reasons, the first April 23, 2009, order granting QA’s motion to dismiss for lack of personal jurisdiction and the trial court’s June 24, 2009, order denying the protective order will be affirmed. The second April 23, 2009, order granting EnQuip’s motion to strike will be reversed.

I

{¶ 5} As succinctly stated by the trial court, “[t]his case arises out of the breakdown in the business relationship between an Italian manufacturer and its North American sales representative, who sold the manufacturer’s products to customers in the chemical and pharmaceutical businesses.”

{¶ 6} The original plaintiffs were Robert W. and Jeffrey Naidel, who are father and

son, and their corporation, EnQuip. The Naidels and EnQuip sued TyTg, Tycon Technologies S.p.A., R&M, Pfaudler, and R&M Italia for breach of their sales commission contract. The Naidels later dropped their claims as plaintiffs. The defendants filed counterclaims against EnQuip and the Naidels, asserting that they engaged in tortious conduct due to the Naidels' creating a new company (QA) and becoming a sales representative for a German competitor, Thaletec. After EnQuip filed its Third Amended Complaint, the Defendants added QA, Thaletec, and Karl Bergmann, head of Thaletec and a former executive of Pfaudler in Europe, as additional counterclaim defendants.

{¶ 7} The general facts underlying these claims are as follows.

{¶ 8} According to the Third Amended Complaint, Robert W. and Jeffrey L. Naidel, who are father and son, began operating a commissioned sales representative's business for Tycon S.p.A., an Italian glass-lined equipment manufacturer, in 1988. In 1996, the Naidels formed EnQuip, a Florida corporation, to operate their business as commissioned sales representatives for Tycon. The Naidels have been engaged in the day-to-day operations of EnQuip's business since its formation.

{¶ 9} In 1994, R&M, a company with headquarters in Greene County, Ohio, acquired Pfaudler, a Delaware company and a direct competitor of Tycon. In 1997, R&M formed Tycon Technoglass, S.p.A. after R&M acquired Tycon S.p.A. and another Italian glass-lined equipment manufacturer. Tycon Technoglass, S.p.A. became TyTg, an Italian limited liability company. Until 2006, TyTg manufactured in Italy and sold worldwide glass-lined vessels, chemical reactor systems and related products under its own brand name for use in the chemical and pharmaceutical industries.

{¶ 10} R&M operates both TyTg and Pfaudler as “business units.” Robbins & Myers Italia (“R&M Italia”), an Italian limited liability company, is an intermediate wholly-owned subsidiary of R&M and a parent of TyTg. EnQuip has alleged throughout the litigation that R&M has exercised control and dominance over TyTg, Pfaudler, and R&M Italia and, as such, that those three companies are alter egos of R&M.

{¶ 11} After TyTg was formed, EnQuip contracted to sell on behalf of TyTg, and EnQuip received commissions on the sale of TyTg products. However, the Naidels became concerned about whether R&M would keep TyTg and Pfaudler as separate and distinct business entities, each having separate and competitive branded product lines. In March 2001, EnQuip entered into a new agency agreement with TyTg. Nevertheless, the relationship between TyTg and EnQuip began to deteriorate. TyTg terminated its agreement with EnQuip in June 2007.

{¶ 12} According to TyTg’s and Pfaudler’s counterclaims, during the course of its relationship with TyTg, EnQuip had access to detailed confidential TyTg customer and sales information. Beginning in 2004, Pfaudler also possessed confidential, proprietary, and trade secret information of TyTg. EnQuip agreed not to disclose commercial or confidential information to third parties.

{¶ 13} Thaletec¹, a recently-formed German company, is a direct competitor of TyTg that also manufactures and sells glass-lined steel processing equipment. TyTg and Pfaudler allege that the Naidels became aware of business opportunities involving Thaletec, and they created QA for the purpose of being Thaletec’s sales representative in North America.

¹The parties often refer to Thaletec as “Thale.”

Thaletec was ultimately sold to a management group led by Karl Bergmann, a German citizen and a former executive of Pfaudler in Europe.

{¶ 14} Pfaudler claims that Thaletec is using Pfaudler information that was misappropriated by Bergmann and his associates to compete unfairly with Pfaudler in North America and Europe. TyTg asserts that “[t]he Naidels and QA Technologies have used and are continuing to use detailed customer, technical and commercial information obtained by Enquip under the Agreement in order to sell Thale products to TyTg customers.”

{¶ 15} On June 27, 2008, Enquip and the Naidels brought suit in the Montgomery County Court of Common Pleas against TyTg, Tycon Technologies S.p.A., R&M, Pfaudler, and R&M Italia.² TyTg filed counterclaims against EnEquip and the Naidels, and named QA as a third-party defendant. The suit was transferred to Greene County after it was established that R&M was located in Greene, not Montgomery, County.

{¶ 16} In January 2009, EnEquip filed a third amended complaint for breach of contract, tortious interference with business relationships, failure to pay commissions, fraud, and for an accounting. As summarized in its subsequent motion to strike, EnEquip “claim[ed] entitlement to commissions due and owing out of its Agency Relationship with [TyTg] and alleges that Defendants conspired to divert sales away from [TyTg] and Pfaudler (another R&M business unit) to avoid paying EnEquip its commission.”

{¶ 17} In response to the Third Amended Complaint, TyTg brought contingent

²The Naidels subsequently dismissed their claims as plaintiffs, and Tycon Technologies S.p.A. was dismissed as a defendant by an agreed order on December 22, 2008. R&M Italia was dismissed for lack of personal jurisdiction on April 23, 2009.

counterclaims³ against EnQuip for breach of contract, breach of duty, breach of good faith and fair dealing, and conversion, as well as additional contingent counterclaims against EnQuip, the Naidels, QA, Thaletec, and Bergmann for misappropriation of trade secrets, tortious interference with business relationships, unfair competition, and civil conspiracy. Pfaudler also brought contingent counterclaims for tortious interference and unfair competition against the Naidels, QA, and Thaletec; for misappropriation of trade secrets against Thaletec, Bergmann, EnQuip, and the Naidels; and for civil conspiracy against the Naidels, QA, Thaletec, and Bergmann.

{¶ 18} Of relevance to the instant appeals, on February 6, 2009, EnQuip moved to strike the contingent counterclaims against QA, Thaletec, and Bergmann. On March 10, 2009, QA moved to dismiss the claims against it for lack of personal jurisdiction. The trial court granted both of these motions on April 23, 2009.

{¶ 19} On April 8, 2009, R&M, TyTg, Pfaulder, and R&M Italia moved for a protective order as to certain interrogatories by EnQuip. In a supplemental memorandum, they asserted that the Privacy Directive prohibited compliance with certain discovery requests. In its June 24, 2009, order, the trial court expressly denied the protective order and clarified that the Privacy Directive did not preclude or otherwise limit discovery in this case.

