

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. WAYNE T. DONER, et al.,	:	Case No. 2009-1292
	:	
Relators,	:	Original Action in Mandamus
	:	
v.	:	
	:	
SEAN D. LOGAN, Director,	:	
Ohio Department of Natural Resources, et al.,	:	
	:	
Respondents.	:	

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**MOTION OF RESPONDENTS FOR AN ORDER REGARDING THE  
ADMISSIBILITY OF CERTAIN EVIDENCE AND FOR PROCEEDING WITH  
EXPERT DISCOVERY**

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BRUCE L. INGRAM\* (0018008)  
\*Counsel of Record

JOSEPH R. MILLER (0068463)  
THOMAS H. FUSONIE (0074201)  
KRISTI KRESS WILHELMY (0078090)  
MARTHA C. BREWER (0083788)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
614-462-6480  
614-719-4775 fax  
blingram@vorys.com  
jrmiller@vorys.com  
thfusonie@vorys.com  
kkwilhelmy@vorys.com  
mcbrewer@vorys.com

Counsel for Relators

RICHARD CORDRAY  
Ohio Attorney General

WILLIAM J. COLE\* (0067778)  
\*Counsel of Record  
MINDY WORLY (0037395)  
JENNIFER S.M. CROSKY (0072379)  
Assistant Attorneys General  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215  
614-466-2980  
866-354-4086 fax  
william.cole@ohioattorneygeneral.gov  
mindy.worly@ohioattorneygeneral.gov  
jennifer.croskey@ohioattorneygeneral.gov

DALE T. VITALE (0021754)  
DANIEL J. MARTIN (0065249)  
RACHEL H. STELZER (0083124)  
Assistant Attorneys General  
2045 Morse Road #D-2  
Columbus, Ohio 43229  
614-265-6870  
614-268-8871 fax  
dale.vitale@ohioattorneygeneral.gov  
daniel.martin@ohioattorneygeneral.gov  
rachel.stelzer@ohioattorneygeneral.gov  
Counsel for Respondents

FILED  
APR 08 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE ex rel. WAYNE T. DONER, et al., : Case No. 2009-1292  
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Relators, : Original Action in Mandamus  
: :  
v. : Master Commissioner Andrew J. Campbell  
: :  
SEAN D. LOGAN, Director, : :  
Ohio Department of Natural Resources, et al., : :  
: :  
Respondents. : :

**MOTION OF RESPONDENTS FOR AN ORDER REGARDING THE  
ADMISSIBILITY OF CERTAIN EVIDENCE AND FOR PROCEEDING WITH  
EXPERT DISCOVERY**

Pursuant to the Master Commissioner’s Order of March 23, 2010, Respondents move for an order on the following particulars:

1) Prohibiting both sides (i.e., Relators and Respondents) in this litigation from submitting and filing with the Court any evidence not provided to opposing counsel on or before March 1, 2010; and

2) Either permitting both sides to depose expert witnesses, or prohibiting both sides from doing so. If the Court permits both sides to conduct expert depositions in the time remaining, it should further order that such depositions are to be completed by April 30, 2010, and, if any deposed witness elects to review his or her deposition transcript, that such transcript(s) will be emailed to defending counsel by May 7, 2010, and that all completed errata sheets be provided to the deposing party’s counsel no later than May 14, 2010.

A memorandum in support follows, with exhibits attached hereto.<sup>1</sup>

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<sup>1</sup> Because of time constraints, Respondents have also filed, simultaneous with this filing, a motion for expedited response and ruling.

Respectfully submitted:

RICHARD CORDRAY  
Ohio Attorney General

  
WILLIAM J. COLE\* (0067778)  
*\*Counsel of Record*

MINDY WORLY (0037395)  
JENNIFER S.M. CROSKEY (0072379)  
Assistant Attorneys General  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215  
614-466-2980  
866-354-4086 fax  
william.cole@ohioattorneygeneral.gov  
mindy.worly@ohioattorneygeneral.gov  
jennifer.croskey@ohioattorneygeneral.gov

DALE T. VITALE (0021754)  
DANIEL J. MARTIN (0065249)  
RACHEL H. STELZER (0083124)  
Assistant Attorneys General  
2045 Morse Road #D-2  
Columbus, Ohio 43229  
614-265-6870  
614-268-8871 fax  
dale.vitale@ohioattorneygeneral.gov  
daniel.martin@ohioattorneygeneral.gov  
rachel.stelzer@ohioattorneygeneral.gov

