ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. WAYNE T. DONER, ET AL.,	:	
Relators,	:	
v.	:	Case No.: 2009-1292
SEAN D. LOGAN, DIRECTOR OHIO DEPARTMENT OF NATURAL RESOURCES, ET AL.,	:	Master Commissioner Campbell
Respondents.	:	

RELATORS' MOTION TO EXTEND PRESENTATION OF EVIDENCE DEADLINE AND MERIT BRIEFING SCHEDULE

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FILED
MAR 17 2009
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SUPREME COURT OF OHIO

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Attorneys for Respondents

RELATORS' MOTION TO EXTEND PRESENTATION OF EVIDENCE DEADLINE AND MERIT BRIEFING SCHEDULE

Pursuant to the Master Commissioner's instructions, this Court's October 23, 2009 Entry, Supreme Court Practice Rule X, Sections 7 and 11, for good cause and in the interests of justice and fairness, Relators request an extension of the deadline for the presentation of evidence from April 1, 2010 to June 1, 2010. As detailed in the attached Memorandum in Support and its accompanying affidavit of Thomas H. Fusonie, recent events necessitate additional time for Relators to submit their presentation of evidence.

Dated: March 17, 2010

Respectfully submitted,

Bruce L. Ingram (0018008)
(*Counsel of Record*)
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Attorneys for Relators

MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

Pursuant to Supreme Court Practice Rules X, Sections 7 and 11, for good cause and in the interests of justice and fairness, Relators request an extension of the current deadline for the presentation of evidence from April 1, 2010 to June 1, 2010. Relators have three reasons for the request.

First, Relators need sufficient time to conduct expert discovery. On December 24, 2009, Relators provided Respondents with affidavits from two experts. Only late afternoon on March 1, 2010, did Respondents finally provide two affidavits and reports from their purported experts. One of those reports consisted of a CD-ROM with two pdf documents – one 50 pages and the other, 93 pages. Only on March 12, 2010, did Relators discover that the 50-page pdf was in fact a 50-page pdf plus two voluminous hidden data files containing a considerable number of subfiles all of which to read required downloading software programs from the Army Corps of Engineers. Under the current schedule, Relators do not have sufficient time to analyze the reports and either confirm or rebut the experts' conclusions and underlying data they relied on. The lack of transparency by one of Respondents' experts with its report heightens the need for additional time.

Second, starting on March 13, 2010, many Relators experienced flooding caused by the western spillway to the Grand Lake St. Marys. Relators need sufficient time to prepare and produce evidence related to that flooding.

Third, in February, 2010, Respondents took 71 depositions of Relators and fact witnesses. Respondents ordered transcripts for all depositions. As of March 16, 2010, Relators have yet to obtain 20 transcripts from the Respondents' selected court reporters. Relators need time to

review those transcripts and correct or clarify the transcripts as needed. Indeed, the transcripts the Relators have received to date contain a large number of errors.

For any and all of these reasons, Relators request an extension of the presentation of evidence deadline from April 1, 2010 to June 1, 2010.

II. BACKGROUND

This original mandamus action concerns 84 Relators asserting that Respondents are taking their property without compensation and that the Court should issue a writ of mandamus ordering Respondents to initiate appropriation actions to compensate the Relators for the ongoing taking of their property. On September 30, 2009, the Court granted an alternative writ and set the presentation of evidence deadline for October 20, 2009. Subsequently, on October 13, 2009, the Court denied Respondents' request to amend the alternative writ schedule, but granted a ten-day extension for filing evidence. As of October 13, 2009, Relators had already obtained considerable evidence regarding their claims, including affidavits by many of the Relators, fact witnesses and expert witnesses.

On October 23, 2009, the Court referred the case to Master Commissioner Campbell "for the limited purpose of receiving evidence and making all necessary determinations and rulings in regard thereto." On November 19, 2009, the Court set an alternative writ schedule. Pertinent to this Motion, the Court ordered that written discovery may be served up to 7 days from the date of the Entry and that the presentation of evidence shall be presented and submitted within 100 days of the date of the entry – March 1, 2010.

In response to discovery requests from Respondents, on December 24, 2009, Relators produced the 66 affidavits they had obtained to date, including from two expert witnesses. In early January, 2010, Respondents proposed an extension of the case schedule from March 1,

2010 to April 1, 2010. Relators agreed with that 30-day extension. On January 13, 2010, this Court, upon the consideration of the matter, agreed to extend the presentation of evidence schedule until April 1, 2010.

