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June 18, 2012

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Re: State ex rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al.
Lake County Court of Common Pleas Case No. 04CV001080

Dear Counsel:

Enclosed please find a copy of the following that will be filed in the above-referenced action:

(1) **State Defendants/Respondents' Motion for Leave *Instanter* to File a Brief in Opposition in Excess of Ten Pages with Proposed Order;**
(2) **State Defendants/Respondents' Initial Brief in Opposition to Plaintiff OLG's Renewed and Supplemental Motion for Fees with Oral Argument Requested;**
(3) **State Defendants/Respondents' Response to Plaintiff OLG's Statement of Additional Relief sought on Count I of the First Amended Complaint;**
(4) **State Defendants/Respondents' Response to Intervening Plaintiffs' Statement of Remaining Claims for Relief on Count I of their Complaint.**

If you should have any questions, please do not hesitate to contact us.

Sincerely,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

Cynthia K. Frazzini (CCW)

CYNTHIA K. FRAZZINI
NICOLE CANDELORA-NORMAN
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June 18, 2012

The Honorable Eugene A. Lucci
Lake County Court of Common Pleas
Lake County Courthouse
47 North Park Place
Painesville, Ohio 44077

Re: State ex rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al.
Lake County Court of Common Pleas Case No. 04CV001080

Your Honor:

Enclosed please find a copy of the **State Defendants/Respondents' Motion for Leave *Instanter* to File a Brief in Opposition in Excess of Ten Pages** that will be filed in the above referenced action today, along with a proposed **Order** for your consideration.

Pursuant to paragraph 6 of your **Order of Procedure (Civil),** we are writing to respectfully direct the Court's attention to this Motion, which requires the immediate attention of the Court.

Thank you for your consideration of this matter.

Sincerely,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

Cynthia K. Frazzini (LW)

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Assistant Attorneys General

cc: James F. Lang and Fritz E. Berckmueller, Attorneys at Law
Homer S. Taft and L. Scot Duncan, Attorneys at Law
Neil S. Kagan and Peter A. Precario, Attorneys at Law

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL., ROBERT MERRILL, TRUSTEE, et al.,	)	Case No. 04-CV-001080
Plaintiffs-Relators and Named Class Representatives,	)	JUDGE EUGENE A. LUCCI
and	)	
HOMER S. TAFT, et al.,	)	
Intervening Plaintiffs-Relators, Pro Se,	)	
v.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
Defendants-Respondents and Counterclaimants,	)	
and	)	
NATIONAL WILDLIFE FEDERATION, et al.,	)	
Intervening Defendants and Counterclaimants.	)	

STATE DEFENDANTS/RESPONDENTS' MOTION FOR LEAVE *INSTANTER* TO FILE A BRIEF IN OPPOSITION IN EXCESS OF TEN PAGES

State Defendants-Respondents Ohio Department of Natural Resources, James Zehringer, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively "the State"), by and through counsel, Ohio Attorney General Michael DeWine, will be filing a Brief in Opposition to Plaintiff OLG's Renewed and Supplemental Motion for Fees. The State submits that a brief in opposition that exceeds ten pages will be necessary in order to set forth the material facts, reasons, and legal authority that compel denial of the Plaintiff-Relator's Motion. Pursuant to Loc. R. III.A.1, the State respectfully requests that the Court grant it leave to file a brief in opposition that is in

excess of ten pages, in the interest of the expeditious administration of justice. A proposed order granting this Motion is attached hereto for the Court's consideration.

Respectfully submitted,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

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Counsel for Defendants-Respondents
Ohio Department of Natural Resources,
James Zehringer, Director, Ohio Department of Natural Resources and the State of Ohio

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **State Defendants/Respondents' Motion for Leave *Instanter* to File a Brief in Opposition in Excess of Ten Pages** was sent by electronic and/or regular U.S. mail, this 18th day of June 2012 to:

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IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL., ROBERT MERRILL, TRUSTEE, et al.,	)	Case No. 04-CV-001080
Plaintiffs-Relators and Named Class Representatives,	)	JUDGE EUGENE A. LUCCI
and	)	
HOMER S. TAFT, et al.,	)	
Intervening Plaintiffs-Relators, Pro Se,	)	
v.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
Defendants-Respondents and Counterclaimants,	)	
and	)	
NATIONAL WILDLIFE FEDERATION, et al.,	)	
Intervening Defendants and Counterclaimants.	)	

STATE DEFENDANTS/RESPONDENTS' MOTION FOR LEAVE *INSTANTER* TO FILE A BRIEF IN OPPOSITION IN EXCESS OF TEN PAGES

State Defendants-Respondents Ohio Department of Natural Resources, James Zehringer, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively "the State"), by and through counsel, Ohio Attorney General Michael DeWine, will be filing a Brief in Opposition to Plaintiff OLG's Renewed and Supplemental Motion for Fees. The State submits that a brief in opposition that exceeds ten pages will be necessary in order to set forth the material facts, reasons, and legal authority that compel denial of the Plaintiff-Relator's Motion. Pursuant to Loc. R. III.A.1, the State respectfully requests that the Court grant it leave to file a brief in opposition that is in

excess of ten pages, in the interest of the expeditious administration of justice. A proposed order granting this Motion is attached hereto for the Court's consideration.

Respectfully submitted,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

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Counsel for Defendants-Respondents
Ohio Department of Natural Resources,
James Zehringer, Director, Ohio Department of Natural Resources and the State of Ohio

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **State Defendants/Respondents' Motion for Leave *Instanter* to File a Brief in Opposition in Excess of Ten Pages** was sent by electronic and/or regular U.S. mail, this 18th day of June 2012 to:

James F. Lang, Esq.
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IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL., ROBERT MERRILL, TRUSTEE, et al.,	)	Case No. 04-CV-001080
Plaintiffs-Relators and Named Class Representatives,	)	JUDGE EUGENE A. LUCCI
and	)	
HOMER S. TAFT, et al.,	)	
Intervening Plaintiffs-Relators, Pro Se,	)	
v.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
Defendants-Respondents and Counterclaimants,	)	
and	)	
NATIONAL WILDLIFE FEDERATION, et al.,	)	
Intervening Defendants and Counterclaimants.	)	

ORDER

This matter came on to be heard upon the filing of the **State Defendants/Respondents' Motion for Leave *Instanter* to File a Brief in Opposition in Excess of Ten Pages**. Upon consideration of this Motion, and for good cause shown, said Motion is hereby granted. It is hereby ORDERED that State Defendants-Respondents shall be permitted to file their Brief in Opposition that is in excess of ten (10) pages in length.

IT IS SO ORDERED.

_____ _____

Date Judge Eugene A. Lucci

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL., ROBERT MERRILL, TRUSTEE, et al.,	)	Case No. 04-CV-001080
Plaintiffs-Relators and Named Class Representatives,	)	Judge Eugene A. Lucci
and	)	
HOMER S. TAFT, et al.,	)	
Intervening Plaintiffs-Relators, Pro Se,	)	
v.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
Defendants-Respondents and Counterclaimants,	)	
and	)	
NATIONAL WILDLIFE FEDERATION, et al.,	)	
Intervening Defendants and Counterclaimants.	)	

STATE DEFENDANTS/RESPONDENTS' INITIAL BRIEF IN OPPOSITION TO PLAINTIFF OLG'S RENEWED AND SUPPLEMENTAL MOTION FOR FEES WITH ORAL ARGUMENT REQUESTED

One of the Plaintiffs/relators, Ohio Lakefront Group, Inc. ("OLG"), has asked this Court to award it attorney fees under R.C. 2335.39. In order to recover fees in this matter, plaintiff OLG must prove **all** of the following:

- That there is a final judgment concluding this action;
- That this is an action in which fees may be recovered;
- That OLG is an eligible party;

- That OLG is the prevailing party;
- That the State initiated this controversy;
- That the position of the State in this matter was not substantially justified; and
- That there are no special circumstances in this case that would make an award unjust.

Because OLG can prove **none** of these, it is not entitled to an award of attorney fees under R.C. 2335.39. Per the discussions with the parties and this Court in the conference of May 18, this Brief deals only with the initial legal issues concerning OLG's request for fees, and the factual questions—of which there are many—are reserved for a later time, if necessary.

