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IN THE COURT OF APPEALS OF OHIO
TENTH DISTRICT

STATE OF OHIO ex rel. OHIO ATTORNEY GENERAL MIKE DEWINE, et al.,	)	Case No. 18-AP-000342
Plaintiffs-Appellees,	)	(ACCELERATED CALENDAR)
vs.	)	
PRECOURT SPORTS VENTURES, LLC, et al.,	)	Appeal from: Franklin County Common Pleas Case No. 2018 CV 001864
Defendants-Appellants.		

BRIEF OF DEFENDANTS-APPELLANTS PRECOURT SPORTS VENTURES LLC, MAJOR LEAGUE SOCCER, L.L.C., TEAM COLUMBUS SOCCER, L.L.C., AND CREW SOCCER STADIUM LIMITED LIABILITY COMPANY

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ASSIGNMENTS OF ERROR

I. The trial court erred when it "tolled" the six-month notice period provided by R.C. 9.67.

II. The trial court erred when it mandated that Appellants comply with judicially-created processes that are neither authorized by R.C. 9.67 nor called for by the facts of this case.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellants challenge an Order that effectively imposes an injunction against them in two separate respects, both of which are impermissible for substantially similar reasons. The overlapping issues presented as to both assignments of error are as follows:

1. Ohio Revised Code Section ("R.C.") 9.67 purports to prevent the "owner of a professional sports team" from relocating the team unless the owner first provides local residents with a six-month period in which those residents have the opportunity to make offers to purchase the team. Did the trial court err when it (a) ordered Appellants to provide local residents with an additional 90-day period in which to make offers to purchase the operating rights to Columbus Crew SC ("Crew SC"), a professional soccer team owned by Major League Soccer, L.L.C. ("MLS"), and (b) enjoined them from relocating the team during this additional period, where the trial court did not find—and Appellees did not and cannot demonstrate—any likelihood of success on the merits of Appellees' case (including that the statute is applicable, constitutional, and that Appellants have violated or will imminently violate it) or otherwise meet the requirements necessary for injunctive relief?

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2. Did the trial court err in injecting itself into what should be, if the statute lawfully applies, a private negotiation process between Appellants and interested parties and instead requiring that Appellants participate in a court-supervised sale process, including undertaking the following obligatory actions:

(a) requiring Appellants to negotiate with Appellees over the categories of information that Appellants must turn over to potential purchasers of Crew SC—including sensitive financial information—which the court will decide if the parties cannot reach agreement;

(b) requiring Appellants to turn over that information to interested purchasers, including purchasers whom Appellants might otherwise deem unqualified to bid;

(c) requiring Appellants to turn over any additional information that is requested by potential purchasers and approved by the court;

(d) requiring Appellants to negotiate with Appellees over the terms of a form non-disclosure agreement ("NDA") to be signed by all parties, potential purchasers, and anyone else ordered by the court, whose terms the court will decide if the parties cannot reach agreement; and

(e) requiring Appellants to entertain bids not made directly to Appellants, as would happen in the ordinary course of business, but submitted directly to the court under seal;

none of which are authorized or even contemplated by R.C. 9.67, and without any finding that Appellees met the requirements for injunctive relief?

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STATEMENT OF THE CASE

This case arises from Appellees State of Ohio ("State") and City of Columbus's ("City") attempt to use an untested, inapplicable, and unconstitutional statute to prevent the relocation of Crew SC, an MLS club that has received consistently disappointing economic support from a market with a dedicated but small fan base. This appeal arises from the trial court's dramatic expansion of that already-problematic statute through an order that functions to (1) enjoin Appellants from exercising their right to relocate Crew SC for at least an additional 90 days and (2) mandate that they perform several affirmative actions not authorized by the statute, including submitting to a court-ordered supervision of the sale process, all in violation of Appellants' constitutional and statutory rights.

That statute, R.C. 9.67, purports to prevent the "owner of a professional sports team" that *both* (a) plays in a "tax-supported facility" *and* (b) receives government-provided "financial assistance" from relocating the team unless the owner either (i) receives permission to relocate from the local government where the team plays or (ii) gives the local government at least six months' advance notice of the team's "intention" to relocate and provides the local government or local residents "the opportunity to purchase the team" during the six months following such notice.

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R.C. 9.67 does not apply to Appellants by its terms as MLS, the owner of Crew SC, does not receive any of the financial support necessary to trigger the statute and Appellees' Amended Complaint ("Complaint") makes no contrary allegations. Moreover, the statute is unconstitutional. Among other infirmities, R.C. 9.67 violates the dormant Commerce Clause of the United States Constitution by privileging local residents over those from other states and impermissibly interfering with a team owner's ability to conduct business in interstate commerce. R.C. 9.67 similarly violates the Privileges and Immunities Clause by providing Ohio citizens with an economic opportunity not afforded to citizens of other states. As the Complaint seeks to apply the statute to Appellants, the constitutional violations are even more egregious—it appears to request that the trial court impose and oversee a forced sale of the team if Appellees learn of an offer that they deem "reasonable."