{¶ 20} TyTg and Pfaudler appeal from these decisions, raising two assignments of

³Because TyTg and Pfaudler challenged whether the suit was properly litigated in Greene County, the counterclaims were contingent upon findings that venue and jurisdiction were proper and that the court should not otherwise decline jurisdiction.

error in App. No. 2009 CA 42 and one assignment of error in App. No. 2009 CA 47. We will address them in turn.

II

{¶ 21} TyTg’s and Pfaudler’s first assignment of error in App. No. 2009 CA 42 states:

{¶ 22} “THE TRIAL COURT ERRED IN STRIKING COUNTERCLAIMS AGAINST CO-CONSPIRATORS OF THE ORIGINAL PLAINTIFFS.”

{¶ 23} As stated above, EnQuip filed its Third Amended Complaint, with leave of court, on January 16, 2009. In addition to bringing contingent counterclaims against EnQuip, TyTg and Pfaudler both brought contingent counterclaims against the Naidels, QA, Thaletec, and Bergmann, who were named as new counterclaim defendants.

{¶ 24} On February 6, 2009, EnQuip filed a motion to strike TyTg’s and Pfaudler’s conditional counterclaims. It argued that TyTg and Pfaudler failed to obtain leave of court before adding new parties, as required by Civ.R. 21, and that the counterclaims “are a patent attempt to hijack this case by raising collateral issues that have no bearing on EnQuip’s claims.” Relying on Civ.R. 13, TyTg and Pfaudler responded that their counterclaims were related claims that they were entitled to raise, without leave, against existing and new parties in response to EnQuip’s Third Amended Complaint. In its reply memorandum, EnQuip urged the court to exercise its discretion to strike the new parties – QA, Thaletec, and Bergmann – “because the addition of new parties will unnecessarily delay and complicate the proceedings with collateral issues.”

{¶ 25} The trial court granted the motion to strike, relying on Civ.R. 21. The court

reasoned:

{¶ 26} “The court notes that Thaletec and Bergmann are not properly before it because of a lack of service. *** Even if the German defendants had been properly served, the court believes there would be serious questions about its jurisdiction over them and that Greene County may be an inconvenient forum.

{¶ 27} “The court also believes its previous statements about the tangential relationship between the defendants and QA Technologies continue to be valid. Those same statements would apply to Bergmann and Thaletec. The contingent counterclaims confuse an already difficult case. The court believes that it is impractical for these parties to be part of the suit. There is no showing that they are indispensable to this litigation. The court believes that any claims against the new parties would be better brought in a separate action and that action, most likely, should be brought in another forum than Greene County Common Pleas Court.

{¶ 28} “The court grants Enquip’s motion to strike the contingent counterclaim only to the extent that the counterclaim makes claims against QA Technologies, Karl Bergmann, and Thaletec. As it relates to Enquip and the Naidels, the counterclaim stands.”

{¶ 29} TyTg and Pfaudler appeal from this ruling, arguing that the court erred in dropping the new counterclaim defendants.

{¶ 30} Civ.R. 21 provides:

{¶ 31} “Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be

severed and proceeded with separately.”

{¶ 32} The intent of Civ.R.21 is to bring in a party “who, through inadvertence, mistake or for some other reason,” was not originally made a party and whose presence is necessary or desirable. *Bill Gates Custom Towing, Inc. v. Branch Motor Exp. Co.* (1981), 1 Ohio App.3d 149, 150, quoting *Crews v. Blake* (S.D.Ga.1971), 52 F.R.D. 106, 107; *Cincinnati Ins. Co. v. Consolidated Equipment Co.*, Montgomery App. No. 19390, 2003-Ohio-47, at ¶24. The same considerations apply when determining whether to drop a party. *Consolidated Equipment* at ¶24.

{¶ 33} “Rule 21 is the mechanism for correcting either the misjoinder or nonjoinder of parties under Rules 19, 19.1, and 20. *** The text of Rule 21 is silent, however, as to what constitutes misjoinder or nonjoinder. Nevertheless, it seems clear that misjoinder of parties arises when they fail to satisfy any of the conditions of permissive joinder under Rule 20(A). Thus, Rule 21 applies when the claims asserted do not arise out of the same transaction or occurrence and do not present some common question of law or fact. Misjoinder of parties may also be declared when no relief is demanded from one or more of the parties joined as defendants. ***” Fink, Greenbaum, and Wilson, *Guide to the Ohio Rules of Civil Procedure* (2006 ed.), ¶21:2; see, also, Staff Notes to Civ.R. 21 (1970), stating that misjoinder of parties under Civ.R. 21 must be read in conjunction with Civ.R. 20. A court may also drop a party who no longer has legal interests or rights in the litigation. *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, at ¶11 (holding that juvenile court did not abuse its discretion when it dropped grandparents from the custody proceedings after the child’s mother was no longer a minor).

{¶ 34} A decision to add or drop parties under Civ.R. 21 is reviewed for an abuse of discretion. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, at ¶12. An abuse of discretion means more than an error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.⁴

{¶ 35} Addressing Civ.R. 21 in the context of adding parties, the Supreme Court has stated that, unless it is apparent from the pleadings that joinder would be futile, a trial court should not consider the merits of the claims or defenses of a proposed new party in determining whether to add a party. *Darby* at ¶16. Rather, the court should consider “traditional grounds,” such as timeliness of the Civ.R. 21 motion and whether joinder would prejudice the existing parties. *Id.*

{¶ 36} Here, the trial court determined that counterclaim defendants – QA, Thaletec, and Bergmann – should be dropped on the bases that they were not indispensable parties and the counterclaims would “confuse” a “complicated” case. However, Civ.R. 21 does not authorize a trial court to drop properly-joined parties in order to streamline complex litigation. Rather, the rule allows the court to drop *misjoined* parties and parties who have become extraneous to the litigation; in this case, the counterclaim defendants are neither misjoined nor extraneous.

{¶ 37} Under Civ.R. 13(H), additional persons may be made parties to a counterclaim in accordance with Civ.R. 20. Civ.R. 20(A) provides that parties may be

⁴Our citation to this authority does not indicate a disagreement with Judge Fain’s concurring opinion involving the rhetorical abuse of the definition of “abuse of discretion.”

joined in one action as defendants “if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.”

