

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE *ex rel.*
OHIO CIVIL RIGHTS COMMISSION, *et al.*

CASE NO. 14-0295

Relators,

Original Action in Prohibition

v.

THE HON. RICHARD J. McMONAGLE,

Respondent

v.

GMS MANAGEMENT CO., INC.

Intervenor

FILED
MAR 07 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Motion Of GMS Management Co., Inc. To Intervene
Civ.R. 24

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The Hon. Richard J. McMonagle*

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MOTION TO INTERVENE

Proposed Intervenor GMS Management Co., Inc. moves to intervene under Civ.R. 24 to protect its interest and to assert the defenses in its proposed Answer, a copy of which is attached as Exhibit 1, and the arguments in its proposed Motion for Judgment on the Pleadings, a copy of which is attached as Exhibit 2, both of which Proposed Intervenor is also filing with the Court to comply with the timing requires under S. Ct. Prac. R. 12.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

STATEMENT OF FACTS

This action arises from Respondent's exercise of jurisdiction over litigation brought by Intervenor as plaintiff, and Relators as defendants, captioned *GMS Management Co., Inc. v. the Ohio Civil Rights Commission, et al.*, case number 820282, pending in the Court of Common Pleas Cuyahoga County (the "*Litigation*"). In the *Litigation* Intervenor seeks injunctive and declaratory relief against Relators with respect to Relators' *ultra vires* and illegal investigation of Intervenor, which investigation was initiated upon a written charge which was not signed under oath as required by R.C. 4112.05(B)(1), which charge alleges that Intervenor committed an unlawful discriminatory practice of housing discrimination against the charging party. The charge was signed under penalty of perjury and not under oath. Relator the OCRC cannot "receive, investigate, or pass upon" a charge unless it is made in writing under oath. R.C. 4112.04(A)(6) and R.C. 4112.09. Signatures "under penalty of perjury" do not constitute signatures "under oath."

In their Complaint in Prohibition, Relators seek to prohibit Respondent from exercising further jurisdiction over the *Litigation*. As such, Intervenor has a direct interest which will be affected by the relief sought by Relators, and should be allowed to intervene to protect its interest pursuant to Civil Rule 24.

ARGUMENT

Intervenor should be allowed to intervene in this action as a matter of right pursuant to Civil Rule 24(A)(2), given the significant interests that it has at stake as the plaintiff in the Litigation over which Respondent presides. Rule 24(A)(2) allows a party to intervene as a matter of right where (1) it has an interest in the property or transaction at issue, (2) the ability of the party to protect that interest may be impaired by the disposition of the action, and (3) the party's interests are not adequately protected by the existing parties to the action. Civ. R. 24(A)(2).

Intervenor clearly has an interest in the property or transaction at issue since it instituted the Litigation. For the same reason Intervenor's ability to protect its interest may be impaired by the disposition of the action in Prohibition *sub judice*. Finally, the threshold to establish the third element is minimal. As this Court held in *State ex rel. Smith v. Frost*, 74 Ohio St. 3d 107, 107-108 (1995) with respect to the fulfillment of all three elements to intervene by a litigant similarly situated with Intervenor (with emphasis added):

The village has an interest relating to the property which is the subject of the action, **since it instituted the action** which led to the permanent injunction entered by Judge Frost that relators seek to vacate in this mandamus action. **Our disposition of relators mandamus action may impair the villages ability to protect its interest.** Finally, the village has met its minimal burden to establish that its interest may not be adequately represented by the current respondents. See, generally, McCormac, Ohio Civil Rules Practice (2 Ed.1992) 93-94, Section 4.37. Therefore, consistent with the liberal construction generally accorded Civ.R. 24 in favor of intervention, the villages motion to intervene is granted and its accompanying Civ.R. 12(B)(6) motion to dismiss will be considered by the court. See *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St. 3d 245, 247, 594 N.E.2d 616, 619.

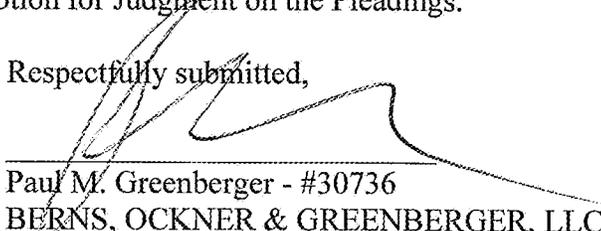
Given Intervenor's direct interest in the subject of this litigation as well as the Litigation, any relief sought by Relators in their Complaint will undoubtedly have an impact on Intervenor's rights. As set out above, this Court has previously allowed litigants to intervene in actions seeking extraordinary writs against a judge presiding over an action in which the prospective intervenor is

a party. Moreover, having already briefed and successfully argued the same issues before Respondent Intervenor and its counsel are better suited to defend the jurisdiction of Respondent over the Litigation.

CONCLUSION

Intervenor has significant interests that may be impaired or impeded by the resolution of this action. In the light of past precedent and liberal construction accorded Civil Rule 24, Intervenor respectfully requests that this Motion to Intervene be granted, and that leave be granted to file the accompanying Answer and Motion for Judgment on the Pleadings.

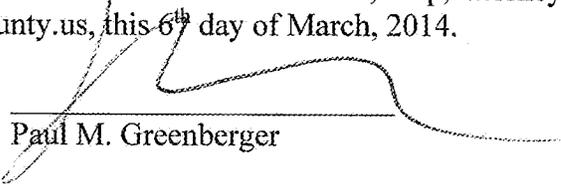
Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to S. Ct. Prac. R. 3.11(B)(1) & (C)(1), a copy of the foregoing has been forwarded by e-mail to opposing counsel Eric E. Murphy, Esq., attorney for Relators, at eric.murphy@ohioattorneygeneral.gov and to Charles E. Hannan, Esq., attorney for Respondent, at channan@prosecutor.cuyahogacounty.us, this 6th day of March, 2014.



Paul M. Greenberger

IN THE SUPREME COURT OF OHIO

STATE *ex rel.*

OHIO CIVIL RIGHTS COMMISSION, *et al.*

Relators,

v.

THE HON. RICHARD J. McMONAGLE,

Respondent

v.

GMS MANAGEMENT CO., INC.

Intervenor

CASE NO. 14-0295

Original Action in Prohibition

Intervenor's Answer
Civ.R. 24(C)

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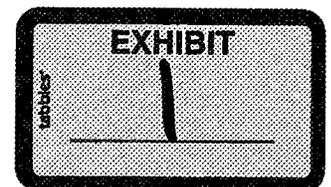
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*Counsel for Respondent
The Hon. Richard J. McMonagle*



Now comes Intervenor, by and through the undersigned counsel who for its Answer to Relators' complaint state as follows:

1. Intervenor admits the allegation in the first unnumbered prefatory paragraph of the complaint that in this action Relators seek relief by way of a writ of prohibition, that Respondent has denied Relators' Motion to Dismiss for lack of subject matter jurisdiction, and that Respondent had, at the time of filing the complaint *sub judice*, set the underlying litigation for a preliminary injunction hearing; but Intervenor denies that Respondent's action has circumvented the special statutory proceeding established by the General Assembly for consideration of charges filed with the Ohio Civil Rights Commission; Intervenor specifically denies the existence of any such special statutory proceeding; Intervenor specifically denies that there was such a special statutory proceeding to exist it would not apply during the investigatory of a lawful written charges made under oath of the unlawful discriminatory practice of housing discrimination; and Intervenor denies the remaining allegations in said first prefatory unnumbered paragraph of the complaint.
2. Intervenor further denies the allegations in the second unnumbered prefatory paragraph of the complaint and specifically denies that Respondent patently and unambiguously lacks jurisdiction over the underlying litigation before Respondent; and Intervenor specifically denies that the affidavit attached to the complaint is sufficient to comply with S. Ct. Prac. R. 12.02(B). Intervenor further specifically and emphatically denies that Intervenor's First Amended Complaint now pending in the common pleas court complaint is attached to said affidavit. That which is attached is a specimen of Intervenor's original and now superseded complaint, albeit without any of its exhibits, which exhibits are part thereof for all purposes

under Civ.R. 10(C). A true copy of Intervenor's pending First Amended Complaint is attached hereto including the exhibits referred to therein.

3. Intervenor admits this court's original jurisdiction in cases seeking a writ of prohibition as alleged in complaint paragraph 1.
4. Intervenor admits the allegations in complaint paragraphs 2 and 3.
5. Intervenor admits that Respondent is a duly elected judge as alleged, that Respondent presides over a tribunal of general subject matter jurisdiction, R.C. 2305.01, as alleged in complaint paragraph 4, but Intervenor asserts that Respondent is thereby empowered to determine its/his own jurisdiction, and Intervenor denies the remaining allegations in complaint paragraph 4.
6. Intervenor specifically denies the allegation in complaint paragraph 5 to the effect that Fasanaro filed a "charge" with the Commission because a charge must be signed under oath and that which was filed by Fasanaro was instead, signed "under penalty of perjury;" Intervenor admits the allegations contained in its underlying complaint pending before Respondent, that the Commission began an "investigation" of Intervenor, albeit an illegal investigation, and that as part of said "investigation" the Commission sought documents, and Intervenor admits that said "investigation" is ongoing, but Intervenor denies the remaining allegations in complaint paragraph 5.
7. Intervenor denies the allegations in complaint paragraphs 6 and 7 to the extent they are inconsistent with Intervenor's First Amended Complaint. Intervenor admits that a copy of its First Amended Complaint is attached to the complaint as Exhibit 1 to Exhibit A, but that the exhibits to said First Amended Complaint were omitted from said Exhibit 1. Intervenor denies the remaining allegations in complaint paragraphs 6 and 7.
8. Intervenor admits the allegations in complaint paragraph 8.

