IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, *et al.*,	)	CASE NO. 04CV001080
	)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,	)	
vs.	)	
	)	**REPLY BRIEF IN SUPPORT OF**
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*,	)	**PLAINTIFF OLG'S RENEWED AND SUPPLEMENTED MOTION FOR FEES**
Defendants-Respondents.	)	

The State takes a "throw everything at the wall" approach in responding to the Motion for Fees of the Ohio Lakefront Group, Inc. ("OLG") by arguing that OLG has failed to satisfy each and every one of the criteria for obtaining a fee award under R.C. § 2335.59. However, for the reasons that follow, each of the State's arguments lack merit.

A. OLG's Request for Fees is Proper at this Time Because a Final Judgment Has Been Entered on an Appeal.

The State contends that OLG's request for fees is premature because no "final judgment" has been entered. Specifically, the State argues that the Ohio Supreme Court's judgment entry is not "final" because it resolved only one "claim" (the declaratory judgment) within the larger "action," and did not address OLG's request for mandamus relief. Yet in taking great pains to discuss the difference between a "claim" and an "action," the State ignores a critical portion of R.C. § 2335.39, which provides not only that fees may be awarded following entry of final judgment on an "action," but also following final judgment on an "appeal." R.C. § 2335.39(B)(1).

The words "action or appeal," which appear throughout the statute, indicate the General Assembly's intent to distinguish between "actions," which, as Defendants acknowledge, often include multiple claims, and "appeals," which by their very nature may or may not pertain to all claims asserted within a given action. Had the General Assembly intended, as Defendants believe it did, to make fees available ***only*** upon the conclusion of an entire case (including,

presumably, any appeals taken therein), it could have simply provided that fees may be recovered "upon entry of final judgment in an action." Instead, the General Assembly included language throughout the statute indicating an opposite intention. In the absence of any reason to treat the "or appeal" language in R.C. § 2335.39 as superfluous,[1] it must be presumed that the General Assembly included such language for a purpose – that of differentiating an "appeal" from an "action." In making this distinction, the statute as written allows recovery of fees not only following the conclusion of an entire case (*i.e.*, upon entry of final judgment in an "action"), but also following the entry of a final judgment on any appeals taken during the course of the litigation, regardless of whether they address all claims raised therein.

This interpretation is supported by Ohio case law, which indicates that a judgment entered on an appeal may be considered "final" for purposes of R.C. § 2335.39 regardless of whether the entire "action" from which the appeal was taken is concluded. *See Arth Brass & Aluminum Castings, Inc. v. Ryan*, 10th Dist. No. 07-AP-811, 2008-Ohio-1109. In *Arth*, the Ohio Supreme Court entered judgment on December 22, 2004, on an appeal taken from the underlying case, and remanded to the trial court for further proceedings. The trial court subsequently denied the plaintiff's request for fees under R.C. § 2335.39, citing the plaintiff's failure to file its request within 30 days of "final judgment." In addressing a disagreement between the trial court and the plaintiff over the date when "final judgment" was entered for purposes of R.C. § 2335.39, the Tenth District Court of Appeals found that the Supreme Court's December 22 entry on the underlying case constituted the "final judgment," even though that judgment did not conclude the action, and "further proceedings" remained to be conducted at the trial court level following the judgment entry. *Id.*

In the case at bar, the Ohio Supreme Court entered "final judgment" on an "appeal" in its order modifying the Eleventh District's ruling on OLG's declaratory judgment claim. As in *Arth*, the fact that further proceedings may remain to be conducted at the trial court level does not alter the "final" nature of the Ohio Supreme Court's decision. The Supreme Court's ruling therefore constitutes a "final judgment on an appeal" for purposes of R.C. § 2335.39, and

[1] As the Ohio Supreme Court has expressly recognized, "no portion of a statute should be treated as superfluous unless it is manifestly necessary to do so." *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 77, 2005-Ohio-3807, 831 N.E.2d 987.

because OLG filed its request within thirty days of that judgment, an award of fees is proper at this time.