This Court will not need to address any of the factual questions – as a matter of law OLG is not entitled to fees under R.C. 2335.39 and so the inquiry must end here.

I. Background

The First Amended Complaint in this matter, filed on July 2, 2004, seeks equitable relief in the form of declaratory judgment and mandamus. The First Amended Complaint does not seek damages or other monetary compensation, but rather a writ of mandamus compelling the state to initiate proceedings for takings compensation. Pursuant to a limited stipulation by the parties, this Court certified a class only as to particular issues related to the first count of the First Amended Complaint.

OLG argued to this Court that its members hold title to land down to the low-water mark. The State maintained that the natural shoreline of Lake Erie could be identified as the ordinary high-water mark. On December 11, 2007, this Court entered judgment on Count I of the First Amended Complaint (the declaratory judgment count) rejecting both positions. (The two mandamus counts of the First Amended Complaint were not reached.) This Court's ruling, on the first of three counts, found that the natural shoreline of Lake Erie and the boundary of the territory held in trust by the State is a constantly changing line "where the lake water actually touches the land at any given time." This Court adopted a position different from that advocated by OLG and different from that advocated by the State defendants. Nonetheless, at that time OLG claimed it was a "prevailing party" and sought attorney fees under R.C. 2335.39.

This Court's decision was appealed to the Court of Appeals for the Eleventh District by all parties. Despite having claimed total victory as the "prevailing party," OLG assigned error to this Court's determination and again argued that the low-water mark is the boundary. 2009-Ohio-4256 at ¶¶ 50-52. That assignment of error was rejected. *Id.* at 101. Instead, the Eleventh District affirmed this Court's determination of the boundary line as the water's edge, changing from moment

to moment. 2009-Ohio-4256, ¶ 131. The Eleventh District also held that the State of Ohio had no standing to appeal this Court's decision. *Id.* at ¶¶ 41, 44.

The Ohio Supreme Court accepted the appeal by the State of Ohio and rejected the positions of all of the parties and the determinations made by this Court and the Appeals Court as to the boundary. 2011-Ohio-4612 at syllabus, ¶ 3. OLG abandoned its earlier position regarding the low-water mark and adopted this Court's determination as its new position before the Supreme Court. *Id.* at ¶ 57. The Ohio Supreme Court rejected the position that OLG had advocated from the beginning of this matter, but had abandoned before the Supreme Court (*id.* at ¶¶ 47-48, 57), and also rejected the new OLG position as taken by this Court and by the Court of Appeals.

The Supreme Court found that the boundary line is neither the low-water mark initially advocated by OLG nor the moment-to-moment line found by this Court and later adopted by OLG as its new position before the Supreme Court. *Id.* at ¶ 57. Although the Supreme Court did not adopt the ordinary high-water mark position of the State, the Court did declare, "The territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes." *Id.*, at syllabus, ¶ 3. Further, the Supreme Court was absolutely clear that the State was right and the Eleventh District and OLG were wrong in their position as to the standing of the State of Ohio and the authority of the Attorney General to pursue an appeal of this Court's decision. *Id.* at ¶¶ 24-37.

Having found that no one got it right when it came to the title boundary on Lake Erie, the Supreme Court sent the case back to this Court to resolve any outstanding issues based on the finding that the boundary line of the State's "territory" is the line at which the water usually stands when free from disturbing causes. *Id.* at syllabus, ¶ 3. And that is where this case stands today, with no final judgment of record on any claim. The parties have submitted their statements of remaining issues at this Court's request, and recently OLG has submitted an additional document outlining additional relief that it seeks, purportedly in relation to the first count of its Amended Complaint. (That request includes a demand for damages to be distributed to as-yet unnamed parties, which is outside this Court's jurisdiction. It also asks for relief on behalf of a class that was not certified with respect to the sort of relief OLG seeks.)

This Court has not yet entered any judgment following remand.

II. There is no final judgment in this action.

Revised Code 2335.39 is designed to apply when an action or appeal is completely resolved. No party can be found to have prevailed while the action is still undecided. Because this action is

still pending, it is too early to determine if any party has prevailed and OLG's premature demand for fees cannot be granted.

The determination of who is a prevailing party is not made piecemeal, issue-by-issue. Revised Code 2335.39 is designed to apply when the litigation for an entire action or appeal has been concluded. It does not grant fees to a party who prevails on a "claim" or on an "issue." The statute applies to an eligible party that prevails in "an action or appeal." Ohio law clearly distinguishes between individual "claims" within an action and an "action" that may include multiple claims. *E.G. Pattison v. Granger*, 120 Oho St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126; *Denham v. City of New Carlisle*, 86 Ohio St.3d 716 N.E.2d 594 (1999); R.C. 2305.113; Civ.R. 54(B) (distinguishing individual "claims" from "action" containing multiple claims). The Ohio Rules of Civil Procedure make clear that an "action" encompasses multiple "claims." Civil Rule 2 provides that there shall be one form of action known as the civil action but Civ.R. 18 allows for multiple claims to be joined in a single action.

The statute is also clear that the use of the term "appeal" may refer either to an appeal of a civil action (*See,* R.C. 2335.39(F)(2)) or appeals of administrative actions to a court of common pleas (*See,* R.C. 2335.39(B)(2)(b); R.C. 2335.39(D)). In either instance the award of fees must only be considered after a final judgment is entered on that appeal. In the case of an appeal of a judgment in a civil action, the award may only be made where the resolution of the appeal concludes the case. Therefore the use of the term "action or appeal" in R.C. 2335.39 clearly refers to the litigation as a whole, and not to piecemeal decisions on various issues or particular claims within an action as a whole.

There is no final judgment in this case. There was, at one time, a final judgment on some issues pertaining to a single claim in a multi-claim action. But then the case was appealed through the Ohio Supreme Court. Then it was remanded to this Court for further proceedings. Accordingly there is no final judgment in this case. With no final judgment, there is as yet no prevailing party.

With no judgment in this action, it is far too early to ascertain whether any party has prevailed in the action and therefore fees cannot be awarded under R.C. 2335.39.

III. OLG may not recover fees under R.C. 2335.39 because the statute does not apply to actions in mandamus.

Plaintiffs filed an action seeking a writ of mandamus and other relief. "R.C. 2335.39 is inapplicable to mandamus actions." *State ex rel. Ohio Liberty Council v. Brunner*, 126 Ohio St. 3d 1510,

2010-Ohio-3331, 930 N.E.2d 330. Therefore R.C. 2335.39 does not apply to this action and OLG may not recover its fees under the statute.

The statute is clear in addressing an action as a whole and not piecemeal. OLG seeks fees for only one claim of its multi-claim mandamus Complaint. OLG's argument that the mandamus relief it seeks is not at issue in its request for attorney fees only puts in sharper relief the question of whether any party can be considered to have "prevailed" in an action where no claim is yet resolved and only one claim has been litigated at all. Contrary to OLG's position, R.C. 2335.39 does not apply piecemeal to individual claims joined together in a single action. Rather, the statute applies to "actions" as a whole and not to discrete claims within "actions" for multiple claims. *Denham, supra.*

Looking at this action as a whole there can be no dispute that it is an action in mandamus even if one other claim for relief is included. The First Amended Complaint asserts three counts, two of which request mandamus relief. Therefore, the essence of Plaintiffs' Amended Complaint is an action in mandamus, and the Ohio Supreme Court has clearly and succinctly stated that "R.C. 2335.39 is inapplicable to mandamus actions." *State ex rel. Ohio Liberty Council v. Brunner, supra.* There is no legal authority for the proposition that R.C. 2335.39 applies to claims for other relief when combined in a mandamus action. Therefore, under binding Ohio Supreme Court precedent, this is not an action in which fees may be recovered under R.C. 2335.39.

Accordingly OLG may not recover attorney fees pursuant to R.C. 2335.39 in this action.

IV. OLG cannot recover attorney fees under R.C. 2335.39 because it has not established that it is an eligible party and because it is only one among many parties plaintiff.