9. Intervenor incorporates its previous admissions and denials in response to complaint paragraph 9.
10. Intervenor denies that Respondent has improperly exercised judicial power as alleged in complaint paragraph 10, but Intervenor admits that as of the filing of the complaint, Respondent had ruled as alleged in complaint paragraph 10.
11. Intervenor denies the allegations in complaint paragraph 11.
12. Intervenor denies the allegations in the first sentence of complaint paragraph 12, as aforesaid because a charge must be in writing under oath. Intervenor further denies that any investigation or adjudication by Relators is a special statutory proceeding and that common pleas courts may not hear declaratory or injunctive [sic] cases that interfere therewith, as alleged in complaint paragraph 12. Intervenor admits the jurisdiction of the common pleas court in appeals under R.C. 4112.06 and the jurisdiction over certain actions pursuant to R.C. 4112.051(A)(2), provided in that all circumstances Relators first have jurisdiction, as further alleged in complaint paragraph 12.
13. Intervenor denies that the charge filed by Fasanaro is within the Commission's jurisdiction to investigate and hear, and Intervenor further denies that the Commission had jurisdiction to "receive" said charge, all of the foregoing for want of a charge in writing under oath, as alleged in complaint paragraph 13. Intervenor denies that the Commission has jurisdiction to determine its own jurisdiction for numerous reasons not the least of which is that it patently and unambiguously lacks jurisdiction, and that it is not a tribunal of general subject matter jurisdiction such as, for example, a court of common pleas, as further alleged in complaint paragraph 13.

14. Intervenor denies the allegations in the first sentence of complaint paragraph 14 for the reasons set out above, but Intervenor admits that the injunctive relief it seeks is set out in its First Amended Complaint attached hereto, but Intervenor denies the remaining allegations in complaint paragraph 14.
15. Intervenor denies that *State ex rel. Albright v. Court of Common Pleas*, 60 Ohio St. 3d 40, 43 (1991) holds that Relators need not show lack of an adequate at law when an agency seeks to prevent a court from interfering with a special statutory proceeding, as alleged in complaint paragraph 15. Intervenor admits that under the circumstances in *Albright*, *i.e.*, the patent and unambiguous lack of jurisdiction on the part of a respondent court, “the adequacy of appeal as a remedy is irrelevant,” *Id.*, but Intervenor denies the remaining allegations in complaint paragraph 15.
16. Intervenor admits there is a statutory deadline for completing an investigation of a lawful charge as alleged in complaint paragraph 16, but Intervenor denies the remaining allegations in complaint paragraph 16.
17. Intervenor denies each and every allegation contained in Relators’ complaint not specifically herein admitted to be true.

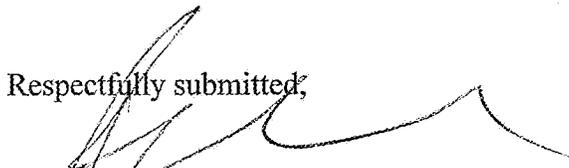
DEFENSES

18. The Complaint fails to state a claim upon which relief may be granted.
19. Relators’ claims are barred by the doctrine of collateral estoppel.
20. Relators’ claims are barred by the doctrine of judicial estoppel.
21. Relators have no jurisdiction over the Fasanaro charge for want of a signature under oath.
22. Relator the OCRC had no jurisdiction to receive the Fasanaro charge for want of a signature under oath.

23. Relators' Affidavit is subject to being stricken under S. Ct. Prac. R. 12.02(B).

WHEREFORE, Intervenor urges this Court to dismiss the complaint against it, granting to it its costs, attorney's fees and such further legal and equitable relief as the Court deems appropriate.

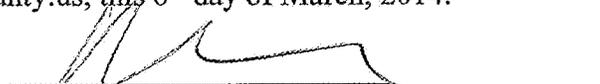
Respectfully submitted,



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Paul M. Greenberger

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GMS Management Co., Inc.
4645 Richmond Road
Warrensville Heights, Ohio 44128

Plaintiff

vs.

The Ohio Civil Rights Commission
Akron Government Building - Suite 250
161 South High Street
Akron, Ohio 44308

and

Ricky J. Boggs, SPHR
Akron Regional Investigator
Akron Government Building
161 South High Street – Suite 205
Akron, Ohio 44306

Defendants

CASE NO. 820282

Judge: Richard J. McMonagle

First Amended Verified Complaint for
Declaratory Judgment, Preliminary
Injunction, & Permanent Injunction

Jury Demand Endorsed Hereon

The Parties

1. GMS Management Co., Inc. (“GMS”) manages for the owner, a residential apartment complex in Austintown, Mahoning County, Ohio, commonly known as Deer Creek Run Apartments (“Deer Creek”), which complex contains three hundred sixty (360) separate apartment suites.
2. Defendant Ohio Civil Rights Commission (“OCRC”) is an administrative body created by the General Assembly by the enactment of R.C. 4112.03 (hereinafter all references to the O.R.C. shall be preceded only by “§”).
3. Defendant Boggs (“Boggs”) is an investigator employed by the OCRC.

Background

4. On or about June 13, 2013, one Thomas B. Fasanaro (“Fasanaro”), filled out a rental application for an apartment at Deer Creek, which application for occupancy was denied, in whole or in part, based upon a credit report from a nationally recognized credit bureau, as a result of which Fasanaro has complained to the OCRC by means of a writing *not under oath*, **Ex. A**,¹ addressed more fully below, that Plaintiffs’ rejection of his occupancy application constituted a discriminatory housing practice rendered unlawful by §4112.02(H).
5. Fasanaro’s “charge” was facially defective for want of the required oath, §§4112.04(A)(6), 4112.05(B)(1) & (B)(2), the required “concise statement of the facts which the complainant believes indicates an unlawful discriminatory practice,” OAC §4112-3-01(C)(3), and for failure to state a claim of housing discrimination as a matter of law.
6. In order to pursue its illegal investigation and invasion of plaintiff’s rights under the Fourth, Fifth and Fourteenth Amendments to the US Constitution, Defendant OCRC:
 - a. enacted an administrative rule – which has become its policy – illegally relaxing the statutory requirement that a charge be under oath thereby depriving defendants of the requisite jurisdiction to conduct an investigation;
 - b. transmitted to plaintiff a notice of the filing of the so-called “charge” which failed to include a statement of plaintiff’s procedural rights but instead, asserts misleading information as to such rights.

¹ Each Exhibit referenced herein is attached to plaintiff’s original Complaint and is incorporated herein by reference.

- c. issued a subpoena which violates the civil rules by which it is constrained, §4112.04(B)(3)(a);
- d. is otherwise coercing plaintiff into “voluntarily” producing voluminous documentation by means of a further administrative rule which threatens up to \$50,000.00 for, among other things, failure to cooperate in an investigation;

7. The OCRC and its investigators, including Boggs, have been engaged in the aforementioned practices as a result of the policy officially enacted by OCRC in approximately 2001 when it defied the statutory requirement that a charge be in writing and under oath thereby illegally expanding its jurisdiction which is limited to receiving, investigating and ruling only “upon written charges made under oath of unlawful discriminatory practices.” §4112.04(A)(6).
8. From OCRC’s annual reports the table below demonstrates that on average only four percent (4%) of all charges files result in a finding of such probable cause. This court is asked to take judicial notice pursuant to Civ.R. 44.1(A)(2).

Fiscal Year	Number of Charges Filed	Probable Cause Found	Percentage Prob. Cause
2010	4,121	177	4.295
2009	4,508	183	4.059
2006	5,702	180	3.156
2003	4,677	219	4.682

9. Given that the OCRC’s own statistics for recent year show that on average only 4% of its defective charges result in a finding of probable cause, the statutory prerequisite to further conciliation and the filing of a complaint which plaintiff can elect to have adjudicated administratively before the commission, a commissioner, or a hearing

examiner, defendants' current investigation of plaintiff is just another indiscriminate abuse of plaintiff's statutory and constitutional rights.

***The Ohio Civil Rights Commission
Jurisdiction***

10. Any person may file a charge with the OCRC alleging an unlawful discriminatory practice provided that "the charge shall be in writing and under oath." §4112.05(B)(1).
11. "Upon receiving a charge, the commission may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice" has occurred. §4112.05(B)(2).
12. As a creature of statute the OCRC only has such jurisdiction as the statute creating it has given it, namely, to (with emphasis added):
 - a. "Receive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices," R.C. 4112.04(A)(6); and
 - b. "Adopt, promulgate, amend, and rescind rules to effectuate the provisions of this chapter and the policies and practice of the commission in connection with this chapter," R.C. 4112.04(A)(4).
13. Administrative rules so enacted by the OCRC cannot add to, subtract from, or otherwise conflict with the Revised Code. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008).
14. To facilitate its limited jurisdiction to receive, investigate, and pass upon only *written charges made under oath* virtually every employee of the OCRC is empowered to administer oaths. §4112.09.
15. Pursuant to §4112.04(A)(4), the OCRC enacted administrative rules, *i.e.*, Ohio Admin. Code Chapters ("OAC") 4112-1 through 4112-8, by virtue of which said rules have the

force of law. *Maralgate, L.L.C. v. Greene County Bd. of Revision*, 130 Ohio St. 3d 316, 321-322 (2011).