Counsel for Respondents

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

While the deadline to file evidence with this Court has recently been extended, communication between the parties' respective counsel shows that there are material misunderstandings about that deadline that should be resolved. While the parties may have agreed on some issues, there are significant disagreements regarding (1) whether additional evidence from Relators or expert witnesses should be allowed, (2) whether neither, one, or both sides may depose expert witnesses in the time remaining. Based on the Master Commissioner's March 23, 2010 order, Respondents seek a resolution of these issues now, in lieu of the parties filing multiple, separate motions in the weeks before evidence is due.

Through counsel, the parties agreed in January of this year that by March 1, 2010, (1) expert evidence would be exchanged, and (2) non-expert (including Relator) depositions would be completed. This agreement included no provision for submitting rebuttal evidence afterward. Although Relators produced two expert affidavits in discovery, Relators did not provide Respondents' counsel with an expert report or other expert evidence on or before March 1, 2010—but two days *afterward* they sent a new expert affidavit with exhibits. Respondents, however, turned over their expert evidence to Relators' counsel on the agreed-upon deadline. This Court should not permit Relators to file additional evidence that was not provided to counsel for Respondents by March 1, especially when they did not seek to extend the agreed-upon deadline until after that deadline had expired.

While Relators indicate they intend to submit evidence of recent flooding on their lands, this Court should not permit them to do so. As noted above, the agreed-upon deadline for Relator depositions was March 1st. Such evidence is immaterial because Relators are seeking relief for a claimed permanent taking, not for multiple temporary takings. Allowing such evidence threatens to prolong the litigation, because Respondents and their experts should be permitted to review any new evidence, conduct depositions, and submit additional expert reports.

This Court should also either permit both sides to take expert depositions, or prohibit both sides from doing so. Relators should not have it both ways—depose Respondents’ experts while denying Respondents the same opportunity—simply because Respondents opposed their motion for a 60-day extension to file evidence. Relators did not ask, and the Master Commissioner did not order, that the extension only apply to Relators and not to Respondents as well. Moreover, Respondents requested that any extension also apply to them. Therefore, if this Court permits expert depositions at this stage of the litigation, fairness requires that both sides be permitted to do so.

## **II. RELEVANT BACKGROUND**

On January 12, 2010, Master Commissioner Campbell held a teleconference with the parties’ respective counsel to address unresolved discovery issues. During this teleconference counsel agreed (and the Master Commissioner thereafter ordered) that the deadline for filing evidence would be extended to April 1, 2010. Immediately after the teleconference concluded Relators’ counsel emailed Respondents’ counsel their understanding that both sides had agreed to exchange expert evidence by March 1, 2010 and conclude expert depositions by March 19, 2010. (Exhibit A.) In a January 14, 2010

follow-up email, Relators counsel also agreed that Relator and non-expert depositions were to be completed by March 1st. (Exhibit B.)

Pursuant to this agreement, Respondents deposed most (but not all) Relators and non-expert witnesses either physically in Mercer County or by phone (for those Relators who do not reside in or near Mercer County) by March 1, 2010. Also per the agreement Respondents provided Relators' counsel on March 1st their expert evidence, in the form of a CD-Rom from Stantec Consulting Corp., which included a report in Adobe Acrobat format and some other files. Relators' counsel thereafter requested Respondents agree to extend by 60 days the deadline to file evidence, because they could not access the non-Acrobat files on the Stantec CD and needed more time to review deposition transcripts. When Respondents' counsel inquired whether Relators would agree to allow them to depose those Relators who had not been deposed, Relators' counsel refused even with the additional 60 days. (Exhibit C.) Respondents withheld their assent to Relators' requested 60-day extension.