{¶ 38} The Naidels, QA, Thaletec, and Bergmann were properly joined with EnQuip as counterclaim defendants under Civ.R. 13(H) and Civ.R. 20(A). TyTg and Pfaudler alleged that EnQuip and the counterclaim defendants had jointly engaged in a civil conspiracy to misappropriate proprietary information, to interfere with their existing and prospective customers “by attempting to sell such customers Thale products or otherwise to divert such customers from TyTg,” and to engage in unfair competition. Because QA, Thaletec, and Bergmann were not misjoined parties, the trial court could not drop them from the litigation merely to simplify the litigation, and it abused its discretion when it did so.

{¶ 39} In its amicus curiae brief, Thaletec and Bergmann cite to several federal courts that have found that *severance* under Civ.R. 21 may be appropriate for the convenience of the parties, to avoid prejudice, to promote judicial economy, and to avoid confusion of the issues. We agree with this approach. There is a difference, however, between severance of the claims and dropping parties from the action. Here, the trial court dropped QA, Thaletec, and Bergmann as parties to the action; the court did not sever the claims.

{¶ 40} To the extent that Thaletec and Bergmann may be subject to dismissal due to improper service, improper venue, or lack of personal jurisdiction, those issues are properly addressed by motion under Civ.R. 12 and do not factor into whether they should be dropped

under Civ.R. 21. See *Darby*, supra.

{¶ 41} In its motion to strike, EnQuip further argued that QA, Thaletec, and Bergmann should be dismissed, because TyTg and Pfaudler failed to seek leave of court prior to adding them as parties. Civ.R. 21 requires the party seeking to add or drop another party to receive leave of court. Civ.R. 15(A), which addresses amendment of pleadings, requires leave to amend a pleading once a responsive pleading has been served. In contrast, Civ.R. 13(H) does not require leave of court to join additional parties as counterclaim defendants, and it is clear that no leave would be required if counterclaim defendants were added in an original pleading. *Camelot Condominium Owners' Ass'n, Inc. v. Ruscoe* (Nov. 25, 1989), Summit App. No. 14125.

{¶ 42} The parties and the trial court both commented that there is a split of authority in Ohio and federal courts about whether leave of court is required to join new counterclaim defendants in a responsive pleading to an amended complaint when those parties had not previously been added. Though noting the issue, the trial court chose not to dismiss QA, Thaletec, and Bergmann for lack of leave and, instead, opted to drop them as counterclaim defendants “on terms it believes are just” under Civ.R. 21. In so doing, the court implicitly allowed them to be added and then dropped them from the action. Although we conclude that the trial court abused its discretion when it dropped QA, Thaletec, and Bergmann under Civ.R. 21, the court did not abuse its discretion when it implicitly granted leave.

{¶ 43} TyTg’s and Pfaudler’s first assignment of error is sustained.

III

{¶ 44} TyTg’s and Pfaudler’s second assignment of error in App. No. 2009 CA 42

states:

{¶ 45} “THE TRIAL COURT ERRED IN DISMISSING A COUNTERCLAIM DEFENDANT FOR LACK OF PERSONAL JURISDICTION.”

{¶ 46} On March 10, 2009, QA moved to dismiss the counterclaims against it for lack of personal jurisdiction, pursuant to Civ.R. 12(B)(2). QA supported its motion with an affidavit by Jeffrey Naidel, which provided the following facts.

{¶ 47} QA was incorporated in Florida on June 16, 2006. It did not transact any business until January 2008, when it reached an agreement with Thaletec to serve as a sales agent for Thaletec in the United States. Thaletec is a German company with no offices or agents in Ohio, and the contract between Thaletec and QA was not negotiated or signed in Ohio. Thaletec has never done business in Ohio, nor has it ever sold any parts or equipment to anyone in Ohio.

{¶ 48} Since 2008, QA’s sole business has been to serve as Thaletec’s sales representative. QA is not licensed to do business in Ohio, does not have any agents in Ohio, does not own property in Ohio, and has not transacted any business in Ohio or with customers located in Ohio. All sales were outside of Ohio and no products were shipped to Ohio. QA “has not sold Thale products or services to customers located in Ohio. Nor has it submitted proposals for sale of Thale products or services to customers or potential customers located in Ohio.” Neither Jeffrey Naidel nor any other QA employee has traveled to Ohio for the purpose of selling or soliciting Thaletec products or services.

{¶ 49} Jeffrey Naidel stated that he, on one occasion, and his father, Robert, on another occasion, visited customers in Ohio on behalf of Lotus Mixers, LLC, another

company owned by the Naidels. “While doing so, [they] may have left a total of five brochures with the receptionists of the following companies: Ricerca near Painesville, Ohio; GFS in Columbus, Ohio; and Process Pluss in Cincinnati, Ohio. QA did not speak to anyone other than the receptionists about the brochures. No requests for information or requests for proposals were received in response to the brochures.”

{¶ 50} TyTg and Pfaudler opposed QA’s Civ.R. 12(B)(2) motion, arguing that QA’s promotion of Thaletec’s products in Ohio in direct competition with their own products was the basis for their counterclaims. They stated: “Accepting the allegations in the counterclaims as true, QA’s personal deliveries of Thale product brochures to customers in Ohio is a tortious act that triggers the application of Ohio’s long-arm statute. *** QA was not only physically present in Ohio but also, while in Ohio, solicited business on behalf of Thale by distributing product literature to customers.”

{¶ 51} A hearing on QA’s motion was held before the magistrate on April 8, 2009. No testimony or other evidentiary material was offered. On April 23, 2009, the trial court found that QA was not subject to personal jurisdiction in Ohio. It reasoned:

{¶ 52} “The sole contact QA Technologies has with Ohio appears to be through the Naidels leaving a few brochures here. It has not otherwise done business in Ohio. It does not own or lease property nor have a bank account here. It has not appointed an agent. It has no employees here. The sole contact is the brochures, which Tycon and Pfaudler say were a tortious act sufficient to bring them into Ohio’s courts.

{¶ 53} “The court believes that broad as ‘transacting’ may be in the long-arm statute, it is not broad enough to encompass QA Technologies. Merely distributing a few brochures

with no sales resulting from them or any other activities in the state is not transacting business.

{¶ 54} “The only way the long-arm statute would apply would be if those brochures were a tortious act. Even assuming that merely giving brochures constitutes acts sufficient to invoke the long-arm statute, the court declines to apply it. The introductory clause in R.C. 2307.382(A) says: ‘A court may exercise personal jurisdiction over’ those who do things in the list that follows. The court is not required to accept jurisdiction. Its decision is based on due process grounds.

{¶ 55} “QA Technologies has not sold anything to Ohio customers. It has not purposefully availed itself of the privileges of doing business in this state. It lacks even the necessary minimum contacts here. Its connections to Ohio were not continuous and systematic. It would offend traditional notions of fair play and justice for suit to be brought into Ohio, a place QA Technologies could not reasonably have been expected to be sued in. Exercising jurisdiction is improper under the Due Process Clause of the Fourteenth Amendment.”