Though the statute does not apply to them and is unconstitutional, Appellants are in full compliance with its terms. Appellees have had notice of the potential relocation of Crew SC since Fall 2017, and Appellants have been open to offers to purchase the team's operating rights ever since. Appellants' consideration of the potential relocation of Crew SC has been transparent. They have not tried to relocate Crew SC in the dead of night.

Nonetheless, Appellees have taken active and increasingly aggressive measures to interfere with Appellants' business operations. One month after filing a meritless complaint, the City moved to extend R.C. 9.67's statutory six-month "opportunity to purchase" period until the conclusion of the litigation under the guise of "equitably tolling" the statute. Inexplicably, the City claimed that fundamentally rewriting the terms of R.C. 9.67 was necessary to prevent the City's own lawsuit from interfering with its residents' ability to purchase Crew SC's operating rights. Several weeks later, the State followed suit, filing its own motion to "toll."

On May 8, 2018, before Appellants had a chance to fully brief their response, the trial court issued a Journal Entry and Order (the "Order") granting in part Appellees' motions and requiring Appellants to provide an additional 90-day period, subject to modifications and extensions as the trial court sees fit. The Order styles the additional 90-day opportunity-to-purchase period as a "pause" of the statutory six-month period, with any time left in the six-month period (a question the court did not determine) to be tacked on after the conclusion of the new 90-day period.

The Order also imposes new affirmative obligations on Appellants in furtherance of a compelled bid process. Not only does the Order require Appellants to turn over sensitive financial information, but it requires them

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to do so through the trial court with Appellants having minimal control over the ultimate destination of that information. The Order further subjects Appellants to court determination on what is an appropriate NDA in the event that Appellees do not consent to MLS's customary NDA and requires Appellants to follow a sale process in which bids for the rights to Crew SC will be submitted directly to the court under seal rather than through the standard channels that Appellants would normally use.

The relief granted by the Order is fundamentally injunctive in nature. Each of these obligations is imposed on pain of contempt if Appellants do not comply. Yet at no point did Appellees even attempt to demonstrate the existence of the four factors necessary for a grant of injunctive relief. The injunctive relief was ordered: (a) without finding that Appellees have a substantial likelihood of success on the merits of their case (they do not); (b) without determining whether R.C. 9.67 is constitutional or applicable to Appellants (it is not); (c) without determining whether the six months had already run; (d) without determining that Appellants violated R.C. 9.67 such that a compelled bid process might be necessary (they have not); and (e) without considering the hardship to Appellants from an extension of the statutory six-month period and the compelled bid process.

As none of the requirements for injunctive relief are met in this case,

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the Order was improvidently granted and must be vacated.

STATEMENT OF FACTS

Crew SC is one of 23 professional soccer teams owned by MLS, a Delaware limited liability company. Compl. ¶¶ 1, 12. Crew SC is managed by Precourt Sports Ventures LLC ("PSV"), a Delaware limited liability company that holds a minority equity interest in MLS. *See id.* ¶¶ 1, 11, 25. PSV also holds membership interests in Team Columbus Soccer, L.L.C. (which holds the operating rights to Crew SC) and Crew Soccer Stadium Limited Liability Company (which owns Crew SC's stadium in Columbus, Ohio ("Stadium") and is the lessee of the land on which the Stadium sits). *See id.* ¶¶ 1, 10, 11, 13, 14, 25.

Appellees allege that, over the years, they have provided financial support to Crew SC "and its affiliates" through five types of support for the Stadium: (1) improvements to Stadium parking facilities, (2) a property tax exemption for the land on which the Stadium sits, (3) an allegedly below-market lease[1] for the land on which the Stadium sits, (4) reimbursing

[1] As noted in Appellants' motion to dismiss the underlying case ("Motion to Dismiss"), also incorporated into Appellants' opposition to the City's motion to "toll," the Stadium lease is not below-market. In fact, according to public records of which this Court may take judicial notice, the lease payments increase according to the consumer price index and earn the Ohio Expositions Commission (which rents out the land for the Stadium)

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the cost to move a storm sewer and construct a water line to serve the Stadium, and (5) an agreement between the City and a third party to extend a road that allegedly increases access to the Stadium. *See id.* ¶¶ 9, 10.

On October 17, 2017, after years of disappointing local financial support for Crew SC, PSV CEO Anthony Precourt publicly announced the potential relocation of the team. *See, e.g.*, Opp. to Toll at 9 n.5. MLS and PSV followed the announcement by meeting with Columbus Mayor Ginther and Columbus Partnership[2] CEO Alex Fischer on November 15, 2017 to discuss the potential relocation and steps that could be taken to improve Crew SC's ability to operate in Columbus. *See id.*, Ex. C.