"R.C. 2335.39(A)(2) excludes from eligibility those who most likely have the ability to pay litigation costs: entities with a certain number of employees or net worth, wealthy individuals, and the state." *Cincinnati School Dist. Bd. of Ed. v. State Bd. of Ed.*, 122 Ohio St.3d 557, 2009-Ohio-3628, 913 N.E.2d 421, ¶ 23. Under the applicable law OLG is just such a party and therefore is not eligible to recover fees in this matter under the statute.

A. OLG's net worth is determined by the aggregate net worth of its members and exceeds the minimum net worth for eligibility.

The statute defines "eligible party" to exclude individuals and organizations whose net worth exceeds a statutory limit. "An individual whose net worth exceeded one million dollars at the time the action or appeal was filed" cannot be an eligible party. R.C. 2335.39(A)(2)(b). Neither can an eligible party be an "association or organization" that had "a net worth exceeding five million dollars at the time the action or appeal was filed." R.C. 2335.39(A)(2)(c). The exclusion does not apply to organizations exempt from taxes under I.R.C. 501(c)(3), but OLG is not such an organization. The

articles of incorporation for OLG (Exhibit A) and its activities include "lobbying and political purposes" that remove it from exemption under I.R.C. 501(c)(3). Therefore OLG is not an eligible party if its net worth exceeds $5,000,000. Under the applicable law, it does. And that precludes OLG from recovering the fees it seeks.

The question of OLG's net worth involves a factual analysis that is beyond the bounds of this brief as per the discussions with the parties and this Court in the conference of May 18. Full consideration of this question would require the parties to engage in discovery and possibly a hearing of facts before this Court. But the question also involves legal issues that are appropriate for consideration at this time. One of those legal questions is how to account for the net worth of a membership association that asserts its standing not on its own behalf – and OLG makes no claim on behalf of its own property – but on behalf of its members. While no Ohio court has been confronted with that question, Ohio law looks to comparable federal law for guidance in applying R.C. 2335.39. *Haghighi v. Moody*, 152 Ohio App.3d 600, 2003 Ohio 2203, 789 N.E.2d 673, (1st Dist.), ¶ 10 ("R.C. 2335.39 is Ohio's version of the Federal Equal Access to Justice Act."). *See also, Boyle v. Ohio State Med. Bd.*, 10th Dist. no. 89AP-1186, 1990 Ohio App. Lexis 3470 at * 4 (applying federal cases under the Federal Equal Access to Justice Act to R.C. 2339.35).

The United States Court of Appeals for the Sixth Circuit addressed this precise question and held that an association's net worth is determined by looking at the aggregate net worth of its members. *Natl. Truck Equipment Assn. v. Natl. Hwy. Traffic Safety Admin.*, 972 F.2d 669 (6th Cir. 1992). In that case, addressing the fee-shifting provisions of the federal Equal Access to Justice Act (EAJA) the Court found that the association litigating on behalf of its members had assets far below the $7,000,000 eligibility threshold of the EAJA but that the aggregate assets of its members far exceeded that threshold. *Natl. Truck Equipment Assn.* at 671. The court held that the appropriate measure for determining the association's eligibility when it asserts associational standing is to consider the assets of all of its members. *Id.*

In reaching its holding, the *Natl. Truck Equipment Assn.* court examined the history and purpose of the EAJA in establishing a threshold above which parties are ineligible for an award of fees. As with Ohio's statute, the EAJA threshold is "to limit the [law's] application to those persons and small businesses for whom costs may be a deterrent to vindicating their rights." *Id.* at 673. Ohio's law serves the same purpose, in that it seeks to "encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." *Haghighi*, at 603, quoting *Collyer v. Broadview Dev. Ctr.*,

81 Ohio App. 3d 445, 448, 611 N.E.2d 390 (10th Dist. 1992). The *Natl. Truck Equipment Assn.* found that the purpose of EAJA would be frustrated if entities that could collectively afford the litigation banded together to form an association to avoid that limitation.

The same logic applies in this case. OLG has represented that it has thousands of members (some which are themselves membership organizations). OLG's members own some of the most desirable, expensive and commercially productive real estate in Ohio. In any factual hearing to establish eligibility for an award to attorney fees – to which the State believes OLG is not entitled as a matter of law – OLG will bear the burden to prove its eligibility. It has yet to present this Court with any evidence on this issue. But it is hard to imagine that at such a hearing the aggregate of the net worth of OLG's members would not be found to far exceed the maximum of $5,000,000 that would allow OLG to recover fees under R.C. 2335.39. While OLG is seeking $509,453.16 in legal fees, that figure divide among its 6,000 to 7,000 members amounts to less than $100 per member. OLG has twice asked for fees and has twice avoided the issue of its net worth. Until it proves under the applicable law that it is an eligible party it cannot be awarded fees. And under the applicable law concerning net worth it will not be able to make that showing.

The same analysis applies to the eligibility threshold of fewer than 500 employees under R.C. 2335.39(A)(2)(d). *Natl. Truck Equipment Assn.* at 671. The plaintiff association in *Natl. Truck Equipment Assn.* association itself employed far fewer than the 500-employee eligibility threshold of the EAJA, but at least six of the association's member entities employed more than 500 each. *Id.* The court found that the spirit and letter of the law require consideration of the aggregate number of employees. *Id.* Otherwise the purpose and intent of the law would be frustrated. The law was not designed to allow ineligible parties to create eligibility simply by banding together in an underfunded association. If it did, a single individual or corporation that exceeds the limits of R.C. 2335.39 would be able to create an association to stand as a plaintiff and thereby recover fees that the individual or corporation could not. Again, OLG will not be able to make the showing of eligibility in terms of aggregate employment to allow it to recover fees under R.C. 2335.39.

B. OLG's status as a class representative precludes its eligibility for fees.

By it terms and structure, R.C. 2335.39 is not designed to cover class actions. Further, because the members of the class OLG represents far exceed the net worth and/or employee limits of R.C. 2335.39, OLG is precluded from obtaining fees because of its status as a class representative.

OLG stands as one of several class representatives in this case for specific and limited issues identified by stipulation and this Court's certification order of June 15, 2006. The class OLG and

others represent includes "All persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property bordering Lake Erie." *Id.* The class includes individuals, small businesses, large multi-national corporations, government entities and non-profit entities. The class undoubtedly includes individuals whose net worth exceeds the $1,000,000 limit that precludes eligibility for fees. The class also undoubtedly includes business entities whose net worth exceeds the $5,000,000 eligibility limit. And among the business and governmental entities that are included in the class, many undoubtedly far exceed the 500-employee limit that precludes eligibility. *Cincinnati School Dist. Bd. of Ed.*, *supra*, at ¶ 2.

No Ohio case supports an award fees to a class representative under R.C. 2335.39. OLG has presented no authority suggesting that the statute can be applied in that manner. But even assuming that the statute was intended to reach class actions, the question of eligibility must be addressed in the aggregate as in *Natl. Truck Equipment Assn.*, *supra*, and for the same policy reasons. A class of ineligible entities should not be permitted to manufacture eligibility by choosing a representative that would satisfy the eligibility requirements when viewed in isolation. The purpose and intent of the statute—protecting impecunious parties while requiring moneyed parties to pay their own way—would be frustrated if moneyed entities could manipulate the system through the choice of a class representative. For that reason, R.C. 2339.35 should not and does not apply to class actions in the first instance. Even if it did, OLG stands in the shoes of ineligible entities as a representative.

Therefore OLG's eligibility must be measured in the aggregate as a class representative and it cannot be awarded fees.

C. OLG may not be considered an eligible party unless all parties plaintiff represented by the same firm are also eligible.

There are currently 12 entities named as relators/plaintiffs in this action who are also represented by the same firm that represents OLG. There are ten individuals, one corporation, and OLG (a nonprofit membership association). OLG is the only one among them who has moved to recover fees but OLG's eligibility may not be considered in isolation from the others. If any one of the named relators/plaintiffs is ineligible the request for fees must be denied.

