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January 10, 2008

Via Messenger

Lynn L. Mazeika, Clerk of Courts  
Lake County Courthouse West Annex  
25 North Park Place  
Painesville, Ohio 44077

Re: State of Ohio 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 Ms. Mazeika:

Enclosed please find the original and two copies of *Plaintiff OLG's Motion for Fees*. Please file the original Motion and return a date-stamped copy to the undersigned with the messenger. Please feel free to contact me if you have any questions.

Thank you for your assistance in this matter.

Very truly yours,

James F. Lang

JFL/cbf  
Enclosures

cc: All counsel of record (via U.S. mail and email)

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Calfee, Halter & Griswold LLP  
Attorneys at Law

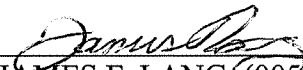
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IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

|  |   |                                   |
|--|---|-----------------------------------|
| STATE OF OHIO EX REL.                    | ) | CASE NO. 04CV001080               |
| ROBERT MERRILL, TRUSTEE, <i>et al.</i> , | ) |                                   |
|  | ) | JUDGE EUGENE A. LUCCI             |
| Plaintiffs-Relators,                     | ) |                                   |
|  | ) |                                   |
| vs.                                      | ) |                                   |
|  | ) |                                   |
| STATE OF OHIO, DEPARTMENT OF             | ) | <b>PLAINTIFF OLG'S MOTION FOR</b> |
| NATURAL RESOURCES, <i>et al.</i> ,       | ) | <b>FEES</b>                       |
|  | ) |                                   |
| Defendants-Respondents.                  | ) |                                   |

Pursuant to Section 2335.39 of the Ohio Revised Code, Plaintiff Ohio Lakefront Group, Inc. ("OLG" or "Plaintiff"), moves the Court for an order awarding OLG its attorney fees against Defendants State of Ohio ("State") and Ohio Department of Natural Resources ("ODNR") (collectively also the "State"). As discussed fully in the attached Brief in Support, which is incorporated by reference, OLG is the prevailing party on the questions certified by the Court for this class action. The State's position in initiating the matter in controversy was not substantially justified, and has resulted in OLG incurring a significant amount of attorney fees. Consequently, OLG requests that the Court grant this Motion and award OLG its attorney fees incurred to date in connection with this action in the amount of \$303,442.74.

Respectfully submitted,

  
\_\_\_\_\_  
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*Counsel for Plaintiff OLG*

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

|  |   |                                      |
|--|---|--------------------------------------|
| STATE OF OHIO EX REL.                    | ) | CASE NO. 04CV001080                  |
| ROBERT MERRILL, TRUSTEE, <i>et al.</i> , | ) |                                      |
|  | ) | JUDGE EUGENE A. LUCCI                |
| Plaintiffs-Relators,                     | ) |                                      |
|  | ) |                                      |
| vs.                                      | ) |                                      |
|  | ) | <b>BRIEF IN SUPPORT OF PLAINTIFF</b> |
| STATE OF OHIO, DEPARTMENT OF             | ) | <b>OLG'S MOTION FOR FEES</b>         |
| NATURAL RESOURCES, <i>et al.</i> ,       | ) |                                      |
|  | ) |                                      |
| Defendants-Respondents.                  | ) |                                      |

Plaintiff OLG respectfully requests, pursuant to Section 2335.39 of the Ohio Revised Code, that the Court award it compensation for the fees it incurred in connection with this action. Faced with a direct challenge from the State to their ownership of lakefront land, class plaintiffs including OLG had no choice but to bring this action to defend their long-standing property rights. Indeed, prior to commencing this action, class plaintiffs specifically directed the State to then-Attorney General Lee Fisher's legal opinion issued to ODNR in 1993 which found that the boundary of the State's territory in Lake Erie is the water's edge, but the State deliberately refused to follow Ohio law. Having now defeated the State, and prevailed in defending the property rights of the thousands of littoral property owners along Lake Erie, OLG is entitled to an award compensating it for the attorney fees incurred as a result of the State's unjustified actions.

