IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Patricia Surbella, et al.,	**:**	**Case No. 2:05-CV-758**
Plaintiffs,	**:**	**Judge: Watson**
v.	**:**	**Magistrate: Kemp**
Mark Foley, et al.,	**:**	**Defendants' Memo Contra Plaintiffs'**
Defendants.	**:**	**Motion to Dismiss without Prejudice**

DEFENDANTS FOLEY AND NOVATEC'S MEMO CONTRA PLAINTIFFS' MOTION FOR DISMISSAL WITHOUT PREJUDICE

Now come Defendants Foley and Novatec, by and through their counsel, and file this Memo Contra Plaintiffs' Motion for Dismissal without Prejudice. For the reasons more fully set forth in the Memorandum in Support below, the Court should deny Plaintiffs' Motion.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction and Factual Background

This matter was filed by Plaintiffs Surbella and Arete/NEOLITH on August 10, 2005, two days after Defendant Mark Foley had filed a Complaint against Surbella and A/N in the Knox County Court of Common Pleas. Due to the pending claims in this Court, Judge Eyster of the Knox County Court of Common Pleas stayed all proceedings in his case upon the motion of Surbella and A/N.

The parties conducted extensive discovery in the instant case and filed a great many motions (the court's docket shows 161 filings as of July 12, 2007, with a few more since then). After Plaintiffs missed several deadlines resulting in having their expert witnesses excluded, after Plaintiffs failed to timely comply with this court's orders, and two days **after** the trial set for July 16, 2007 was to begin, Plaintiffs have now decided that they have had their fun with this case and filed a Motion for Dismissal of their claims. They now argue, after filing a motion in the Knox County proceedings to stay those proceedings pending the outcome of the instant proceedings, that dismissal should be granted without prejudice so that they can litigate their claims again in Knox County. So they successfully sought to stay the proceedings in Knox County, using the federal proceedings as the reason, and now seek to shut these proceedings down in order to go back to Knox County. But they also hint that they may re file the case in this Court. Delay is the object here.

II. Law and Argument

A. Civil Rule 41(a)(1) Notice of Dismissal Previously Filed

Civil Rule 41(a)(1) allows a plaintiff, under limited circumstances to dismiss his claims for relief merely by giving notice to the Court, but this power of the Plaintiff is limited in federal proceedings to two situations:

> **(1) By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(a) of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

In this case, on July 15, 2007, Plaintiffs filed two stipulations of dismissal purporting to have authority to sign for Mr. Andrew Ruzicho. But as was argued in Defendants' recently filed Motion to Strike, Plaintiffs did not have authority to sign Mr. Ruzicho's name to either Stipulation of Dismissal they filed. As such, there is no stipulation and therefore dismissal without prejudice cannot be noticed by the Plaintiff pursuant to Civil Rule 41(a)(1)

B. Plaintiffs' Motion for Dismissal Pursuant to Civ. R. 41(a)(2)

This leaves Civil Rule 41(a)(2) as the only basis for the dismissal of this action at the behest of the Plaintiff. Civil Rule 41(a)(2) states in pertinent part as follows:

> **(2) By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

1. Court Has Discretion to Dismiss Plaintiffs' Claims With or Without Prejudice.

Federal Rule of Civil Procedure 41(a)(2) permits a district court to dismiss an action 'upon such terms and conditions as the court deems proper.' "[1] "The rule is designed primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions."[2] These matters fall within the district court's discretion and "[r] eversal requires a clear abuse of discretion."[3] Courts generally agree that Rule 41(a)(2) motions "should be allowed unless defendant will suffer some prejudice other than the mere prospect of a second lawsuit."[4]

2. Factors Courts Consider in Determining Prejudice

In determining whether a dismissal would cause prejudice to a defendant, a court should consider: a) the excessive and duplicative expense of a second litigation, b) the defendant's effort and expense of preparation for trial, c) lack of plaintiff's diligence in bringing the motion and d) the extent to which the current suit has progressed.[5] Prejudice can also arise because of insufficient explanation of the need for a dismissal."[6] These factors are neither exhaustive nor conclusive; courts should be sensitive to other considerations unique to the circumstances of each case.[7]

As the United States District Court for the Eastern District of New York found in the case of Bosteve Ltd. v. Marauszwki, 110 F.R.D. 257:

> This action has been pending for nearly two years. During this time, defendant has expended substantial sums on pretrial discovery and counsel fees. Further,

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1 Am. Nat'l Bank & Trust Co. v. Bic Corp. 931 F.2d 1411, 1412 (10th Cir. 1991) (quoting rule).