B. Fees Are Recoverable in This Action Regardless of Whether it is an Action in Mandamus (Which it is Not).

The State erroneously asserts that fees are not recoverable in the present case because R.C. § 2335.39 is not applicable to mandamus actions. Opposition at pp. 4-5. The State's arguments to this effect not only misrepresent the state of the law, but also are inapplicable to this litigation, which is not an action in mandamus.

1. The State's contention that R.C. § 2335.39 is inapplicable to mandamus claims is unsupported and without merit.

Despite the State's claims to the contrary, the weight of authority indicates that R.C. § 2335.39 is applicable in the context of mandamus actions. First, nothing in the statutory language provides any support for the idea that fees are not recoverable in a mandamus action. While R.C. § 2335.39(F) lists the types of actions in which the statute is inapplicable (e.g., appropriations proceedings under Chapter 163 of the Revised Code; civil actions or appeals involving torts; and appeals pursuant to section 119.12 of the Revised Code) the list contains no mention of mandamus actions. In the absence of any indication that this list was not intended to be exhaustive, principles of statutory construction dictate that that the statute is applicable to mandamus actions.[2]

Second, the State's argument regarding applicability of R.C. § 2335.39 to mandamus actions runs counter to the Ohio Supreme Court's decision in the landmark case of *State ex rel. R.T.G., Inc. v. State,* 98 Ohio St.3d 1, 14, 780 N.E.2d 998, 1011 (2002), a mandamus action in which the court awarded fees under R.C. § 2335.39. Notably, Defendants fail to cite to *R.T.G.* at any point in their Opposition, and instead cite to a summary decision, *State ex rel. Ohio Liberty Council v. Brunner*, 126 Ohio St.3d 1510 (2010) (Table), in support of their claim that R.C. § 2335.39 is inapplicable to the present action. The *Brunner* ruling, which involved an expedited election contest, makes no reference to *R.T.G.*, nor does it in any way overrule *R.T.G.* Moreover,

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[2] *See Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.,* 121 Ohio St.3d 560, 2009–Ohio–1355, 906 N.E.2d 409, 2009–Ohio–1355, ¶ 42 (under the principle of "*expressio unius exclusion alterius*" ("to express one thing is to exclude the other), the legislature's failure to name an item reflects an intent to exclude it).

the *Brunner* ruling appears to turn on the relators' failure to satisfy R.C. § 2335.39(B)(1)(e). The Court also cited two Ohio decisions, but neither addresses the application of R.C. § 2335.39. *See State ex rel. Myles v. Brunner*, 20 Ohio St.3d 1413, 2008-Ohio-6166, 897 N.E. 2d 650 (Table) (summarily denying motion for fees in mandamus action without explanation), and *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶ 78 (holding attorney fees not recoverable as ***damages*** under R.C. § 2731.11, without addressing applicability of R.C. 2335.39).

The *Brunner* ruling's discussion of R.C. § 2335.39 is inapplicable here and, in any case, the State's interpretation of it is contrary to the plain language of R.C. § 2335.39 and the *R.T.G.* decision. Thus, the State's reliance upon the *Brunner* ruling is misplaced.

2. Even if R.C. § 2335.39 were inapplicable to actions in mandamus, this is not such an action.

Moreover, the present action is not, and has not at any point in the last eight years been, an action in mandamus. Since this Court entered its order in 2006 bifurcating OLG's declaratory judgment request and certifying a class with respect to the declaratory judgment only,[3] all proceedings have pertained solely to OLG's request for a declaratory judgment. To date, none of the parties, including the State, have advanced any substantive arguments with respect to OLG's request for mandamus relief. In this respect, the State's attempt to classify the present action as a mandamus claim is undercut by its arguments and efforts over the past eight years, all of which have been focused solely on the declaratory judgment action. Indeed OLG's entitlement to mandamus relief has at all times been ancillary to and dependent upon its success in the declaratory judgment action (thus prompting this Court's bifurcation of the issues). OLG's request for mandamus relief represents the remedy available to property owners for the State's unlawful taking of their property – the legal issue presented in OLG's declaratory judgment action. In bifurcating the declaratory judgment and mandamus actions early in the litigation, this