**I. Procedural Background**

In the 1990's, ODNR began requiring littoral landowners to enter into submerged land leases with the State to use land located below the ordinary high water mark – a mark which ODNR then arbitrarily set at an elevation of 573.4 feet IGLD (1985) (the "State's OHW"). ODNR had not previously required submerged land leases for property located below the State's OHW. Littoral landowners rightly saw this as an attack on their established and previously

unchallenged property rights and together with OLG filed this class action lawsuit against ODNR and the State on May 28, 2004. OLG amended the Complaint on July 2, 2004. On December 15, 2004, the Court denied the State's motion to dismiss and scheduled a hearing on OLG's motion to certify a class for March 4, 2005. The State waited until February 23, 2005 – only nine days before the class certification hearing – to file its responsive pleading, which included a counterclaim against OLG and other class plaintiffs and frivolous cross-claims against the United States of America and the United States Army Corps of Engineers. On June 8, 2006, after the case was removed to federal court, and then remanded after dismissal of the “claims” against the United States and the Army Corps of Engineers, the State agreed to stipulate with OLG to class certification on three agreed questions of law. The Court certified the class, and those three questions of law, on June 9, 2006.

The parties then fully briefed their own separate motions for summary judgment on each of the three certified questions in the summer of 2007. At the same time, ODNR selected independent outside legal counsel to represent it in this matter and, on July 13, 2007, having reviewed OLG's motion for summary judgment, ODNR withdrew its opposition to OLG's claims. Although the new administration and ODNR recognized that ODNR's previous position had not been justified by existing Ohio law, Attorney General Marc Dann nevertheless elected to continue pursuing the State's position that it owned all littoral property on Lake Erie lakeward of the State's OHW.

On December 11, 2007, the Court entered an order denying the State's motion for summary judgment and granting OLG's motion in part. In sum, the Court rejected the State's contention that the State's OHW was the boundary between the public trust territory and private property rights and held – as the prior Ohio Attorney General had similarly opined to ODNR in 1993 – that the water's edge was instead the proper legal boundary. The Court's determination also is consistent with ODNR policy as stated in its draft Ohio Coastal Zone Management Program published in 1979, which defined the boundary of the public trust territory as the line “where land and water meet,” and its Combined Coastal Management Program & Final Environmental Impact Statement for the State of Ohio published in March 1997, which defined the beach extending landward from the water's edge as subject to private ownership and stated that “[p]rivate littoral rights extend to the point where land and water meet.” As the party that

has prevailed over the State, OLG now seeks an award of the fees it incurred to defend this unnecessary challenge to the class members' littoral property rights.

## **II. Discussion**

OLG has a statutory right to an award of attorneys fees as the prevailing party in this dispute with the State. *See* Ohio Rev. Code § 2335.39. Section 2335.39 of the Ohio Revised Code, which is entitled "Compensation for fees incurred by prevailing party in connection with action or appeal[,]" provides in pertinent part that:

. . .in a civil action, or appeal of a judgment in a civil action, to which the state is a party . . . the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal...

Ohio Rev. Code § 2335.39(B)(1). Subsection (B)(1) further provides that such a motion for fees shall be filed "with the court within thirty days after the court enters final judgment in the action or appeal[.]" and shall "do all of the following:

- (a) Identify the party;
- (b) Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;
- (c) Include a statement that the state's position in initiating the matter in controversy was not substantially justified;
- (d) Indicate the amount sought as an award;
- (e) Itemize all fees sought in the requested award. The itemization shall include a statement from any attorney who represented the prevailing eligible party, that indicates the fees charged, the actual time expended, and the rate at which the fees were calculated."

Ohio Rev. Code § 2335.39(B)(1)(a-e).

Once a prevailing eligible party such as OLG timely files such a motion, "the state has the burden of proving that its position in initiating the matter in controversy was substantially justified[.]" As explained further below, the State cannot meet that burden. Thus, OLG is entitled to an award compensating it for attorneys fees incurred in connection with this dispute.

Each of the five statutory requirements are addressed below in order.

**A. Identification of OLG.**

OLG is a duly formed non-profit corporation which represents, and most of whose members are, owners of littoral property on Lake Erie. (First Amended Complaint at ¶ 2.) OLG filed this action against ODNR and the State on May 28, 2004, and has retained attorneys from the law firm of Calfee, Halter & Griswold LLP in Cleveland, Ohio to represent it and the class members throughout these proceedings.