2 Phillips USA, Inc. v. Allflex USA, Inc. 77 F.3d 354, 357 (10th Cir. 1996) (quotation omitted).

3 Am. Nat'l Bank & Trust Co. v. Bic Corp. 931 F.2d 1411 at 1412; Zimpro Inc. v. United States Environmental Protection Agency, 83 F.R.d. 302, 303 (N.D.N.Y. 1979); 5 Moore's Federal Practice, Section 41.05[1] at 47 (2d ed. 1985).

4 In Re Paoli R.R. Litigation, 916 F.2d 829, 863 (3d Cir. 1990); Ohlander v. Larson, 114 F.3d 1531, 1537 (10th Cir. 1997).

5 Manners v. Fawcett Publications Inc., 85 F.R.D. 63, 65 (S.D.N.Y. 1979); 5 Moore's Federal Practice, § 41.05[1] at 53-57 (2d ed. 1985).

6 Ohlander, 114 F.3d at 1537.

7 Id.

> plaintiff brought this motion on the eve of trial. Courts have not hesitated to deny Rule 41(a)(2) motions in similar circumstances. *See e.g.* Ferguson v. Eakle, 492 F.2d 26, 29 (3d Cir. 1974) (district court's failure to deny Rule 41(a)(2) motion was an abuse of discretion when the motion was made after pretrial discovery was completed and on the eve of trial); Pace v. Sourther Express Co., 409 F.2d 331, 334 (7th Cir. 1969) (district court properly exercised its discretion in denying plaintiff's motion for dismissal without prejudice where defendant had expended much effort in preparing for trial); 5 Moore's Federal Practice, § 41.05[1] at 53-57 (2d ed 1985) (citations omitted).

Nearly all of the same factors are present in the instant case. The case was first filed in August of 2005, two weeks shy of two years ago. The Defendants in this case too have expended substantial sums of money on pre-trial discovery and counsel fees. Further, the Plaintiffs in this case have also waited until the eve of trial and have advanced no reasonable explanation for their desire to dismiss their lawsuit in their motion. It is appropriate to deny a dismissal after completion of extensive discovery and a pretrial conference to avoid financial prejudice to defendant.[8]

a. Excessive and Duplicative Expenses

In the instant case, despite Plaintiffs' conclusory arguments (unsupported by any affidavit) that "the parties will not have to incur expenses in conducting additional discovery or time for preparation", this is a false statement, both factually and legally.

1) Requests For Admissions Limited To These Proceedings

While Plaintiffs may argue that all of the discovery from this Court can be used again, this is not the case with Requests for Admissions. Civil Rule 36 states that:

> **(a) Request for Admission.** A party may serve upon any other party a written request for the admission, **for purposes of the pending action only**, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request [emphasis added].

[8] Ockert v. Union Barge Line Corp., 190 F.2d 303, 205 (3d Cir. 1951).

> **(b) Effect of Admission. …**Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Thus any admissions obtained or denied in this action are not useful in any other case, and efforts toward securing such admissions or denials would have to be duplicated in subsequent or other proceedings.

2) Pre-Trial Statement

Local Rule 16.1 states that this Court shall establish General Orders about certain matters. Paragraph IV of General Order No. 01-1 requires that the parties to litigation confer together before a final pretrial conference and then file a joint proposed pre-trial order no later than three days before the final pretrial. Paragraph V of this General Order put the Plaintiffs on notice that "The failure of any party or trial attorney to comply with the provisions of this General Order may result in dismissal or default, as may be appropriate."