Relators moved this Court for an extension, which the Master Commissioner granted, noting that issues regarding discovery or the admissibility of evidence should be resolved by the parties or raised by an appropriate motion. While Respondents opposed Relators' motion, they requested that any extension granted to Relators should also apply to them. (Respondents' Memorandum in Opposition to Relators' Motion to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing, p. 3.) On March 31, 2010, Respondents' counsel emailed Relators' counsel, and requested they agree to the following: (1) that neither side may file any expert evidence that was not provided to opposing counsel by March 1, 2010; (2) that both sides would within 18 days produce

their experts for deposition on mutually-agreeable dates without the need for subpoenas; (3) that Relators would provide deposition errata sheets by April 16, 2010 and agree to allow Respondents to depose Relators who made any substantive changes to their depositions; and (4) that Relators not submit or file evidence of recent flooding on their lands. (Exhibit D, Mar. 31, 2010 email of William J. Cole to Relators' counsel.) Relators' counsel responded that (1) there was no agreement that Relators could not obtain rebuttal evidence after March 1, 2010; (2) Respondents may not depose Relators' experts because Respondents did not seek an extension and unreasonably opposed Relators' motion for 60-day extension; and (3) they cannot agree to provide all errata sheets by April 16th because they have not yet received all deposition transcripts, but will agree on a case-by-case basis to allow Respondents to depose Relators only on their substantive deposition corrections; and (4) they do not agree not to submit or file evidence of recent flooding on Relators' lands. (Id., Apr. 5, 2010 email of Thomas H. Fusonie to Respondents' counsel.)

Respondents believe that the unresolved issues regarding discovery and the admissibility of certain evidence should be resolved prior to the deadline for filing evidence. Pursuant to the Master Commissioner's March 23rd order, Respondents have first tried to resolve these issues with Relators' counsel. While there may be some agreement on discovery issues (e.g., Relators are willing to let Respondents conduct limited depositions of Relators who make substantive corrections to their depositions), there are still important issues that should be resolved before the June 1st deadline for filing evidence. Accordingly, Respondents have filed this motion so that the Court may consider and decide these unresolved issues.

### III. ARGUMENT

- A. **Because the parties previously agreed to complete Relator depositions and exchange expert evidence by March 1, 2010 without exception, this Court should prohibit any party from filing any evidence not provided to opposing counsel by that date.**

Although the parties agreed to conclude non-expert (including Relator) depositions and exchange all expert evidence by March 1, 2010 without exception (Ex. A and B), Relators now intend to submit expert rebuttal evidence plus affidavits from Relators of recent flooding on their lands. For the reasons below, this Court should prohibit any party from submitting any evidence not provided to opposing counsel by the agreed-upon deadline.

1. **The parties did not agree to the submission or exchange of additional, supplemental, or rebuttal expert evidence after the agreed-upon deadline.**

Relators' insistence that they be allowed to file expert evidence not provided by the March 1st deadline—a deadline they agreed upon—is a complete about-face. Throughout this litigation Relators have insisted that collateral estoppel bars Respondents from re-litigating most of the issues in this case. (See Relators' Memorandum in Support of a Writ of Mandamus, p. 9; Memorandum in Opposition to Respondents' Combined Motion to Refer the Action to a Master Commissioner and Amend the Alternative Writ Schedule, pp. 5-7; Memorandum in Opposition to Motion for Expedited Discovery or to Refer the Action to Mediation, pp. 3-6.) When Respondents sought to amend the original writ schedule, Relators said they were prepared then to present their evidence and submit their briefs within the limited time allotted. (Relators' Memorandum in Opposition to Respondents' Combined Motion to Refer the Action to a Master Commissioner &

Amend the Alternative Writ Schedule, p. 3.) Now that they have seen Respondents' expert reports, Relators have changed their minds.

Without disavowing that they agreed to exchange expert evidence by March 1, 2010, Relators now say they intend to submit additional evidence to rebut Respondents' expert evidence. Relators further accuse Respondents' counsel of reading in a no-rebuttal limitation to the agreement that is not in any correspondence between the parties. (Ex. D, Apr. 5, 2010 Fusonie email, second ¶.)

Closer scrutiny shows that Relators, not Respondents, are trying to read in a non-existent exception to the agreement. When the parties' counsel agreed to the March 1st deadline for exchanging expert evidence, neither side even mentioned rebuttal evidence. On March 1st, Respondents turned over their expert evidence to Relators' counsel in accordance with the agreement. Relators, who had previously provided their expert affidavits to Respondents in discovery, produced no additional expert evidence. Only after the March 1st deadline passed did Relators complain that they need time to gather rebuttal evidence. And two days later, Relators sent Respondents' counsel an additional expert affidavit with exhibits. (Exhibit E, March 3, 2010 e-mail from Thomas H. Fusonie attaching additional expert testimony.)

