

ORIGINAL

IN THE SUPREME COURT OF OHIO

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CASE NO.: 2010-1536

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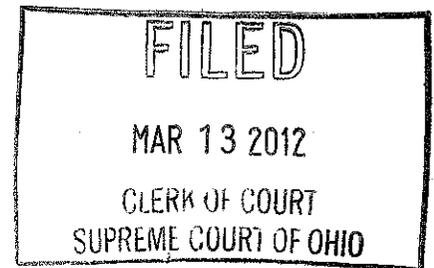
**O'SHEA & ASSOCIATES CO., LPA**

**RELATOR**

v.

**CUYAHOGA METROPOLITAN  
HOUSING AUTHORITY**

**RESPONDENT**



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On Appeal from the Court of Appeals,  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No.: 93275

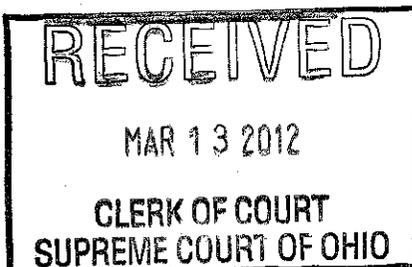
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**MOTION FOR PROTECTIVE ORDER**

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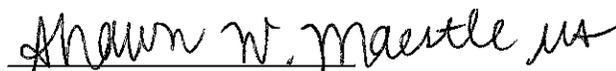
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**Attorney for Respondent**



Respondent, Cuyahoga Metropolitan Housing Authority ("CMHA"), through counsel and pursuant to Civ. R. 26(C), respectfully asks the Court to issue a protective order preventing the Relator, O'Shea & Associates Co., L.P.A ("O'Shea"), from taking the deposition of a CMHA representative or otherwise conduct discovery while this matter is still on appeal and until after the matter is remanded to the Court of Appeals, with a mandate, and the documents are produced in accordance with the January 19, 2012 order of the Ohio Supreme Court, and only after briefing by the parties on the issue of whether discovery is necessary.

The reasons for this motion are more fully set forth in the attached memorandum.

Respectfully submitted,



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## MEMORANDUM

### **I. BACKGROUND FACTS**

On July 20, 2010, the Court of Appeals issued a Writ of Mandamus, compelling the CMHA to disclose certain documents found to be public records pursuant to R.C. §149.43. On September 1, 2010, the Court of Appeals issued granted CMHA's motion to stay judgment pending appeal. On September 1, 2010, CMHA timely filed a notice of appeal in the Ohio Supreme Court. On January 19, 2012, the Ohio Supreme Court affirmed in part and reversed in part the Court of Appeals' September 1, 2010 order. Part of the Ohio Supreme Court's order involves disclosure of documents only after redaction by CMHA:

Based on the foregoing, we hold that the personal identifying information in CMHA lead-poisoning documents, such as the names of parents and guardians, their social-security and telephone numbers, their children's names and dates of birth, the names, addresses, and telephone numbers of other caregivers, and the names of and places of employment of occupants of the dwelling unit, including the questionnaire and authorization, do not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the CMHA and are not obtainable under the Public Records Act. However, the remainder of the completed forms is subject to disclosure under R.C. 149.011(G) and 149.43. If any question should arise about whether any portion of the completed forms discloses personally identifiable information, the court of appeals on remand will determine which portions should be redacted and not be subject to disclosure.

*State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, Slip Opinion No. 2012-Ohio-115, ¶36

On January 27, 2012, O'Shea filed a motion for reconsideration of the Ohio Supreme Court's January 19, 2012 order. The motion for reconsideration is still pending.

Meanwhile, on February 18, 2012, CMHA received a notice of deposition, pursuant to Civ. R. 30(B)(5), purportedly filed in the Court of Appeals. (See Exhibit A.) The notice of

deposition seeks to depose a representative of the CMHA as to matters concerning documents sought in a public records request at the heart of O'Shea's mandamus action, presently under appeal, including the location of those documents, the persons assigned to locating the documents, the costs associated with locating and copying the documents, the persons who made the decision not to produce any document, and the persons who performed redaction of the documents. (See Exhibit A.)

On March 8, 2012, Mr. Maestle sent Mr. O'Shea an email noting Mr. Maestle's objections and asking Mr. O'Shea to withdraw the notice. Mr. O'Shea responded that he was holding firm to his position. Thus, the parties have not been able to resolve this dispute without court intervention.