Defendants sought Plaintiffs' cooperation in filing a Pre-Trial Statement before the February 21, 2007 Pre-Trial. Plaintiffs ignored Defendants' email request. A true and accurate copy of this email is attached hereto as Exhibit C. Defendants timely filed their Pre-Trial Statement before the February 21, 2007 Pre-Trial. Plaintiffs never filed a Pre-Trial Statement, though counsel for Plaintiffs promised the Court at the Pre-Trial on the record that they would file one later that day or the next.

25 Mr. Donchatz, did you do anything with respect to the

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1 final pretrial order?
2 MR. DONCHATZ: No, Your Honor. I'm sorry about that.
3 I haven't filed anything yet, but I will file something today
4 or tomorrow for sure.
5 THE COURT: To the extent that you're able to do so,
6 I'd appreciate that you consult with them and that it be as
7 joint as possible.

After that promise to the Court, Plaintiffs never bothered with it.

Local Rule 6.02 of the Knox County Court of Common Pleas also requires the filing of Pre-Trial Statements. But those pretrial statements are not the joint submissions that this Court's rules require, and require different matters to be addressed in a different order. The pre-trial statement filed in this case cannot be used in the Knox County Court of Common Pleas. Thus this is another example of duplicative efforts on the part of the Defendants if this matter is dismissed without prejudice.

3) Trial Exhibit Notebooks

Defendants have spent a significant amount of time and effort in putting together Trial Exhibit Notebooks and distributed them to Plaintiffs and to the Court. Plaintiffs never bothered to compile or distribute Trial Exhibit Notebooks to opposing counsel or to the Court.

4) Defendants' Expert Witnesses

Defendants timely disclosed and hired expert witnesses to compile reports and to testify about the STARS software and how APPL, a subsequent Praxis III program, is not substantially similar to STARS. Plaintiffs missed their March 1, 2006 deadline imposed by the Court for disclosure of expert witnesses. Money spent here by the Defendants has been wasted if this Court allows Plaintiffs' claims to be dismissed without prejudice. This is because Copyright Infringement claims cannot be heard in the Knox County Court of Common Pleas, and thus the claim would have to be re-filed in this Court, and the experts would have to be retained again.

5) Time Spent Preparing for Trial

Defendants spent a great deal of time and effort during the weeks before this trial, organizing and preparing the presentation of their defense against Plaintiffs' case. These hours

cannot be used again in other litigation. Since Plaintiffs never produced Trial Exhibit Notebooks as required by the Court before the trial, Defendants were forced to prepare their case without knowing what exhibits Plaintiffs would deign to offer the Court. Defendants were left to guess at which documents would be used. Additionally, as pointed out in Defendants' Motion to Compel Production of Documents, Plaintiffs have never provided dozens of their named exhibits to the Plaintiffs in addition to other discovery documents.

6) Continuing Discovery

Defendants spent a great deal of time in their unsuccessful attempt to obtain necessary discovery from Plaintiffs. Defendants sought financial records which the Court is presently reviewing in camera to determine their admissibility. Defendants sought the computer back up tapes, which Plaintiffs eventually turned over, but the last quarter of 2004 and the first quarter of 2005 were never turned over to Defendants. Defendants had to file a Motion for Plaintiffs to Show Cause before the complete ADE contract was turned over in response to it, and Plaintiffs have still not turned over the complete email correspondence with ADE, despite their many claims that they have.

Plaintiffs refused to fully comply with this Court's February 23, 2007 Order granting in part Defendants' Motion to Compel Discovery. Defendants were forced to prepare for this trial without the discovery ordered by this Court. The expenditures of the Motion to Compel and Motion to Show Cause will be wasted if this matter is dismissed without prejudice. Defendants will have to expend additional time and money in any future efforts to collect the discovery that this Court ordered and which was never turned over. This is more evidence of duplicative efforts which will be necessitated if this Court grants a dismissal without prejudice.