16. Pursuant to Civ.R. 44.1(A)(2), plaintiff asks this court to take judicial notice of the cited provisions of the OAC.
17. The OCRC violated its §4112.04(A)(4) rule making authority by adopting an administrative rule OAC §4112-3-01(B)(2) which eliminates the §4112.05(B)(1) jurisdictional requirement that charges of housing discrimination be in writing under oath, and thereby impermissibly conflicts with the Revised Code.
18. In particular, OAC §4112-3-01(B)(2) substitutes for an oath a mere declaration that such “charge” be signed “... under penalty of perjury,” a strictly federally equivalent to an oath per 28 USC §1745, which equivalency the Ohio Supreme Court and appellate courts have explicitly rejected on every occasion as the equivalent of an oath.
19. Because the OCRC is only empowered to “**Receive, investigate, and pass upon written charges made under oath**,” §4112.04(A)(6), the elimination by rule of a charge under oath impermissibly expands the jurisdiction of the OCRC. [Emphasis supplied.]
20. It is only “[u]pon receiving a charge, [that] the commission may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice has been or is being engaged in.” § 4112.05(B)(2).
21. A written charge under oath is thus a jurisdictional prerequisite for the exercise of jurisdiction by the OCRC, in the absence of which the OCRC cannot “initiate a preliminary investigation.”
22. As in this case, the personal past experience of GMS is that OCRC as a matter of practice conducts similarly intrusive unlawful, unfounded, and arbitrary housing discrimination

investigations in violation of plaintiff's rights under the Fourth, Fifth and Fourteenth Amendments the result of which is to either coerce GMS, as a respondent in such investigations to relinquish its constitutional rights to the privacy of its business records and premises under threat of compensatory damages, punitive damages and injunctive relief for failure to cooperate, to pay a settlement to buy its peace at great expense, to engage counsel at greater expense to defend itself, or all of the foregoing.

The Fasanaro Housing Discrimination "Charge"

23. In addition to the required oath, to be facially adequate a "charge" must allege an "unlawful discriminatory practice," §§4112.04(A)(6), 4112.05(B)(1) & (B)(2), and must include "concise statement of the facts which the complainant believes indicates an unlawful discriminatory practice." OAC §4112-3-01(C)(3).
24. On or about August 8, 2013, Fasanaro completed a "State of Ohio Housing Discrimination Charge," ("Charge") a true copy of which is attached hereto as **Ex. A**, alleging that he filled out an application as aforesaid, that his application was denied, and that it was denied because he is not employed, his income does not meet rent criteria, and poor credit, merely stating further: "I believe Respondent's reasons for denying me were do [sic] to my disability due to the source of my income, and that I'm not employed due to my disability."
25. Instead of placing Fasanaro under oath as required by §§4112.04(A)(6), 4112.05(B)(1) & (B)(2), in Box #7 of the Charge the signature of Fasanaro is entered under the following language (with emphasis added): "I declare **under penalty of perjury** that I have read this charge (including attachments) and that it is true and correct."

26. Fasanaro's charge lacks the requisite oath, a concise statement of facts, and an allegation of an unlawful discriminatory practice.
27. Because Fasanaro's bad credit is not the same as his alleged disability, and further because impecunious people with disabilities stand on the same footing as everyone else, Fasanaro fails to charge that he was qualified to rent housing which, in turn, fails to even allege an unlawful discriminatory practice.
28. Defendants failed to initiate a Fact finding conference pursuant to OAC §4112-3-02, "to examine the factual basis behind the charge."
29. Defendants did not internally vet the **unsworn** charge to determine if Fasanaro was financially qualified to rent plaintiff's apartment suite in the first instance, *e.g.*, as found in *Sutton v. Piper et al.*, 344 Fed. Appx. 101 (6th Cir. 2009) (no accommodation needed for disabled if they have "a limited amount of money to spend on housing" even if his disability resulted in an inability to work).
30. Defendants did not vet the charge to determine if it contained, as mandated by OAC §4112-3-01(C)(3) "A concise statement of the facts which the complainant believes indicates an unlawful discriminatory practice."
31. Under §4112.04(B)(3)(a), in an investigation the OCRC shall have access to premises, records and documents "and other evidence or possible sources of evidence ... as reasonably necessary for the furtherance of the ... investigation," and in investigations "the commission shall comply with the fourth amendment"
32. Despite the foregoing, under OAC §4112-3-03(A), "The investigation of any alleged unlawful discriminatory practices by the commission need not be limited to the particular facts or issues raised in any charge affidavit."

33. Despite the facially defective “charge” defendants initiated an invasive and unlawful investigation of plaintiff as follows:

a. Plaintiff received the attached August 15, 2013 “official notification,” **Ex. B**, which notification of the filing of Fasanaro’s “charge” does not include the mandatory notice of procedural rights.

- i. OAC §4112-6-01(A)(2) requires that prompt notice to respondent of the *filing of a charge include “the procedural rights and obligations of respondents under Chapter 4112,” which procedural rights include the right of a respondent to elect an administrative or judicial forum for the resolution of any subsequent complaint that may be issued as a result of the investigation, R.C. 4112.05(B)(5), which procedural rights are defined in OAC Chap. 4112-3, entitled “Procedural Provisions,” and which includes in OAC §4112-3-05(C)(2) the same forum election provisions;*
- ii. Instead, the “official notification” misleads respondents by indicating that a hearing will be held before an Administrative Law Judge. **Ex. B**, p. 2.
- iii. Defendants further misstate that 24 CFR §103.215(a), applies to the OCRC investigation.

34. Attached to the “official notification,” **Ex. B**, is an invasive request upon plaintiff to produce voluminous documentation under the threat of punitive damages for failing to cooperate in an investigation, by which defendants:

- a. Seek from plaintiff, *inter alia*, a list of **all three hundred sixty (360)** current residents including complete name, address, phone number and move in date, **Ex. B**, p. 3, ¶7.

35. Defendants have further intentionally violated §4112.05(B)(3)(a) which requires that an investigation be completed within 100 days, and if not so completed § 4112.05(B)(3)(b) requires that the OCRC “shall notify the ... respondent in writing of the reasons for the noncompliance.”

36. Defendants failed to truthfully notify plaintiff of the reasons for noncompliance.

37. Instead, defendants misled plaintiff as follows:

- a. By the November 19, 2013 letter, **Ex. C**, Boggs advised plaintiffs that completion of the investigation was impracticable expressly because of a need to complete interviews with parties or witnesses, to conduct a legal analysis, and to finish writing a report.
- b. Boggs failed to state that the investigation was not completed because of a need to subpoena documents or conduct an inspection of the premises, **Ex. C**, ¶¶2 & 3.

38. Despite the statutory mandate to **truthfully** advise Plaintiffs of the reasons for the failure to complete the investigation in 100 days, Boggs instead sought the attached December 20, 2013, subpoena **Ex. D**, contrary to **Ex. C**, ¶¶2 & 3.

39. There is no rational basis for the issuance of the “subpoena.”

40. The subpoena has been issued in the total absence of subject matter jurisdiction by the OCRC thus the OCRC has no jurisdiction to revoke or modify the subpoena under §4112.04(B)(3)(d)

41. The subpoena fails to conform to Civ.R. 45 are required by §4112.05(B)(3)(a), namely:

- i. It requires attendance for testimony of the deponent, served in Warrensville Heights, Ohio, at a deposition at 4415 Deer Creek Court, in Austintown, Ohio, which is within Mahoning County, Ohio, contrary to Civ.R. 45(A)(1)(b)(ii), and Civ.R. 45(B).
- ii. It usurps plaintiff’s business premises for the conduct of a deposition without compensation in violation of plaintiff’s rights under the fifth and fourteenth amendments to the US Constitution, >_
- iii. The “sworn” return of subpoena purports to have been sworn to in Franklin County, Ohio. It is possible that both the notary, an Assistant Attorney General in the Cleveland office, and the affiant, also an Assistant Attorney General in the Cleveland office, were in Columbus on the date of the execution of the return, but the subpoena was served with the pre-printed “Franklin County” jurat.
- iv. The subpoena was served by certified mail and the return, **ironically under oath**, does not reflect that “fact.”

- v. It is obviously impossible to serve a subpoena containing a completed return by certified mail given that at the time of mailing one cannot possibly know the date of service.
- vi. Civ.R. 45(B) thus requires that when "the subpoena is served by mail delivery, the person filing the return shall attach the signed receipt to the return."
- vii. It invades plaintiff's right to privacy under the fourth and fourteenth amendments to the US Constitution, lacking both probable cause in the case of a warrant, and insufficient ground were it a legitimate administrative subpoena.

42. Plaintiff has been the subject of prior similar investigations by the OCRC and continues to manage approximately 3,000 apartment suites within Ohio, the management of which will continue into the future as governed by R.C. Chap. 4112, and OAC Chap. 4112, thereby justifying a declaration of plaintiff's rights, including, without limitation, the declarations sought below.

43. Plaintiff is thus entitled to a declaration that:

- a. OAC §4112-3-01(B)(2) is unenforceable as being in conflict with the oath requirements of §§4112.04(A)(6), 4112.05(B)(1) & (B)(2), and 4112.09.
- b. Defendants' conduct violates the respective statutory and administrative rule provisions cited above.
- c. Defendants' conduct violates plaintiff's constitutional rights as aforesaid.
- d. Defendants' conduct results from a policy officially adopted by the OCRC.
- e. Despite having been afforded a reasonable opportunity to deliberate, Defendants' conduct was undertaken and persists with deliberate indifference towards the plaintiffs' rights.
- f. The means adopted by the OCRC for the initiation of investigations, the conduct of said investigations, and the processes and procedures undertaken thereafter are not suitable to the end in view, are not impartial in operation and are unduly

oppressive upon respondents, and have no real and substantial relation to their purpose, and that they interfere with private rights beyond the necessities of the situation.