Between February 2, 2010 and February 26, 2010, Respondents took 71 depositions. The parties had agreed to complete fact witness depositions by March 1, 2010. Despite having the opportunity to do so, Respondents elected not to depose approximately 15 Relators. For all depositions they took, Respondents selected the court reporters. Respondents ordered transcripts for all the depositions they conducted.[1]

At approximately 4:15 p.m. on March 1, 2010, Respondents finally delivered to Relators' counsel two affidavits and reports of its purported experts. Prior to that date, Respondents produced zero affidavits. As noted above, one of the reports, a report from Stantec, Respondents produced on a CD-Rom. Respondents provided no cover letter or any verbal indication that the report included (a) data that was hidden and (b) data that required downloading software programs from the Army Corps of Engineers to read. That report contained two pdfs – one of 93 pages and the other contained 50 pages. The last page of the 50 page pdf is titled "Appendix C Modeling Input and Output." Nothing on that page suggests that to access the Modeling Input and Output Relators had to figure out how (a) the Modeling was attached to the pdf; (b) how to unhide the attachment; and (c) how to download software to be able to read it.

On March 3, 2010, Relators recognized that in the interest of fairness and justice, they needed an extension of the deadlines to complete expert discovery and because for many of the depositions the Respondents took, the parties had yet to receive the transcripts. The deponents

[1] Attached hereto as Exhibit A is an affidavit of one of Relators' counsel, Thomas H. Fusonie. In his affidavit, Attorney Fusonie certifies to the best of his knowledge the accuracy of the background statements in this Motion.

needed time to review them for any corrections. The transcripts Relators have received contain an unusually large number of typographical errors.

Later on March 3, 2010, Relators emailed Respondents indicating that the 50-page pdf (the "Technical Report") was missing Appendix C.

On March 4, 2010, Respondents informed Relators that they were "agreeable" to a 60-day extension provided Relators agreed to seven conditions. Respondents made no mention of Relators' communication indicating that Appendix C to the Technical Report was missing.

On March 5, 2010, Relators informed Respondents that they could agree to four of their conditions in total and two of them in part. Relators requested that instead of a cut-off date of March 15 for adding witnesses, as proposed by Respondents, that the parties have until March 22, 2010. Relators also could only agree to the production of the files of Press Campbell (one of Relators' expert witnesses) that were not attorney work product or confidential materials from Mr. Campbell's work for another landowner, Case Leasing and Rental, in a lawsuit against Respondents currently pending in the Court of Claims. The only condition Relators could not agree with was Respondents' request to now depose Relators that they voluntarily elected not to depose in January or February, 2010. Relators did agree that Respondents could depose any Relators that submit additional affidavits, such as Relator Wayne Doner, who executed a supplemental affidavit in late February, 2010 (produced on March 1, 2010).

On that same day, Relators again indicated that the scope of expert discovery needed remained unknown to it as the Stantec report remained incomplete.

Having received no response from Respondents, on March 9, 2010, Relators' counsel called Respondents' counsel and left a voicemail message asking for a return call. Respondents' counsel did return the call that day indicating he would have an answer on the extension the next

day. Subsequently, on March 9, counsel for the parties exchanged emails. Respondents' counsel indicated that before responding he wanted to know from whom Relators intend to submit affidavits and evidence. In response, Relators' counsel expressed confusion on why Respondents on March 4, 2010 proposed further time (until March 15) to identify additional witnesses, but on March 9 wanted to know what affidavits/evidence Relators intended on submitting as its presentation of evidence. In addition, Relators' counsel again asked about the missing pages from Stantec's Technical Report.

On March 10, 2010, having heard no response from Respondents' counsel, Relators' counsel emailed the Case Management Counsel and suggested a telephone conference with the Master Commissioner concerning the proposed 60-day extension. Only after that email was sent did Respondents' counsel inform Relators' counsel that Respondents would not agree to continue the evidence/briefing schedule. In addition, Respondents' counsel finally indicated that the Stantec Technical Report contained additional "file extensions" that needed to be converted to ".zip" extensions. Counsel also finally indicated that to open the files, Relators needed two modeling programs "HEC-HMS" and "HEC-RAS."