Thus it is clear that Defendants will again have to pay attorneys to fully re-litigate a case which was set for trial on July 16, 2007 from scratch. Defendant will again have to miss work to appear at pre-trial hearings (something that Plaintiff Surbella didn't find important enough to do back on February 21, 2007), status conferences, depositions, trial preparation sessions, and then for trial. Defendants' witnesses will again have to be retained and put on call, their lives disrupted as well.

b. Defendants' Effort and Expense of Preparation for Trial

As stated above, Defendants have spent a great deal of time and money preparing for this trial before this federal court, which trial was to start on July 16, 2007. Defendants went to great expense to conduct the video deposition of Paulette Blevins from Arkansas. Defendants secured at great cost, reports comparing STARS and APPL. Defendants compiled voluminous Trial Exhibit Notebooks and distributed them to the Court and opposing counsel, even though Plaintiffs didn't bother to put together any Trial Exhibit Notebooks nor distribute them to the Court nor opposing counsel. Approximately 161 filings appear on the docket of this case, and now, if Plaintiff is granted a dismissal without prejudice, all of those efforts of counsel for the Defendants as well as the efforts and energies of the Defendants, mean nothing.

c. Lack of Plaintiffs' Diligence in Bringing the Motion

Plaintiffs' well-established pattern in this case is anything but diligent. The manner in which they finally got around to filing their Motion for Dismissal, days after the trial was supposed to start is par for the well-established course. Plaintiff missed the March 1, 2006 deadline for disclosing expert witnesses and their reports. Magistrate Kemp found that Plaintiffs did not offer a justifiable reason for missing this deadline. Magistrate Kemp concluded that the Plaintiffs simply were not diligent in the matter. Despite four (4) extensions granted for

Dispositive and Discovery deadlines [9], Plaintiffs still did not manage to execute deposition subpoenas for several witnesses until after the final deadline. Defendants moved to Quash these deposition subpoenas issued in disregard of the September 1, 2006 deadline[10] and Magistrate Judge Kemp granted this Motion to Quash on October 10, 2006.[11]

Plaintiffs did not bother to file a Pre-Trial Statement prior to the February 21, 2007 Pre-Trial, nor to file one later in the day or the next day even after promising the Court that they would. Plaintiff Surbella did not even bother to attend that Pre-Trial, nor seek leave of the Court to be absent. Despite this Court's Order to turn over the Arkansas Contract by 11:00am Thursday, February 23, 2007, Plaintiffs did not turn this document over until several months later on June 15, 2007, and only then in response to Defendants' Motion to Show Cause. Plaintiffs still have not completely complied with this Court's February 23, 2007 Order granting in part Defendants' Motion to Compel Discovery as regards the remaining backup tapes and complete email correspondence between Plaintiffs and ADE.

d. Extent to Which the Case Has Progressed

But most importantly, Plaintiffs waited until almost 11:00 p.m. the night before the trial to file the first of their two notices of dismissal. After Defendants had to protest their signature being attached to not one but two stipulations to which they did not agree, Plaintiff informed the

[9] Consent MOTION to Continue June 1, 2006 *Discovery Deadline* (document 33)
6/1/2006 Order granting Discovery extension to July 31, 2006 (document 35)
First MOTION to Continue Dispositive Motion Deadline until August 1, filed 6/21/2006 (document 37)
Second MOTION for Extension of Time to August 20, 2006 Joint Motion file 6/27/2006 (document 40)
6/28/2006 Order Granting (40) Joint Motion for Extension of Time to file dispositive motions - new date 8/20/2006. (document 41)
Joint MOTION for Extension of Time [discovery deadline], New date requested 9/1/2006, filed 7/31/2006 (document 47)
8/8/2006 ORDER granting (47) Motion for Extension of Time - extension to 9/1/2006 for discovery and 9/20/2006 for dispositive motions. (document 51)

[10] SUBPOENAS Returned Executed as to Noel Alden, Steve Strohl & Dorothy Foley by plaintiff, 9/13/2006 (document 59)
[11] 10/20/2006 ORDER granting (62) Motion to Quash. (document 72)

Court and opposing counsel on the afternoon of July 16, 2007, that he already had a Motion to Dismiss drafted up and ready to file, and that he would go back to his office and file it immediately. Finally, two days later, July 18, 2007, Plaintiff filed a two and a half page Motion for Dismissal, half of which was taken up by a case caption, signature block, and certificate of service.

e. Lack of Sufficient Explanation of the Need for Dismissal

Plaintiffs' Motion for Dismissal makes no attempt to explain why the need to dismiss their case with prejudice at literally the very last few hours before trial. They argue in their motion (unsupported by affidavit) that the parties are close to settlement. But after several mediations and a day of settlement talks, it is clear that the parties simply cannot agree.

