

FILED

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IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

LYNNE L. MAZEIKA
LAKE CO CLERK OF COURT

STATE OF OHIO EX REL.)	CASE NO. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.,)	
)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,)	
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents.)	

STATE OF OHIO EX REL.)	CASE NO. 04CV001081
HOMER S. TAFT, et al.,)	
)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,)	
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents.)	

**PLAINTIFFS-RELATORS' BRIEF IN OPPOSITION TO MOTION
OF THE STATE OF OHIO FOR STAY**

The most recent Motion for Stay filed by Defendants-Respondents (the "State") sets forth three arguments for staying this action, and the class certification hearing: (1) the State's addition of the United States and U.S. Army Corps of Engineers will result in this case being removed to federal court; (2) the State's discovery as to class certification issues "has been foreclosed"; and (3) class certification should be stayed until the United States and U.S. Army Corps of Engineers have responded to the State's "cross claims" against them. Although the Court has exercised its discretion to postpone the class certification hearing, Plaintiffs believe it necessary to make clear that the first argument depends upon an unknown and the second and

third arguments are based on false premises. While Plaintiffs intend to file separately to address the frivolous nature of the “cross claims” asserted by the State, this brief will address the false statements regarding discovery made by the State in its Motion for Stay.

Any failure on the part of the State to obtain discovery relating to class certification is a failure wholly of the State’s own making. Although Plaintiffs filed their Motion for Class Certification on September 17, 2004, the State has engaged in no discovery efforts other than to serve on each Plaintiff a set of 40 interrogatories and a few document requests. Nearly all of the State’s interrogatories were directed at the underlying merits of Plaintiffs claims, not class certification. Given that class certification for purposes of Plaintiffs’ declaratory judgment action involves few if any factual issues, the lack of class certification discovery is not surprising. The State did not request an expedited response from Plaintiffs, and it did not seek Plaintiffs’ assistance in scheduling Plaintiffs’ depositions. Indeed, prior to the State’s Motion to Stay, the State never mentioned that it might require depositions in advance of the class certification hearing. Plaintiffs elected not to seek a protective order limiting discovery to class certification issues, and, instead, responded in due course to the State’s merits discovery.

Importantly, the facts do not support the State’s claim in its Motion that it had received no responses to its discovery as of February 23, 2005. To the contrary, as of the date of the State’s Motion, counsel for Plaintiffs had served via both e-mail and Federal Express written discovery responses on behalf of Plaintiffs Yankel, Nickel, Wade, Sheffield Lake, Inc., Zeber, Betleski, and Merrill. The responses of the remaining Plaintiffs (excepting those of the Ohio Lakefront Group, which are not yet due) were served between February 23 and February 25. Given the State’s decision not to limit its discovery to class certification issues, it has no legitimate basis for complaining now that it was prejudiced.

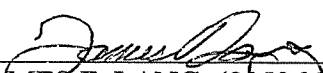
Indeed, only two of the forty interrogatories served by the State – requests to identify, respectively, lay and expert witnesses Plaintiffs intend to offer as witnesses on class certification – relate to the State’s concern that it was delayed in scheduling depositions. However, the State neglects to mention in its Motion that Plaintiffs’ counsel directly answered these interrogatories more than one month prior to the scheduled date of the class certification hearing. Plaintiffs’ counsel responded to the State on February 1, 2005 via e-mail:

I can tell you that our response to your requests regarding witnesses at the certification hearing is that we have stated a *prima facie* case. Other than the class representatives themselves, who may or may not testify, we do not intend to

present other witnesses except in rebuttal. As we do not know what issues, if any, the state intends to pursue (I expect the stipulations should help clarify this), I do not know if we will have rebuttal witnesses.

It should be obvious by now that the State's game plan is to do whatever it can, including misrepresenting facts and law to this Court and filing frivolous "cross claims," to prevent this Court from declaring what Ohio law is. Instead of welcoming a much-needed clarification of Ohio law, the State's sole focus is creating error for appeal (in the hope of gaining further delay and imposing further financial burdens on Plaintiffs). However, the State's threats that the Court would commit "manifestly prejudicial" reversible error by certifying the class are without merit. The Court can certify the class now *conditionally* under Civ. R. 23(C)(1), thereby gutting any procedural complaint the State has been working so hard to create. Ohio law expressly permits a class to be certified conditionally, with the possibility for amendment or later de-certification. Ohio R. Civ. P. 23(C)(1); see also Beder v. Cleveland Browns, 129 Ohio App. 3d 188, 201 (Cuyahoga 1998). Consequently, the Court can and should proceed with certification "as soon as practicable after the commencement of [this] action" as required by Civ. R. 23(C)(1) despite the State's gamesmanship. This is particularly true now that the State, by virtue of having asserted a counterclaim against Plaintiffs, has agreed that common questions exist regarding the boundary of public trust ownership and that Plaintiffs are appropriately named as parties to resolve those questions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition was served, via regular U.S. mail, upon the following, this 2nd day of March, 2005:

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