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

OLG is now a prevailing eligible party. An “eligible party” is defined as a “party to an action or appeal involving the state[.]” Ohio Rev. Code § 2335.39(A)(2).<sup>1</sup> A “prevailing eligible party” is further defined as “an eligible party that prevails in an action or appeal involving the state.” Ohio Rev. Code § 2335.39(A)(5). In light of OLG’s participation in this action involving the State, and the Court’s December 11, 2007 order which both denied the State’s motion for summary judgment and in part granted OLG’s motion, OLG satisfies both definitions. As such, OLG is entitled to an award of fees from the State.

**C. The State’s Position in Initiating the Matter Was Not Substantially Justified.**

The State’s position in initiating the matter in controversy was not substantially justified. First, it was the State, not OLG, that initiated the matter in controversy. Though OLG was the first to file claims in this dispute, the operative initiating act for purposes of this motion is not the filing of the action, but the State’s initiation of the underlying conflict.<sup>2</sup> As the Ohio Supreme Court recently clarified, Section 2335.39 will “permit fees where the state initiates either the *conduct* that gave rise to the litigation *or* initiates the litigation caused by the controversy.” *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 14 (2002) (“If fees ... [w]ere permitted only where the state initiated the legal action, the protection that R.C. 2334.39 [sic] would not be available where landowners, such as in the instant case, were compelled to initiate legal action to get relief from the state.”); *see Child Care Provider Certification Dep’t v. Harris*, 2003-Ohio-6500, ¶¶ 21-22 (Cuyahoga 2003) (citing *RTG* on same point); *see also Warren’s Eastside Auto Sales v. Ohio*

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<sup>1</sup> Pursuant to Ohio Rev. Code § 2335.39(A)(2)(c), a corporation with a net worth exceeding \$5 million at the time the action is filed cannot be a prevailing party. However, as a volunteer non-profit organization, at no time has OLG had a net worth approaching or resembling \$5 million.

<sup>2</sup> The State too, along with ODNR, has filed its own claims in this dispute – counterclaims against a number of class plaintiffs and OLG. Those counterclaims were effectively denied by the Court’s December 11, 2007 order.

*Dep't of Public Safety, 2003-Ohio-5702, ¶ 21, n.1 (Trumbull 2003) (same).* The State initiated the conduct that led to this action 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. (First Amended Complaint at ¶¶ 1, 10-13, 24-30.) Plaintiffs, including OLG, were forced by the State's conduct to file this action so as to vindicate their property rights.

A few years prior to the filing of this action, the State had sought and received the opinion of then Attorney General Lee Fisher that persons owning littoral property, not the State, held title to the land between the water's edge and the State's OHW. This is consistent with the rulings of Ohio courts and with ODNR's statements from the late 1970s through the late 1990s that the boundary of Lake Erie was the water's edge, not an ordinary high water mark. Thus, in forging ahead with its attack on class members' property rights, the State was ignoring its own publications, the opinion and advice of Ohio's chief legal officer, and the unanimous refrain of Ohio courts.

This Court certified three questions for class determination and the parties filed summary judgment briefs on each. After reading the summary judgment motions filed by OLG and by the Attorney General, ODNR elected to adopt a "new regulatory policy" and announced that it would "honor the apparently valid property deeds of the plaintiff-relator lakefront owners" unless this Court adopted the Attorney General's position. Despite this express change in policy, the State, through the current Attorney General Marc Dann, persisted in enforcing a now twice disclaimed boundary against plaintiffs and OLG. On December 11, 2007, the Court entered an order granting OLG's motion in part and denying the State's motion. Specifically, the Court held that plaintiffs have title to land down to the "water's edge," which, rather than the State's OHW which the Court rejected, is the boundary of the public trust territory.

Thus, in pursuing a position which the State knew from the start had no support, the State acted in a manner that was not substantially justified. Notably, although Attorney General Dann has taken an appeal on behalf of the State of Ohio from the Court's December 11, 2007 Order, ODNR has not.

**D. Award of Fees Sought in the Amount of \$280,683.96.**

OLG seeks to recover \$303,442.74 in payments for legal costs made by it in connection with this action, consisting of \$280,683.96 in hourly billings plus expenses totaling \$22,758.78.