{¶ 56} We agree with the trial court’s assessment.

{¶ 57} In order for a court to enter a valid judgment, the court must have personal jurisdiction over the defendant. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. When the court’s exercise of personal jurisdiction is challenged, the plaintiff (or, in this case, the counterclaimant) has the burden of establishing the jurisdiction of the court over the defending party. *Ashton Park Apts., Ltd. v. Carlton-Naumann Constr., Inc.*, Lucas App. No. L-08-1395, 2009-Ohio-6335, ¶12.

{¶ 58} If the court considers the Civ.R. 12(B)(2) motion based on the parties' written submissions and without an evidentiary hearing, the plaintiff is merely required to make a prima facie showing of personal jurisdiction. *Id.* The trial court must consider the allegations in the complaint and the documentary evidence in the light most favorable to the plaintiff and resolve all competing inferences in the plaintiff's favor. *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 236. "The non-moving party meets his prima facie burden by producing sufficient evidence to allow reasonable minds to conclude that the trial court has personal jurisdiction over the moving party." *Ashton Park* at ¶12. We review the trial court's decision to dismiss a party for lack of personal jurisdiction de novo. *Id.*

{¶ 59} The Supreme Court of Ohio has employed a two-step process in determining whether an Ohio court has personal jurisdiction over a nonresident defendant. *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 2001-Ohio-1289, citing *U.S. Sprint Communications Co., L.P. v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184. First, the court must determine whether Ohio's long-arm statute, R.C. 2307.382, and the applicable Rule of Civil Procedure, Civ.R. 4.3(A), confer personal jurisdiction. *Id.* If so, the court must then determine whether exercising personal jurisdiction would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution. *Id.*

{¶ 60} R.C. 2307.382(A) allows an Ohio court to exercise personal jurisdiction over a nonresident defendant for causes of action "arising from" the defendant's "[t]ransacting any business in this state" or "[c]ausing tortious injury by an act or omission in this state." R.C. 2307.382(A)(1), (3). Civ.R. 4.3(A)(1) and (3) allows for service upon such a nonresident

defendant.

{¶ 61} The phrase “transacting any business” has been interpreted broadly and includes “*** to prosecute negotiations; to carry on business; to have dealings ***.” *Kentucky Oaks Mall Co. v. Mitchell’s Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, quoting Black’s Law Dictionary (5 Ed.1979) 1341. The phrase thus encompasses more than “contract” and includes business negotiations. *Id.* Nevertheless, the Supreme Court has “long held” that “the mere solicitation of business by a foreign corporation does not constitute transacting business in Ohio.” *U.S. Sprint*, 68 Ohio St.3d at 185, citing *Wainscott v. St. Louis-San Francisco Ry. Co.* (1976), 47 Ohio St.2d 133. See, also, *Hildebrand v. Steck Mfg. Co., Inc.* (Fed. Cir., 2002), 279 F.3d 1351, 1354.

{¶ 62} It is undisputed that the sole basis for exercising personal jurisdiction over QA in Ohio is the Naidels’ leaving of five brochures with receptionists at prospective customers during trips to Ohio on behalf of Lotus Mixers. These brochures did not generate any business for QA or Thaletec, and no requests for information or for proposals were received in response to the brochures. The Naidels’ actions in leaving these five brochures amounted to, at most, “mere solicitation,” which was insufficient to constitute transacting business within the meaning of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1).

{¶ 63} TyTg and Pfaudler rely on *O’Connor v. Sandy Lane Hotel* (C.A.3, 2007), 496 F.3d 312, to support their assertion that the Naidels’ delivery of sales brochures was sufficient to support personal jurisdiction. In *O’Connor*, the plaintiffs sued a Barbados resort hotel in Pennsylvania after Mr. O’Connor, while staying at the hotel, slipped in a shower and tore his rotator cuff during his receipt of spa services. The plaintiffs alleged

that they had received seasonal newsletters from the hotel since a previous stay at the hotel and, after the plaintiffs booked a return trip, the hotel sent a brochure and traded telephone calls with them in order to schedule spa services. The Third Circuit concluded that, through these acts, the hotel “deliberately reached into Pennsylvania to target two of its citizens” and had purposefully availed itself of conducting activities within Pennsylvania. *Id.* at 318.

{¶ 64} The hotel’s contacts in *O’Connor* were more significant than the Naidels’ activities in Ohio. Although the Naidels dropped off brochures at several companies, no subsequent business contacts resulted from that conduct; the Naidels did not receive any requests for information or requests for proposals from those companies, and they did not negotiate with any of those customers regarding the sale of Thaletec’s products. In contrast, the hotel and the O’Connors had entered into a business relationship and arranged for the O’Connors’ use of spa services at the hotel. The hotel’s conduct in *O’Connor* went beyond mere solicitation.

{¶ 65} TyTg and Pfaudler assert that “QA’s personal deliveries of Thaletec product brochures to customers in Ohio is a tortious act that triggers the application of R.C. § 2307.382(A)(3).” They argue: “It is the solicitation itself that gives rise to Pfaudler’s and TyTg’s counterclaims; QA’s solicitation was directed to TyTg customers and was facilitated by knowledge of those customers gained through the Naidels’ work through EnQuip with TyTg. QA’s solicitation was part of the conspiracy among EnQuip, the Naidels, Thaletec, QA and Bergmann to misappropriate the trade secrets of and unfairly compete with TyTg and Pfaudler.”

{¶ 66} “Section 2307.382(A)(3) of the Ohio long-arm statute has been interpreted to

require a tortious occurrence where the causing act or omission as well as the resulting tortious injury occur in Ohio. This act or omission establishes the defendant's contact with Ohio, and it is out of this contact that the cause of action must arise." *Gerber v. Riordan* (N.D. Ohio, May 28, 2009), Case No. 3:06-CV-01525. See, also, *Hildebrand*, 279 F.3d at 1355.

{¶ 67} In its counterclaims, TyTg alleged that QA and the Naidels "have used and are continuing to use detailed customer, technical and commercial information obtained by Enquip under the Agreement in order to sell Thale products to TyTg customers." TyTg asserted that QA and the other counterclaim defendants have misappropriated commercially sensitive, confidential and proprietary information (Count IV), have interfered with TyTg's existing and prospective customer relationships by attempting to sell such customers Thale products or otherwise divert customers by TyTg (Count VI), have engaged in unfair business tactics (Count VII), and engaged in a civil conspiracy to misappropriate trade secrets, engage in unfair competition, and tortiously interfere with business relationships (Count VIII).