They next argue that the Defendants will not be prejudiced by a dismissal without prejudice, but this is not an explanation of why they are dismissing the case.

Plaintiffs next argue that "Instead, Plaintiffs choose to assert their claims in Knox County County [sic] where they remain intact." On August 8, 2005, Defendant Foley filed claims against Pat Surbella and A/N in the Knox County Court of Common Pleas. On August 10, 2005, Plaintiffs Pat Surbella and A/N chose to litigate in this Court by filing the Complaint in this case. On October 26, 2005, Plaintiffs chose to assert their counterclaims before the Knox County Court of Common Pleas. Exhibits A and B are Plaintiffs' Motion to Stay the proceedings in Knox County, filed October 5, 2006 and Judge Eyster's Entry granting stay of proceedings filed on October 16, 2006.

So now they choose to assert their claims in Knox County again. But will they? After obtaining a dismissal of the claims in this case without prejudice, nothing stops them from re filing them in this Court again and starting this litigation from scratch, in which case all of their

lack of diligence leading to excluded witnesses and evidence will be swept away. Defendants will be penalized at the mere whim and caprice of the Plaintiffs. Plaintiffs even hint in their Motion to Dismiss that they may file again in this Court: "Thus if litigation is necessary, the essential claims presented here can be litigated in Knox County **or in a re-filed case in this Court** [emphasis added]."[12] Thus where and when they file their claims next is anyone's guess if they are granted a dismissal without prejudice.

f. Other Reasons

1) Plaintiffs' Conduct Proves They Never Intended to Go to Trial

The pattern of Plaintiffs' conduct in this litigation could not be clearer. This litigation was brought before this Court without any intention of going to trial. It was filed two days after Defendant Foley filed his claims for relief in the Knox County Court of Common Pleas. Plaintiffs missed the March 1, 2006 deadline to disclose their expert witnesses and submit their expert witness reports and Magistrate Kemp found that they provided no good reason for doing so. Plaintiffs violated Local Rule 16.1 as it incorporates this Court's General Order 01-1 when they simply ignored Defendants' email regarding fashioning a joint Pre-Trial Statement and then never bothered to file a Pre-Trial Statement for the Pre-Trial held on February 21, 2007. Plaintiffs lost on a motion to compel discovery, and a motion to show cause had to be filed before anything like compliance with this Court's orders on the missing discovery could be had. Plaintiff Pat Surbella did not even bother to show up for the Pre-Trial held on February 21, 2007 and did not petition the Court for leave not to show up. Plaintiffs never even bothered to provide Trial Exhibit books to either the Court or the Defendants.

[12] Plaintiffs' Motion to Dismiss Page 2.

On the evening before trial, with no explanation whatsoever, Plaintiffs filed two Notices of Dismissal based upon stipulations which were never agreed to by Defendants. Plaintiffs then had to be called in to court on the July 16, 2007 trial date to address issues arising out of this conduct.

After a day of discussions, during which Plaintiffs' counsel informed the Court that Plaintiffs were dropping the case because Plaintiff Surbella had "had a bellyful of litigation and is folding her tents", the Defendants and the Court learned that she was just about to file a new case against the State of Arkansas based upon losing the ADE contract, despite this Court's repeated admonitions that settlement discussions were to be global regarding all claims of the parties arising out of this matter.

Now they argue that this case should be dismissed without prejudice so that they can litigate further in Knox County. The question now is whether Plaintiff Surbella has a "bellyful of litigation" or whether that was just more dishonesty from this vexatious litigant. The real reason that Plaintiffs are dismissing their case is that they were and remain completely unprepared to go to trial in a matter they never intended to try. Now they seek a dismissal with prejudice so that they can keep Defendants and his clients from proceeding with their important business relationships.