[3] *See* Order Certifying Class Action On Count One Of The First Amended Complaint In Case No. 04-CV-001080 at ¶8 (June 9, 2006) ("As authorized by Civ.R. 23(C)(1) and 23(C)(4), the court determines that a class action shall be maintained on Count I of Plaintiffs-Relators' First Amended Complaint upon the common questions of law found herein, and hereby certifies that class action under the provisions of Civ.R. 23(B)(2). The two remaining counts of Plaintiffs-Relators' First Amended Complaint – "Count II - Mandamus/Inverse Takings Compensation" and "Count III - (In the Alternative) Mandamus/Inverse Takings Compensation" – are hereby bifurcated pending final resolution of Count I.").

Court recognized (and the State agreed) that the gravamen of OLG's case against the State is a demand for declaratory judgment. As such, this litigation and the resulting appeal has for all purposes been a declaratory judgment action.

Because the matter for which OLG seeks fees in this case is not in fact an action in mandamus, the State's arguments regarding the applicability of R.C. § 2335.39 to mandamus claims are irrelevant and unavailing.

C. OLG Is an "Eligible Party" Entitled to Recover Fees Under R.C. § 2335.39

The State advances a variety of overlapping and intertwined arguments in support of its claim that OLG does not qualify as an "eligible party" under the statute. Yet each of the arguments advanced by the State to this effect lacks merit and is wholly unsupported by the statutory language.

1. R.C. § 2335.39 does not require OLG to aggregate the net worth or number of employees held by its members for purposes of determining its eligibility, nor would aggregation be appropriate.

The State argues that OLG falls outside the definition of an "eligible party" under R.C. § 2335.39 because the aggregate net worth of its members exceeds five million dollars, and because in the aggregate, the number of employees held by all of its members exceeds 500. Opposition at p. 5. Yet the statute contains no language indicating that such aggregation of members' net worth is required. Further, Defendants' reliance on *National Truck Equipment Ass'n v. National Highway Traffic Safety Admin.*, 972 F.2d 669, 672 -673 (6th Cir.1992) is misplaced, as *National Truck* involved an unincorporated trade association. In contrast to the trade association at issue in National Truck, OLG is a non-profit corporation incorporated under the laws of Ohio. Indeed, it is a fundamental principle of Ohio law that a corporation (whether for profit or not) is an entity separate and distinct from its members, such that a member/shareholder's assets do not constitute assets of the corporation. *See, e.g., State ex rel. DeWine v. S&R Recycling, Inc.*, 195 Ohio App.3d 744, 2011-Ohio-3371, 961 N.E.2d 1153 at ¶30 (7th Dist.). Any extension of the aggregation theory to incorporated entities such as OLG would run counter to these well-established principles.

Moreover, the Sixth Circuit has clarified that the aggregation concept it applied in *National Truck* should only be utilized in "limited circumstances." *Caremore, Inc. v. N.L.R.B.*, 150 F.3d 628, 630 (6th Cir.1998). *See also Tri-State Steel Const. Co. Inc. v. Herman*, 164 F.3d

973, 978 (6th Cir.1999) (refusing to aggregate net worth of corporate parent and its subsidiary for purpose of determining subsidiary's eligibility under EAJA). Similarly, the Fifth Circuit Court of Appeals has declined, in the context of the EAJA, to extend the aggregation principle to formal business organizations, finding it "unlikely that Congress intended an implicit aggregation rule to apply to [partnerships, corporations, and units of local government]." *Texas Food Indus. Assoc. v. USDA*, 81 F.3d 578, 582 (5th Cir. 1996).