On March 11, 2010, Relators attempted to find the additional "file extensions", but despite the assistance of technology staff for Relators' counsel, Relators could not locate the additional files. Finally, on March 12, 2010, Respondents provided enough information for the Relators to uncover the additional file extensions and to open the file extensions. The file extensions turned out to be Appendix C to Stantec's Technical Report. The uncovered data contains considerable electronically stored information in several subfiles that will require significant time to analyze.

On March 12, 2010, Relators reiterated their request for a 60-day extension. Respondents immediately indicated their opposition to such a request.

On March 13, 2010, many of the Relators started experiencing severe flooding on their parcels downstream from the western spillway the Grand Lake.

As of March 17, 2010, Relators have still not received approximately 20 transcripts from Respondents' court reporters.

III. ARGUMENT

Based on the foregoing, Relators believe a 60-day extension of the presentation of evidence schedule is merited to (a) complete expert discovery; (b) ensure adequate time for the Relators to review their deposition transcripts; and (c) address the new severe flooding that has just occurred.

Relators should have ample time to respond to Respondents' expert report, which not only presented Respondents' position on the claims, but seeks to rebut the affidavit of Relators' expert, Press Campbell, an affidavit Respondents have had since December 24, 2009. Relators certainly need additional time to obtain rebuttal evidence to Respondents' contentions concerning Mr. Campbell's work. In addition, giving Relators' sufficient time to respond to Respondents' expert reports may narrow the contested issues. For example, even on its surface, the Stantec Report establishes that the new spillway and Respondents' ongoing management decisions regarding the water level of the Grand Lake St. Marys cause severe flooding of about 77 of the approximately 90 parcels at issue. However, Relators believe that if given adequate time to review the 143-page Stantec report plus its voluminous file extensions, Relators will be able to confirm those points. In addition, if provided sufficient time, Relators believe they will establish that Stantec has manipulated underlying data or chosen incorrect modeling options to

under-calculate and under-report the severe flooding impact the new spillway and Respondents' ongoing management decisions have on all of the Relators' parcels. The interests of justice and fairness should permit Relators to determine if their facial assessment of the Stantec report is correct. The parties then need time to schedule and conduct expert depositions and obtain the transcripts from those depositions.

Moreover, that Respondents and/or their expert, Stantec, failed to produce an expert report in a transparent and readily accessible format only buttresses the need for the extension. Would Respondents have submitted the Stantec report in the same format to the Court, and with no explanation on how to open all the data? The obvious answer is no, they would not have left the Court to divine how to uncover Appendix C to the Technical Report and divine that it needed to download software programs from the Army Corps of Engineers to convert Appendix C into a readable format.

Further, considering the number of Relators and parcels recently impacted by flooding, Relators need sufficient time to gather and prepare the evidence of that flooding. Relators believe the more efficient approach here is to grant the extension of the presentation of evidence deadline versus having Relators seek at a later date leave to supplement their presentation of evidence.

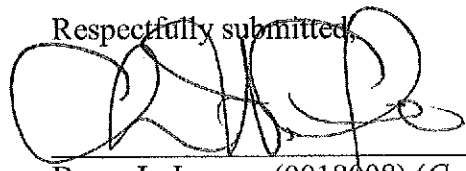
Likewise, for an efficient approach to the presentation of evidence, an extension is needed because Relators have yet to receive 20 transcripts from Respondents' court reporters.

Finally, this Motion is Relators' first request for additional time in this action. Respondents have previously obtained extensions of the presentation of evidence schedule, including a 30-day extension to which Relators consented.

Thus, for the reasons above, Relators respectfully request that the Court extend the presentation of evidence and merit briefing schedule 60 days.[2]

Dated: March 17, 2010

Respectfully submitted,



Bruce L. Ingram (0018008) (*Counsel of Record*)
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Kristi Kress Wilhelmy (0078090)
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thfusonie@vorys.com
kkwilhelmy@vorys.com

Attorneys for Relators

[2] Relators do not believe that Respondents should have the opportunity to depose Relators they elected not to depose in January or February, 2010 unless those Relators produce additional affidavits or evidence. Respondents should not be able to take advantage of any extension to cure their apparent mistake in choosing not to depose certain Relators.