Though R.C. 9.67 does not apply to Appellants by its terms and is unconstitutional, Appellants nevertheless are in compliance with its terms. Appellants provided repeated notice in Fall 2017 of the potential relocation and have been open to offers to purchase the team's operating rights since. Indeed, on December 6, 2017, Crew SC provided a draft NDA to a prominent local citizen who expressed an interest in the team. *See* Opp. to

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significantly more than other similar leases of the Commission. *See* Defs.' Mot. to Dismiss ("MTD") at 6 n.3. Appellees' claims fail either way.

[2] The Columbus Partnership is an organization the stated primary goal of which is to improve the economic vitality of the Columbus region.

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Toll, Ex. B. That NDA was never signed, nor did that individual ever contact Crew SC to negotiate its terms. *See id.*

On March 16, 2018, surprised by the Complaint's allegation that they had not provided notice under R.C. 9.67, *see* Compl. ¶ 34, Appellants sent a letter to Mayor Ginther reiterating the existing notice, expressly declaring their intent to provide notice for the avoidance of doubt, and again inviting interested parties to contact them about purchasing the rights to Crew SC (while reserving their objections to the statute's applicability and constitutionality). *See* Opp. to Toll, Ex. C. That same month, MLS officials also met with Columbus Partnership CEO Fischer and potential local investors for the team. *See id.*, Ex. D. Appellants followed those conversations by providing a new NDA (in MLS's customary form) to those persons who expressed an interest in a team. *See id.*, Ex. F.

Despite Appellants' provision of both notice and an opportunity to purchase the team, in April 2018, Appellees filed separate motions seeking to "toll" the statutory six-month notice period. On May 8, 2018, the trial court issued the Order, granting Appellees' motions in part, requiring Appellants to provide local residents with an additional 90-day period during which time Appellants may not relocate, while simultaneously requiring them to undertake actions in furtherance of a judicially-created

process governing the sale of the team. *See* Order at 12, 16–17.

STANDARD OF REVIEW

This Court should analyze the questions of law raised by this appeal *de novo*. *See, e.g.*, *84 Lumber Co., L.P. v. Houser*, 2011-Ohio-6852, ¶¶ 16–18 (11th Dist. 2011) (reviewing grant of preliminary injunction *de novo* where the determination of whether to grant the injunction "first rested" on the court's determination of a legal issue); *Youngstown City Sch. Dist. Bd. of Educ. v. State*, 2017-Ohio-555, ¶ 45 (10th Dist. 2017) (Brunner, J., dissenting) (appellate courts apply *de novo* review to legal determinations made in reaching decision to grant preliminary injunction). As the trial court assumed the validity of the facts alleged in the Complaint for purposes of evaluating the motions to "toll," *see* Order at 2 n.4, the trial court did not make any factual findings that merit the application of an abuse of discretion standard. *Cf., e.g.*, *Keefer v. Ohio Dep't of Jobs & Family Servs.*, 2003-Ohio-6557, ¶¶ 13–14 (10th Dist. 2003).

ARGUMENT

THE TRIAL COURT ERRED IN EFFECTIVELY IMPOSING AN INJUNCTION ON APPELLANTS WITHOUT ANY DETERMINATION THAT THE REQUIREMENTS FOR INJUNCTIVE RELIEF HAD BEEN MET (Both Assignments of Error).

As explained in detail in Appellants' opposition to Appellees' motion

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to dismiss this appeal, incorporated here by reference, the Order inescapably functions as an injunction against Appellants. For at least an additional 90 days, the Order prevents Appellants from exercising their right to relocate Crew SC and requires them to provide local residents with "the opportunity to purchase the team" beyond the period created by statute. The Order further requires Appellants to submit to court oversight of what would otherwise be private negotiations over the potential sale of certain rights regarding Crew SC, and to participate in a compelled bid process not created by the statute. *See* Opp. to MTD Appeal at 10–18. [3]

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[3] In their reply on their motion to dismiss this appeal, Appellees argued that the Order does "not impose any affirmative obligations or restrictions" beyond conferring and further argued that "it is R.C. 9.67, not the Order, that prevents" a relocation. *See* MTD Appeal Reply at 8. Appellees grossly mischaracterize the Order in at least three respects. *First*, as explained above, the Order creates an additional 90-day period in which Appellants may not relocate Crew SC. *See* Order at 12. It is the Order itself that adds this additional period in which Crew SC may not relocate and not R.C. 9.67. *Second*, not only does the Order affirmatively "require[]" "Defendants . . . to provide information and materials" and order them to "agree upon the terms of an NDA" within 14 and 7 days, respectively, but it imposes penalties if they do not. In the event that Appellants are unable to reach agreement with Appellees on the information to be provided, the "Court will decide" for them. *See id.* at 16. Likewise, if Appellants are unable to reach an agreement with Appellees on the terms of an NDA, the court will consider competing NDAs. *See id.* *Third*, the Order injects the court into Appellants' private business negotiations by creating a compelled bid process in which the court will have a say in "what constitutes [a] bona

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As the injunctive nature of the Order is fully explained in those submissions, this brief turns straight to an explanation of why the trial court erred in granting the injunctive relief described above. Given that the errors made by the trial court are largely the same for all components of the injunction, the two Assignments of Error are briefed together and individually highlighted where appropriate.