Ohio Rev. Code § 2335.39(A)(3) defines “fees” subject to recovery as “reasonable attorney’s fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee as approved by the court.” The General Assembly set the seventy-five dollar per hour presumption in 1984 in Am. Sub. S.B. 102, and it has not been adjusted since then. Thus, the determination of reasonable attorney’s fees essentially is at the sound discretion of the trial court.

**E. Itemization of Fees.**

Through December 31, 2007, Calfee, Halter & Griswold LLC (“Calfee”) has charged OLG hourly fees in the amount of \$280,683.96 for its representation of OLG and the class in this action plus \$22,758.78 for actual expenses incurred. (*See* Statement of James F. Lang, partner with Calfee, attached hereto as Exhibit A.) Each attorney’s and paralegal’s billing rate and hours worked are itemized on Attachment 1 to Exhibit A, and the expenses paid by OLG are itemized on Attachment 2 to Exhibit A. Itemized billing statements can be made available for review subject to appropriate protections.


This action has been ongoing for more than three years, much of that as a result of the State’s filing of motions and pleadings which unnecessarily delayed the Court’s consideration of the substantive issues presented. This action has involved heavy motion practice, including the State’s efforts to dismiss the action and oppose class certification, as well as the State’s failed attempt to add the United States of America and the Army Corps of Engineers as parties to this action in an attempt to avoid resolution of these claims by a state court. Given the State’s opposition to squaring its policy with Ohio law and the complexity of the issues presented, the fees incurred by OLG were reasonable.

**III. Conclusion**

For the foregoing reasons, and as provided in Ohio Rev. Code § 2335.39, Plaintiff Ohio Lakefront Group, Inc. requests that the Court grant this Motion and enter an order awarding OLG \$303,442.74 from the State as compensation for the attorneys fees incurred through December 31, 2007 in connection with defending their rights and pursuing this action.



Respectfully submitted,

  
\_\_\_\_\_  
JAMES F. LANG (0059668)  
FRITZ E. BERCKMUELLER (0081530)  
CALFEE, HALTER & GRISWOLD LLP  
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Cleveland, Ohio 44114  
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jlang@calfee.com  
fberckmueller@calfee.com

*Counsel for Plaintiff OLG*

**CERTIFICATE OF SERVICE**

A copy of the foregoing **PLAINTIFF OLG'S MOTION FOR FEES** and **BRIEF IN SUPPORT OF PLAINTIFF OLG'S MOTION FOR FEES** was served, via e-mail and regular U.S. Mail, upon the following, this 10th day of January, 2008:

Cynthia K. Frazzini, Esq.  
John P. Bartley, Esq.  
Assistant Attorneys General  
Environmental Enforcement Section  
2045 Morse Road, Building D-2  
Columbus, Ohio 43215

Homer S. Taft  
20220 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116

L. Scot Duncan  
1530 Willow Drive  
Sandusky, Ohio 44870

Neil S. Kagan  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104

Peter A. Precario  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215

Julie A. Blair  
Assistant General Counsel  
Northeast Ohio Regional Sewer District  
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Cleveland, OH 44115

Kathleen M. Trafford  
Porter Wright Morris & Arthur  
41 S. High St.  
Columbus, Ohio 43215

  
\_\_\_\_\_  
One of the Attorneys for Plaintiff OLG

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

|  |   |                              |
|--|---|------------------------------|
| STATE OF OHIO EX REL.                    | ) | CASE NO. 04CV001080          |
| ROBERT MERRILL, TRUSTEE, <i>et al.</i> , | ) |                              |
|  | ) | JUDGE EUGENE A. LUCCI        |
| Plaintiffs-Relators,                     | ) |                              |
|  | ) |                              |
| vs.                                      | ) |                              |
|  | ) |                              |
| STATE OF OHIO, DEPARTMENT OF             | ) |                              |
| NATURAL RESOURCES, <i>et al.</i> ,       | ) | <b>STATEMENT OF ATTORNEY</b> |
|  | ) | <b>JAMES F. LANG</b>         |
| Defendants-Respondents.                  | ) |                              |