Relators' about-face is even more obvious considering they have argued that the original alternative writ and this Court's rules contemplate the simultaneous presentation of evidence. (Relators' Memorandum in Opposition to Motion for Expedited Discovery or to Refer the Action to Mediation, pp. 6-7.) Respondents' position—that no post-deadline rebuttal evidence should be allowed—is more faithful to Relators' earlier argument than Relators' current stance. Holding Relators and Respondents to their

agreement places, as Relators once argued, both sides on “equal footing as to the evidence the opposing party will present.” (Id. p. 6.)

In their latest email, Relators presume that the Master Commissioner granted their extension motion based on their professed need to obtain expert rebuttal evidence. (Id.) But the Master Commissioner did not state the grounds for his decision, and his order invites the parties to file a motion regarding the admissibility of evidence if they cannot agree. Moreover, Relators had offered multiple reasons for their extension request, and Respondents had conceded that one of those bases, Relators’ right to review their deposition transcripts, was a valid concern.

When the parties’ counsel agreed in January to set a deadline for exchanging expert evidence they did not distinguish between expert evidence-in-chief and expert rebuttal evidence. Despite having nearly two months to gather more expert evidence, Relators did not submit any additional expert evidence by the agreed-upon deadline. Nor did Relators approach Respondents about extending the deadline until *after* that deadline passed and they had Respondents’ expert reports. If Relators wanted the opportunity to submit expert rebuttal evidence, their counsel could and should have raised that matter with Respondents’ counsel before agreeing on a deadline for exchanging evidence, or even thereafter, *but before that deadline expired*. The same, of course, goes for Respondents. Accordingly, this Court should prohibit any party from filing with the Court any expert evidence—rebuttal, supplemental, or otherwise—that was not provided to opposing counsel on or before March 1, 2010, per the parties’ agreement.

**2. This Court should not permit Relators to file evidence of recent (post-March 1, 2010) flooding on their lands, because such evidence is immaterial to their permanent taking claim.**

Relators claim that on March 13, 2010, many of them started to experience severe flooding on their lands downstream from the western spillway of Grand Lake St. Marys. (Relators' Motion to Extend Presentation of Evidence Deadline & Merit Briefing Schedule pp. 3, 8, 9.) They intend to present additional evidence of such flooding. (Ex. D.) However, Relators are seeking relief for an alleged *permanent* taking of their lands, not for multiple temporary takings. (Complaint.) Evidence of additional flooding allegedly caused by ODNR's spillway modification is irrelevant to Relators' permanent taking claim.

The parties agreed to complete Relator and non-expert depositions by March 1, 2010. (Ex. B.) If Relators are permitted to submit additional evidence now, they presumably will seek to file evidence of further alleged flooding until this case is concluded. Such claims will require further review by Respondents and their experts, including depositions and additional expert reports, with no good end in sight. This is especially problematic because the Master Commissioner has stated that no further extensions will be granted except upon extraordinary circumstances. (Mar. 23, 2010 entry.) Therefore, this Court should not permit Relators to file evidence of recent flooding on their lands.

**B. Fairness requires that this Court either permit both sides to take oral depositions of the other's expert witnesses, or prohibit both sides from doing so.**

In their April 5th email, Relators' counsel says that Respondents may not depose Relators' experts because Respondents did not seek an extension and unreasonably

opposed Relators' motion for 60-day extension. (Ex. D.) Relators believe they alone are entitled to conduct expert depositions because only they moved Court to extend the deadline for filing evidence.

Relators' position is unavailing. Although the Master Commissioner extended the deadline to file evidence, he did not extend any other agreed-upon deadlines. Relators are mistaken that their agreed-upon deadline to depose experts has been extended or lifted, because the Master Commissioner's March 23, 2010 order requires this to be done by agreement or appropriate motion. There is no such motion pending before the Court.