{¶ 68} Pfaudler similarly alleged that QA, as Thaletec's agent, promoted the sale of Thale products in North America. It stated that QA's website prominently features photographs of Thale equipment that are copied from Pfaudler designs and were designed and manufactured using misappropriated information. Pfaudler alleged that the Naidels and QA have used detailed customer, technical, and commercial information misappropriated from Pfaudler to sell Thale products and have provided confidential and proprietary information related to Pfaudler customers to Thale.

{¶ 69} Both TyTg and Pfaudler allege in their counterclaims that personal

jurisdiction over QA is proper in Ohio under R.C. 2307.382(A)(1), (2), and (3). However, there are no allegations in their counterclaims that any of the offending conduct occurred in Ohio.

{¶ 70} Again, the sole basis for personal jurisdiction over QA under R.C. 2307.382(A)(3) is the Naidels' leaving of five brochures for Thaletec products in Ohio. Under the broadest interpretation of these facts, QA's conduct might be construed as tortious acts occurring in Ohio. Although Jeffrey Naidel stated that the brochures were left when he and his father were in Ohio on behalf of Lotux Mixers, it is reasonable to infer that they were acting on behalf of QA, in Ohio, when they left the brochures. By leaving the brochures, the Naidels, acting for QA, allegedly attempted to interfere with TyTg's and Pfauder's customers.

{¶ 71} R.C. 2307.382(C) provides that the exercise of personal jurisdiction under the long-arm statute is appropriate only if the cause of action arises from acts enumerated in the statute. Here, there is no indication that TyTg's and Pfauder's claim arise out of QA's actions in Ohio. As stated above, neither TyTg's nor Pfauder's counterclaims allege any specific activity by QA in Ohio, and they contain no suggestion that QA's conduct in Ohio resulted in any injury to TyTg and Pfauder. Jeffrey Naidel stated in his affidavit that they spoke only to receptionists when the brochures were dropped off, and QA received no requests for information or requests for proposals as a result of those brochures. Moreover, QA "has not sold Thale products or services to customers located in Ohio. Nor has it submitted proposals for sale of Thale products or services to customers or potential customers located in Ohio." Thus, assuming that QA wrongfully distributed brochures in

Ohio, there are no allegations by TyTg or Pfaudler – nor any facts provided by Jeffrey Naidel– that indicate that TyTg and Pfaudler suffered any injury in Ohio and brought suit based on QA’s conduct in this state.

{¶ 72} Further, turning to the second prong of the analysis, we agree with the trial court that the exercise of personal jurisdiction under R.C. 2307.283(A)(3) does not comport with due process.

{¶ 73} Under the second part of the personal jurisdiction analysis, an Ohio court may exercise personal jurisdiction over an out-of-state defendant only if the exercise of such jurisdiction would comport with due process. The United States Supreme Court has stated that the exercise of personal jurisdiction over a nonresident defendant comports with due process if the foreign defendant has “minimum contacts” with the forum state such that to require the defendant to defend its interests in the forum state “does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95; *State ex rel. Toma*, supra; *Hall v. Tucker*, 161 Ohio App.3d 245, 2005-Ohio-2674, at ¶26.

{¶ 74} The standard for determining whether a foreign defendant is subject to personal jurisdiction in the forum state depends on whether the suit arises from the defendant’s contacts in the forum state. If the defendant’s contacts with the forum state are not the basis for the suit, then personal jurisdiction over the foreign defendant comports with due process only if the defendant’s contacts are “substantial” and “continuous and systematic.” *Youn v. Track, Inc.* (C.A.6 2003), 324 F.3d 409. If the action arises from the defendant’s contacts in the forum, the defendant must be subject to specific personal

jurisdiction. Because there are no allegations that QA had continuous and systematic contacts with Ohio, we are concerned with whether the trial court could exercise specific personal jurisdiction over QA.

{¶ 75} Specific personal jurisdiction is established when (1) the non-resident defendant has purposefully availed itself of the privilege of conducting activities in the forum state; (2) the plaintiff's claims arise out of those activities directed at the forum state; and (3) the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Youn*, 324 F.3d at 418, citing *Southern Machine Co. v. Mohasco Indus., Inc.* (C.A.6 1968), 401 F.2d 374, 381; *Fritz-Rumer-Cooke Co. v. Todd & Sargent* (Feb. 8, 2001), Franklin App. No. 00AP-817. "The constitutional touchstone is whether the nonresident defendant purposely established contacts in Ohio so that the defendant should reasonably anticipate being haled into court there." *State ex rel. Toma*, supra, citing *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528, 541-542.

{¶ 76} In *Burger King*, the United States Supreme Court discussed the contours of the "purposeful availment" requirement:

{¶ 77} "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State. Thus where the defendant

‘deliberately’ has engaged in significant activities within a State, or has created ‘continuing obligations’ between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by ‘the benefits and protections’ of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.” *Id.*

{¶ 78} Applying these standards, even if the Naidels’ actions of leaving five brochures on behalf of QA constituted a tortious act, such as unfair competition, QA’s mere solicitation through five brochures was attenuated contact with Ohio, which itself brought no apparent injury to TyTg’s or Pfaudler’s business. This contact was insufficient to constitute purposeful availment. We agree with the trial court that QA could not reasonably have been expected to be sued in Ohio based on those five brochures.

{¶ 79} TyTg and Pfaudler submit that QA’s involvement in this litigation is “neither a hardship nor a surprise,” considering that its principals, the Naidels, sought out this jurisdiction when they filed their original complaint in the Montgomery County Court of Common Pleas. They argue that there would be no additional burden to any party if QA remained a party, and there is no violation of “fair play.” While TyTg and Pfaudler are likely correct that litigation in Ohio would present no hardship to QA, QA is a separate legal entity from the Naidels, and our analysis must focus on whether QA – not the Naidels – would reasonably expect to be sued in Ohio based on their contacts with this forum. In the light of the fact that QA left five brochures in Ohio, none of which resulted in any business prospects for

QA or Thale or any apparent injury to TyTg or Pfaudler, we cannot conclude that QA would reasonably expect to be sued in Ohio based on those contacts.

{¶ 80} The second assignment of error is overruled.

IV

{¶ 81} TyTg's and Pfaudler's sole assignment of error in App. No. 2009 CA 47 states:

{¶ 82} "THE TRIAL COURT ERRED IN FINDING THAT EUROPEAN PRIVACY LAWS AND REGULATIONS DO NOT APPLY AND DO NOT PRECLUDE THE TRANSFER TO THE UNITED STATES AND PRODUCTION OF CERTAIN DOCUMENTS AND DATA OF DEFENDANTS-APPELLANTS LOCATED IN EUROPE."