Accordingly, calculation of OLG's net worth and/or number of employees based on the aggregate of OLG's members would be inappropriate in the present case, and OLG's eligibility depends only upon the net worth and number of employees attributable to OLG itself. As OLG has represented to this Court, OLG's assets are nowhere close to five million dollars, and its number of employees falls well below 500. Accordingly, OLG is "eligible" to recover its fees under R.C. § 2335.39, regardless of the net worth or number of employees attributable any of its members.

2. OLG's status as a class representative does not preclude it from recovering fees.

The State also attempts to defeat OLG's status as an eligible party by claiming, without any support, that R.C. § 2335.39 is inapplicable to class actions, and that OLG, as a class representative, is not entitled to recover fees. Opposition at pp. 7-9. These arguments fail for a number of reasons.

First, nothing in the statute itself indicates that it should be inapplicable to class actions. As explained above, R.C. § 2335.39(F) exhaustively lists the contexts in which the statute is inapplicable, and makes no mention of class actions. Second, federal courts applying the Equal Access to Justice Act (which Defendants admit are instructive as to the operation of R.C. § 2335.39) have awarded attorney fees in the context of class actions, and have awarded such fees to the class representatives. *See, e.g., Pirus v. Bowen,* 869 F.2d 536, 541 (9th Cir. 1989); *Briggs v. U.S.*, 2012 WL 476348 at ¶ 1 (N.D.Cal.).

Finally, in an attempt to mask the lack of authority supporting its position, the State claims only that OLG "has presented no authority suggesting that the statute can be applied in that manner." Opposition at p. 8. In making this assertion, the State falsely assumes that it is OLG's burden to cite court decisions that support the plain language of the statute. Yet the language and spirit of R.C. § 2335.39 favors placing the burden on the ***state*** to demonstrate that

fees should ***not*** be awarded under the statute. *See* R.C. § 2335.39(B)(2) (placing burden of proof on state); *see also Haghighi v. Moody,* 152 Ohio App.3d 600, 2003-Ohio-2203, 789 N.E.2d 673, ¶ 25 (observing that one purpose of R.C. § 2335.39 is to ease the burden on parties seeking judicial intervention to vindicate their rights against the state). Accordingly, the absence of authority presented on this issue reflects a failure on the part of ***the State***, and not, as the State contends, on the part of OLG. Because the State has failed to sustain its burden in this respect, an award of fees to OLG in this class action is proper.

3. OLG's net worth should not be aggregated with that of other class plaintiffs, and the eligibility of other plaintiffs is immaterial to OLG's eligibility.

The State suggests, again without explanation, that even if OLG were entitled to fees as a class representative, "the question of eligibility should be addressed in the aggregate," suggesting that OLG's net worth and number of employees should be aggregated with that of all class plaintiffs for purposes of determining the class's eligibility. Opposition at p. 8. The State similarly argues (again without any support) that the ineligibility of other class action plaintiffs under R.C. § 2335.39 renders OLG ineligible as well, regardless of whether OLG may itself be eligible. The State's arguments should be rejected as their interpretation of the statute runs directly counter to its purpose.

In *Olenhouse v. Commodity Credit Corp.,* 922 F. Supp. 489 (D.Kan. 1996), a District Court interpreting the Equal Access to Justice Act addressed an argument similar to that advanced by the State and rejected the government's position that a class representative's net worth must be aggregated with the net worth of other class members in determining its eligibility. The court further held that only the named plaintiffs in a class action must meet the net worth requirements to be eligible for fees, because a rule requiring aggregation would undermine the very purpose of the EAJA. *Id.* at 492. As the court observed, "[u]nder such an interpretation, the larger the class of injured parties . . . the less likely that [any one party] could recover their fees and expenses." *Id.* Such an approach would discourage the use of class action suits, as it would raise the cost of litigation to otherwise eligible entities. *Id.* (citing *Pettyjohn v. Shalala,* 23 F.3d 1572, 1575 (10th Cir.1994) ("the EAJA was enacted "to ensure people would not be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in pursuing their rights")).