As discussed above, the purpose of R.C. 2339.35 is to allow impecunious parties to recover fees while parties exceeding the net worth limits are required to pay their own way. That purpose would be defeated if a group of otherwise ineligible parties were permitted to select one among them who is eligible to seek fees on their behalf. Because they are all represented by the same firm

they all incurred fees together. The factual question of the net worth of the other relators/plaintiffs must be addressed before fees can be awarded. If any one of them is ineligible then OLG cannot be permitted to collect fees in their place.

Accordingly, OLG's request for fees under R.C. 2335.39 must be denied because OLG is not an eligible party.

V. No party can be considered to have "prevailed" because no party was correct in identifying the boundary in question and the Supreme Court rejected both positions that OLG had taken.

Even assuming that OLG is correct that a party can be considered to have prevailed in an action or appeal when only a single claim of a multi-claim action has been addressed (and judgment has not yet been entered on that claim), OLG did not prevail on the issue of where the boundary is located.

OLG asserts that it "prevailed" after what it calls "minor modifications" made by the Ohio Supreme Court to this Court's summary judgment disposition, but that ignores the fact that OLG's initial position in this case was rejected by two courts and its new position before the Supreme Court was also rejected. In truth no party prevailed although the state's position was closest to being correct. OLG was wrong, and the Supreme Court also found that this Court and the Eleventh District also did not reach the correct conclusion. Being the prevailing party means more than showing that the other side was not entirely correct. When no party has won the case, no party is a "prevailing party." *Ohio Civil Rights Comm. v. GMS Mgt. Co., Inc.*, 9th Dist. No. 19814, 2000 Ohio App. Lexis 2827. In this case only a single issue has been decided (and no final judgment entered yet) and that issue was not decided in favor of any party.

OLG's request is also far too broad because the fees it seeks are not limited to the issue on which it claims to have prevailed and it appears to seek fees incurred for its attorneys' work on issues that have not been resolved. OLG's fee request has not yet been substantiated with any detailed billing records of the sort that will need to be produced should discovery proceed on these issues. But the fee claim appears to extend to <u>all</u> issues on which plaintiffs' counsel has worked in this case—including issues as to which plaintiffs lost relating to the standing of the State and authority of the Attorney General. OLG has not provided any breakdown of how its attorneys spent their time and how much was devoted to the issue on which OLG claims to have prevailed as opposed to issues not yet resolved, and issues as to which OLG's counsel has been representing other members of the class. OLG claims that it has prevailed on a single issue (although there is no

final judgment of record) but seeks to collect all fees on all matters for all Plaintiffs. That is not the law of Ohio, for good reason.

Accordingly OLG is not a prevailing party and is not entitled to fees under R.C. 2335.39.

VI. OLG may not recover attorney fees under R.C. 2335.39 because the State did not initiate this controversy.

Before awarding OLG the fees it seeks, this Court must then determine whether the State's position "in initiating the matter in controversy was substantially justified." But it was not the State that initiated this controversy. The burden is on OLG to show that the State initiated this matter, but none of the named plaintiffs was subject to any prohibition against using their property as they claim.

OLG claims that the State initiated the underlying conflict by "prohibiting plaintiff landowners, including members of OLG, from using their property to the extent it was located below the State's OHW, regardless of fee ownership of that land, unless and until Plaintiffs agreed to pay ODNR to lease that land they owned back from ODNR." Plaintiffs' Fees Motion, pg. 5. Therefore, Plaintiffs claim, they "were forced by the State's conduct to file this action so as to vindicate their property rights." *Id.* But none of the named plaintiffs in this case was subjected to any such thing.

None of the Plaintiffs currently named in this action was ever prohibited by the State from using their property as alleged in Plaintiffs' Complaint, and none of the Named Plaintiffs in this action was ever required to lease anything from ODNR as alleged in Plaintiffs' Complaint, because none of the remaining Named Plaintiffs (or Intervening Plaintiffs) in this case has ever applied for (let alone been granted or denied) a lease from the State of Ohio.

Revised Code 1506.11 is permissive, stating that the State "may" enter into a lease of its Lake Erie territory "upon application of any person who wants to develop or improve part of the territory." Only three of the plaintiffs originally named in the First Amended Complaint ever applied for and were granted leases under that statute, and none of them remains as named plaintiffs in this case. Former plaintiffs Steve Nickel and Timothy and Kimberly Rosenberg applied for and were granted leases under R.C. 1506.11. State's Motion to Dismiss, pgs. 4-5. They never provided notice to the Director of any claim of harm or concern until they appeared as Plaintiffs in this action, and even then did not submit any evidence on the record to support Plaintiffs' allegations. *Id.* On February 15, 2007, all three lessees – Mr. Nickle and Mr. and Mrs. Rosenberg – filed a Motion to Withdraw from this case. The Court granted that Motion on March 2, 2007.

The remaining Named Plaintiffs and Intervening Plaintiffs – Robert Merrill, Trustee, Ohio Lakefront Group, Inc., Anthony J. Yankel, Charles S. Tilk, Sheffield Lake, Inc., Sandra Wade, David Zeber, LeMarr L. & Patricia J. French, Neal Oscar Luoma, Homer S. Taft, L. Scot Duncan and Darla J. Duncan – have never been subjected to an action of the State as alleged in Plaintiffs' Complaint. They have never submitted an application to the Director of the Department and have never been granted or denied a lease. If the State actions alleged in their Complaint did happen, they did not happen to any of the remaining Named Plaintiffs. Rather, in all the time that has passed, not even one more party who could potentially offer evidence of such claims has been substituted or added as a Plaintiff in this case.

OLG asserts associational standing on behalf of those whom it claims were subjected to the alleged improper behavior by the State, and that is what initiated the matter in controversy. But other than OLG's claim that its members were so subjected, no Plaintiff standing before this Court today asserts such a claim on their own behalf. OLG attempts to elide its interests with those it claims to represent and use that to open the door to all fees for all matters in a case that has not been resolved. Revised Code 2335.39 was not designed to award a party for pursuing the interests of others who do not seek that relief for themselves.

Plaintiffs, not the State, initiated this action. The State did not initiate this controversy as to OLG and OLG is the only entity seeking to recover fees in this case. Therefore OLG may not be awarded fees under R.C. 2335.39.

VII. OLG may not recover attorney fees under R.C. 2335.39 because the position of the State in this matter was substantially justified.

Even if OLG were ultimately to prevail once this action is resolved, OLG still would not be entitled to fees under R.C. 2335.39 because the State's position – though ultimately found to be incorrect by the Supreme Court on the boundary location issue – was substantially justified as the result of a deliberative and careful process.

The statute states that a motion for fees shall be denied where the State has sustained its burden of proof that its position in initiating the matter in controversy was substantially justified. R.C. 2335.39(B)(2)(a). To determine whether the State's was "substantially justified," this Court must determine whether its "action in initiating the matter in controversy was based upon an articulated rationale supported by evidence from which a reasonable person could find that the state was substantially justified." *Gilmore v. Ohio State Dental Bd.*, 161 Ohio App.3d 551, 2005-Ohio-2856 (1st Dist.). In making such a determination, the Court must "rely on the investigation, evidence, and

information [the State] had in its possession at the time it initiated the matter in controversy, and not upon evidence introduced during or after the administrative hearing." *Id.* A position that is "substantially justified" does not mean "justified to a high degree," but rather, "justified to a degree that could satisfy a reasonable person." *Boyle v. Ohio State Med. Bd.* (Aug. 7, 1990), 10th Dist. No. 89AP-1186 at *5, citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

Ohio courts have routinely held that a mere failure of the State to prevail on the merits does not establish a presumption that its position was not substantially justified. See *Boyle v. Ohio State Medical Bd,* 1990 Ohio App. LEXIS 3470 (10th Dist.); *In re Malik v, State Medical Bd.,* 1989 Ohio App. LEXIS 3770 (10th Dist.); *Linden Med. Pharm., Inc, v. Ohio Slate Bd. of Pharm.,* 2005-Ohio-6961 (10th Dist.). The State's position may be justified, even if it does not ultimately prevail, if there is a genuine "dispute concerning the propriety of the state's action from the facts of the case or the law applicable thereto" or "if a reasonable person, knowledgeable in the area of law, believes the state's position is correct, then the substantially justified standard has been met." *Boyle,* at *5. Moreover, one of the express purposes of this exception was to provide a "safety valve" that "helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law." *Linden,* 2005-Ohio-6961, at 21, 30.