For the reasons that follow, a protective order is needed to prevent O'Shea from proceeding with the noticed deposition of a CMHA representative because the Court of Appeals has stayed its judgment during appeal, the Ohio Supreme Court has not yet issued a mandate because O'Shea's motion for reconsideration is still pending, O'Shea cannot seek to conduct discovery in this proceeding while this Court lacks jurisdiction, and because this type of deposition may be appropriate only if and when a legitimate dispute exists as to whether the document production is done in accordance with the Ohio Supreme Court's January 19, 2012's order.

## II. LAW AND ARGUMENT

- A. The Court should grant CMHA's motion for protective order and stay discovery until after the case is remanded, and if and when it is found by the Court of Appeals to be necessary.

Under Civ. R. 26(C), a party may move for a protective order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place \*\*\*." Here, the protective order is necessary to protect CMHA from annoyance and undue burden and expense considering that the timing of the request is inappropriate and incredibly premature.

### 1. The Court of Appeals presently lacks jurisdiction over this matter.

Not only has the Court of Appeals issued a stay of execution in this matter, the Court of Appeals has been divested of its jurisdiction while the matter is on appeal in the Ohio Supreme Court. During the pendency of the appeal, the Court of Appeals may only exercise jurisdiction over matters that are not inconsistent with the Supreme Court's jurisdiction over the appeal. See, *Yee v. Erie County Sheriff's Dep't*, 51 Ohio St. 3d 43, 44 (1990).

The Court of Appeals does not regain jurisdiction until after the issuance of a mandate:

(A) After the Supreme Court has decided an appeal on the merits, the Clerk shall issue a mandate. The mandate shall be issued ten days after entry of the judgment, unless a motion for reconsideration is filed within that time in accordance with S.Ct. Prac. R. 10.9(B) or 11.2.

(1) If a motion for reconsideration is denied, the mandate shall be issued when the order denying the motion for reconsideration is filed with the Clerk.

(2) If a motion for reconsideration is granted, the mandate shall be issued ten days after the entry of the judgment is filed with the Clerk.

S.Ct. Prac. R. 11.4(A)(1)-(2).

Here, O'Shea's motion for reconsideration is still pending. Therefore, the Supreme Court still has exclusive jurisdiction over the appeal. O'Shea has jumped the gun by seeking discovery that will necessarily require reference to and discussion about documents that are the subject of the present appeal. As such, O'Shea cannot be allowed to conduct discovery in the Court of Appeals matter until, at the very least, the Court of Appeals regains jurisdiction.

**2. Discovery is not presently appropriate and may not ever be necessary.**

Not only does the Court of Appeals currently lack jurisdiction in this matter, but O'Shea has not sought leave to conduct discovery, and such discovery is not yet required and may never be required. The Ohio Supreme Court's January 19, 2012 order specifically sets out the procedure to be followed in the Court of Appeals once the mandate is issued. Specifically, it has ordered the production of documents, some of which are to be redacted per its order. The Ohio Supreme Court has specifically stated that "[i]f any question should arise about whether any portion of the completed forms discloses personally identifiable information, the court of appeals on remand will determine which portions should be redacted and not be subject to disclosure." *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, ¶36.

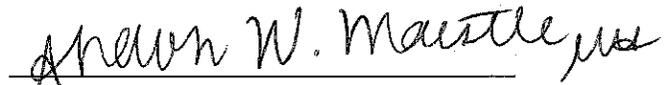
Here, discovery is entirely premature. No production has yet taken place, and no questions or disputes have arisen. Should a dispute arise, O'Shea can request leave from the Court of Appeals to conduct discovery on the matter, and the parties can brief the necessity of discovery. To require discovery at this early juncture would result in only undue annoyance and expense to CMHA. See, e.g., *Grover v. Bartsch*, 170 Ohio App. 3d 188 (2d Dist. 2006) (granting

motion for protective order, while motion to dismiss was pending, upon finding that discovery was premature and could ultimately be unnecessary).

### III. CONCLUSION

For all of the above reasons, the court should grant CMHA's motion for a protective order that stays discovery until otherwise ordered by the Court of Appeals.

Respectfully submitted,



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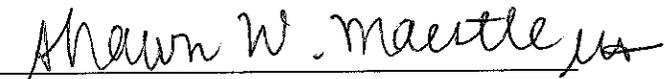
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*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 12<sup>th</sup> day of March, 2012, to the following:

Michael J. O'Shea  
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