Relators did not ask the Court to extend only *their* deadline—they requested an “extension of *the* deadline for the presentation of evidence from April 1, 2010 to June 1, 2010.” (Emphasis added.) (Id. p. 2.) The Master Commissioner's March 23, 2010 order states that the “*parties* shall file their evidence no later than June 1, 2010.” (Emphasis added.) Further, nothing in the Master Commissioner's order suggests that Respondents' opposition to Relators' motion was unreasonable, that only one side may depose expert witnesses, or that any further depositions may be taken. Relators have no authority for their unreasonable assertion that they alone may depose expert witnesses in the time remaining.

Relators cannot credibly insist that the Master Commissioner's latest order, which allows motions on evidentiary and discovery issues, applies solely to them because they asked for an extension and Respondents did not. Further, contrary to Relators' assertion, Respondents requested that any extension granted to Relators should also apply to them.

When Respondents sought last year to extend the original writ schedule by 90 days, they did not argue that the extension would only apply to them because Relators

opposed their motion. And when the Court extended the writ schedule,<sup>2</sup> Respondents did not suggest that the new deadlines should be one-sided because of Relators' opposition effort. Fairness dictates that deadlines should apply equally, regardless of which side sought an extension and which side opposed it. If Relators are allowed to depose Respondents' experts, so too must Respondents be allowed to depose Relators' experts.

If this Court permits the parties to conduct expert depositions, some additional deadlines should be ordered because of time constraints. Respondents propose the following: Both sides may depose the other side's expert witnesses by April 30, 2010, pursuant to counsel's agreement regarding place and time and without the need for subpoena. If any deposed witness elects to review his or her deposition transcript, such transcript will be sent to the defending counsel by May 7, 2010. All completed errata sheets are to be provided to the deposing party's counsel no later than May 14, 2010.

#### **IV. CONCLUSION**

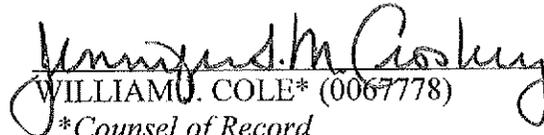
For these reasons, this Court should (1) prohibit both sides from submitting and filing evidence not provided to opposing counsel by March 1, 2010; and (2) either permit both sides to depose expert witnesses by April 30, 2010, or prohibit both sides from doing so.

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<sup>2</sup> The Court initially denied Respondents' request to extend the original writ schedule (entry dated Oct. 13, 2009), but later stayed the deadlines. (Entry dated Oct. 23, 2009.)

Respectfully submitted:

RICHARD CORDRAY  
Ohio Attorney General

  
WILLIAM COLE\* (0067778)

\*Counsel of Record

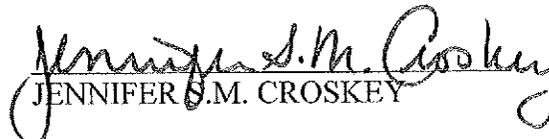
MINDY WORLY (0037395)  
JENNIFER S.M. CROSKEY (0072379)  
Assistant Attorneys General  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215  
614-466-2980  
866-354-4086 fax  
william.cole@ohioattorneygeneral.gov  
mindy.worly@ohioattorneygeneral.gov  
jennifer.croskey@ohioattorneygeneral.gov

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RACHEL H. STELZER (0083124)  
Assistant Attorneys General  
2045 Morse Road #D-2  
Columbus, Ohio 43229  
614-265-6870  
614-268-8871 fax  
dale.vitale@ohioattorneygeneral.gov  
daniel.martin@ohioattorneygeneral.gov  
rachel.stelzer@ohioattorneygeneral.gov

Counsel for Respondents

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent by electronic and regular mail on April 8, 2010, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, Kristi Kress Wilhelmy, and Martha C. Brewer, Vorys, Sater, Seymour & Pease, P.O. Box 1008, Columbus, OH 43216.

  
JENNIFER S.M. CROSKEY

**Jennifer Croskey**

**From:** Miller, Joseph R. [JRMiller@vorys.com]  
**Sent:** Tuesday, January 12, 2010 1:46 PM  
**To:** William J. Cole; Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin  
**Subject:** RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Bill,

Following up on the Court conference of this afternoon and the Court's admonition that the parties agree upon a schedule for the completion of discovery, we accept your proposal to exchange expert evidence by March 1 and conclude expert depositions by March 19. We also accept your compromise proposal during the Court conference that non-expert depositions be completed by each side by February 15.