"[T]he intent of the attorney fees section of the statute is to censure frivolous government action which coerces a party to resort to the courts to protect his or her rights." *In the Matter of: Razia Malik, M.D. v. State Medical Bd.,* 1989 Ohio App. LEXIS 3770 (Oct. 2, 1989), Franklin App. No. 88AP-741, unreported (1989 Opinions 3763, 3767-3768). In *Collyer v. Broadview Dev. Ctr.,* 81 Ohio App. 3d 445, 449, 611 N.E.2d 390 (10th Dist.), the court, in construing R.C. 2335.39, noted that:

> Under this provision, an award of attorney fees is not automatic. It has been held that there is no presumption that attorney fees should be awarded to the prevailing eligible party. *** However, a party need not go so far as to prove bad faith or malice. Rather, the basic standard to be applied to the state's action under scrutiny is whether such action was 'substantially justified.' In essence, this translates into a determination of whether the state's action or inaction was unreasonable on the facts or on the law. *** This determination will not be disturbed on appeal, absent an abuse of discretion. *** (Citations omitted.)

"[T]he mere failure of the state to prevail on the merits of an appeal does not establish a presumption that its position was not substantially justified." *James v. State,* 1997 Ohio App. LEXIS 5599 (Nov. 25, 1997), Columbiana App. No. 96-CO-65, unreported. "Rather, the determination as to whether the state's position was substantially justified turns on whether the state's action or inaction was unreasonable on the facts or the law." *Id.*

The State's legal position in this case was supported by extensive precedent, as the briefs filed in this case readily attest and will not be recited yet again here. Nor was the State's position a new development. It was undisputed in this matter that Ohio received title and sovereign authority up to the ordinary high water mark of Lake Erie at statehood under the federal common law Equal Footing Doctrine, later codified in the federal Submerged Lands Act. Yet, Plaintiffs contended that after statehood the title received by the State had become recognized in the adjacent upland owners down to the low water mark. They contended that Ohio was a low water state. But the State could not find an Opinion of the Ohio Supreme Court or an Act of the Ohio Legislature that clearly and unequivocally recognized such a transfer. Instead, the preamble of the Fleming Act of 1917 (today R.C. 1506.10) proclaimed that the State continued to hold the same Lake Erie lands and waters Ohio received at statehood "as proprietor in trust for the people of the state." And as proprietor in trust, the State could not in good faith make an assumption against the full title it had received in 1803 with the obligation to hold the same for all Ohioans, particularly given this language.

The 1878 decision of the Ohio Supreme Court in *Sloan* did not support the notion of a title transfer to the low water mark (a theory already debunked by the 93 AG Opinion and rejected by this Court, the Court of Appeals and the Supreme Court in this case). The State was not a party to *Sloan* in 1878, but the *Sloan* court did cite to law describing the title boundary in terms of the "usual high water mark," and describing that boundary as the equivalent of the "ordinary high water mark" of the ocean. *Id.* at 513. The *Sloan* opinion cited and quoted *Seaman v. Smith*, a prior decision of the Illinois Supreme Court applying the "usual high water mark" as the title boundary of an upland owner on another Great Lake – Lake Michigan. *Id.* Given the use of this language in the *Sloan* opinion, and the dearth of authoritative opinions since that time, the State was substantially justified in formulating a policy based on that language. That position was far more justified than OLG's thrice-rejected "low water mark" position, as *Sloan* had outright rejected that approach.

OLG claims that the State pursued "a position which the State knew from the start had no support," and that "the Supreme Court held, the law on the boundary has been clear, and contrary to the State's position for more than 130 years." OLG's Renewed and supplemental Motion for Fees, pg. 7. Yet this case demonstrates that there was a genuine good faith dispute as to the state of the law. The well briefed, sincere, good-faith positions of all parties—as well as the thorough and thoughtful decisions of both this Courts and the Court of Appeals—were all ultimately rejected by the Ohio Supreme Court.

Thus, while the State's position was ultimately held to be incorrect (as were the positions of OLG, intervenors, and two courts) the State's position was substantially justified. Therefore fees cannot be awarded to OLG under R.C. 2335.39

VIII. OLG may not recover attorney fees under R.C. 2335.39 because special circumstances apply that would make an award unjust.

This unique case also presents special circumstances that "make an award unjust." R.C. 2335.39(B)(2). Because of the special circumstances of this case, OLG's request for fees should be denied.

Revised Code 2335.39 provides that a court shall deny a fee request if it determines that "special circumstances make an award unjust." As noted in *Linden Med. Pharm., Inc. v. Ohio State Bd. of Pharm., supra* at ¶20, there is a "dearth of Ohio case law regarding special circumstances under R.C. 2335.39." Therefore, Ohio courts again look to the federal EAJA for guidance. *Id.* Like R.C. 2335.39, the EAJA authorizes an award of attorneys' fees to a party who prevails against the government in a civil case unless "special circumstances" make an award unjust. *Id.* This exception thus gives the Court discretion to deny attorney fees where traditional equitable considerations dictate that an award should not be made. *Id.* at ¶ 21 (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 11); *Oguachuba v. Immigration and Naturalization Serv.*, 706 F.2d 93, 98 (2d Cir., 1983). Therefore, attorney fees have been denied where courts weighed the greater impact of an award and determined that denial "best served public policy." *Linden, supra* at ¶ 31. The Sixth Circuit has held that "special circumstances" are those that "implicate substantive issues such as close or novel questions of law." *Tri-State Steel Construction Company v. Herman*, 164 F. 3d 973, 979 (6th Cir. 1999); *Lopez v. Comm'r of SSA*, 2010 U.S. Dist. LEXIS 47737 (N.D. Ohio May 14, 2010).

One of the special circumstances in this case is that it is unique and presents challenges not typical in litigation over boundary lines and regulatory activity. Like the State Defendants in this case, this Court engaged in a thoughtful, thorough and extensive analysis of history, caselaw and scientific data to locate the title boundary line. Likewise OLG engaged in a thoughtful, thorough and extensive analysis of history, caselaw and scientific data to locate the boundary line. The State does not contend that OLG's analysis, though not impartial, was in any way made in bad faith. But OLG's position was also rejected by the Supreme Court. Intervenors and amicus parties all weighed in on the question. Their positions were also determined not to be correct.

Thus, this is exactly the kind of case that the Sixth Circuit was referring to in finding that "special circumstances" are those involving "close or novel questions of law." All of the parties, as

well as this Court and the Court of Appeals, were ultimately found to be incorrect about the title boundary by the Supreme Court. It is unjust in these circumstances to hold the State responsible for OLG's fees when so many actors engaged in good faith analysis all reached wrong conclusions.

Another of the special circumstances that makes this case one where an award of fees is unjust is the fact that the territory in question is one held in trust by the State for the citizens of Ohio (including OLG's members). The State in this case is not acting on its own behalf but on behalf of the beneficiaries of a trust, and therefore owes a fiduciary duty to the beneficiaries. *Gilman v. Hamilton County Bd. of Revision*, 127 Ohio St. 3d 154, 2010-Ohio-4992, ¶ 158.

> If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had. An individual may abandon his private property, but a public trustee cannot abandon public property.

State v. Cleveland & Pittsburgh Railroad Company (1916), 94 Ohio St. 61, 77. A trustee owes a duty take reasonable steps to enforce any claim it has on behalf of the beneficiaries. *In re First Nat'l Bank*, 37 Ohio St. 2d 60, 307 N.E.2d 23, syllabus (1974). While that would not be a basis to excuse or justify a frivolous position, it is a special circumstance where public policy should allow the State the benefit of the doubt as it seeks to enforce rights as a trustee to a territory whose boundary has been shown to be subject to reasonable dispute.

The EAJA's "special circumstances" exception is a "safety valve" that gives "the court discretion to deny awards where equitable considerations dictate an award should not be made." *Scarborough v. Principi*, 541 U.S. 401, 422-23, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004). This case is undoubtedly unique in many respects. Thus this Court should exercise its discretion and consider all of the many factors in this case that militate against an award of fees.