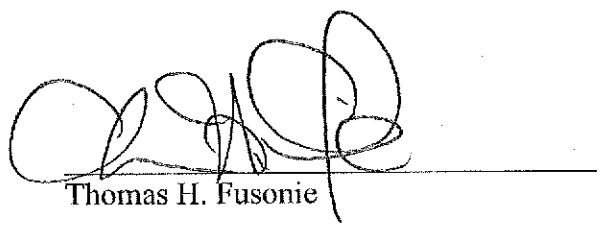
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via electronic mail and U.S. Mail postage prepaid, this 17th day of March, 2010:

William J. Cole
Mindy Worly
Jennifer S.M. Croskey
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

Dale T. Vitale
Daniel J. Martin
Rachel H. Stelzer
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229

Attorneys for Respondents



Thomas H. Fusonie

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. WAYNE T. DONER, ET AL.,	:	
Relators,	:	
v.	:	Case No.: 2009-1292
SEAN D. LOGAN, DIRECTOR OHIO DEPARTMENT OF NATURAL RESOURCES, ET AL.,	:	
Respondents.	:	

AFFIDAVIT OF THOMAS H. FUSONIE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

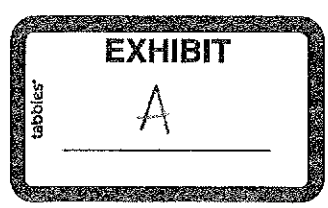
My name is Thomas H. Fusonie. I am over the age of 21 and I am competent to make this affidavit. The facts stated herein are within my personal knowledge and are true and correct. I state as follows:

1. I am one of the counsel for Relators in the above-referenced case.

2. To the best of my knowledge the facts stated in Relators' Motion to Extend Presentation of Evidence Deadline and Merit Briefing Schedule are true and accurate.

3. I attach as Exhibit 1 true and accurate copies of electronic mail communications I had with counsel for Respondents.

4. I attach as Exhibit 2 a true and accurate copy of the cover page to Appendix C to the Grand Lake St. Marys and Beaver Creek Hydrologic and Hydraulic Analysis prepared by



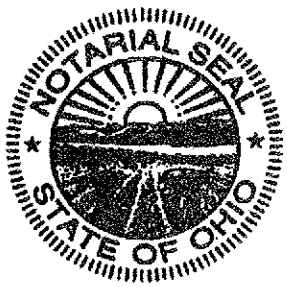
Stantec.

FURTHER, Affiant sayeth naught.

Thomas H. Fusonie

Sworn to before me and subscribed in my presence this 17th day of March, 2010.

Notary Public



GLORIA J. SNYDER
Notary Public, State of Ohio
My Commission Expires
December 18, 2013

3/17/2010 8035374

Fusonie, Thomas H.

From: Fusonie, Thomas H.
Sent: Friday, March 12, 2010 10:16 AM
To: 'Kudela, Justin'
Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.; 'Jennifer Croskey'; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Daniel J. Martin; William J. Cole
Subject: FW: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Justin,

I am providing an additional email exchange for MC Campbell's consideration concerning a 60-day extension of the schedule.

Thank you.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Friday, March 12, 2010 10:11 AM
To: Fusonie, Thomas H.
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; Mindy Worly; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.; Jennifer Croskey
Subject: RE: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Tom:

We still oppose your request for a 60-day extension.

Bill Cole

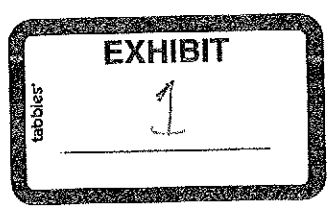
From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Friday, March 12, 2010 10:09 AM
To: Jennifer Croskey; William J. Cole
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; Mindy Worly; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Jennifer,

Thank you for your explanation. I now see the attached files at the bottom of the window. I appreciate your email.

We reiterate that the CD-ROM came with no explanation for where or how to find Appendix C; and no explanation that in order to view the files we would need to download software to view. A party in litigation should not have to divine how to open and read an opposing party's expert report, let alone that in order to read the data, he or she has to download external software to do so.

Further, having now at least seen the volume of data in Appendix C, the Stantec report is considerably more than 140 pages.



Is it still ODNR's position to refuse a 60-day extension of the presentation of evidence and briefing schedule to complete expert discovery?