Joe

**From:** William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]  
**Sent:** Tuesday, January 12, 2010 8:58 AM  
**To:** 'Campbell, Andrew'; Ingram, Bruce L.; Miller, Joseph R.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin  
**Cc:** Kudela, Justin  
**Subject:** RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Master Commissioner Campbell:

Per your instruction, here are the outstanding unresolved discovery issues between the litigants:

- 1) Venue of depositions of Relators: Respondents' counsel maintain the right to depose Relators in their chosen venue of Columbus, with allowances for those who can document a physical inability to travel here. Relators' counsel insist that all such depositions take place in Mercer County.
- 2) Scheduling of expert evidence and depositions: Based on Joseph Miller's Jan. 8 correspondence, it appears that the parties agree, with the Court's approval, to extend to April 1 the deadline for filing their evidence with the Court. Relators' counsel proposes that Respondents provide their expert evidence to them by February 15, to allow them to complete discovery by March 1. Respondents' counsel counter-proposes that both parties exchange their expert evidence (affidavits, reports, supplements) by March 1, and conclude all expert and non-expert depositions by March 19.
- 3) Communications, if any, between Respondents and J. Anthony Logan (Mr. Logan represented certain other Mercer County landowners in a prior litigation, and was subsequently chief legal counsel for ODNR until early December): Relators' counsel claims that any substantive legal communications that Mr. Logan had with Respondents about this litigation are not privileged, and they demand all documentation of such communications. Respondents maintain that Mr. Logan's substantive legal communications, if any, with ODNR about this litigation are privileged. Further, Respondents note that there is no documentation of such communications to produce.
- 4) Relators' refusal to answer Respondents' Interrogatory # 5, part 3, which asks whether any Relators have applied to the federal Natural Resources Conservation Service for drought or other natural causes: Relators object to this interrogatory as irrelevant and refuse to answer. Respondents maintain that Relators must answer (and produce all related documentation pursuant to Respondents' attendant Request for Production # 5) because any factual evidence of whether, when, how, and why Relators filed requests for assistance is relevant to support or rebut their allegations that they have been and will continue to be flooded.

4/8/2010



5) Relators' refusal to answer Respondents' Interrogatory # 6, which asks whether any Relators ever received any financial assistance, compensation or other relief from any entity, including the federal Department of Agriculture's Farm Service Agency since 1997 for property damage or loss due to flooding, drought, or other natural causes: Relators object to this interrogatory as irrelevant and refuse to answer. Respondents maintain that Relators must answer (and produce all related documentation pursuant to Respondents' attendant Request for Production # 5) because any factual evidence of whether, when, how, and why Relators filed requests for assistance is relevant to support or rebut their allegations that they have been and will continue to be flooded.

The above list does not include all of Respondents' supporting arguments, which counsel will be prepared to discuss at the 1:00 phone conference.

**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

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**From:** Campbell, Andrew [mailto:Andrew.Campbell@sc.ohio.gov]  
**Sent:** Monday, January 11, 2010 1:20 PM  
**To:** blingram@vorys.com; jrmiller@vorys.com; thfusonie@vorys.com; kkwilhelmy@vorys.com; William J. Cole; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin  
**Cc:** Kudela, Justin  
**Subject:** Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Counsel:

In an e-mail sent to the clerk's office on Friday afternoon, January 8, counsel for relators informed the court that the parties "have reached an impasse related to certain discovery issues" and sought the court's assistance in resolving those matters. Correspondence between counsel was attached.

It is not clear from the foregoing correspondence what issues remain outstanding between the parties. To expedite consideration of these matters, counsel for each side should reply to this e-mail and submit a description of outstanding discovery issues by 9:00 a.m. tomorrow morning (Tuesday, January 12). The description of issues should be submitted by replying to this e-mail using the reply-to-all function, as should any questions. Any discovery requests and responses relevant to the outstanding issues should be included with the party's submission.

A telephone conference will be held at 1:00 p.m. the same day (Tuesday, January 12) to discuss the outstanding issues. Further information regarding the conference (confirming time and date, how it will be initiated, procedures to be used, etc.) will be circulated via e-mail prior to the conference.

Except as stated above, and as previously directed, the parties should continue to first contact the clerk's office regarding any future matters or issues concerning this case.