Given these special circumstances, an award of fees under R.C. 2335.39 is unjust.

IX. Any judgment on attorney fees under R.C. 2335.39 must await discovery on factual issues.

Given all of the factors addressed above there is no basis as a matter of law to award OLG the fees it seeks in this case. But further factual issues may also preclude an award and will certainly limit it. As discussed during the May 18 conference, the amount of fees in question is subject to discovery as at least some of the fees incurred by OLG were not related to the single issue on which OLG claims to have prevailed. R.C. 2335.39 also limits the hourly fee that a party may recover and factual inquiries must be made as to that issue as well. Furthermore the net worth question requires further discovery and possibly a hearing, as may the question of whether the position of the State

was substantially justified. Accordingly no award of fees under R.C. 2335.39 can be made unless those factual questions are also resolved.

Accordingly, OLG's request for fees must be denied. The State defendants respectfully ask that this Court hear oral argument regarding the legal issues addressed herein.

Respectfully submitted,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

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EXHIBIT A

DATE:	DOCUMENT ID	DESCRIPTION	FILING	EXPED	PENALTY	CERT	COPY
10/25/2000	200029901404	DOMESTIC ARTICLES/NON-PROFIT (ARN)	25.00	.00	.00	.00	.00

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CLEVELAND, OH 44116

STATE OF OHIO

Ohio Secretary of State, J. Kenneth Blackwell

1188347

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

OHIO LAKEFRONT GROUP, INC.

and, that said business records show the filing and recording of:

Document(s)	Document No(s):
DOMESTIC ARTICLES/NON-PROFIT	**200029901404**

United States of America
State of Ohio
Office of the Secretary of State

Witness my hand and the seal of the Secretary of State at Columbus, Ohio this 25th day of September, A.D. 2000.

J. Kenneth Blackwell

Ohio Secretary of State

ARTICLES OF INCORPORATION OF
OHIO LAKEFRONT GROUP, INC.
AN OHIO NON-PROFIT CORPORATION

We, the undersigned, acting jointly as incorporators of a corporation under the Ohio Nonprofit Corporation Law, Sections 1702.01 et seq. of the Revised Code of Ohio, do adopt the following Articles of Incorporation for such corporation:

ARTICLE I. NAME

The name of the corporation shall be Ohio Lakefront Group, Inc.

ARTICLE II. PRINCIPAL OFFICE

The place in Ohio where the principal office of the corporation is to be located is the City of Lorain, Lorain County.

ARTICLE III. NONPROFIT STATUS

The corporation is a nonprofit corporation as defined in Section 1702.01(C) of the Revised Code of Ohio. As such, it is not formed for the pecuniary gain or profit of, and its net earnings or any part thereof is not distributable to, its members, directors, officers or other private persons except as specifically permitted under the provisions of the Ohio Nonprofit Corporation Law.

ARTICLE IV. PURPOSE

(a). The specific and primary purposes for which this corporation is organized are to preserve and enhance the Lake Erie shoreline; to advocate reasonable goals for Ohio Coastal Management; to represent the rights and interests of lakefront property owners and residents as true stewards of Lake Erie shoreline with respect to international, federal, state, municipal and other governmental programs and regulation; to represent the knowledge and experience of lakefront property owners who have the most direct personal stake in rule-making and legislation for Ohio Coastal Management and other governmental programs; to protect the lakefront owners from laws or regulation that unfairly burdens their property or littoral rights; to inform lakefront owners and other interested citizens relating to issues affecting Coastal Management, littoral rights, erosion, lake levels, engineering and related issues; and to inform and involve the public in the decision-making process relating to Coastal Management, water quality and other issues affecting Lake Erie.

(b). The general purposes for which this corporation is organized are to perform research, publish materials; bring, maintain, defend or support litigation; appear before

legislative and regulatory bodies; and hold civic and educational forums relating to Ohio Coastal Management and shoreline issues; to employ staff, consultants and others to perform the required tasks; and to raise, obtain and spend funds in pursuance of these purposes and for all other lawful purposes.

(c). This corporation is formed and shall be operated for scientific, research, civic, public informational, lobbying, and political purposes. No part of the net earnings shall inure to the benefit of any member, director or officer of the corporation except as provided by law.

(d). This corporation shall have and exercise all authority conferred upon nonprofit corporations under the laws of Ohio generally, and specifically as provided in Section 1702.12 of the Ohio Nonprofit Corporation Law, provided, however, that this corporation has no authority to engage in any activity that in itself is not in furtherance of its purposes as set forth in subparagraphs (a) through (c) of this Article IV.

ARTICLE V. FIRST BOARD OF DIRECTORS

The following persons (not less than three) shall serve the corporation as directors until the first annual meeting or other meeting called to elect directors:

Name	Post Office Address
1. Adrian Betleski	1723 E. Erie Ave. Lorain, Ohio 44052
2. David Carek	4635 Edgewater Dr. Sheffield Lake, Ohio 44054
3. L. Scot Duncan	P.O. Box 1320 Sandusky, Ohio 44870
4. Jo-Ann Dyson	26902 Lake Rd. Bay Village, Ohio 44140
5. Barbara Evans	1801 East Erie Ave. Lorain, Ohio 44052
6. James O'Connor	4269 East Lake Road Sheffield Lake, Ohio 44054
7. Wally Paine	33344 Lake Road Avon Lake, Ohio 44012
8. Keith Rader	5823 October Lane Madison, Ohio 44057
9. Homer S. Taft	29404 Lake Road Bay Village, Ohio 44140
10. Anthony Yankel	29814 Lake Road Bay Village, Ohio 44140
11. Joseph Zieba	3248 W. Erie Ave. Lorain, Ohio 44053

ARTICLE VI. DURATION

The period of the corporation's duration is perpetual.

ARTICLE VII. INCORPORATION OF UNINCORPORATED ASSOCIATION

This corporation previously operated as an unincorporated association under the name of The Ohio Lakefront Group, which was organized for a purpose or purposes for which natural persons may lawfully associate themselves. The voting members of the unincorporated association on August ___, 2000, by the same procedure and affirmative vote of its members as the By-Laws (Articles of Association and Regulations of the association) required for an amendment to the By-Laws, being a majority vote of the members present at a convened meeting the purpose of which was stated in the notice of the meeting. In accordance with Section 1702.08 of the Ohio Nonprofit Corporation Law, the members of the unincorporated association shall be the initial members of this corporation, and all the rights, privileges, immunities, powers, franchise, and authority, and all the property and obligations of the unincorporated association shall upon filing of these Articles of Incorporation, pass to, vest in, and (in the case of liabilities and obligations) be the obligation of this corporation.

Additionally, new members of this corporation may be admitted in accordance with the provisions of the Regulations of the corporation.

ARTICLE VIII. MEMBERSHIP

The authorized number, qualifications, and manner of admission of members of this corporation; the different classes of membership (if any); the property, voting, and other rights and privileges of members; the liability of members for dues and/or assessments and the method of collection thereof; and the termination and transfer of membership shall be as set forth in the By-Laws (Regulations) of this corporation.

ARTICLE IX. MANAGEMENT OF CORPORATE AFFAIRS

(a). Board of Directors. The powers of this corporation shall be exercised, its properties controlled, and its affairs conducted by a board consisting of an odd number of not less than three directors. Initially, there shall be eleven directors. The number, class, term or method of election of directors may be changed at any meeting held for the purpose of electing directors by a majority vote of those present and voting, or at any membership meeting where notice that a proposed change in the number, class, term or method of election of directors will be considered is given to the membership by mail or electronic means not less than ten days prior to such meeting.

(b). Election of Directors. The method of electing directors shall be as set forth in the By-Laws (Regulations).

(c). Elective Officers. The officers of this corporation shall be a president, a secretary, a treasurer, and such vice-presidents and other officers as shall be elected annually by the Board of Directors as provided in the By-Laws (Regulations).