Tom Fusonie

From: Jennifer Croskey [mailto:Jennifer.Croskey@ohioattorneygeneral.gov]
Sent: Friday, March 12, 2010 8:08 AM
To: William J. Cole; Fusonie, Thomas H.
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; Mindy Worly; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Tom,

Actually, I have checked our control copies and the files are there. When you open Stantec_GLSM_Report1_Technical.pdf in Adobe Acrobat, if the attached files are not showing at the bottom of the Acrobat window, you need to click on the Attachments tab at the left side. You will then be able to see the files at the bottom of the window. In the Description field for each file, there is an instruction to change the file extension. After the file extension is changed, you can save and unzip the files. Of course, to view those files you will need the Army Corps software, which is available for free on its website.

http://www.hec.usace.army.mil/software/hec-hms/download.html

http://www.hec.usace.army.mil/software/hec-ras/hecras-download.html

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OhioAttorneyGeneral.gov
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From: William J. Cole
Sent: Thursday, March 11, 2010 9:21 PM
To: Fusonie, Thomas H.
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Tom:

I will talk to Stantec tomorrow and get back to you.

Bill

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Thursday, March 11, 2010 4:17 PM
To: William J. Cole
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Bill,

Our IT staff has explored the Grand Lake Saint Mary's Hydrologic and Hydraulic Modeling CD-ROM disk, dated March 1, 2010. It located two files on the disk, named:

Stantec_GLSM_Report1_Technical.pdf
50 of 50 pages displayed. No embedded (*.zzz) files located.

Stantec_GLSM_Report2_Discussion_Mapping.pdf
93 of 93 pages displayed. No embedded (*.zzz) files located.

There were no additional files found on the CD-ROM. No .zzz files. No .zzz files that were to be renamed to .zip files, to ultimately display the information.

Our IT staff reviewed each file further looking for embedded content, to determine if the .zzz files could have been embedded within either of the PDF files, but no embedded files were located.

As a further point, nothing from the labeling of the .pdf file extensions suggest that any file extensions had to be changed.

Considering the above, we've either confirmed our original contention that Appendix C to the Technical Report is missing from the CD-ROM or if .zzz files are on the CD-ROM, ODNR and Stantec have not provide us with sufficient information still to locate the .zzz file extensions.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Wednesday, March 10, 2010 8:03 PM
To: Fusonie, Thomas H.
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Tom:

I am only available Friday before 10:30 AM. Based on our correspondence, I am not agreeable to continue the evidence/briefing schedule.

There should be nothing missing from the Stantec report. You will need HEC-HMS and HEC-RAS to open the files. The file extensions must be changed from .zzz to .zip (this should be indicated on the description in the .pdf). Once changed, it is a zip file that contains the HEC-HMS and HEC-RAS modeling.

Let me know if you still have difficultly with the file.

Bill Cole

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Wednesday, March 10, 2010 6:51 PM
To: Kudela, Justin
Cc: Miller, Joseph R.; Ingram, Bruce L.; Wilhelmy, Kristi K.; William J. Cole; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: Case No. 2009-1292, Doner, et al. v. Logan, et al.

Justin,

If the Master Commissioner is amenable, we would like to set up a phone conference with him to discuss extending the presentation of evidence deadline. Relators would like to proceed as soon as practical, such as Friday, if possible. To that end, I have attached recent correspondence between counsel concerning a 60-day extension.

Thank you.

Tom Fusonie

From: Kudela, Justin [mailto:Justin.Kudela@sc.ohio.gov]
Sent: Wednesday, January 13, 2010 9:07 AM
To: Miller, Joseph R.; Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; william.cole@ohioattorneygeneral.gov; mindy.worly@ohioattorneygeneral.gov; jennifer.croskey@ohioattorneygeneral.gov; rachel.stelzer@ohioattorneygeneral.gov; dale.vitale@ohioattorneygeneral.gov; daniel.martin@ohioattorneygeneral.gov; Brewer, Martha C.
Subject: 2009-1292

Good Morning,

The attached entry was just announced in Case No. 2009-1292. Master Commissioner Campbell wanted me to remind you that as indicated in the phone conference yesterday the entry does not address the Interrogatory regarding Anthony Logan and the issue of attorney-client privilege. If the parties want a ruling on that issue a motion to compel will need to be filed, which complies with all the requirements of the Rules of Practice of the Supreme Court of Ohio, and which contains a statement of facts and citations to relevant authority on the issue. If such a motion is filed it should be filed either in person or by mail at the Clerk's Office. Please let me know if you have any questions regarding the entry or the filing of a motion to compel. Thank you.