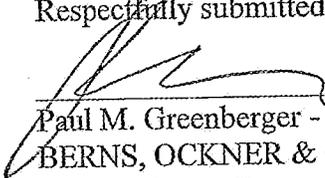
44. Plaintiff has no adequate remedy at law.
45. Unless enjoined defendants will continue to suffer irreparable harm.
46. Unless enjoined defendants will continue to violate plaintiff's rights under R.C. Chap. 4112, plaintiff's rights to an expectation of the privacy of its business records and premises, as well as plaintiff's right to be compensated if the government should take, even temporarily, its property.
47. Unless enjoined defendants will continue to impose the illegal, *ultra vires*, unwarranted and heavy burden it places on plaintiff to respond to overly burdensome requests for information which burden would not be imposed in the first instance were defendants to follow the applicable statutes and lawful regulations.
48. Plaintiff is entitled to preliminary and permanent prohibitory injunctive relief enjoining defendants from further pursuit of this or any investigation of plaintiff upon a written charge not under oath, upon a charge which fails to provide the concise statements required by administrative rule, and/or upon a charge which fails to state a claim of an unlawful discriminatory practice.
49. Given the fact that on average only 4% of the OCRC's investigations result in a finding of probable cause, to avoid the further unwarranted and illegal burdens upon plaintiff, plaintiff further seeks a mandatory permanent injunction to the effect that defendant OCRC and its employees undergo further training, under the supervisions of plaintiff's counsel, so as to assure that the OCRC and its employee respect the civil rights of

respondents and otherwise conform to the statutes as written and to the applicable constitutional provisions.

50. Plaintiff is also an eligible party entitled to an award of its reasonable attorney's fees pursuant to R.C. 2335.39.

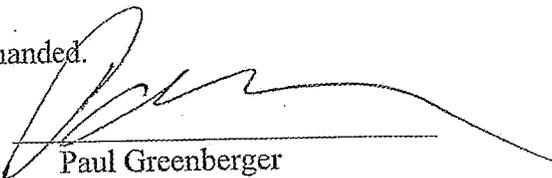
WHEREFORE, Plaintiff urges this court to grant the relief requested herein plus costs, attorney's fees, and such further legal and equitable relief as the court deems appropriate.

Respectfully submitted,


Paul M. Greenberger - #30736
BERNS, OCKNER & GREENBERGER, LLC
3733 Park East Drive - Suite 200
Beachwood, Ohio 44122-4334
216-831-8838
FAX - 216-464-4489
E-mail: pgreenberger@bernsockner.com
Attorneys for Plaintiff

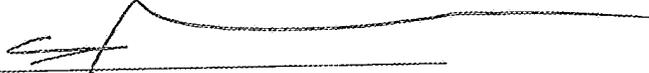
JURY DEMAND

A trial by jury is hereby demanded.

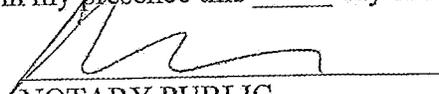

Paul Greenberger

VERIFICATION

I, the undersigned, have read the foregoing and hereby verify under oath that I am competent to testify as to the facts set forth in the above complaint of which I have personal first-hand knowledge, and that the foregoing factual allegations are true and correct.


Stuart J. Graines

Sworn to before me and subscribed in my presence this 20th day of January, 2014.


NOTARY PUBLIC

PAUL GREENBERGER, Attorney
Notary Public - State of Ohio
My Commission has no expiration date
Sec. 147.03 R.C.

CERTIFICATE OF SERVICE

Pursuant to Civ. R. 5(B)(2)(f), a copy of the foregoing has been forwarded by e-mail to opposing counsel David Oppenheimer, Esq., at david.oppenheimer@ohioattorneygeneral.gov, this 20th day of January, 2014.

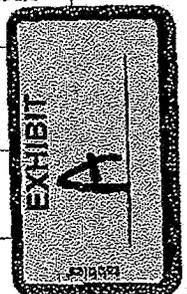
/s/ Paul M. Greenberger

Paul M. Greenberger

State of Ohio Housing Discrimination Charge

OCRC Use Only:		OCRC Number: <u>143(37051)08122013</u>	HUD Number:	Filing Date:
1. Name of person or organization alleging harm:		Home Phone Number:		Business Phone Number:
Thomas Fasaniaro		() 330-216-4129		()
Street Address	City	County	State	Zip
1676 Warchester Avenue	Lake Milton	Mahoning	OH	44429
2. Against whom is this complaint being filed?			Phone Number	
Deer Creek Run Apartments, Mara Jewell, Agent/Manager			() 330-797-9100	
Street Address	City	County	State	Zip
4581 Deer Creek Court	Austintown	Mahoning	OH	44515
Check the applicable box or boxes which describe(s) the party named above:				
<input type="checkbox"/> Builder <input type="checkbox"/> Owner <input type="checkbox"/> Broker <input type="checkbox"/> Salesperson <input checked="" type="checkbox"/> Supt. or Manager <input type="checkbox"/> Bank or Other Lender <input type="checkbox"/> Other				
If you named an individual above who appeared to be acting for a company in this case, check this box <input type="checkbox"/> and write the name and address of the company below:				
Name: <u>GMS Management Co. Inc.</u>				
Address: <u>4645 Richmond Road, #101, Cleveland, OH 44128 (216) 766-6000</u>				
Name and identify others (if any) you believe violated the law in this case:				
3. What did the person you are complaining against do? Check all that apply and give the most recent date these act(s) occurred in block 6a.				
<input checked="" type="checkbox"/> Refuse to rent, sell, or deal with you <input type="checkbox"/> Falsely deny housing was available <input type="checkbox"/> Engage in blockbusting <input type="checkbox"/> Discriminate in broker's services <input type="checkbox"/> Discriminate in the conditions or terms of sale, rental occupancy, or in services or facilities <input type="checkbox"/> Threaten, intimidate, harass, or coerce you to keep you from the full benefit of the State or Federal Fair Housing Law <input type="checkbox"/> Advertise in a discriminatory way <input type="checkbox"/> Discriminate in financing <input type="checkbox"/> Other (explain):				
4. Do you believe you were discriminated against because of your: (Check all that apply)				
<input type="checkbox"/> Race <input type="checkbox"/> Color <input type="checkbox"/> Religion <input type="checkbox"/> Sex <input checked="" type="checkbox"/> Handicap <input type="checkbox"/> National Origin <input type="checkbox"/> Ancestry <input type="checkbox"/> Retaliation <input type="checkbox"/> Military Status <input type="checkbox"/> The presence of children under 18, or a pregnant female in the family				
5. What kind of house or property was involved?:				
<input type="checkbox"/> Single-Family house <input type="checkbox"/> A house or building for 2, 3, or 4 families <input checked="" type="checkbox"/> A building for 5 families or more <input type="checkbox"/> Other, including vacant land held for residential use (explain):				
Did the owner live there?		Is the house or property:		
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown		<input type="checkbox"/> Being sold? <input checked="" type="checkbox"/> Being rented?		
What is the address of the house or property? (street, city, county, state and zip code):				
Deer Creek Run Apartments, 4581 Deer Creek Court, Austintown, OH 44				
6. Summarize in your own words what happened. Use this space for a brief statement of the facts. Additional details may be submitted on an attachment. Note: OCRC will furnish a copy of the charge to the person or organization against whom the charge is made.				
I am disabled. Respondent's reasons for denying my application for rent was because I'm not employed, income does not meet rent criteria, and poor credit.				6a. When did the act(s) checked in item 3 occur? (include the most recent date if several dates are involved.)
				June 24, 2013
7. I declare under penalty of perjury that I have read this charge (including attachments) and that it is true and correct.				
Signature:		Date:		Date:
<u>[Signature]</u>				8/8/2013
OCRC Representative:		Date:		

RECEIVED
AUG 12 2013
OCRC-INTAKE
AKRON



AKRH3(37051)08/22013

OCRC HOUSING CHARGE

Page Two

I believe Respondent's reasons for denying me were due to my disability due to the source of my income, and that I am not employed due to my disability.

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OCRC-INTAKE
AKRON

I declare under penalty of perjury that I have read this charge (including attachments) and that it is true and correct.

Signature: J J [unclear]

Date: 8/8/2013

OCRC Representative: _____

Date: _____



Governor John Kasich

EXHIBIT B

Mara Jewell, Agent/Manager
C/O Deer Creek Run Apartments
4581 Deer Creek Court
Austintown, OH 44515

GMS Management Co., Inc.
4645 Richmond Rd. #101
Cleveland, OH 44128

RECEIVED
AUG 16 2013

Deer Creek Run Apartments
4581 Deer Creek Court
Austintown, OH 44515

OHIO
CIVIL RIGHTS
COMMISSION

G. Michael Payton
Executive Director

Commissioners

Leonard Hubert, Chairman
Stephanie Mercado
William W. Peteman III
Tom Roberts
Rashmi Yajnik

Subject: Thomas Fasanaro v. Deer Creek Run Apartments
AKR H3 (37051) 08122013

This is an official notification that you have been named as a Respondent in the above-cited case. The housing discrimination charge was officially filed with the Department of Housing and Urban Development and the Ohio Civil Rights Commission (OCRC), pursuant to the Fair Housing Act and Section 4112 of the Ohio Revised Code. As required by law, a copy of the charge is enclosed.