2) Other Courts' Dockets In Limbo

This Court should also consider that if it grants the Plaintiffs' Motion to Dismiss without Prejudice, there is not guarantee that Plaintiffs will not turn right around and re-file their claims with this Court, further stalling the other courts waiting for the outcome of litigation in this Court.

a) Franklin County Court of Common Pleas, Division of Domestic Relations

As this Court has noted, this is not the only litigation that Defendant Foley is engaged in. Defendant Foley successfully appealed the outcome of the Trial Court in his divorce case, Foley v. Foley, and, by coincidence, his new trial date in that matter was set for July 16, 2007, the same day that this matter was supposed to go to trial. Defendants moved for a continuance of this because of the conflict with the case before Judge Yarborough at the Franklin County Court of Common Pleas, Division of Domestic Relations. This motion was denied by this Court, which stated that there would be no continuance of the July 16, 2007 trial date. This forced the case before Judge Yarborough to be moved. Gregg Lewis is Defendant Foley's attorney in that case and he has testified via affidavit that the outcome of this case affects the outcome of that case.

It should also be noted that Defendant Foley's divorce case was previously delayed one (1) year from July 13, 2006 until July 16, 2007 because of ex parte material Plaintiffs' counsel, Kenneth Donchatz, sent to Judge Preisse, which resulted in Judge Preisse's recusal and the reassignment of that case to Judge Yarborough.

b) Franklin County Court of Common Pleas Receivership

The Franklin County Court of Common Pleas has to hold open the Novatec Receivership, Case No. 03 CVH 01 1070 while this Court decides whether or not the ownership of certain intellectual property rights in computer software, STARS, transferred to the Plaintiffs during a sale of tables, desks, chairs, and used computers, or whether that property remained Novatec's. Plaintiffs in this case intervened and stopped the sale of STARS as an asset of the receivership, arguing that it was up to this Court to determine who the proper owner of STARS is. A true and accurate copy of Judge Brown's Order to Stay Proceedings is attached as exhibit D. The outcome

of that case depends upon the outcome of this case. If this case is dismissed without prejudice, it is likely that the receivership case cannot close.

c) United States Bankruptcy Court

The United States Bankruptcy Court has had to hold Defendant Foley's personal bankruptcy case open while the Receivership Court awaits the decision of this Court. Fred Luper is the attorney for the Creditors in that case and he has stated to both parties that the outcome of this case affects the outcome of his case. If Mr. Luper is unable to obtain assets from the receivership Mr. Foley's bankruptcy cannot close.

d) Knox County Court of Common Pleas

The Knox County Court of Common Pleas stayed its proceedings in the case of Foley v. Surbella, Case No. 05 OT 080320. The Knox County case was filed before this case, but is now awaiting the outcome of this case. A copy of the Court's granting Pat Surbella and A/N's Motion for Stay of that case is attached hereto as Exhibit B.

3) Lack of Substance to Dismissed Claims

All of this further exacerbated by the lack of substance of the asserted claims. Plaintiffs are suing Defendants for violation of a non-compete clause which Defendants were prepared to prove 1) excluded the Arkansas Department of Education (as a pre-existing client of Novatec and Foley); 2) had expired by the time Defendant Foley started to compete; and 3) is found in a contract that Plaintiffs themselves first breached (by terminating Defendant Foley on January 4, 2005 with no notice or chance to remedy as the contract requires). All of the non-compete activities they allege took place after January 4, 2005 when Defendant Foley was unceremoniously fired by letter with no notice.

They seek to collect for civil conspiracy when, on the eve of trial, they still cannot name any co-conspirators, nor have they any admissible evidence proving the existence of such co-conspirators.

They seek relief for "contempt of court" when the orders they allege Defendants are in contempt of are not this courts orders. They seek relief for "frivolous conduct" when the conduct they describe took place in a state court proceeding and when Ohio Revised Code Section 2323.51 specifically mandates that such a claim must be brought by motion, not as a claim for relief.

They seek damages for copyright infringement upon software with no evidence of transfer of intellectual property as required by law. The seek damages under the Computer Fraud and Abuse act when they cannot prove that Defendants' actions fell within the Act's requirements, and where the only evidence shows that all Defendants did was change the IP address of their own website, Novatec-inc.com, which they had a perfect right to do.