Justin

Justin T. Kudela
Case Management Counsel
The Supreme Court of Ohio
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65 South Front Street, 8th Floor
Columbus OH 43215-3431
Phone: 614-387-9530
Fax: 614-387-9539
Justin.Kudela@sc.ohio.gov

From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance

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From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

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From the law offices of Vorys, Sater, Seymour and Pease LLP.

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Fusonie, Thomas H.

From: Fusonie, Thomas H.
Sent: Tuesday, March 09, 2010 11:04 PM
To: 'william.cole@ohioattorneygeneral.gov'
Cc: Ingram, Bruce L.; Brewer, Martha C.; Miller, Joseph R.; Wilhelmy, Kristi K.
Subject: Re: Doner v. ODNR

Bill,

On March 4, ODNR proposed adding witnesses by March 15. We will agree to March 22. Based on your email below, ODNR now wants us to identify additional evidence today - only 8 days after receiving a 140 plus page partial report from ODNR's expert witness, Stantec. We're not going to do that. We don't even have the entire Stantec report yet. When are we getting the missing pages from the technical report?

If ODNR wants, we can agree to modify ODNR's proposed deadline for depositions, April 15, to April 22.

Thanks.

Tom

----- Original Message -----
From: William J. Cole <william.cole@ohioattorneygeneral.gov>
To: Fusonie, Thomas H.
Sent: Tue Mar 09 20:00:02 2010
Subject: RE: Doner v. ODNR

Tom:

Before I respond, will you tell me from who else you intend to submit affidavits/evidence?

Bill

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Tuesday, March 09, 2010 5:36 PM
To: William J. Cole
Subject: Doner v. ODNR

Bill,

Thanks for the call. I will be in tomorrow until 2.

Tom Fusonie

From the law offices of Vorys, Sater, Seymour and Pease LLP.

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Fusonie, Thomas H.

From: Fusonie, Thomas H.
Sent: Friday, March 05, 2010 4:29 PM
To: 'William J. Cole'; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

Thank you for your prompt email. We can agree to a cut-off date of March 22 for adding witnesses. We can agree to a cut-off date of April 15 for deposing witnesses. We can agree to permitting limited re-deposing of Relators who submit additional affidavits. Finally, we can agree to withdrawing our objections as to validity and service of the subpoena on Press Campbell and can agree to produce his file subject to the same qualifications as ODNR has placed on the production of its experts' files. We obviously cannot agree to the requests as to Case Leasing documents ODNR seeks from Mr. Campbell other than to point out that ODNR must have obtained some documents from Mr. Campbell in the Case Leasing lawsuit.

On deposing Relators who have not been deposed, Relators cannot agree. The purpose of our need for the extension is to ensure adequate time regarding expert discovery. We can understand ODNR's request to depose Mr. Doner for the limited purpose of questioning him about his supplemental affidavit produced on March 1. But as to Relators ODNR chose not depose before March 1, we do not. ODNR had at least six weeks to take those depositions and chose not to. ODNR''s apparent request now for those depositions is a much different request than seeking merely an extension for adequate time to complete expert discovery, the scope of which is still not known because Stantec's report, as produced, is incomplete.

Please advise by the end of the day Monday if ODNR can agree to the 60-day extension request with Relators' agreement as outlined above to some of ODNR's conditions.

Have a good weekend.

Tom

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Thursday, March 04, 2010 4:33 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Cc: Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Tom:

We are agreeable to your 60-day extension request under the following conditions:

1) have a cut-off date (March 15) for adding witnesses;
2) have a cut-off date (April 15) for deposing witnesses;
3) permit ODNR to depose Relators who have not been deposed, and/or re-depose Relators who submit additional affidavit(s)/evidence; and
4) waive your objections to the validity and service of our subpoena upon Press Campbell, and produce our requested items in sufficient advance of his deposition.

Please advise.

Bill

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Wednesday, March 03, 2010 12:07 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

I can respond to some additional points in your email.

First, we agree to produce Messrs. Campbell and Vannatta in Columbus in return for you producing Stantec and Mr. De Groot in Columbus on mutually agreeable dates and times. We certainly can accommodate Mr. De Groot's request that his deposition start in the morning.