**JAMES F. LANG**, an attorney representing plaintiff OLG in this action, states the following:

1. I am a partner in the law firm of Calfee, Halter & Griswold LLC (“Calfee”). As the responsible partner for the litigation captioned above, I have personal knowledge of the statements made herein.
2. Calfee was retained in 2004 by the Ohio Lakefront Group, Inc. (“OLG”) to represent it in a dispute with the State of Ohio and the Ohio Department of Natural Resources over the boundary between the public and private property abutting Lake Erie in Ohio.
3. Calfee has represented OLG throughout this action. Calfee was appointed class counsel in 2006. Calfee has had several attorneys and support personnel working on this action over the course of the action.
4. Through December 31, 2007, as shown on Attachment 1, Calfee has billed OLG or accrued time to be billed to OLG of at least \$280,683.96 for work directly related to pursuing its claims in this action. That sum is the product of a total of 1,152.46 hours worked and billed in connection with this dispute as shown on Attachment 1. Since 2004, the hourly rates of Calfee attorneys and paralegals billing time to this dispute has ranged from \$140 per hour to \$335 per hour.
5. Additionally, as shown on Attachment 2, Calfee has billed OLG \$22,758.78 for expenses incurred in litigating this action to a successful conclusion, including \$10,298.20 for publication of the legal notice of class certification.

6. These fees and expenses were reasonably incurred to prevail against the State of Ohio in this action.

Dated: January 10, 2008

  
JAMES F. LANG

**Chart of Legal Services Billed by Rate and Hours: *State of Ohio ex rel. Robert Merrill, Trustee, et al. vs. State of Ohio, Department of Natural Resources, et al.***

| Billing Attorney/Paralegal      | Year | Rate | Hours   | Billed Amount |
|---------------------------------|------|------|---------|---------------|
| Lang, James - Partner           | 2007 | 335  | 184.2   | 61,707        |
|                                 | 2006 | 315  | 80.55   | 25,375.73     |
|                                 | 2005 | 300  | 116.7   | 35,010        |
|                                 | 2004 | 280  | 85.1    | 23,828        |
|                                 | 2004 | Flat | 76.4    | 7,500         |
| Berckmueller, Fritz - Associate | 2007 | 215  | 257.7   | 55,405.50     |
|                                 | 2006 | 195  | 57.81   | 11,270.73     |
| Sullivan, K. James - Associate  | 2007 | 215  | 48.2    | 10,363        |
|                                 | 2006 | 195  | 28.4    | 5,538         |
|                                 | 2005 | 180  | 97.9    | 17,623.50     |
| Grendell, Henry – Associate     | 2004 | 215  | 56.3    | 12,104.50     |
| Mulcahy, Michael – Senior Atty  | 2006 | 330  | 0.3     | 99            |
|                                 | 2005 | 330  | 8.8     | 2,904         |
|                                 | 2004 | 330  | 18.5    | 6,105         |
| Sybyl, Jennifer - Paralegal     | 2007 | 165  | 5.7     | 940.50        |
|                                 | 2006 | 160  | 15.7    | 2,512         |
| Berliner, Stacy - Associate     | 2004 | 140  | 10.2    | 1,428         |
| Moses, Kim - Associate          | 2006 | 275  | 0.5     | 137.50        |
|                                 | 2004 | 240  | 3.3     | 792           |
| Szabo, Magda - Senior Attorney  | 2006 | 200  | 0.2     | 40            |
|                                 |      |      | 1152.46 | 280,683.96    |

## LTD

| Description             | Amount    | Billed Amount |
|-------------------------|-----------|---------------|
| L.D. Phone - Non Cash   | 64.12     | 64.12         |
| Duplicating             | 1,824.60  | 1,824.60      |
| Cash Payments           | -6.67     | -6.67         |
| Delivery Fees           | 1,743.73  | 1,743.73      |
| Filing Fee              | 175.00    | 175.00        |
| Newspaper Advertisement | 10,298.20 | 10,298.20     |
| Prof Services-Other     | 1,455.64  | 1,455.64      |
| Telecopy                | 254.00    | 254.00        |
| Database Fees           | 9,787.25  | 6,879.96      |
| Duplicating-Binding     | 70.20     | 70.20         |
| Total                   | 25,666.07 | 22,758.78     |