An injunction is an "extraordinary remedy" that is only available where "it is necessary to prevent a future wrong that the law cannot." *Garono v. State*, 37 Ohio St. 3d 171, 173 (Ohio 1988). This high burden can never be met where, as here, the parties seeking injunctive relief lack a valid claim. *See, e.g.*, *In re Barone*, 2005-Ohio-4479, ¶ 19 (11th Dist. 2005) ("[W]hen there is no cause of action at law, there can be none in equity.").

To obtain a preliminary injunction under Ohio law, a plaintiff must show by clear and convincing evidence that (1) the plaintiff has a substantial likelihood of success on the merits of its case, (2) the plaintiff will be irreparably harmed in the absence of an injunction, (3) "no third parties will be unjustifiably harmed if the injunction is granted," and (4) the

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fide purchaser" and receive all offers directly from such bona fide purchasers, which "will then be provided to counsel." *See id.* at 17.

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injunction is in the public interest. *See, e.g.*, *Vineyard Christian Fellowship v. Anderson*, 2015-Ohio-5083, ¶ 11 (10th Dist. 2015); *Hydrofarm, Inc., v. Orendorff*, 180 Ohio App. 3d 339, 2008–Ohio–6819, ¶ 18 (10th Dist. 2008). The plaintiff's burden in demonstrating these factors is "substantial." *KLN Logistics Corp. v. Norton*, 174 Ohio App. 3d 712, 2008-Ohio-212, ¶ 11 (8th Dist. 2008). A court "simply cannot apply equitable principles if the plaintiff has failed to prove all the elements of [its] legal claim against a defendant." *Thompson v. Dawson*, 2003-Ohio-3291, ¶ 23 (7th Dist. 2003).

Appellees made none of the showings necessary to support a preliminary injunction, and the trial court did not consider any of the four factors necessary for a grant of injunctive relief. To the contrary, the Order expressly admits that the trial court simply presumed the statute's applicability and constitutionality for the purposes of ruling on the motions to "toll." *See id.* at 12 ("The Court's ruling on the Motions to Toll is premised on the notion that R.C. 9.67 is applicable."). Such a presumption is entirely inappropriate and prejudicial because it was used to impose obligations on Appellants that simply do not exist under the law. As such, the injunction is inappropriate, and the Order should be vacated. Moreover, even if Appellees had attempted to make the necessary

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showings, they would fail each prong of the test.

A. Appellees have no likelihood of success on the merits, much less the substantial likelihood of success necessary to justify injunctive relief.

1. R.C. 9.67 does not apply to Appellants on its face.

As explained in Appellants' Motion to Dismiss, incorporated here by reference, the statute does not apply on its face for at least two reasons. *See* MTD at 7–10. *First*, by its terms, R.C. 9.67 applies only to the "*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." R.C. 9.67 (emphasis added). As the Complaint acknowledges, MLS is the "owner" of Crew SC. *See* Compl. ¶ 12. Yet nowhere does the Complaint allege that MLS receives any support from the State or a political subdivision. Nor could it, as MLS does not receive any such support. Because R.C. 9.67 does not apply to MLS and no other Appellant is the team owner (as distinct from being a minority member of MLS (a Delaware LLC), with certain rights and obligations in connection with the operation of the club), Appellees cannot make out a claim.[4]

[4] When the General Assembly drafted R.C. 9.67, its focus was apparently on a "traditional" sports-league model, where individual teams are separately owned. MLS's model is different, because the league itself owns

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In their briefing below, Appellees argued for a different parsing of R.C. 9.67. They claimed it is the "team"—not the "owner"—that both "uses" a tax-supported facility and "receives financial assistance" from the State or political subdivision. But that reading would make the sentence ungrammatical: the subject of the sentence (the word "owner") would have no corresponding verb. Therefore, their reading is a nonstarter.[5]

Second, R.C. 9.67 sets forth two financial conditions that must be met before the statute is triggered: Appellees must demonstrate *both* that the owner "uses" a "tax-supported facility" for Crew SC's home games *and* that the owner "receives financial assistance" from the government. *See* R.C. 9.67. The wording and structure of the statute, placing these requirements

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the individual teams. Of course, that does not provide a basis for courts to expand the statutory language beyond its plain meaning.