Regarding expert depositions, we also agree that extensions of the deadlines are needed. ODNR produced two affidavits on March 1, one of which is in excess of 140 pages and because of its format, took considerable time just to open and copy. In addition, logistically, we believe more time is needed to arrange for the expert depositions and obtain the transcripts for the depositions. Also, as an additional reason for the need of an extension, the parties have yet to receive all transcripts taken of fact witnesses. Those still need to be reviewed by the deponents and any corrections to the transcripts made.

We would propose emailing Justin Kudela to arrange a call with the Master Commissioner to request a 60-day extension of the Presentation of Evidence deadline and corresponding extensions of the merit briefing.

We will agree to produce the files of Mr. Vannatta in advance of his deposition which ODNR does not already have in its possession. You may not know, but Mr. Vannatta has already produced his general Mercer County file in ODNR v. Baucher, et al., along with his file specific to the Bauchers' parcels. Rachel may have those?? If not, Rob Schlatter or Rich Makowski does.

Has ODNR served a valid subpoena to Mr. Campbell for documents?

Thanks.

Tom

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Tuesday, March 02, 2010 4:12 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Cc: Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Tom:

First, regarding the Kuhn property: Do you plan to submit any affidavit or evidence from Kevin Kuhn? If so, we want the opportunity to depose him. Otherwise, we do not object to substituting the Kuhn Estate for Ms. Kuhn.

Second, regarding expert witness depositions: If you agree to produce Messrs. Campbell and Vannatta in Columbus, we will produce Stantec and Mr. De Groot in Columbus at a mutually agreeable date and time. (As

Mr. De Groot teaches in the evenings, we ask that his deposition be scheduled to start in the morning.) Along those same lines we also ask you to produce Mr. Jay Gould for deposition in Columbus. We may need more time to respond to the statements in his affidavit that we just received yesterday, which may include seeking an extension of one or more deadlines.

Third, regarding expert papers: We will produce the contents of our experts' files provided that they were relied upon or addressed by the expert and are not attorney work product. Will you agree to similarly produce the files of Messrs. Vannatta and Campbell in advance of their depositions?

Please advise.

William J. Cole
Senior Assistant Attorney General
Ohio Attorney General Richard Cordray's Office
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614.466.2980 (phone), 866.354.4086 (fax)
william.cole@ohioattorneygeneral.gov

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Monday, March 01, 2010 6:53 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Cc: Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

The executors are Ms. Kuhns' three sons, Darrell, Marvin and Kevin. As for Mr. Vannatta, we will produce him in Columbus without the need for subpoena at a mutually-convenient date – assuming the same applies for Stantec. As for Mr. Campbell, I assume that if our answer is yes, ODNR will be producing Mr. De Groot for deposition in Columbus as well?? Also, we need to know if now that Stantec and De Groot have produced affidavits, if they will be promptly producing their files we previously subpoenaed.

Tom

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Monday, March 01, 2010 4:07 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Cc: Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Tom:

I should be able to answer your question below tomorrow. Do you know who are the executors/representatives of Ms. Kuhn's estate?

Regarding experts, will you produce yours (Messrs. Campbell and Vannatta) for deposition in Columbus without the need for subpoena?

Bill

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Monday, March 01, 2010 3:25 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Cc: Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

I'm sure we can work out dates for the depositions. How about my questions below? Can we indicate in our motion for substitution of parties that ODNR does not oppose the substitution?

Thanks.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Monday, March 01, 2010 3:11 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Cc: Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Subject: RE: Doner, et al. v. Logan, et al.

Tom:

Will you agree to scheduling and arranging expert depositions without the need for subpoenas?

Please advise by tomorrow.

William J. Cole
Senior Assistant Attorney General
Ohio Attorney General Richard Cordray's Office
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614.466.2980 (phone), 866.354.4086 (fax)
william.cole@ohioattorneygeneral.gov

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Monday, March 01, 2010 10:30 AM
To: William J. Cole; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; Daniel J. Martin
Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.
Subject: Doner, et al. v. Logan, et al.

Bill,

Will ODNR consent to the substitution of the executors of Marilyn Kuhn's Estate in for Ms. Kuhn?

Thanks.

Tom Fusonie
From the law offices of Vorys, Sater, Seymour and Pease LLP.

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Appendix C
Modeling Input and Output

EXHIBIT
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