They seek relief for breach of contract based upon their "contract" to lease the house at 100 Ohio Avenue in Knox County, Ohio, when their own January 4, 2005 letter terminating Mr. Foley recites that they are declining to accept Mr. Foley's "offer" to lease them the house.

4. Imposition of Attorneys Fees Insufficient Sanction.

It may be tempting for this Court to simply impose attorneys fees upon Plaintiffs and dismiss their claims without prejudice. But Plaintiffs have represented time and time again to Defendants that they are completely out of money. Plaintiff A/N is a defunct company and Plaintiff Surbella's counsel, Mr. Donchatz, has repeatedly told Defendants' Counsel and this Court that he would "march her down to bankruptcy court" and discharge any judgment Defendant Foley obtained against Plaintiff Surbella on the claims in Knox County. Thus an

award of attorneys fees against a penniless yet vexatious litigant has limited, but not insignificant, meaning.

III. Conclusion

For the reasons set forth above, this Court should only allow a dismissal of this case with prejudice and for attorneys fees against the Plaintiffs (if the Court dismisses this case with prejudice, Defendants will file a petition for fees at that time setting out their fees and expenses). All of the factors in the case law and the facts of this case favor this outcome. This case was brought for no other reason than to delay the proceedings in the Knox County Court of Common Pleas, and Plaintiffs were simply unprepared to go to trial, just as they have been unprepared throughout this case. But this case has delayed several other courts as well, and there is no end in sight to the delay of the litigation in these and other courts if this case is dismissed without prejudice.

Respectfully submitted,

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/s/ Eric E. Willison
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(614)221-3938
Co-Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record via the federal court's electronic filing system.

/s/ Andrew J. Ruzicho II
Andrew J. Ruzicho II (0064024)

IN THE COURT OF COMMON PLEAS
KNOX COUNTY, OHIO

MARK FOLEY	:	
PLAINTIFF,	:	
-vs-	:	Case No. 05BR080320
PAT SURBELLA, ET. AL.	:	Judge Otho Eyster
DEFENDANTS.	:	**ORDER**

This matter came before the Court on Defendant's Motion For Stay Pending Outcome Of Identical Federal Action and the Court finding Defendant's motion well taken, it is

ORDERED Defendant's Motion For Stay Pending Outcome Of Identical Federal Action is granted. Counsel for Defendant shall file a report as to the status of this case on or before March 15, 2007.

IT IS ORDERED.

Otho Eyster, JUDGE

Close Code O

cc:
Andrew Ruzicho, II
Eric Willison
Kenneth Donchatz

EXHIBIT B

JM # 34

To: donchatz
From: "Andrew J. Ruzicho II" <andy@ruzicholaw.com>
Subject: pretrial order
Cc:

Please forward your portions of the pretrial order at your earliest convenience.

TERMINATION NO. 17
BY: MSM 5-30-06

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY OHIO
CIVIL DIVISION

C0360J19

Case No. 03 CVH-01-1070

In re:

Judge Brown

Dissolution of Novatec Automation Systems, Inc.

FILED
COMMON PLEAS COURT
06 MAY 30 PM 4:42
CLERK OF COURTS

ORDER TO STAY PROCEEDINGS

The action is for the dissolution of the corporation Novatec Automation Systems, Inc. On September 8, 2005, the court adopted the magistrate's decision issuing a preliminary injunction enjoining the receiver from selling software developed by the company until ownership of the software has been determined by the United States District Court for the Southern District of Ohio in *Mark Foley, et al. v. Pat Surbella, et al.*, case number 2:05-CV-208. As the software is the sole remaining asset of the company, court finds that it would be in the interest of all parties and the court to stay the proceedings until the federal court issues a decision regarding the ownership of the software.

Accordingly, the court ORDERS that this action be stayed pending resolution of the federal case. The parties shall notify the court as soon as practicable after the federal court resolves the question of software ownership.

EXHIBIT D

Case No. 03CVH-01-1070

C0360J20

Judge Eric Brown

30 May 2006

Date

Copies to:

Paul L. Wallace, counsel for receiver

Kenneth R. Donchatz, counsel for Arete/NEOLITH

EXHIBIT D