[5] More precisely, the main body of the statute reads: "No owner of a professional sports team that [1] uses a tax-supported facility for most of its home games and [2] receives financial assistance from the state or a political subdivision thereof [3] shall cease playing most of its home games at the facility unless . . . ." R.C. 9.67 (numbering added). On Appellees' reading, the subject of each of the numbered clauses is "professional sports team." But then the words "No owner" play no role in the sentence, which cannot be right. The correct reading, therefore, is that the subject of each clause is "owner." This reading is further supported by the fact that R.C. 9.67 refers to an "owner's intention to cease playing most of its home games at the facility" in subparagraph B, where the verb "playing" corresponds with the subject "owner." *See id.*

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in separate clauses, makes plain that they are separate conditions that must be independently satisfied. Under the rule against surplusage, "financial assistance" must mean something different from "tax-supported facility," because otherwise the former would be rendered meaningless. *See, e.g.*, *State ex rel. Nat'l Lime & Stone Co. v. Marion Cty. Bd. of Comm'rs*, 2017-Ohio-8348 ¶ 14 (Ohio 2017) ("Our role is to evaluate the statute as a whole and to interpret it in a manner that will give effect to every word and clause, avoiding a construction that will render a provision meaningless or inoperative."); *N.E. Ohio Reg'l Sewer Dist. v. Bath Twp.*, 144 Ohio St. 3d 387, 2015-Ohio-3705, ¶¶ 12–13 (Ohio 2015) (finding the word "and" between two terms in a statute to have a conjunctive effect and declining to adopt an interpretation that would render one of the terms meaningless). Thus, even if MLS were using a tax-supported facility, there would still need to be an allegation that it receives separate financial assistance.

The Complaint, however, contains no such allegations. Each of the five instances of support alleged in the Complaint relates to the Stadium and is tax-related. Ohio courts have construed "tax support" broadly to include *any* support derived from tax revenue, including indirect support given by declining to take an action that otherwise would have resulted in money going into government coffers. *See, e.g.*, *Cleveland Elec. Illuminating*

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Co. v. Cleveland, 37 Ohio St. 3d 50 (Ohio 1988) (broadly construing "tax support" to include excusing a debt to the city); *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n*, 40 Ohio St. 3d 10, 12 (Ohio 1988) (broadly construing "tax support" to include a government entity's provision of rent-free use of public land to a private party). Any government support for the Stadium or its environs would thus constitute "tax support" for the "facility." *See id.*

As neither MLS (nor any other Appellant, were one to read the statute to treat them as an "owner") has even plausibly received financial support unrelated to the Stadium, R.C. 9.67 does not apply by its terms, and Appellees have no likelihood of success on the merits of their case.

2. R.C. 9.67 is unconstitutional as applied to Appellants.

Further, Appellees have no likelihood of success on the merits of their case because R.C. 9.67 is unconstitutional. *See* MTD at 10–18.

a. R.C. 9.67 violates the dormant Commerce Clause.

The dormant Commerce Clause prohibits states from directly regulating interstate commerce, discriminating against interstate commerce, or effectively favoring in-state interests over out-of-state interests. *See, e.g.*, *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 369–70 (6th Cir. 2013). When a

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state statute does any of these things, courts "generally str[ike] down the statute without further inquiry."[6] *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also, e.g.*, Cases Cited in MTD at 11. As prohibited by the dormant Commerce Clause, discrimination simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *see also, e.g.*, Cases Cited in MTD at 11. Differential treatment "is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other [s]tates." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577–78 (1997).

i. R.C. 9.67 unconstitutionally benefits local purchasers and consumers over those from other states.

By its terms, R.C. 9.67 unconstitutionally favors citizens of Ohio over

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[6] Where a court finds that a challenged statute is "neither discriminatory nor extraterritorial," the court applies the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and uphold it "unless the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Am. Beverage Ass'n*, 735 F.3d at 370 (quoting *Pike*, 397 U.S. at 142). *Pike* does not come into play here because R.C. 9.67 on its face treats in-state residents differently from out-of-state residents and discriminates against interstate commerce.

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citizens of other states by tying an owner's ability to relocate its team to a mandatory requirement that the owner must provide "the political subdivision or any individual or group of individuals *who reside in the area*" a six-month-long opportunity to purchase the team. *See* R.C. 9.67 (emphasis added). In prohibiting relocation of a team before an opportunity to purchase it is given to local residents, the statute thus gives local residents a leg up in the purchase process regardless of whether other individuals also make bids for the team. While an out-of-state resident may always make an offer for the team in the six months following notice, the team cannot be sold to the out-of-state resident until after the full six-month period for local residents has expired. In contrast, nothing in the statute prohibits a sale to a local resident before the six-month period is up. The statute thus impermissibly tips the scales in favor of local purchasers by making it more difficult for out-of-state citizens to purchase the rights to a team. That harms not only those out-of-state residents but also the team owner, who loses the value of increased competition for the team. Of course, the trial court's extension of that six-month period has enlarged the defect here.