There are two options for processing the above referenced charge. You may elect either *Option A--Alternative Dispute Resolution*, or *Option B--Investigation*.

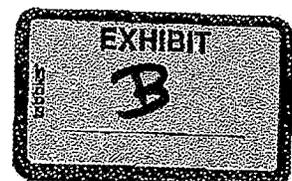
Option A: Alternative Dispute Resolution (ADR)

ADR is a mediation program implemented by the OCRC aimed at helping parties resolve their disputes without a full investigation by the OCRC or costly and time-consuming litigation.

Mediation brings disputing parties together in an effort to resolve their complaint through communication and problem solving. The goal is to provide a "win-win" resolution. The mediation process is confidential. If you participate in the mediation process, any communication made during the mediation session cannot be used in any other civil or administrative proceeding. There will be no record of the proceeding and any notes taken by the mediator will be destroyed. The parties and the mediator will not disclose information regarding the process unless all parties to the mediation and the mediator expressly consent to disclosure. If the mediation is successful, it results in a binding settlement between the parties.

Participation in the program is voluntary. Should the parties choose to participate; the OCRC will not take any further action in this matter pending completion of the mediation process. If an agreement is reached with the complaining party, the OCRC will close its file regarding this charge. Should an agreement not be reached the case will be forwarded for a full investigation. Participation may thus avoid investigation by the OCRC or substantial expenses involved in possible litigation and damages.

AKRON
REGIONAL OFFICE
AKRON GOVERNMENT
BUILDING
161 SOUTH HIGH STREET,
SUITE 205
AKRON OH 44308
(330) 643-3100 Phone
(888) 278-7101 Toll Free
(330) 643-3120 Fax
www.ocrc.ohio.gov



If you would like to take part in this mediation process, please fax the enclosed mediation referral form to Lynne D. Geib at (330) 643-3120 or you may contact Mrs. Geib via email at lynne.geib@civ.ohio.gov within two weeks from the date of this letter. Should you have any questions with regard to the mediation, please contact Lynne D. Geib at (330) 643-3100. Failure to respond within two weeks will be deemed an election to proceed through investigation.

Option B: Investigation

Should you decide not to participate in the ADR program, you must file a written position statement that thoroughly addresses each of the Complainant's allegations in the enclosed charge no later than two weeks from the date of this letter. You may assert in your position statement any defense, which might be available in a court of law. In addition to the position statement, please provide the information/documentation requested. (*See Information and Document Request*)

Upon receipt of this information a full investigation will be conducted. The investigator may then submit a more detailed request for information.

The purpose of the investigation is to determine whether probable cause exists to believe that discrimination occurred or is about to occur. If it is so determined, you will be notified pursuant to Section 4112.05 of the Ohio Revised Code. The OCRC shall then endeavor to eliminate the practice by informal methods of conference, conciliation, and persuasion. If the Commission fails to effect the elimination of an unlawful discriminatory practice by informal methods, the Commission shall issue and cause to be served a complaint stating the charges involved and containing a notice of an opportunity for a hearing. Should a hearing be held the Commission may adopt the findings and recommendations of the Administrative Law Judge and grant appropriate relief.

Be advised that it is unlawful for any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in Section 4112, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

Should you elect not to participate in the ADR program, please respond to the information listed under Option B, as well as the documents requested in the enclosed document request list.

FOR THE COMMISSION

Ricky J. Boggs

Ricky J. Boggs, SPHR

Akron Regional Investigator

ricky.boggs@civ.ohio.gov

Enclosure

State of Ohio Housing Discrimination Charge

OCRC Use Only:		OCRC Number: <u>444</u> <u>H3(37051)08122013</u>	HUD Number:	Filing Date:
1. Name of person or organization alleging harm:		Home Phone Number:		Business Phone Number:
Thomas Fasanaro		() 330-216-4129		()
Street Address	City	County	State	Zip
1676 Warchester Avenue	Lake Milton	Mahoning	OH	44429
2. Against whom is this complaint being filed?			Phone Number	
Deer Creek Run Apartments, Mara Jewell, Agent/Manager			() 330-797-9100	
Street Address	City	County	State	Zip
4581 Deer Creek Court	Austintown	Mahoning	OH	44515
Check the applicable box or boxes which describe(s) the party named above:				
<input type="checkbox"/> Builder <input type="checkbox"/> Owner <input type="checkbox"/> Broker <input type="checkbox"/> Salesperson <input checked="" type="checkbox"/> Supt. or Manager <input type="checkbox"/> Bank or Other Lender <input type="checkbox"/> Other				
If you named an individual above who appeared to be acting for a company in this case, check this box <input type="checkbox"/> and write the name and address of the company below:				
Name: <u>GMS Management Co. Inc.</u>				
Address: <u>4645 Richmond Road, #101, Cleveland, OH 44128 (216) 766-6000</u>				
Name and identify others (if any) you believe violated the law in this case:				
3. What did the person you are complaining against do? Check all that apply and give the most recent date these act(s) occurred in block 6a.				
<input checked="" type="checkbox"/> Refuse to rent, sell, or deal with you <input type="checkbox"/> Falsely deny housing was available <input type="checkbox"/> Engage in blockbusting <input type="checkbox"/> Discriminate in broker's services <input type="checkbox"/> Discriminate in the conditions or terms of sale, rental occupancy, or in services or facilities <input type="checkbox"/> Threaten, intimidate, interfere, or coerce you to keep you from the full benefit of the State or Federal Fair Housing Law <input type="checkbox"/> Advertise in a discriminatory way <input type="checkbox"/> Discriminate in financing <input type="checkbox"/> Other (explain):				
4. Do you believe you were discriminated against because of you? (Check all that apply)				
<input type="checkbox"/> Race <input type="checkbox"/> Color <input type="checkbox"/> Religion <input type="checkbox"/> Sex <input checked="" type="checkbox"/> Handicap <input type="checkbox"/> National Origin <input type="checkbox"/> Ancestry <input type="checkbox"/> Retaliation <input type="checkbox"/> Military Status <input type="checkbox"/> The presence of children under 18, or a pregnant female in the family				
5. What kind of house or property was involved?:				
<input type="checkbox"/> Single-Family house <input type="checkbox"/> A house or building for 2,3, or 4 families <input checked="" type="checkbox"/> A building for 5 families or more <input type="checkbox"/> Other, including vacant land held for residential use (explain):				
Did the owner live there? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown Is the house or property: <input type="checkbox"/> Being sold? <input checked="" type="checkbox"/> Being rented?				
What is the address of the house or property? (street, city, county, state and zip code): <u>Deer Creek Run Apartments, 4581 Deer Creek Court, Austintown, OH 44</u>				
6. Summarize in your own words what happened. Use this space for a brief statement of the facts. Additional details may be submitted on an attachment. Note: OCRC will furnish a copy of the charge to the person or organization against whom the charge is made.				
I am disabled. Respondent's reasons for denying my application for rent was because I'm not employed, income does not meet rent criteria, and poor credit.			6a. When did the act(s) checked in item 3 occur? (include the most recent date if several dates are involved.) June 24, 2013	
7. I declare under penalty of perjury that I have read this charge (including attachments) and that it is true and correct.				
Signature: <u>[Signature]</u>		RECEIVED		Date: <u>8/8/2013</u>
OCRC Representative:		AUG 12 2013		Date:
		OCRC-INTAKE		
		ARON		

AKRH3(37051)08122013

OCRC HOUSING CHARGE

Page Two

I believe Respondent's reasons for denying me were do to my disability due to the source of my income, and that I am not employed due to my disability.

RECEIVED
AUG 12 2013
OCRC-INTAKE
AKRON

I declare under penalty of perjury that I have read this charge (including attachments) and that it is true and correct.

Signature: J. J. [Signature]

Date: 8/8/2013

OCRC Representative: _____

Date: _____

This request is in response to the enclosed complaint alleging that an act of discrimination in violation of the Fair Housing Act has been committed by your institution. Pursuant to Section 103.215 of the Regulations implementing the Fair Housing Act, and 4112.04 (B)(3)(a) of the Ohio Revised Code, we ask that you make available to us the following documentation and answers in writing AND e-mail correspondence addressed to:

Ricky J. Boggs
Housing Investigator
Ohio Civil Rights Commission
161 S. High Street, Suite 205
Akron, Ohio 44308
(330) 643-3116 (direct dial)
(330) 643-3120 (fax)
ricky.boggs@civ.ohio.gov

1. Provide the name, title, address and telephone number of the person designated to represent the Respondent in this matter.
2. Provide a written position statement that thoroughly addresses each of the Complainant's allegations in the charge affidavit. Relevant documentation and affidavits from persons involved should be used to support your position statement.
3. Provide the complete address of the property identified in the charge and specify the type of property (i.e. single family, double, etc.).
4. Provide a complete list of all properties owned by the Respondent(s) to include:
 - a. Complete name of property
 - b. A house or building for 2-4 families
 - c. A building for 5 or more families.
5. Do(es) the owner(s) live in the property in question?
6. If the Respondent(s) receive(s) HUD assistance, please specify:
 - a. Type of assistance (i.e. Section 8)
 - b. The amount of assistance received.
 - c. The HUD Program Office Contact who has knowledge about the Respondent's program obligation.
7. Provide a list of all current residents to include:
 - a. Complete name
 - b. Complete address
 - c. Telephone number
 - d. Move in date
8. State whether prior to this complaint, the owner(s) or manager(s) of the subject property have ever been a party to a fair housing or civil rights lawsuit or investigation. If so, state the title of the case(s), the date(s) of filing, and the outcome(s).

