

I. INTRODUCTION

Relator Paul Perrea's ("Relator") most recent motion to strike evidence in this matter misinterprets the Court's rules and serves only to highlight his confusion regarding what this case is really about. Respondent Cincinnati Public Schools ("CPS") properly filed the affidavit of Joanne Jensen under the Ohio Rules of Civil Procedure and the rules of this Court. If the Court considers Ms. Jensen's properly submitted affidavit, CPS does not object to the Court also considering the affidavit of Jerome D'Agostino. Dr. D'Agostino's affidavit, however, should be given no weight because it wrongly assumes facts not in evidence and sets forth opinions irrelevant to any issue before the Court.

II. ARGUMENT

A. The Court May Properly Consider Joanne Jensen's Affidavit.

Respondent has violated no procedural rule in submitting Ms. Jensen's affidavit for the Court's consideration.¹ The Court's October 15, 2008, order merely provides that the parties "shall file any evidence they intend to present within 20 days of the date of this entry." (emphasis added) It does not state, as Perrea argues, that no evidence may be submitted to rebut arguments made in a party's merits brief. In fact, the Court's rules specifically provide that "[i]n all original actions filed under this rule, these rules shall govern the procedures and the form of documents filed in the actions. **The Ohio Rules of Civil Procedure shall supplement these rules unless clearly inapplicable.** Where these rules conflict with the Ohio Rules of Civil Procedure, these rules shall control." S. Ct. R. X § 2 (emphasis added). Ohio Civil Rule 56, which Perrea has cited to the Court on multiple occasions, permits the filing of such rebuttal evidence and allows courts "to permit affidavits to be supplemented or opposed by depositions or

¹ As stated in CPS's response to Perrea's first motion to strike evidence in this case, the affidavit of Dr. Elizabeth Holtzaple, which sets forth the same information contained in Ms. Jensen's affidavit, is proper. Therefore, Perrea's second motion to strike should be found moot.

further affidavits.” Ohio Civ. R. 56(e). Nothing in the Court’s procedural rules prohibit the filing of such evidence.

Notably, Perrea neither mentioned the economic value of the Semester Exams nor raised any issue regarding Dr. Elizabeth Holtzapple’s affidavit until after CPS filed its merits brief. (Reply Brief of Relator, Paul Perrea, pp. 10-11) CPS therefore did not have the opportunity to address his arguments or submit proper rebuttal evidence under the Ohio Rules of Civil Procedure.

Because Ms. Jensen’s affidavit was properly submitted in response to Perrea’s argument regarding the value of the Semester Exams, Supreme Court Rule XIV does not apply. As stated above, the Court’s October 15, 2008, order did not prohibit the filing of rebuttal evidence as contemplated by Ohio Civ. R. 56. A motion for an extension of time to file Ms. Jensen’s affidavit was therefore not required. CPS has not sought an “order or other relief” requiring the submission of yet another motion. The Court may therefore consider Ms. Jensen’s affidavit.

B. The Affidavit Of Dr. D’Agostino Is Irrelevant To This Matter.

If the Court considers Ms. Jensen’s properly submitted affidavit, which sets forth evidence directly relevant to whether the Semester Exams are trade secrets exempt from disclosure under the Ohio Public Records Act, CPS would have no procedural objection to the Court also considering Dr. D’Agostino’s affidavit. But the Court should give Dr. D’Agostino’s affidavit no weight because it sets forth information that is wholly irrelevant to this case.

Dr. D’Agostino’s entire affidavit relates to the “validity” of the CPS Semester Exams -- an issue that is immaterial to whether the tests are trade secrets. Moreover, Dr. D’Agostino wrongly assumes that CPS does not perform any reliability or validity tests on the Semester Exams. CPS did not produce any such documents in response to Perrea’s discovery requests or

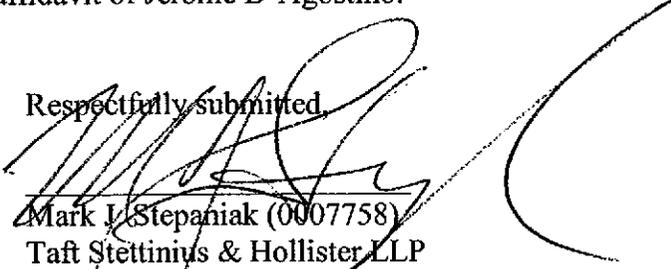
during the pendency of this matter because they are irrelevant to the legal issue before the Court. (See Responses and Objections to Relator Paul Perrea's First Set of Interrogatories and First Request for Production of Documents of Respondent Cincinnati Public Schools, MAN 00001-00010) Although CPS maintains that the Semester Exams are effective, valid and reliable, none of these factors enhances or diminishes the tests' economic value as trade secrets. See Besser v. Ohio State Univ. (2000), 89 Ohio St.3d 396, 732 N.E.2d 373.

Dr. D'Agostino's opinion that "[t]est security' entails maintaining the integrity of test scores so that valid inferences can continually be drawn from the scores" is similarly irrelevant. The only pertinent inquiry regarding "test security" in this case is whether the Semester Exams were "subject to efforts that are reasonable under the circumstances to maintain [their] secrecy." Ohio Rev. Code § 1333.61(D). Dr. D'Agostino's affidavit is silent with respect to this issue. His "expert opinion" that test security, under his own definition which is immaterial to the legal standard for identifying trade secrets, has already been breached should be ignored. Dr. D'Agostino's affidavit should be given no weight.

III. CONCLUSION

For each and all of the foregoing reasons, Respondent Cincinnati Public Schools respectfully requests that the Court deny Relator's Motion to strike the affidavit of Joanne Jensen in its entirety and give no weight to the irrelevant affidavit of Jerome D'Agostino.

Respectfully submitted,



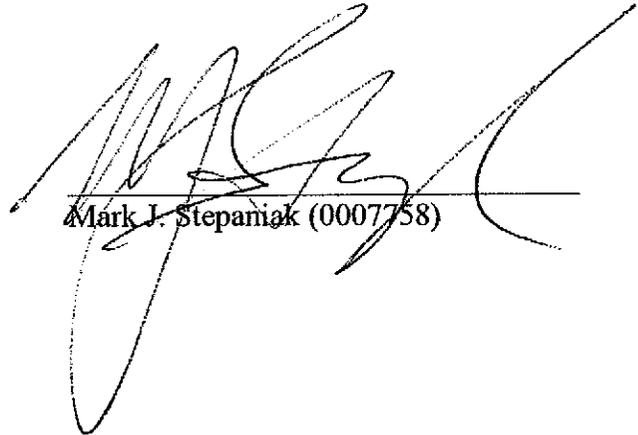
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Relator's Motion to Strike the Affidavit of Joanne Jensen of Respondent Cincinnati Public Schools has been served upon the following via Regular U.S. Mail, postage prepaid, this 12th day of February, 2009:

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