Policies that benefit citizens of one state to the detriment of citizens of other states are classic violations of the dormant Commerce Clause. *See, e.g.*, *Camps Newfound*, 520 U.S. at 576 (dormant Commerce Clause

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"precludes a state from mandating that its residents be given a preferred right of access" to benefits "over out-of-state consumers"); *Dayton Power & Light Co. v. Lindley*, 58 Ohio St. 2d 465, 474 (Ohio 1979) (Ohio tax was invalid where it effectively encouraged consumption of Ohio coal and discouraged consumption of out-of-state coal); *Ecological Sys., Inc. v. City of Dayton*, No. 18966, 2002 WL 125702, at *7–8 (2d Dist. Feb. 1, 2002) (ordinance violated dormant Commerce Clause where it prohibited discharge from "another state into the City of Dayton's wastewater facilities"); Cases Cited in MTD at 12–13.[7]

Given that R.C. 9.67 is facially discriminatory and impermissibly favors local interests over out-of-state interests to the detriment of the latter, it should be struck down without further inquiry. Appellees have no likelihood of success on the merits of their case, much less the substantial likelihood of success necessary to support preliminary injunctive relief.

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[7] The fact that R.C. 9.67 may also discriminate against Ohio citizens who live outside the Columbus area does not absolve the statute of its discriminatory effects on all out-of-state residents. *See, e.g.*, *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

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ii. R.C. 9.67 unconstitutionally limits the movement of property in interstate commerce.

R.C. 9.67 also violates the dormant Commerce Clause by imposing a six-month waiting period and other hurdles on owners wishing to relocate their teams.[8] Those hurdles both (1) make it more difficult for team owners (and operators) to reach arrangements with out-of-state entities for stadium leases, sponsorship rights, and season tickets, and (2) simultaneously infringe on the ability of individuals and businesses in other states (and possibly those states and political subdivisions themselves) to entice a club to relocate.

It is well-settled that "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *C & A Carbone Inc.*, 511 U.S. at 394. Similarly, the United States Supreme Court has long held that states may not restrict the movement of resources out of the state. *See, e.g.*, Cases Cited in MTD at 14. As R.C. 9.67 discriminates against interstate

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[8] In their Complaint, Appellees suggest reading R.C. 9.67 to impose even higher hurdles to relocation by dramatically expanding the scope of the word "opportunity" to include a forced sale where Appellees believe a "reasonable" offer has been made. Such an interpretation would create even greater burdens on interstate commerce.

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commerce by attempting to impermissibly restrict professional sports teams from moving out of state and by interfering with interstate business operations, the statute is *per se* invalid and should be struck down.[9] *See, e.g.*, *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644–46 (6th Cir. 2010).

iii. The market participant exemption does not apply.

Courts recognize a limited exception to the dormant Commerce Clause where a state acts as a direct participant in a market rather than as a market regulator. *See, e.g.*, *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208, 218 (1983) (market participant exemption is only available to a state seeking "to govern the State's own economic conduct and to determine the parties with whom it will deal," not where state action "more closely resembles an attempt to impede trade among private parties"); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988) (explaining, as an example, that "when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business");

[9] The Order exacerbates these constitutional violations by imposing significant additional roadblocks to those already included in R.C. 9.67 through its imposition of the injunctive requirements detailed above.

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Shaper v. Tracy, 97 Ohio App. 3d 760, 763–64 (10th Dist. 1994).

To act as a direct participant, the state must act as a "consumer or vendor," *Shaper*, 97 Ohio App. 3d at 763, "engaged in an entirely private business." *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980). In contrast, a state acts as a market regulator where the state engages in classic governmental activity, including taxing its citizens, granting tax-related benefits to its residents, or otherwise regulating trade among private parties. *See Shaper*, 97 Ohio App. 3d at 764; *White,* 460 U.S. at 208, 218; *New Energy Co. of Indiana*, 486 U.S. at 271, 277 (rejecting contention that Ohio acted as a market participant in enforcing an Ohio statute that awarded tax advantages to companies that produced ethanol in Ohio).

Here, Appellees are acting as market regulators, not direct market participants. Appellees did not create a market for professional sports teams; nor offer a good or service in that market; nor purchase anything in that market. Instead, Appellees have sought to inject themselves as a regulator of the market, determining when teams may leave and to whom they may be sold. That they cannot do. Merely (allegedly) providing tax support to Crew SC at some point is insufficient to turn a governmental function into the direct and current market participation needed to sidestep the strictures of the dormant Commerce Clause. *Compare, e.g.*, *Bungard v.*

Ohio Dep't of Job & Family Servs., 2007-Ohio-6280, ¶ 15 (10th Dist. 2007) (state is a market participant when it sells lottery tickets) *with Shaper*, 97 Ohio App. 3d at 764 (state is not a market participant where it taxes interest on bonds issued by non-Ohio governmental entities). The dormant Commerce Clause applies, and R.C. 9.67 violates it. Consequently, Appellees cannot demonstrate any likelihood (much less a substantial likelihood) of success on the merits of their case.

b. R.C. 9.67 violates the Privileges and Immunities Clause.