{¶ 83} EnQuip has submitted a number of interrogatories, requests for admission, and requests for documents. R&M, Pfaudler⁵, TyTg, and R&M Italia (collectively, "Defendants") initially responded with objections, claiming that the number of interrogatories was excessive and asserting they had several defenses to the action, including improper venue, lack of personal jurisdiction, comity, forum non conveniens, lack of subject-matter jurisdiction, and insufficient process. On March 3, 2009, EnQuip filed a Motion for An Order Requiring Defendants to Comply Fully with Discovery. It also requested that it be allowed interrogatories in excess of those permitted by the local rules.

{¶ 84} On April 2, 2009, the court granted EnQuip's request for

⁵Pfaudler has operations in Germany and the United Kingdom.

interrogatories and requests for admissions in excess of the number permitted by the local rules. The court ordered: “If the defendants have concerns about specific interrogatories – and not merely their overall numbers – then they are to file motions for protective orders that detail each and every interrogatory or request for admission they believe objectionable and why they ought not be obliged to answer.”

{¶ 85} On April 8, 2009, Defendants moved for a protective order as to certain interrogatories by EnQuip. Defendants argued that they should not be required to respond to interrogatories 2-6 and 21 and that the responses to other interrogatories should be limited. R&M Italia and TyTg also moved for a protective order prohibiting discovery on the merits pending resolution of their motions relating to service of process, personal jurisdiction, and forum non conveniens.⁶

{¶ 86} On the same day, a hearing was held before the magistrate. At that time, counsel for EnQuip indicated that the parties had no dispute with respect to requests for admission, and the jurisdictional interrogatories had been answered, except with respect to the jurisdictional interrogatories 7, 9-13, 22 and 30, which asked Defendants to “identify” certain employees. (Tr. at 20-21.) Counsel for Defendants responded that, in addition to the burdensome nature of those requests, “there is a privacy directive in the European Union that prohibits a European company from releasing personal information about its employees. If, in fact, that is what is contemplated, I believe that we are going to have to consult with

⁶Those issues have since been resolved. On April 23, 2009, the trial court dismissed R&M Italia for lack of personal jurisdiction, but found that the court properly could – and would – exercise personal jurisdiction over TyTg.

European counsel and determine whether we are even permitted to do so.”

{¶ 87} Counsel for R&M and Pfaudler agreed to answer the disputed interrogatories within 28 days. As to TyTg and R&M Italia, the Italian companies, counsel indicated that he would supplement the motion for a protective order to argue the applicability of the Privacy Directive.

{¶ 88} On April 22, 2009, Defendants filed a supplemental memorandum in support of their motion for a protective order as to EnQuip’s discovery. In this memorandum, Defendants argued that the Privacy Directive “strictly limits the transfer of ‘personal data,’ which includes (emphasis added) ‘any information relating to an identified or identifiable natural person,’ including ‘one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.’”

Defendants stated that the Privacy Directive prohibits the transfer of personal data to third countries unless that third country has adequate levels of data protection, which the United States does not. Applying a five-factor balancing test set forth in Restatement (Third) of Foreign Relations Law §442, Defendants asserted that a protective order should be granted. They proposed alternative options for proceeding with discovery, including: (1) responding based solely on information available in the United States, (2) making documents in Europe available for inspection but without transfer to the United States, (3) obtaining the consent of each individual whose private data would be transferred, and (4) pursuing discovery through the Hague Evidence Convention.

{¶ 89} EnQuip responded to Defendants’ supplemental memorandum on May 7, 2009. EnQuip argued that the Privacy Directive did not prohibit discovery in

this case. It claimed that the requested discovery fell within Article 26(1)(d) of the Privacy Directive, which permits the transfer of data when “the transfer is necessary *** for the establishment, exercise or defense of legal claims.” EnQuip further asserted that Defendants “have not even specified what ‘personal data’ within the scope of the Directive has been requested by EnQuip’s interrogatories or document requests.” The company states: “It would seem reasonable and appropriate for Defendants at a minimum to say that there is a problem or potential problem with this or that specific item of information and then look to the Directive to determine whether it applies.” Third, citing *Societe Nationale Industrielle Aerospetiale v. United States District Court for the Southern District of Iowa* (1987), 482 U.S. 522, 107 S.Ct. 2542, 96 L.E.2d 461, EnQuip asserts that the Italian defendants can be compelled to produce evidence, even if compliance would violate a foreign statute.

{¶ 90} On May 13, 2009, the trial court ruled on EnQuip’s March 3, 2009, Motion for an Order Requiring Defendants to Fully Comply with Discovery. The court noted that Defendants had moved for a protective order and had filed a supplemental motion concerning the Privacy Directive. Addressing EnQuip’s requests for production of documents, the court ordered Defendants to produce for inspection and copying all of the documents requested in the disputed requests, i.e., Request Nos. 4, 5, 6, 21, 47, 51, 53, 55, and 58. The court also directed Defendants to answer Interrogatories Nos. 2-6, 21, 22, and 29.⁷

⁷These interrogatories state:

“INTERROGATORY NO. 2: Identify each document that R&M intends to introduce as evidence at any trial of or hearing in this matter. ***

“INTERROGATORY NO. 3: Identify each person whom any of the

{¶ 91} The trial court's most detailed discussion of the Privacy Directive appeared in its treatment of interrogatories 2-5. It stated:

{¶ 92} "Defendants argue that the Privacy Directive issued by the European Parliament and Council of the European Union on October 24, 1995 protects

Defendants intends to call as a witness at the trial of or any hearing in this matter, and provide a detailed summary of the substance of each witness' expected testimony, including all material points therein. ***

"INTERROGATORY NO. 4: Identify each expert any of the Defendants has consulted with, retained, or from whom information has been received by a Defendant in respect to this matter, and also identify each report received from each such expert and all communications with such expert. ***

"INTERROGATORY NO. 5: Provide the following information with respect to all opinions on which each expert you will call as a witness as the trial of or at any hearing in this case: (A) a complete statement of all opinions the witness will express and the basis and reasons for them; (B) the data or other information considered by the witness in forming them; (C) identify all exhibits that will be used to summarize or support them; (D) the witness's qualifications ***; (E) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (F) a statement of the compensation to be paid for the study and testimony in the case. ***

"INTERROGATORY NO. 6: State whether the Defendants, for purposes of identifying documents containing information responsive to these interrogatories and documents *** have examined the desktop and laptop computers, cell phones, PAD devices and home computers used by [named individuals] and their respective secretaries and assistants. ***

"INTERROGATORY NO. 21: Identify by case number, court, and parties each civil lawsuit involving employees, sales agents or claims for commissions brought anywhere in the world in which R&M, R&M Italia, Pfaudler, or TyTg has been a party. ***

"INTERROGATORY NO. 22: Identify each agent and sales representative of TyTg, R&M Italia and Pfaudler (or who was selling TyTg Products or Pfaudler Products) to whom a commission has been paid anywhere in the world from and after January 1, 2000. ***

"INTERROGATORY NO. 29: Identify each bank or other financial institution at which any of the Defendants maintain an account ***. For each account, also provide the location of the office at or through which is maintained, the title or name of the account, the type of account ***, and the last four digits of the account number."

individuals with regard to the processing of personal data and the free movement of such data. Defendants argue that the Italian Company Defendant is protected against the processing of personal data.