Andrew J. Campbell  
Master Commissioner

4/8/2010

The Supreme Court of Ohio  
65 South Front Street  
Columbus, Ohio 43215-3431  
Facsimile: (614) 387-9569  
[andrew.campbell@sc.ohio.gov](mailto:andrew.campbell@sc.ohio.gov)

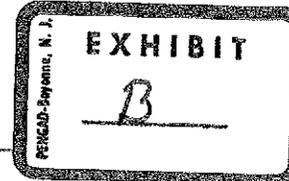
From the law offices of Vorys, Sater, Seymour and Pease LLP.

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4/8/2010



**William J. Cole**

**From:** Miller, Joseph R. [JRMiller@vorys.com]  
**Sent:** Thursday, January 14, 2010 10:21 AM  
**To:** William J. Cole  
**Cc:** Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.  
**Subject:** RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Bill,

I obviously disagree with your characterization of your February 15<sup>th</sup> proposal, but, regardless, as I understand it from your various correspondence, what you are now proposing is as follows:

- March 1<sup>st</sup>: Relator and non-expert depositions should be completed
- March 1<sup>st</sup>: Deadline by which ODNR will provide to Relators any reports and affidavits of its expert witnesses
- March 19<sup>th</sup>: Deadline by which all expert depositions should be completed
- April 1<sup>st</sup>: Evidence to be submitted, as established by the Master Commissioner's Order

Relators will agree to the schedule above.

You still have not provided us any dates for deposition of the fact witnesses we requested some time ago. Will you provide potential dates to us this week?

Thank you,  
 Joe Miller

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**From:** William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]  
**Sent:** Wednesday, January 13, 2010 3:35 PM  
**To:** Miller, Joseph R.  
**Cc:** Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.  
**Subject:** RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Joe:

We are working on dates and locations to depose Relators in Mercer County. We will probably add some more names to the "first round" list I sent you earlier.

During yesterday's phone conference, I requested a March 1st deadline for Relator and other non-expert depositions. Feb. 15th was not a compromise proposal, but simply an alternative date if the Master Commissioner was going to decide the issue. Plus, at that time neither side knew which way the Master Commissioner was going to rule on the deadline extension for submittal of evidence. Now that the Master Commissioner has extended that deadline to April 1 and ordered Relator depositions to occur in Mercer County, I request that you agree to a March 1st deadline. Allowing for non-expert depositions in Jan.-Feb., while reserving the expert depositions for March, will in no way prejudice your side. And a March 1st deadline provides both sides with greater flexibility to schedule (and if necessary, reschedule) depositions

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due to conflicts, inclement weather, or otherwise. We will, of course, continue to work with you in scheduling deposition dates and times, and having until March 1st will allow the depositions and their transcription to occur in a more orderly and manageable fashion. Considering that we willingly agreed to the full extension you requested for both the expert-deposition and evidence deadlines to give your side sufficient time to review our expert affidavits and material, we hope you will agree to this reasonable request.

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

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**From:** Miller, Joseph R. [mailto:JRMiller@vorys.com]

**Sent:** Tuesday, January 12, 2010 1:46 PM

**To:** William J. Cole; Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin

**Subject:** RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Bill,

Following up on the Court conference of this afternoon and the Court's admonition that the parties agree upon a schedule for the completion of discovery, we accept your proposal to exchange expert evidence by March 1 and conclude expert depositions by March 19. We also accept your compromise proposal during the Court conference that non-expert depositions be completed by each side by February 15.

Joe

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

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4/7/2010

**William J. Cole**

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**From:** Fusonie, Thomas H. [thfusonie@vorys.com]  
**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 to 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

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**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.

4/7/2010



**William J. Cole**

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**From:** Fusonie, Thomas H. [thfusonie@vorys.com]  
**Sent:** Monday, April 05, 2010 5:19 PM  
**To:** William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.  
**Cc:** Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin  
**Subject:** RE: Doner v. Logan, 2009-1292  
**Sensitivity:** Confidential

Bill,

On March 15, the Master Commissioner requested that any request to extend the presentation of evidence deadlines needed to be by motion and filed by March 17. On March 17, 2010, Relators filed such a motion. Relators identified three reasons for the extension: to analyze and confirm or rebut Respondents' expert affidavits and then respond to them; to gather evidence of recent flooding; and to obtain and review transcripts not yet received. ODNR opposed the motion and in particular reasons # 1 and #2. ODNR did not file its own motion to extend any deadlines. With this context, we respond to your questions.