9. Provide the complete and correct legal name of every owner, partner, corporation, manager, and rental agent associated with the property in question. . . .
 10. Provide complete tenant file of Charging Party, including, but not limited to, all notices, letters or other written communications between Charging Party, and all information related to all requests for accommodations.
 11. Provide a copy of all rental policies and procedures of the property in question.
 12. Provide documentation of all tenants who reside at the complex with known disabilities. Indicate source of tenant incomes, if known.
-

HIGHLIGHTS OF THE OCRC'S MEDIATION PROGRAM

BENEFITS OF MEDIATION

- Cost efficient
- Cost saving for the taxpayers
- Less time consuming (faster resolution)
- Informal
- Confidential
- No need for lengthy preparation
- Reduces emotional stress
- Presence of a neutral third party (Mediator)
- Process allows the parties to reach their own solutions
- Can preserve relationships/avoid ill-will of adversarial administrative process
- No publicity
- Avoid on-site investigations
- Forum for open communication
- Win-win (3 out of every 4 cases are resolved in mediation)

WHAT IS MEDIATION?

- Mediation is the process for resolving complaints on a voluntary basis in a confidential forum.
- Mediation allows for better customer service as it helps parties resolve their disputes without a full investigation thus saving resources and time.
- The Mediator is a neutral third party who works with the Charging Party and the Respondent (Employer, Landlord, etc.) to make communication easier so they can talk and resolve their dispute.

WHAT IS THE MEDIATION PROCESS?

- Each party will have a full and fair opportunity to discuss their position.
 - The Mediator may ask questions to gain a better understanding of the dispute.
 - Once each side has had the opportunity to speak, the Mediator will meet separately with each party to privately examine the basic interests of the parties.
 - The Mediator may work back and forth between the parties to find common interests and help construct a resolution.
-



Governor John Kasich

~~November 19, 2013~~

Thomas Fasanaro
1676 Waverchester Ave.
Lake Milton, OH 44429

RECEIVED
NOV 20 2013

By: _____
Mara Jewell, Agent/Manager
C/O Deer Creek Run Apartments
4581 Deer Creek Court
Austintown, OH 44515

GMS Management Co., Inc.
4645 Richmond Rd. #101
Cleveland, OH 44128

Deer Creek Run Apartments
4581 Deer Creek Court
Austintown, OH 44515

OHIO
CIVIL RIGHTS
COMMISSION

G. Michael Payton
Executive Director

Commissioners

Leonard Hubert, Chairman
Lori Baracotta
Stephanie Mercado
William W. Patmon, III
Tom Roberts

RE: Thomas Fasanaro v. Deer Creek Run Apartments
AKR H3 (37051) 08122013

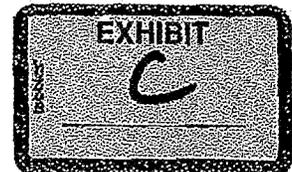
Dear Sir or Madam:

This is to advise you that the investigation of the above-referenced matter has not been completed within 100 days from the filing of the charge.

Completion within 100 days was impracticable because there is a need to:

- 1. Complete interviews with parties and/or witnesses.
- 2. Subpoena (formally request) documents related to the investigation or arrange other formal information gathering.
- 3. Conduct an on-site investigation
- 4. Conduct more investigation because the information gathered so far shows a need for more investigation and analysis
- 5. Include HUD program offices and/or other State, Local or other federal agencies in the investigation
- 6. Make additional efforts to conciliate (settle) the complaint
- 7. Determine where there is further support for information provided by parties or witnesses.
- 8. Analyze issues involving new or complicated areas of law.

AKRON
REGIONAL OFFICE
AKRON GOVERNMENT
BUILDING
SUITE 205
151 SOUTH HIGH STREET
AKRON OH 44308
(330) 643-3100 Phone
(888) 278-7101 Toll Free
(330) 643-5120 Fax
www.crc.ohio.gov



Akron Regional Office
Thomas Fasanaro v. Deer Creek Run Apartments
AKR.H3 (37051) 08122013
Page 2

- 9. Conduct a legal analysis of information gathered during the investigation.
- 10. Finish writing a report of the investigation
- 11. Amend the complaint to add or delete parties or claims or make other changes.
- 12. Special issues have come up that require additional time:

At this time, the projected date for completion of the investigation of this case will be June 28, 2014. This date, however, is subject to change because we cannot always predict what additional information or further action may be necessary to ensure that a comprehensive and impartial investigation has been conducted.

If you do not receive contact regarding this investigation by this date, feel free to call the investigator for an update on the investigation. If there is a need for additional information from you directly, we will contact you. We would appreciate your continuing cooperation should there be a need for additional investigation or conciliation.

If you have any questions regarding your case or wish additional information about the reasons why completion of the investigation within 100 days was impracticable, please contact the investigator assigned to your case.

Ricky J. Boggs
Akron Regional Office
161 South High Street, Suite 205
Akron, Ohio 44308
(330) 643-3100 Main
(330) 643-3116 Direct
ricky.boggs@civ.ohio.gov

We can respond more quickly to your concerns if you have your charge number whenever you contact us.

FOR THE COMMISSION,
Bradley S. S. Dunn
Bradley S. S. Dunn
Akron Supervisor

Alcon Regional Office
Thomas Fasanaro v. Deer Creek Run Apartments
AKR H3 (37051) 08122013
Page 2

Alcon Regional Office

COMPLAINANT'S REPRESENTATIVE

N/A.

RESPONDENT'S REPRESENTATIVE

James R. Ogden, Esq.
PO Box 3021
Cuyahoga Falls, OH 44223-0321

State of Ohio



Civil Rights Commission

30 E. Broad Street, 5th Floor, Columbus, Ohio 43215-3414

SUBPOENA

TO:

Thomas Fasanaro

Complainant

v.

Case Number: AKR H3 (37051) 08122013

Deer Creek Run Apartments

Respondent

To: GMS Management Co., Inc.

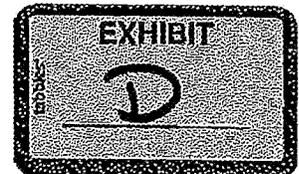
C/O Patricia E. Stegh, Agent

4645 Richmond Rd. #101

Warrensville Hts., OH 44128

YOU ARE HEREBY COMMANDED TO:

- Attend and give testimony and evidence for the matter under investigation or in question before the OHIO CIVIL RIGHTS COMMISSION.
- Attend and give testimony at a (trial) (hearing) (deposition) before the OHIO CIVIL RIGHTS COMMISSION, or a representative thereof, on the date, time and at the place specified below.
- Attend to testify before the OHIO CIVIL RIGHTS COMMISSION, or a representative thereof, and produce documents and/or tangible things at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Produce and permit inspection and copying, on the date and at the time and place specified below, of any designated documents that are in your possession, custody or control.
- Produce and permit inspection and copying, testing, or sampling, on the date and at the time and place specified below, of any tangible things that are in your possession, custody or control.



Permit entry upon the following described land or other property, for the purposes described in civil 34(a) (3), on the date and at the time and place specified below.

Description of land or other premises:

4415 Deer Creek Court, Management Office

Austintown, OH 44515

DATE: 12-20-2013 TIME: 10:00am PLACE: 4415 Deer Creek Court, Management office
Austintown, OH 44515

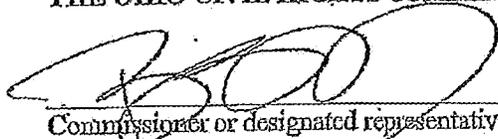
DESCRIPTION OF ITEMS TO BE PRODUCED:

Copies of all Rental Policies; All rental applications submitted between 01-01-2013 and 12-20-2013, including but not limited to, credit checks, all correspondence, notes of conversations and status of application.

As issued by Section 9.84, Ohio Revised Code, you may be accompanied, represented and advised by an attorney when giving such testimony.

Issued this 25 day of November, 2013, A.D., at 2 o'clock, P M, on behalf of

THE OHIO CIVIL RIGHTS COMMISSION


Commissioner or designated representative

RETURN ON SERVICE

STATE OF OHIO
COUNTY OF FRANKLIN

Sharon D. Tassie, being duly sworn, deposes and says that on the 26th day of November 2013, he/she served the within subpoena on the within named Patricia Steph, Apt by delivering to a true copy thereof with all the endorsements thereon.

Sworn and subscribed to before me the

Sharon D. Tassie 0039896
26th day of November

David Appenderman my term expires
Notary Public not expire

Civil Rule 45 (C) Protection of persons subject to subpoenas.

- 1) Any Respondent or other party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.
- 2) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial.
 - (b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.
- 3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:
 - (a) Fails to allow reasonable time to comply;
 - (b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;
 - (c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;
 - (d) Subjects a person to undue burden.
- 4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.
- 5) If a motion is made under division (C)(3)(e) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

Civil Rule 45 (D) Duties in responding to subpoena.

- 1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents or electronically stored information pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.
- 2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials under Civ. R. 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Civil Rule 45 (E) Sanctions.

Failure by a person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery. The court from which a subpoena was issued may impose upon a party or attorney in breach of the duty imposed by division (C)(1) of this rule an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney's fees.