As explained in the Motion to Dismiss, R.C. 9.67 also violates the Privileges and Immunities Clause by attempting to create economic opportunities for Ohio citizens at the expense of providing similar opportunities for citizens of other states. *See, e.g.*, *Alerding v. Ohio High Sch. Athletic Ass'n*, 779 F.2d 315, 316–17 (6th Cir. 1985); MTD at 14–15. In discriminating against potential purchasers from outside of Ohio, R.C. 9.67 harms both those individuals and Appellants for related reasons. R.C. 9.67 impedes citizens of other states in their efforts to purchase the team's operating rights, which correspondingly harms Appellants by reducing competition for the team's operating rights and artificially lowering the team's value in a potential sale. That the statute also violates the Privileges

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and Immunities Clause is yet another reason why Appellees have no likelihood of success on the merits of their case.[10]

3. Appellants have complied with R.C. 9.67.

Injunctive relief is wholly inappropriate where, as here, Appellants have complied with the terms of R.C. 9.67. In fact, the Complaint admits that Appellees are on notice of Appellants' intent to relocate Crew SC and further acknowledges that Mr. Precourt has engaged in conversations with at least one potential investor. *See* Compl. ¶¶ 28–30.

Moreover, in their opposition to the City's motion to toll, Appellants provided ample evidence that they are in compliance with R.C. 9.67, including (1) affidavits showing that PSV sent an NDA to an interested individual in December 2017 and that MLS and PSV sent out new NDAs in April 2018; (2) the March 2018 letter to Mayor Ginther, in which Appellants detailed the notice given in Fall 2017, reiterated their intent to provide notice under the statute for the avoidance of any doubt, and

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[10] For the reasons explained in the Motion to Dismiss, R.C. 9.67 is also unconstitutionally void for vagueness and, as applied, could lead to an unconstitutional taking in violation of Ohio law and the United States and Ohio constitutions. *See* MTD at 15–24. Indeed, the statute appears to impermissibly seek to mandate the opportunity for a sale of intangible interest, *i.e.*, a membership interest in a Delaware LLC.

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reaffirmed their willingness to hear offers for the rights to Crew SC; (3) email correspondence between counsel for MLS and the State in which counsel for MLS reaffirmed its commitment to providing NDAs to bona fide prospective purchasers; and (4) an article confirming that MLS has continued to engage in substantive conversations with local residents regarding the team in the months following the provision of notice. *See* Opp. to Toll, Ex. B–F.

The trial court did not consider any of this evidence in issuing the Order, instead assuming the truth of the allegations in the Complaint. *See* Order at 2, 2 n.4. Yet the standard for deciding a motion to dismiss is wholly inapplicable and inappropriate in the context of determining whether to impose injunctive relief. To have properly granted an injunction, the trial court needed to find that Appellees had demonstrated each prong of the four-prong test by "clear and convincing *evidence*." *Hydrofarm*, 2008–Ohio–6819, ¶ 18 (emphasis added).

Absent any demonstration that Appellants have violated R.C. 9.67 or will imminently violate the statute, Appellees are not entitled to the extraordinary relief imposed by an injunction. *See, e.g.*, *Oberhaus v. Alexander*, 28 Ohio App. 2d 60, 61 (3d Dist. 1971) ("[A]lthough a continuing trespass is a basis for injunctive relief, it is not sufficient to have

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merely a speculative, anticipated trespass."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

The compelled bid process mandated by the Order—in which the trial court created a process nowhere embodied or authorized by R.C. 9.67—is additionally inappropriate in light of the total lack of evidence that Appellants have violated the statute.

B. Appellants are irreparably harmed by the Order.

As explained above, R.C. 9.67 does not—and cannot—apply to Appellants. *See also* MTD at 7–24. The trial court's decision to presume R.C. 9.67's applicability (and therefore its constitutionality) for purposes of the Order and to mandate that Appellants follow the terms of an injunction not contemplated by the statute has thus resulted in an immediate, continuing, and irreparable violation of Appellants' rights.

While the Order is in place, Appellants cannot exercise their rights to relocate Crew SC; cannot take actions in support of relocation, such as arrangements for a stadium lease, sponsorships, and season-ticket packages; and must turn over sensitive financial information through the

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trial court, all while following a compelled bid process that injects the trial court into Appellants' private business operations and the statutory opportunity to purchase.

Yet in light of the inapplicability and unconstitutionality of R.C. 9.67, *see, e.g.*, MTD at 7–24, Appellants should not be required to wait any time at all to exercise their rights, much less wait an additional 90 days or more. Nor should they be required to provide an additional 90-day window for local residents to make offers to purchase the team's operating rights or to comply with the court-imposed processes that now govern how Appellants must act during the pendency of the six-month period.

Each day that Appellants are required to comply with R.C. 9.67 and with the additional processes imposed by the trial court is another day that Appellants' rights are being violated and another day that they are missing out on business opportunities. And each day that Appellants lose to the injunction is a day that Appellants will have permanently lost. The trial court cannot give them back the 90 days it has added to the six-month period. Nor could Appellants' sensitive information be unseen in the event that they are compelled to turn it over (particularly to any parties chosen by the court) on pain of contempt.