As the *Olenhouse* opinion acknowledged, a rule requiring that all parties in a multi-party action must qualify as "eligible" in order for any party to recover its fees would deter otherwise-eligible parties from becoming involved in litigation alongside similarly-situated parties. The same deterrent effect would result from aggregation of the net worth attributable to all class action plaintiffs, as both would significantly reduce an otherwise-eligible party's likelihood of recovering its fees. In light of the purpose behind R.C. § 2335.39, this could not have been the result intended. Contrary to the State's position, OLG's eligibility to recover fees is unaffected by the eligibility or ineligibility of other named plaintiffs in the action, and OLG's net worth need not be aggregated with that of the other class plaintiffs.

As stated above, OLG qualifies as an eligible party based on its net worth and number of employees. OLG is accordingly entitled to an award of its fees in this action.

D. OLG Is the Prevailing Eligible Party and Entitled to an Award of Fees.

The State offers a half-hearted attempt to rebut the showing that OLG is now a prevailing eligible party by claiming that "being the prevailing means more than showing that the other side was not entirely correct." Opposition at p. 9. To the contrary, OLG need not succeed "in having 'complete victory'" to be a prevailing party. *Korn v. Ohio State Medical Board*, 71 Ohio App. 3d 483, 487 (Franklin 1991). While certain of OLG's arguments may not have been adopted by the courts throughout the various proceedings, all three adopted OLG's argument that the State's public trust territory does not extend to the ordinary high water mark. It was this point, advanced by the State in its submerged lands leasing program, that started this controversy and required OLG to initiate litigation. It was this point that the State advanced in its Counterclaim filed against Plaintiffs-Relators and pursued unsuccessfully before this Court and on appeal. Because OLG succeeded in refuting that point, it has prevailed in this litigation, regardless of whether it obtained "complete victory" as disputed by the State.[4]

[4] OLG is not filing a separate response to the opposition from the National Wildlife Federation ("NWF") for two reasons. First, NWF is abusing its intervenor status in filing its opposition, as it has no interest that could be impaired by resolution of this motion. *See* Ohio R. Civ. P. 24. Second, NWF's arguments are limited to the prevailing party prong of the analysis, lacking in reason, and entirely subsumed within the arguments made by the State.

E. The State's Position in Initiating the Matter Was Not Substantially Justified.

The State attempts to rebut this point through two separate arguments as to who initiated the matter and whether the State's position was substantially justified, but fails on both. First, with regard to who initiated this matter, the State ignores the holding of *State ex rel. R.T.G. Inc. v. State*, 98 Ohio St. 3d 1, 14 (2002) which held that where, as here, the State has engaged in a temporary taking, it is the State, not the entity seeking mandamus to compel appropriation proceedings, that first initiated the matter in controversy for purposes of R.C. § 2335.39. The Court noted that to hold otherwise would "lead to an absurd result" because the protections of the statute "would not be available where landowners, such as in the instant case, were compelled to initiate legal action to get relief from the state." *R.T.G.*, 98 Ohio St. 3d at 14. Not only did the State initiate the matter in controversy, but it also filed a baseless Counterclaim against Plaintiffs-Relators claiming ownership to ordinary high water mark under federal law (and completely ignoring Ohio law) and further created unnecessary cost and delay by filing a baseless "cross-claim" against the United States of America and the Army Corps of Engineers![5] The State initiated this matter.

Instead of distinguishing the *R.T.G.* holding and the line of cases that follow, or even mentioning those cases at all, the State turns again to its strained attack on OLG's associational standing to argue in essence that because OLG was not itself harmed as an association, OLG did indeed initiate the controversy between it and the State. Opposition at p. 10. This argument, in addition to being a completely irrelevant distraction, ignores the agreements that the State made in proceeding on Count I. The State agreed to have this count certified as a class action, agreed to let OLG serve as a class representative and agreed to let the undersigned counsel serve as class counsel. June 9, 2006 Order, p. 3. It cannot now revoke those agreements to avoid its statutory obligation to pay fees. OLG appropriately represented the class in addressing the harms asserted here, and thus did not initiate the controversy by being the first to file suit. It was the State, by insisting on an ordinary high water mark boundary against the members of the class, including members of OLG, that initiated the matter in controversy.