OHIO CIVIL RIGHTS COMMISSION
Akron Regional Office
161 South High Street, Ste. 205
Akron, Ohio 44308



7012 2210 0000 8857 3222

GMS Management Co., Inc.
C/O Patricia E. Stegh, Agent
4645 Richmond Rd. #101
Cleveland, OH 44128

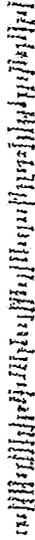
*Kathy
Nov 30*



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IN THE SUPREME COURT OF OHIO

STATE *ex rel.*
OHIO CIVIL RIGHTS COMMISSION, *et al.*

CASE NO. 14-0295

Relators,

Original Action in Prohibition

v.

THE HON. RICHARD J. McMONAGLE,

Respondent

v.

GMS MANAGEMENT CO., INC.

Intervenor

Motion Of Intervenor **GMS Management Co., Inc.** For
Judgment on the Pleadings, Civ.R. 12(C)

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*Counsel for Respondent
The Hon. Richard J. McMonagle*



I. Issue presented.

This case is not about discrimination. It is about the system of checks and balances.

Distilled to its basics the simple issue presented is whether a common pleas judge has the jurisdiction to prohibit by injunction a state commission from conducting an investigation which the commission initiated upon its receipt of a written charge signed “under penalty of perjury,” as purportedly permitted by an administrative rule promulgated by said commission, §4112-3-01(B)(2), but where: 1) the statute which enumerates the powers and duties of said commission explicitly limit its powers so that it is only empowered to “Receive, investigate, and pass upon written charges made under oath ...,” R.C. 4112.04(A)(6); 2) the statute which allows for aggrieved parties to file such charges with the commission also requires that those charges “shall be in writing and under oath,” R.C. 4112.05(B)(1); 3) the statute which authorizes the institution of a preliminary investigation is dependent upon the receipt of such a charge; and where 4) the General Assembly reinforced the requirement that such charges be “under oath” administered by another, by authorizing all relevant employees of said commission to administer such oaths. R.C. 4112.09.

Given this Court’s repeated pronouncements that a writing signed “under penalty of perjury” is not the equivalent of a writing signed “under oath,” *Toledo Bar Ass’n v. Neller*, 102 Ohio St. 3d 1234, 1236-1237 (2004), and *Lisboa v. Kleinman (In re Donnelly)*, 134 Ohio St. 3d 1221 (2011), given further the fact that the state, which by definition includes said state commission, has successfully argued that same principle, see, e.g., *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279 (Cuyahoga County 1973), and given further that an administrative rule cannot conflict with a statute, *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm’n*, 117 Ohio St. 3d 441 (2008), the answer to the issue presented is clear at the

outset. On the one hand, the common pleas judge clearly has such jurisdiction. On the other hand, the commission patently and unambiguously lacks jurisdiction to “receive, investigation, or pass upon” any charge not made in writing “under oath.” Intervenor is thus entitled to Judgment on the Pleadings.

II. Introduction.

In determining this Motion for Judgment on the Pleadings this Court may consider the complaint, answer, and for all purposes the instruments attached thereto. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 569-570 (1996) and Civ.R. 10(C). From those pleadings the following appear.

Intervenor, plaintiff in the underlying litigation (“*Litigation*”) over which Respondent presides, manages approximately 3,000 apartment dwellings in Ohio, including the 360 unit apartment complex at which one Mr. Fasanaro (“*Fasanaro*”) applied for occupancy. Intervenor is thus subject to the lawful application of R.C. Chap. 4112.

Relator Ohio Civil Rights Commission (the “*OCRC*”), a defendant in the Litigation, was created by R.C. 4112.03, with the jurisdiction granted by R.C. 4112.04, among which is the limited jurisdiction to “**Receive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices.**”¹ R.C. 4112.04(A)(6). [Emphasis supplied.] In further recognition that the OCRC’s jurisdiction is dependent upon a charge “under oath” the General Assembly enacted R.C. 4112.09 by which “The executive director, compliance officer, each field investigator, and each regional director of the Ohio civil rights commission ... may administer oaths, take affidavits, [sic] and acknowledgements, and attest the execution of any instrument in writing.” In fact, the names of those so empowered to administer oaths must be recorded in the

¹ “Unlawful discriminatory practices’ means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code.” R.C. 4112.01(A)(8).

secretary of state's office which recordation must be canceled and replaced "whenever the occupant of any such office changes." *Id.*

With the knowledge of the immediate availability of those so authorized to administer oaths, the General Assembly further provided that: "Any person may file a charge with the commission alleging that another person has engaged or is engaging in an unlawful discriminatory practice" provided that "the charge shall be in writing and under oath." R.C. 4112.05(B)(1). Thereafter, the OCRC may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice has occurred. If it is found probable a complaint is initiated and scheduled for mandatory conciliation. If not successfully conciliated either party involved may elect to have the complaint adjudicated in common pleas court. R.C. §§ 4112.05(B)(1) & 4112.051(A)(2).

Either in the alternative to, or simultaneous with, the foregoing administrative investigation, an aggrieved party may commence an action in common pleas court alleging an unlawful discriminatory practice. R.C. §§4112.051 and 4112.99.

Relator Boggs, a defendant in the Litigation, is the investigator assigned by the OCRC to investigate Fasanaro's charge.

Fasanaro, upon denial of his occupancy application, submitted to Respondent the OCRC a written "charge" signed only under "penalty of perjury." In the process of said investigation Relators subjected Intervenor to any number of notices, procedures, and burdens. None of said notices, procedures, and burdens were lawful because the jurisdiction of the OCRC can only be invoked by charges made in writing under oath.

By its enactment and adoption of Ohio Adm. Code (“*OAC*”) §4112-3-01(B)(2),² the OCRC purported to lessen the dignity of the signature required on a charge from “under oath,” as required by R.C. §§4112.04(A)(6), 4112.05(B)(2) and 4112.05(B)(2), to a signature “under penalty of perjury.” OAC §4112-3-01(B)(2) is ineffective as being in direct conflict with said statutes.

Time after time the state of Ohio has successfully argued that statements signed “under penalty of perjury” are not signed “under oath.”³ Time after time this Court and others have consistently ruled that statements signed “under penalty of perjury” are not signed “under oath.”⁴

The “charge” filed by Fasanaro, having been signed “under penalty of perjury,” albeit ostensibly permitted by OAC §4112-3-01(B)(2) was insufficient to invoke the preliminary investigation by Relators. As a matter of law, Relator the OCRC did not even have the jurisdiction to “receive” a charge not signed under oath. R.C. 4112.04(A)(6).

² “For charges that allege a violation ... of division (H) of section 4112.02 of the Revised Code, the charge shall be in writing, the original being signed and affirmed by the complainant. The affirmation shall state: **‘I declare under penalty of perjury that the foregoing is true and correct.’**” OAC §4112-3-01(B)(2). [Emphasis supplied.]

³ See, e.g., *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279 (Cuyahoga County 1973) (letter to Department of Taxation signed “Under the penalties of perjury” held not to have been signed under oath and, therefore, *insufficient to invoke the jurisdiction of the Department*); *Watley v. Ohio State Adult Parole Auth.*, 2006-Ohio-2745, NaN-P12 (Franklin County June 1, 2006) (citing *Toledo Bar Assn. v. Neller*, 102 Ohio St. 3d 1234, 2004 Ohio 2895, at P1, 809 N.E.2d 1152, court held that where affidavit, i.e., declaration under oath, is required, but a statement is instead signed under penalty of perjury pursuant to 28 USC 1746, it is not a statement made “under oath” thereby depriving the court of jurisdiction); and *Ohio ex rel. Trawick v. Trumbull Corr. Inst.*, 2012-Ohio-5839, NaN-P16 (Trumbull County Dec. 10, 2012) (citing *Toledo Bar Assn. v. Neller*, “only a written declaration made under oath before a proper officer qualifies as an ‘affidavit,’” i.e., a statement under oath).

⁴ *Toledo Bar Ass'n v. Neller*, 102 Ohio St. 3d 1234, 1236, 2004-Ohio-2895, ¶22. An affidavit is a “written declaration under oath,” R.C. 2319.02, not a written declaration under signed under penalty of perjury.

Intervenor originally cooperated in the illegal and ultra vires investigation through its further initial mediation process which process itself further violates R.C. Chap. 4112 and the relevant provisions of the Ohio Administrative Code. Jurisdiction cannot be created by Intervenor's participation, and it is sometimes more economical to submit to an unwarranted governmental intrusion than it is to fight it. However, when Intervenor received a purported subpoena seeking, inter alia, "a list of all three hundred sixty (360) current residents including complete name, address, phone number and move in date," {¶34a},⁵ which further imposed upon Intervenor the duty to allow a deposition to be conducted within its business premises, Intervenor filed the Litigation. {¶41 (i – vii)} Due to the fact that Intervenor had previously been subjected to similar illegal investigations by the OCRC, and Intervenor continues to manage approximately 3,000 suites in Ohio, {¶42}, Intervenor sought injunctive relief to enjoin the illegal and ultra vires investigation, and declaratory relief as to the lawfulness and propriety of other investigatory steps and procedures undertaken by Relators during either the Fasanaro or any future lawful investigations. Given that the civil penalties for the unlawful discriminatory practice of housing discrimination far exceed those for criminal violation of the same laws, which criminal violations involve more egregious conduct, Intervenor is entitled to such declaratory relief under all circumstances.

Respondent, a judge of the common pleas court, a tribunal of general jurisdiction capable of determining his own jurisdiction, overruled Relators' motion to dismiss. As here, Relators contended that Respondent patently and unambiguously lacked subject matter jurisdiction because the Litigation by-passed a "special statutory proceeding" then pending within the jurisdiction of the OCRC.