(d). Standing Committees. This corporation shall have an Executive Committee of at least three members as shall be set forth in the By-Laws (Regulations), which shall include the President, Secretary and Treasurer of the corporation, or their respective substitutes as established by the Board of Directors in the case of their unavailability. The Executive Committee shall have the power to exercise all powers of the Board of Directors and the corporation whenever it shall determine, in accordance with the By-Laws, that exigent

circumstances require such action. The corporation shall have such other standing committees as the Board of Directors or the By-Laws shall determine from time to time.

ARTICLE X. REGULATIONS

The full voting members of the corporation, by a majority vote of such number of them as attend any membership meeting, may adopt Regulations or amendments to the Regulations of the corporation, provided that such vote occurs after the membership has been given ten days prior notice by mail or other means of the proposed vote to adopt or amend Regulations. A true copy of the initial proposed Regulations or Amendments shall, if not attached to the notice, be made available through electronic means or by mailing to any member upon written request. The requirement to provide a copy of the proposal prior to voting on it at a meeting may be waived if two-thirds of the members present and voting at a duly called meeting, of which notice has been given, consent to the consideration of the adoption of the provision. Any amendment to a proposed amendment that deals with the same provision or subject matter may be made upon motion at the meeting at which a vote on the initial proposal is to be voted on without any prior notice. Until such time as the membership may adopt other Regulations, and to the extent not directly contrary to the provisions of these Articles of Incorporation, the By-Laws of the Ohio Lakefront Group adopted on May 25, 1999, as thereafter amended, shall be the Regulations of the corporation.

IN WITNESS WHEREOF, we have executed these Articles of Incorporation on August 25, 2000.

Thomas Jordan, Incorporator

Adrian, Betleski, Incorporator

David Carek, Incorporator

L. Scot Duncan, Incorporator

Jo-Ann Dyson, Incorporator

Barbara Evans, Incorporator

James O'Connor, Incorporator

Wally Paine, Incorporator

Keith Rader, Incorporator

Homer S. Taft, Incorporator

~~Anthony Yankel, Incorporator~~

Joseph Zieba, Incorporator

ANTHONY YANKEL, Incorporator

ORIGINAL APPOINTMENT OF STATUTORY AGENT

Pursuant to the provisions of section 1702.06 or the Revised Code of Ohio, the Nonprofit Corporation Law, the undersigned, being a majority of the incorporators of OHIO LAKEFRONT GROUP, INC. appoint:

Thomas Jordan

whose complete address is:

4301 East Lake Road

Sheffield Lake

Lorain County, Ohio 44054

To be the statutory agent upon whom any process, notice or demand required or permitted by statute to be served upon the corporation may be served.

Thomas Jordan, Incorporator

Adrian, Betleski, Incorporator

David Carek, Incorporator

L. Scot Duncan, Incorporator

Jo-Ann Dyson, Incorporator

Barbara Evans, Incorporator

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **State Defendants/Respondents' Initial Brief in Opposition to Plaintiff OLG's Renewed and Supplemental Motion for Fees with Oral Argument Requested** was delivered by electronic and/or regular U.S. mail, this 18th day of June 2012 to:

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IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL., ROBERT MERRILL, TRUSTEE, et al.,	)	Case No. 04-CV-001080
Plaintiffs-Relators and Named Class Representatives,	)	Judge Eugene A. Lucci
and	)	
HOMER S. TAFT, et al.,	)	
Intervening Plaintiffs-Relators, Pro Se,	)	
v.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
Defendants-Respondents and Counterclaimants,	)	
and	)	
NATIONAL WILDLIFE FEDERATION, et al.,	)	
Intervening Defendants and Counterclaimants.	)	

STATE DEFENDANTS/RESPONDENTS' RESPONSE TO PLAINTIFF OLG'S STATEMENT OF ADDITIONAL RELIEF SOUGHT ON COUNT I OF THE FIRST AMENDED COMPLAINT

OLG's Statement of Additional Relief asks for much that is beyond the bounds of Count I of the First Amended Complaint and its role as a class representative for specifically defined, limited issues. Notably the Statement of Additional Relief now submitted asks for a declaration as to the validity of leases, and for monetary compensation. Neither of those is available to OLG as this litigation currently stands. The State defendants file this response simply to note that OLG suddenly seeks new relief to which it is not entitled in the context of this litigation. The State

defendants will provide further briefing on these issues when and as procedurally appropriate, but did not want OLG's procedural over-reach to go unremarked.

I. Any request for monetary compensation is beyond the relief sought in this action and OLG's limited role as a class representative.

Count I of the First Amended Complaint sought declaratory relief only, not monetary compensation of any kind. The First Amended Complaint asks for relief on Count I as follows:

> 2) On Count I, a declaratory judgment that:
>
> i) Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by Ohio law (including the rules of accretion, avulsion, erosion and reliction), their deeds, and their original patent;
>
> ii) The interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands;
>
> iii) ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them;
>
> iv) Any current submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs.

Money is not mentioned anywhere in Count I. In fact, none of the counts of the First Amended Complaint mentions monetary relief in any form, and nowhere in the prayer for relief is monetary compensation requested in any form. Instead the First Amended Complaint specifically requests that the State defendants be compelled to initiate separate proceedings to address any claim for compensation.

Further, neither OLG nor any other named plaintiff is certified as a class representative for any claim or issue dealing with monetary compensation. The parties entered into a limited stipulation for class certification only as to certain issues. That stipulation was adopted by this Court in its June 15, 2006 Order Certifying Class Action on Count One of the First Amended Complaint. The class was certified with the named plaintiffs as representatives for three limited questions of law, none of which concerned monetary compensation. OLG appears now to be attempting to

circumvent the procedural rules for trying to amend a complaint (for it must know that such effort would be strongly opposed on good grounds), and its effort at procedural legerdemain cannot be countenanced.

The three certified questions of law set out in this Court's June 15, 2006 Order Certifying Class Action on Count One of the First Amended Complaint in Case No. 04--001080 were as follows:

> (1) What constitutes the furthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms "southerly shore" in R.C. 1506.10, "waters of Lake Erie" in R.C. 1506.10, "lands presently underlying the waters of Lake Erie" in R.C. 1506.11, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11, and "natural shoreline" in R.C. 1506.10 and 1506.11.
>
> (2) If the furthest landward boundary of the "territory" is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet OGLD (1985), and does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State.
>
> (3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

The Order quoted verbatim the stipulation of the parties. Nothing in either the stipulation or the certification order indicated that monetary compensation was an issue for which the class was certified or that it was a question of law common to the members of the class. Neither the stipulation nor the Order suggested that OLG or any named plaintiff stands as a representative for claims of monetary relief relating to any submerged land lease. Neither the stipulation nor the Order even mentioned submerged land leases in passing, let alone as a common question of law for which the class was certified. Furthermore, the stipulation specifically stated that the parties requested this Court to certify Count One "upon the common questions of law" and that limitation was expressly included in this Court's certification order.

The State defendants would be unfairly prejudiced if their limited stipulation to three issues of law were now somehow to be expanded to an unlimited stipulation that OLG may represent all littoral land owners for all claims whatsoever. In general, a purported waiver of one's rights must be strictly construed. *State v. Otte*, 94 Ohio St. 3d 167, 2002-Ohio-343 (waiver of right to jury trial); *In re Miller* (1992), 63 Ohio St.3d 99 (waiver of physician patient privilege); *Royce v. Smith* (1981), 68 Ohio St. 2d 106, 115 (waiver of sovereign immunity); *Allenbaugh v. Canton* (194), 137 Ohio St. 128, 134 (waiver of statutory right to pay); *Wells v. Sacks* (1962), 115 Ohio App. 219, 222 (waiver of right to

indictment in criminal trial). Although parties are free to waive their rights, "the proof of a waiver of a legal right must be found in the express assent of the party." *Reckner v. Warner* (1872), 22 Ohio St. 275, 294. The State defendants did not waive, and did not intend to waive their right to contest OLG's standing to represent littoral land owners for any issues beyond those specifically identified in the limited stipulation.

And as discussed below, no named plaintiff could be certified as a class member for such relief because no named plaintiff has ever entered into a lease. Therefore— even if the limitations of the parties' stipulation and the certification order were not considered—OLG cannot seek monetary compensation for a class that it cannot represent under Civ.R. 23. Because OLG is now seeking monetary relief that was never sought in this litigation, for a class question that was never certified and for which it does not and cannot represent a class, its request must be denied.