{¶ 93} “Plaintiff points out that Article 26(1) of the Directive permits the transfer of data for the establishment, exercise or defense of legal claims.

{¶ 94} “The Court concludes that Defendants in this litigation fit within the exception to the restrictions of the Privacy Directive, if that Directive would even apply to the Defendants in this Case, and to this Case. The Court also concludes that Defendant [TyTg] has subjected itself to the laws of the State of Ohio, including the Rules of Civil Procedure, by doing business here.”

{¶ 95} Addressing the interrogatories individually, the trial court repeatedly stated that “the Privacy Directive is not applicable to bar or ‘protect’ Defendants from substantively answering the interrogatories.”

{¶ 96} Five days later, Defendants filed a reply memorandum in support of their motion for a protective order. They claimed that the exception set forth in Article 26(1)(d) was inapplicable and that there were alternative methods of conducting discovery that would not violate the Directive. On June 12, 2009, EnEquip requested clarification as to whether the court’s May 13, 2009, order on its motion to compel overruled Defendants’ motion for a protective order.

{¶ 97} In its June 24, 2009, order clarifying the May 13, 2009, order, the court noted that discovery issues had been limited by the parties to the Privacy Directive’s impact on the litigation and Defendants’ objections to certain interrogatories and document requests. The court held that, “in ruling on

Defendants' objections to the discovery requests that were the subject of the Motion for Protective Order, the Court decided the Motion for Protective Order." The court expressly denied the protective order, stating: "The Court also ORDERS for the reason set forth in the May 13, 2009 Entry, and taking into consideration Defendants' May 18, 2009 Reply Memorandum, that the European Union Privacy Directive does not preclude or otherwise limit discovery in this litigation."

{¶ 98} On appeal, Defendants argue that the trial court erred in concluding that the Privacy Directive was inapplicable to this litigation. They emphasize that the limitations on the transfer of private data are sweeping, that the exception set forth in Article 26(1)(d) is inapplicable, and that the five-factor balancing test weighed in favor of granting a protective order.

{¶ 99} EnQuip responds that Defendants "did not meet their burden to obtain a protective order" because they "made no effort to demonstrate the applicability of the Privacy Directive to any of EnQuip's specific interrogatories or documents requests. Instead, they stubbornly maintained without specific demonstration that the Privacy Directive applies across the board and that they therefore are not required to produce any information that may be physically located in Europe." EnQuip further contends that disclosure is permitted under Article 26(1)(d) and that balancing test weighs in favor of disclosure.

{¶ 100} In their reply brief, Defendants assert that "[t]he trial court obviously understood that it was being asked to address a basic principle for all discovery in this case, not just the then pending requests, and it issued an order with that broad scope. But EnQuip again avoids the issue – the question on appeal is whether the

Privacy Directive applies at all. If so, then each request and deposition question can be examined in that light.”

{¶ 101} Ohio has a liberal discovery policy which, subject to privilege, enables opposing parties to obtain from each other all evidence that is material, relevant and competent, notwithstanding its admissibility at trial. *Fletcher v. Nationwide Mut. Ins. Co.*, Darke App. No. 02CA1599, 2003-Ohio-3038, at ¶14, citing Civ.R. 26(B)(1). Specifically, Civ.R. 26(B)(1) provides:

{¶ 102} “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

{¶ 103} Civ.R. 26(C) permits the court to enter a protective order, as justice requires, “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” in connection with a discovery request. The court may order, for example, that the discovery not be had, that discovery may be had only on specific terms or conditions, that discovery be had by another method, that the scope of discovery be limited, that discovery be conducted by only certain designated persons, and that confidential matters not be disclosed. Civ.R.

26(C).

{¶ 104} The trial court has broad discretion over discovery matters. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, at ¶18. A trial court's determination of whether a protective order is necessary is within the sound discretion of the court. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13, ¶23. However, a court's determination of whether requested information is confidential or privileged from disclosure is a question of law to be reviewed de novo. *Schlotterer* at ¶13. "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Id.*

{¶ 105} As recognized by the parties, the United States Supreme Court has addressed the interplay between local discovery rules and foreign law in *Societe Nationale Industrielle Aerospatiale*. In that case, two corporations owned by the Republic of France sought a protective order in the United States District Court for the Southern District of Iowa in response to interrogatories, requests for production of documents, and requests for admissions. The companies asserted that, because the requested discovery could only be found in France, the Hague Convention dictated the exclusive procedures that must be followed for pretrial discovery and compliance under the Federal Rules of Civil Procedure would violate French penal law. Addressing the interplay between the Hague Convention and the Federal Rules of Civil Procedure, the United States Supreme Court rejected interpretations either that required the use of the Hague Convention to the exclusion of any other discovery procedures whenever evidence located abroad is

sought for use in an American court or that required that parties resort first to the Hague Convention procedures. *Id.* at 534. The Court concluded that the Hague Convention “was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad,” *id.* at 536, and “the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.” *Id.* at 539-40.

{¶ 106} The Supreme Court further concluded that comity did not require the parties to resort to the Hague Convention procedures in all instances “without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.” *Id.* at 544. It noted that relevant factors in a comity analysis included: “ ‘(1) the importance to the ... litigation of the documents or other information requested; ‘(2) the degree of specificity of the request; ‘(3) whether the information originated in the United States; ‘(4) the availability of alternative means of securing the information; and ‘(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.’ ” *Id.* at n.28, quoting Restatement of Foreign Relations Law of the United States (1986) § 437(1)(c). In a footnote, the Court commented that a foreign country’s law that proscribed disclosure “is relevant to the court’s particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.” *Id.* at n.29.

{¶ 107} In this case, we are concerned with the Privacy Directive. Under the Privacy Directive, “personal data” is defined as “any information relating to an identified or identifiable natural person ***; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity[.]” “Processing” of personal data includes, among other things, collection, recording, dissemination, and use.