As to question no. 1, there was no agreement that Relators could not obtain rebuttal expert evidence after March 1. You are reading in a limitation not found in any correspondence between the parties. ODNR could not seriously have believed it could produce on March 1 manipulated and fundamentally flawed "expert" reports and then shield them from any expert rebuttal. Moreover, as indicated by the granting of Relators' motion for an extension, the Court found as good cause for the extension Relators' need to obtain rebuttal expert evidence.

As to question no. 2, ODNR claimed that the deadline for expert depositions has come and gone. It sought no extension of the presentation of evidence deadline to take expert depositions. Relators did. ODNR could have agreed to Relators' request for an extension. Instead, it refused to do so and forced Relators to expend time and resources in filing the motion to extend with the Court. ODNR does not now get to benefit from Relators' hard work in obtaining the extension of the presentation of evidence deadline – despite ODNR's obstruction. ODNR had its chance to depose Relators' experts, it decide to forego that opportunity and instead unreasonably opposed Relators' extension request. We do not agree to ODNR benefitting from Relators' extension efforts, and so, we do not agree to ODNR taking the deposition of Relators' experts.

As to question no. 3, we have not received all of the transcripts yet. You should have in excess of 35-40 errata sheets in your possession. But since we still do not have about 12 transcripts from the State's court reporters, we cannot agree to April 16. To extent ODNR suggests some errata sheets contain substantive corrections, please identify the Relators/witnesses ODNR wants to depose and the line entries to those deponents' errata sheets that ODNR has identified as substantive corrections. We will then on a case-by-case basis agree or disagree to a deposition of the deponents. Any deposition will be limited to the line entries that we agree are substantive corrections.

As to question no. 4, the answer is no. See Relators' motion and the Court's March 23 Entry.

Tom Fusonie

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**From:** William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]  
**Sent:** Friday, April 02, 2010 1:34 PM



4/7/2010

**To:** Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.  
**Cc:** Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin  
**Subject:** RE: Doner v. Logan, 2009-1292  
**Sensitivity:** Confidential

Counsel:

Please respond by Monday, April 5, to my March 31st inquiries (see below).

Thank you.

**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

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le  
March 31, 2010 7:10 AM  
ias H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.  
Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin  
v. Logan, 2009-1292  
ential

Counsel:

In his March 23d decision granting your request to extend the deadline for filing evidence to June 1st, Master Commissioner Campbell wrote that issues regarding discovery or the admissibility of evidence should be resolved by the parties or raised by appropriate motion. So that Respondents may determine whether a motion is necessary, please advise on the following as soon as possible:

- 1) Will you abide by our January 12th agreement that the deadline to exchange expert evidence was March 1st, and therefore neither side may file any expert evidence not provided to the other side by that date?
- 2) Will you abide by our March 1st agreement that both sides will produce their experts for deposition in Columbus at a mutually-agreeable date without the need for subpoenas? Will you further agree that, consistent with our January 12th agreement, that expert depositions will be concluded within the next 18 days (i.e., by April 17th)?
- 3) Have you received the transcripts of all of the Relator/non-expert witness depositions? If so, will you agree to email us by April 16 copies of all executed errata sheets for those depositions? Do you also agree, if requested, to schedule for deposition any such Relators/witnesses who make any substantive corrections to their deposition transcripts, in accordance with the conditions set forth in the Master Commissioner's January 13th order (i.e., Relators who reside in or near Mercer County will be deposed in Mercer County)?
- 4) Do you agree not to submit or file evidence of recent (post-March 1st) flooding on Relators' lands?

**William J. Cole**

4/7/2010

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

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**William J. Cole**

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**From:** Fusonie, Thomas H. [thfusonie@vorys.com]  
**Sent:** Wednesday, March 03, 2010 7:35 PM  
**To:** Fusonie, Thomas H.; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; William J. Cole; Daniel J. Martin  
**Cc:** Brewer, Martha C.; Wilhelmy, Kristi K.; Miller, Joseph R.; Ingram, Bruce L.  
**Subject:** Doner, et al. v. Logan, et al.  
**Attachments:** Affidavit of Keith Earley.pdf

Please find attached a supplemental production.

Tom Fusonie

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

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