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[5] *See* Answer, Counterclaim And Cross-Claim Of Defendants-Respondents State Of Ohio, Department Of Natural Resources; Sam Speck, Director, Ohio Department Of Natural Resources, And; The State Of Ohio (filed Feb. 23, 2005).

With regard to the issue of substantial justification, the State again misses the operative point and focuses not on the information the State had in its possession and relied on in first advancing the ordinary high water mark as a boundary for its submerged lands leasing program, but instead on the information it cited many years later in its briefs to this and the other courts. The State, not OLG, bears the burden of establishing that it was substantially justified at the time in taking the challenged actions. *See In re Williams*, 78 Ohio App. 3d 556, 559 (Franklin 1992); *see also Gilmore v. Ohio State Dental Board*, 161 Ohio App. 3d 551, 558 (Hamilton 2005). It has not met that burden here. In its opening brief, OLG set out the contrary information available to the State at the time it started advancing the ordinary high water mark as the boundary, including the *Sloan v. Biemiller* opinion, an Attorney General Opinion on this specific point and other related authority, all of which rejected the ordinary high water mark as the boundary. If any information supported a finding of substantial justification on the use of the ordinary high water mark, it would be in the State's possession and thus could have been presented here. That it was not presented suggests it does not exist. Though the State asks for a hearing on this issue, it has presented no factual basis to support that request and none to support its burden of proof here. The State took an unjustified legal position solely for the purpose of administrative convenience – taking private property was the "easiest" way to order property owners to do the State's bidding. Thus, the State has not shown that its claim or ownership to ordinary high water mark – instead of to the natural shoreline as provided by statute – was substantially justified.

F. The State Has Failed to Describe "Special Circumstances" for Avoiding the Payment of Attorney's Fees.

Trying to argue the same point twice, the State claims that the novelty and closeness of the legal issues also constitute special circumstances making an award of attorneys fees to OLG unjust. The State again bears the burden here and presents no viable basis for its position. First, because the cases cited by the State on this point from the Sixth Circuit and Northern District of Ohio did not actually involve questions of the novelty or closeness of the law, this should not serve as a recognized basis for denying a motion for fees under R.C. § 2335.39. Even if it were otherwise, the Supreme Court made clear in its opinion here that the law has been settled on this point, and against the State, since first announced by it "in 1878 and clarified in 1916[.]" 2011-Ohio-4612, ¶62. The General Assembly also made clear long ago that the public trust boundary

does not extend beyond the natural shoreline. Thus, the State cannot meet its burden here to show that the question of law was so close or novel as to present a "special circumstance."

III. Conclusion

For the foregoing reasons, OLG respectfully requests that the Court grant its Motion and award OLG its attorney fees incurred to date in connection with this action in the amount of $509,453.16 plus $68,791.33 in related expenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **REPLY BRIEF IN SUPPORT OF PLAINTIFF OLG'S RENEWED AND SUPPLEMENTED MOTION FOR FEES** was served, via e-mail and regular U.S. Mail, upon the following, this 17th day of July, 2012:

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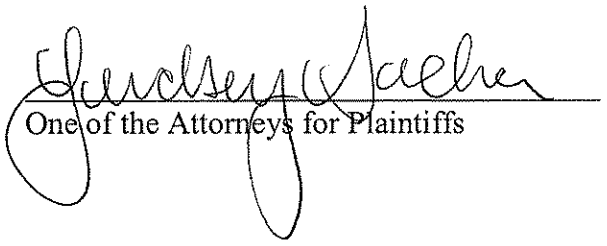

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