II. No declaration as to the validity of leases can be made on behalf of a class because no class was certified for that issue and no named plaintiff can represent such a class.

In addition to the newly claimed monetary compensation, OLG is asking for a declaration as to the validity of submerged lands leases. That question, too, is beyond the bounds of the limited class certification and stipulation in this case. Furthermore, because no named plaintiff ever so much as entered into a submerged lands lease, no named plaintiff can represent a class of lease holders.

None of named plaintiffs (or intervening plaintiffs) in this case has ever applied for or entered into a submerged lands lease from the State of Ohio pursuant to R.C. 1506.11. Only three of the plaintiffs originally named in the First Amended Complaint ever applied for and were granted leases under that statute, and none of them remain as named plaintiffs in this case. On February 15, 2007, all three lessees – Mr. Nickle and Mr. and Mrs. Rosenberg – filed a Motion to Withdraw from this case. The Court granted that Motion on March 2, 2007.

Pursuant to Civ.R. 23, a class may only be certified if the representatives have claims or defenses that are typical of the class and the representatives will fairly and adequately protect the interests of the class. In this case no named plaintiff is even a member of a purported class of property owners who entered into submerged lands leases. They do not have claims or defenses in common with such owners and cannot adequately represent such owners. OLG and the named plaintiffs are not even members of the newly asserted class for whom they seek to invalidate leases and recover money. It also appears that OLG is not adequately representing such class members as

it is attempting to create a fund for their benefit and then divert money from that fund to "an entity or entities chosen by Plaintiff" OLG.

Because no class has been certified as to the question of the validity of the leases, and because OLG and the named plaintiffs could not represent such a class, OLG cannot seek relief for such a class. Accordingly OLG cannot obtain the declaratory and monetary relief it seeks regarding submerged lands leases.

III. OLG's request for distribution of a cy pres award is not within this Court's jurisdiction.

When a party seeks money damages against the State the only court with jurisdiction to hear the claim is the Court of Claims. R.C. Chapter 2743. The "cy pres" award that OLG seeks in this case is in reality a claim for money damages. This Court does not have jurisdiction to grant the relief that OLG seeks in the creation of a fund from submerged land leases and the distribution of part of that fund as a "cy pres award" made to "an entity or entities chosen by Plaintiff" OLG.

OLG proposes that a fund be created to return submerged lands lease fees for land between the ordinary high-water mark and the natural shoreline of Lake Erie and that after a year any unclaimed portion of that fund be distributed as a "cy pres award." First of all, there is no need to use this fund approach as ODNR has a record of each lease holder (none of whom is a named plaintiff in this case), and any question of returning lease payments can be dealt with directly on a case by case basis. But more importantly, the "cy pres award" would in essence be an award of damages that are not within this Court's jurisdiction. *Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523. Especially where funds are distributed without being specifically identified as being wrongly withheld and traceable and returnable to a particular party, cf. *Santos v. Ohio Bureau of Workers Compensation*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, such award is in the nature of a damages award (and perhaps even an award of punitive damages) and is not an equitable remedy within the jurisdiction of this Court.

Therefore the "cy pres award" that OLG hopes to obtain is not within this Court's jurisdiction to grant.

IV. Conclusion.

OLG may not amend its complaint by simply asking for more relief now than has been litigated to date, in violation of Civ.R. 15.

Likewise, OLG may not represent—and recover monetary compensation for—a class that has not been certified on issues of law that no class has been certified for. If OLG or any named plaintiff wishes to be so certified on outstanding claims, Civ.R. 23 provides a mechanism to seek that relief and also allows the State defendants to oppose that certification. And that certification must be opposed because no named plaintiff in fact shares a common issue of law or fact with the class they want to recover money for.

Because OLG may not make an end run around the applicable Civil Rules in this manner, it may not obtain the "additional relief" it seeks without complying with those rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **State Defendants/Respondents' Response to Plaintiff OLG's Statement of Additional Relief sought on Count I of the First Amended Complaint** was sent by electronic and/or regular U.S. mail, this 18th day of June 2012 to:

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LAKE COUNTY, OHIO

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Plaintiffs-Relators and Named Class Representatives,	)	Judge Eugene A. Lucci
and	)	
HOMER S. TAFT, et al.,	)	
Intervening Plaintiffs-Relators, Pro Se,	)	
v.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
Defendants-Respondents and Counterclaimants,	)	
and	)	
NATIONAL WILDLIFE FEDERATION, et al.,	)	
Intervening Defendants and Counterclaimants.	)	

STATE DEFENDANTS/RESPONDENTS' RESPONSE TO INTERVENING PLAINTIFFS' STATEMENT OF REMAINING CLAIMS FOR RELIEF ON COUNT I OF THEIR COMPLAINT

Intervening Plaintiffs Homer Taft, Scott Duncan and Darla Duncan do not have standing to obtain the relief that they seek in their Statement of Remaining Claims for Relief on Count 1 of their Complaint. Their Statement seeks sweeping, universal relief on behalf of all littoral property owners but the Intervening Plaintiffs are not class representatives and cannot seek relief on behalf of others. Because none of their requests is limited to their own claims, none of their requests merits consideration to the extent that it reaches beyond their own individual parcels of property. The State Defendants file this response simply to note that the Intervening Plaintiffs now purport

through their filing to advance new claims and seek new relief to which they are not entitled. The State Defendants will provide additional briefing on these issues when and as procedurally appropriate.

Under Civ.R. 17, every action must be prosecuted in the name of the real party in interest. A litigant may not assert a claim on behalf of others. *Portsmouth v. McGraw* (1986), 21 Ohio St. 3d 117, 122, 488 N.E.2d 472. "It is well-recognized that, in order to have standing to obtain injunctive relief, a person must have a personal stake in the injunction sought. *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 270, 730 N.E.2d 1037." *Feathers v. Gansheimer*, 11th Dist. No. 2007-A-0052, 2008-Ohio-1652, ¶ 8. The Civil Rules provide limited exceptions to this principle, none of which applies here. Notably, Civ.R. 23 allows representatives to be appointed on behalf of a class of litigants but the Intervening Plaintiffs are not class representatives. Accordingly, the Intervening Plaintiffs may not obtain class relief.

The first request for relief in Intervening Plaintiffs' Statement of Remaining Claims for Relief on Count 1 of their Complaint—seeking an order invalidating all submerged lands leases—also must be denied for lack of standing. Intervening Plaintiffs themselves never entered into any such lease and they do not—and could not—represent a class of lease-holders. Because neither Mr. Taft nor the Duncans ever entered into a submerged lands lease, they have no standing to seek any order related to such leases. Even if they had, they could only obtain relief as to their own [hypothetical] leases because they are not class representatives.

The second, third and fourth requests should not be accorded legal significance because the Intervening Plaintiffs have standing only to seek relief as to their own property. They ask for sweeping relief relating to "any lands along Lake Erie" and any policy relating to littoral rights and the rights of littoral land owners, but they represent only themselves in this action and do not have standing to seek relief on behalf of others. Intervening Plaintiffs may only obtain a declaration as to their own rights.

The third and fourth requests also go beyond the bounds of this litigation and this Court's authority by asking this Court to "enjoin" the State Defendants to adopt new regulations. The Statement filed by the Intervening Plaintiffs asks for relief from the submerged lands leasing program. The Ohio Supreme Court has clarified the title boundary line in question but has not declared that the State is prohibited from enforcing the submerged lands leasing statute on its side of that line. Nor has any other regulation or proposed regulation been the subject of this litigation. The Intervening Plaintiffs are essentially asking this Court to assume continuing jurisdiction over all

regulations and policies (whether they exist now or not) that may in any way affect the relationship of littoral land owners and the State. Moreover, of course, what the Intervening Plaintiffs now purport to seek is not a proper injunction at all.

Accordingly, for these and other reasons and as the State Defendants will brief at the procedurally appropriate juncture, Intervening Plaintiffs may not obtain the sweeping, universal relief they now purport to seek in their Statement of Remaining Claims for Relief on Count 1.

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