Such violations constitute irreparable harm, and Appellants will

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continue to be irreparably harmed until the injunction is lifted and their rights are adjudicated. *See, e.g.*, *Mansfield Family Rest. v. CGS Worldwide, Inc.*, No. 00-CA-3, 2000 WL 1886226, at *2 (5th Dist. Dec. 28, 2000) (finding harm to appellant in situations where "cat is let out of the bag and can never be put back in," such as the prevention of an athlete playing football for a year or the forced production of sensitive information); *Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043, ¶ 38 (10th Dist. 2016) (enforcement of unconstitutional statute would cause irreparable harm); *Inrex Home Care, LLC v. Ohio Dep't of Dev. Disabilities*, 2016-Ohio-7986, ¶ 13 (10th Dist. 2016) (noting that even the risk of loss to business opportunities constitutes irreparable harm).

Though Appellants detailed the irreparable harm that an extension of the statutory six-month period would cause them in their opposition to the City's motion to "toll," *see* Opp. to Toll at 11–13, the trial court did not make any findings as to the harm that the injunctive relief imposes on Appellants, as it was required to do. In granting an injunction without finding that Appellees had demonstrated by clear and convincing evidence that Appellants would not be "unjustifiably harmed if the injunction is granted," the trial court committed reversible error. *See Vineyard Christian Fellowship*, 2015-Ohio-5083, ¶ 11.

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C. In contrast, Appellees would not be harmed by a proper reading of the statute.

Unlike Appellants, who are undeniably harmed by the Order's dictates, Appellees would not be harmed at all in the absence of an injunction. As explained above, Appellants are already in compliance with the very statute that Appellees seek court oversight to enforce; thus they already have everything to which they could claim to be entitled.

Moreover, the harm that Appellees claimed in support of their motions to "toll" makes no sense. The crux of Appellees' motions is the argument that Appellants are somehow using the litigation to "run the clock" on the statutory six-month period, thus ensuring that they do not have to comply with the statute. *See* City's Mot. to Toll at 3; State's Mot. to Toll at 8, 10.

Yet unlike Appellants, which are now subject to impermissible restraints on their abilities to relocate and otherwise operate their businesses and obligations to produce sensitive business information outside the course of their normal business operations, Appellees would not be harmed at all in the absence of the injunction. Interested parties can submit offers to purchase the rights to operate Crew SC (and related rights) right now, just as they have been able to do since Day 1. Indeed, it is only Appellees who have sought delay—hopeful no doubt that the litigation

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would interfere with Appellants' ability to relocate Crew SC. As explained above and to the trial court, Appellants have been open to offers to purchase the team's operating rights since the potential relocation of the team was announced and have engaged in conversations with potentially interested parties on multiple occasions. *See* Opp. to Toll at 6–10, Ex. B–F.

Nothing about this lawsuit has any bearing on whether an interested party can make an offer for the rights to Crew SC, and dragging out the lawsuit only serves to further Appellees' unspoken goal of forcing Crew SC to stay in Columbus through frivolous and aggressive litigation. That it may take longer than six months for the litigation—which *Appellees* brought—to be resolved is not an "extraordinary circumstance" meriting the imposition of an injunction against Appellants. If it were, Appellees could always do an end run around the legislature's decision to impose a six-month opportunity period by the simple device of bringing a lawsuit. But the statute should not operate differently against different parties based on whether the government chooses to sue them.

As Appellees did not—and cannot—show by clear and convincing evidence that they will be irreparably harmed in the absence of an injunction, the trial court erred in granting one. *See Vineyard Christian Fellowship*, 2015-Ohio-5083, ¶ 11.

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D. Enjoining Appellants from relocating Crew SC and otherwise forcing them to undertake affirmative actions not contemplated by statute does not serve the public interest.

Last, the injunction imposed by the Order does not serve the public interest. It does not serve the public interest to authorize the violation of Appellants' constitutional rights, nor does it serve the public interest to expand the scope of a statute beyond its terms, regardless of how much Appellees want to keep the team in Columbus. *See, e.g.*, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001) ("it is always in the public interest to prevent violation of a party's constitutional rights"); *cf., e.g.*, *Youngstown City Sch. Dist. Bd. of Educ.*, 2017-Ohio-555, ¶ 80 (Brunner, J., dissenting) (determining whether a statute was constitutionally enacted is a matter of public interest); *Escape Enters., Ltd. v. Gosh Enters., Inc.*, 2005-Ohio-2637, ¶ 47 (10th Dist. 2005) (preserving sanctity of contractual relations is in the public interest). To hold otherwise would be to diminish both the constitution and state law.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court vacate the Order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Brief of Defendants-Appellants* was served on all parties on June 8, 2018 via email and the Court's electronic service to the following:

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