{¶ 108} Article 25 of the Privacy Directive provides that “Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if *** the third country in question ensures an adequate level of protection.” Defendants state that the United States does not provide an adequate level of protection. Article 26 states several exceptions to the prohibition, including where the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defense of legal claims. Article 26(1)(d).

{¶ 109} Upon review of the interrogatories and the applicable law, we agree with EnQuip that Defendants have failed to establish that they were entitled to a protective order based on the Privacy Directive or for any other reason.

{¶ 110} As an initial matter, Defendants have not established, with particularity, that they could not comply with specific discovery requests. For example, Interrogatory 29 asked Defendants to identify their bank accounts or accounts with other financial institutions. The Privacy Directive refers to “personal data” of “natural persons.” Defendants have not indicated that corporate

information regarding the companies' accounts fall within the scope of the Privacy Directive. Even if it did, Defendants, as parties, could waive their privacy interests in their own data and comply with EnQuip's request.

{¶ 111} Similarly, although the Privacy Directive might preclude Defendants from disclosing personal information about their expert witnesses, it is reasonable to assume that these individuals would agree to allow the disclosure of their names, their opinions, and the like, particularly if they were willing to testify on behalf of Defendants, at which time these facts would become public. Defendants have not indicated that they took any steps or made any effort to respond to EnQuip's interrogatories within the bounds of the Privacy Directive.

{¶ 112} Defendants have not identified any particular information that cannot be produced to EnQuip. Rather, they argue, blanketly, that they can produce what is not covered by the Privacy Directive and cannot produce what is. They have not identified specific documents or information that they are precluded from disclosing.

{¶ 113} Because of the lack of specificity in Defendants' challenge to EnQuip's discovery requests, application of the Restatement's five-factor balancing test is difficult. Upon review of EnQuip's requests, we do not find that the interrogatories and the documents that EnQuip has requested are overly broad, burdensome or irrelevant to the claims. Defendants assert that many of the documents and other information may be obtained from the companies in the United States. While this may be true, Defendants have not detailed which documents fall within the Privacy Directive and assert that it would be burdensome to sort through documents to determine which originated in the United States or

could be located elsewhere and which cannot. However, the burden is on Defendants to establish that a protective order is necessary and they, not EnQuip or the court, must establish that particular evidence is subject to the Privacy Directive and arguably cannot be disclosed.

{¶ 114} In short, Defendants have failed to meet their burden of establishing that the Privacy Directive or any other reason should preclude their having to respond to EnQuip's specific discovery requests under the Ohio Rules of Civil Procedure. The trial court did not abuse its discretion in denying Defendants' request for a protective order.

{¶ 115} The assignment of error is overruled.

V

{¶ 116} The principle of *lex parsimoniae* results in the following summary of our holdings:

{¶ 117} First Assignment: In the Third Amended Complaint, sales representative sued the manufacturer it represented for breach of contract. The manufacturer counterclaimed alleging that its former representative was now working for a competitor of the manufacturer; the manufacturer also added counterclaim defendants that it claims are involved with its former representative. The court erred in granting the representative's motion to strike the added counterclaim defendants based on Civ.R. 21 because the additional defendants would "confuse an already difficult case;" however true that may be, Civ.R. 21 permits dismissal only if the new parties are misjoined or are extraneous, which they are not.

{¶ 118} Second Assignment: The court did not err in dismissing a counterclaim defendant for lack of personal jurisdiction. The counterclaim defendant's mere solicitation did not constitute doing business in Ohio and such solicitation was not the basis of the counterclaim. Additionally, it had insufficient contacts in Ohio to comport with due process.

{¶ 119} Third Assignment: The court did not err in refusing a protective order where the defendants did not meet their burden pursuant to Civ.R. 26(C).

{¶ 120} The April 23, 2009, order granting QA's motion to dismiss for lack of personal jurisdiction and the trial court's June 24, 2009, order denying the protective order will be affirmed. The April 23, 2009, order granting EnQuip's motion to strike will be reversed.

{¶ 121} We are not unaware of the trial court's reference to *Jarndyce and Jarndyce* and that our holding concerning discovery may engender additional filings; at the same time, we note the trial court's request for the "utmost cooperation" and the fact that it said it "would review and consider Plaintiff's application for sanctions" if that became necessary.

.....

BROGAN, J., concurs.

FAIN, J., concurs separately:

{¶ 122} I concur fully in all of the holdings set forth in Judge Froelich's well-reasoned opinion for this court.

{¶ 123} My purpose in writing separately is frankly to declare war against one of the most unfortunate formulations – if not the most unfortunate formulation – to

appear in Ohio appellate jurisprudence:

{¶ 124} “The term ‘abuse of discretion’ connotes more than an error of law or of judgment.”

{¶ 125} I have traced this offensive formulation as far back as *Steiner v. Custer* (1940), 137 Ohio St. 448, 450, which, in turn, cites Black’s Law Dictionary (2 Ed.), 11 as authority. The definition of “abuse of discretion” in Black’s Law Dictionary, Eighth Edition (2004), at 11, offers no support for the offensive formulation:

{¶ 126} “1. An adjudicator’s failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.”

{¶ 127} Interestingly, the definition of “abuse of discretion” in Black’s Law Dictionary, Fourth Edition (1968), which was the edition of Black’s Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

{¶ 128} “ ‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion. * * * * . *It is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances. * * * * .* And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the

reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; *an error of law*. * * * * .

{¶ 129} “A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. * * * * . Unreasonable departure from considered precedents and settled judicial custom, *constituting error of law*. * * * * . The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court and is said by some authorities to imply not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. * * * * . Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. * * * * . Difference in judicial opinion is not synonymous with ‘abuse of discretion’ as respects setting aside verdict as against evidence. * * * * .” (Citations omitted; emphasis added.)

{¶ 130} I can only speculate that the origins of the offending formulation lay in an attempt to make the following point too succinctly:

{¶ 131} When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error.⁸ By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a

⁸Of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review.

different result is not enough, without more, to find error.

{¶ 132} I know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But I am not aware of any Ohio appellate decisions, and I hope I never become aware of any, in which it is declared, as part of the *holding*, that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 133} I will save the enterprising researcher the trouble of combing through opinions in which I appear as the author by freely admitting that, on numerous occasions, I have been too lazy to delete a quotation or paraphrase of the offending formulation from a staff attorney's draft. I am confident, however, that in none of the opinions I have authored is it part of the *holding* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 134} So let me close by boldly declaring that no court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.⁹

.....

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⁹This does not, of course, obviate the existence of frequent and lively disagreements between courts and individual judges as to what the law is.

Matthew T. Green
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