⁵ Denotes paragraph number in that which Relators refer to as Intervenor's "complaint." Complaint Exhibit 1 to Exhibit A.

Given that it is empowered only to **receive, investigate, or pass upon** charges made in writing under oath, it is the OCRC which patently and unambiguously lacks subject matter jurisdiction. Moreover, as the name of the “special statutory proceeding” deference rule (“*Deference Rule*”) implies, a prerequisite to its invocation is the existence of some adjudicatory proceeding which is patently absent during the current illegal and ultra vires investigatory stage. R.C. 4112.05(B)(2). Ironically, even were this matter in the adjudicatory stage the OCRC’s jurisdiction over such adjudications is not exclusive. Relators can thus prove no set of facts in support of their claim that would entitle them to relief. In fact, that which is presented is a matter of law. Accordingly, Intervenor is entitled to Judgment on the Pleadings. Relators’ conduct is not above the scrutiny of the common pleas court.

III. Intervenor is entitled to Judgment on the Pleadings.

A. Relators’ affidavit is facially incorrect and must be stricken as deficient.

Despite Relators’ affidavit, complaint Exhibit A, required by S. Ct. Prac. R. 12.02, that which is attached to said affidavit as Exhibit 1, which Exhibit contains neither Respondent’s name a judge nor the common pleas court case number assigned, is not that to which affiant has sworn it is, namely: Intervenor’s “amended complaint” filed on January 20, 2014. It is instead an unfiled courtesy copy of Intervenor’s original complaint, albeit without its incorporated and attached exhibits which are a part thereof for all purposes per Civ.R. 10(C).

Intervenor’s First Amended Complaint, which supersedes and renders Intervenor’s original complaint a nullity, is attached to Intervenor’s proposed Answer herein. While the exhibits to the original complaint were incorporated by reference into said First Amended Complaint by reference, {¶4} and fn. 1, p. 2, they are attached to Intervenor’s Answer.

In addition to being facially incorrect Relators' affidavit for the same reason fails to specify the details of the claim. Finally, said affidavit fails to affirmatively state that affiant is competent to testify to all matters stated in the affidavit. S. Ct. Prac. R. 12.02(B)(1) and (B)(2). See, also, *State ex rel. Sekermestrovich v. City of Akron*, 90 Ohio St. 3d 536, 538, 740 N.E.2d 252 (2001).

While a true copy of the First Amended Complaint with exhibits is attached to Intervenor's Answer, the affidavit must be stricken and Judgment on the Pleadings must be rendered in Intervenor's favor.

B. Even considering Relators' affidavit Intervenor is entitled to Judgment on the Pleadings.

Relators now bring suit against Respondent seeking a writ of prohibition. To be entitled to the writ, Relators must establish that (1) Respondent is about to exercise quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Eshleman v. Fornshell*, 125 Ohio St. 3d 1, 3 (2010). For want of allegations of elements (2) and (3) Relators' complaint fails to state a claim.

The first element must be conceded. Respondent is exercising his judicial power over the underlying litigation. That said, Intervenor is nonetheless entitled to Judgment on the Pleadings pursuant to Civ.R. 12(C) and/or a dismissal for failure to state a claim upon which relief may be granted. See, Civ.R. 12(B)(6) & 12(H)(2).

The four corners of Relators' pleading (complaint) includes "for all purposes" the attachments thereto including, without limitation, Intervenor's First Amended Complaint (hereinafter, simply Intervenor's complaint) in the Litigation, albeit inappropriately without the exhibits thereto. Civ.R. 10(C) and S. Ct. Prac. R. 12.02(B). See, Exhibit 1 of Relators'

complaint Exhibit A. Taking all allegations of Relators' complaint as true, Fasanaro filed a charge with Relator OCRC alleging that Intervenor, a real property management company, rejected his housing application due, in part, to his disability. Based upon said charge Relator OCRC began an investigation of Intervenor in the process of which Relator OCRC sought documentation from Intervenor. Said investigation is ongoing. (All of the foregoing alleged in Relators' complaint, ¶5).

As for Intervenor's complaint, Intervenor alleged as plaintiff in the Litigation that Fasanaro's charge was "*not under oath*" [sic], ¶4, "Fasanaro's charge was facially defective for want of the required oath," ¶5, a "'charge shall be in writing and under oath,' §4112.05(B)(1)," ¶10, upon receiving a charge the commission may initiate a preliminary investigation, ¶11, oaths can be administered by virtually every employee of the OCRC, ¶14, OAC §4112-3-01(B)(2) cannot conflict with R.C. §§4112.04(A)(6), 4112.05(B)(1), or 4112.05(B)(2), ¶¶12-13, 17, and Intervenor's complaint further asked Respondent to take judicial notice of the cited provisions of the Ohio Administrative Code, ¶16, including the aforesaid OAC §4112-3-01(B)(2), which substitutes for an oath a mere declaration that a charge be signed "... under penalty of perjury," a strictly federal equivalent to an oath pursuant to 28 USC §1746, ¶18.

With the foregoing allegations taken as true, Relators cannot prevail because they cannot muster any set of facts by which to overcome the conclusion that **for want of a charge signed "under oath" Relators patently and unambiguously lack jurisdiction over the Fasanaro matter.** "Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 569-570 (1996).

IV. Summary of Intervenor's argument.

As a creature of statute the OCRC only has the powers conferred by statute. Thus, it can only “**Receive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices.” R.C. 4112.04(A)(6)(with emphasis added). Concomitantly, “[a]ny person may file a charge with the commission” but “the charge shall be in writing and under oath.” R.C. 4112.05(B)(1).**

Fasanaro's charge, albeit deficient in other subjective regards, is objectively deficient because a signature “under penalty of perjury” is not a signature under oath. In the absence of a written charge under oath no jurisdiction is conferred upon the OCRC.⁶ *Powell v. Ohio Civil Rights Com.*, 51 Ohio App. 2d 197 (Franklin County 1976), syllabus. See, also, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64-65 (1984) (a charge under oath is a jurisdictional prerequisite to the issuance of a subpoena; investigative authority is tied to charges filed with the Commission). That Intervenor did not immediately object immediately is of no consequence. Lack of jurisdiction cannot be conferred by stipulation or waived. See, e.g., *State ex rel. Sugardale Foods, Inc. v. Industrial Comm'n*, 90 Ohio St. 3d 383, 385-386 (2000).

While the dignity of Fasanaro's signature, i.e., “under penalty of perjury” appears to comply with OAC §4112-3-01(B)(2), it patently and unambiguously not “under oath.” It is a given that the OCRC cannot by means of an administrative rule vary the jurisdictional requirement of an oath required by the General Assembly. See, e.g., *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008). The substitution of a lesser

⁶ “The jurisdiction of such officials and tribunals must be invoked in the manner prescribed by statute, and their proceedings must be in accordance with valid statutory requirements. They * * * can not dispense with the essential forms of procedure which condition their statutory powers, or have been prescribed for the purpose of investing them with power to act.” *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279-280 (Cuyahoga County 1973).

dignity for the signature on a charge alleging an unlawful discriminatory practice of housing discrimination impermissibly conflicts with said statutes. *Id.*

To be clear: “it is no small thing to be called upon to respond” to discrimination charges. *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002). Unlike the OCRC which can only receive written charges made under oath, the EEOC nonetheless requires a “verified charge before the agency will require a response from the employer.” *Id.*, fn. 9.

In light of the patent and unambiguous lack of jurisdiction, Intervenor filed suit for injunctive and declaratory relief. That case is pending before Respondent. Relators rely on the Deference Rule to support their claim that it is instead Respondent, who patently and unambiguously lacks jurisdiction to proceed with the Litigation. By that rule “it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve *matters committed to special statutory proceedings*” *State ex rel. Smith v. Frost*, 74 Ohio St. 3d 107, 112 (1995). [Emphasis supplied.] However, the rule only applies where the forum conducting the special statutory proceeding “has *exclusive* authority over” the matters so committed to it. *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190, 195 (1992). [Emphasis supplied.] Because there is no special statutory proceeding pending Relators’ reliance on that rule is misplaced. Intervenor seeks no relief from Respondent over “matters committed to a special statutory proceeding.” Moreover, whenever proceedings involving unlawful discriminatory practices involving housing discrimination do lawfully materialize the OCRC’s jurisdiction over “matters committed” to it is not exclusive.

As the word “proceeding” implies, there must be a pending adjudicatory process. The Fasanaro matter is now in the preliminary investigative stage – albeit without jurisdiction. The adjudicatory stage will not be reached, if reached at all, until a complaint is issued which alleges the

commission of an unlawful discriminatory practice. R.C. 4112.05(B)(5). The adjudicatory jurisdiction of the OCRC over a complaint alleging an unlawful discriminatory practice *is not exclusive*. Any party – including Intervenor as a respondent – can elect to have the complaint adjudicated in the common pleas court. R.C. §§4112.05(B)(5) and 4112.051(A)(2). In fact, the charging party has the right to initiate its own litigation at any time within one year after the alleged unlawful discriminatory practice was committed,” R.C. 4112.05(B)(1), and may do so even while a lawful administrative investigation is pending.

In every event, the matter committed to the administrative or judicial forum is whether or not “the respondent has engaged in, or is engaging, any *unlawful discriminatory practice*.” R.C. 4112.05(G). [Emphasis supplied.] **Intervenor’s First Amended Complaint before Respondent seeks no declaration whatsoever as to any “matter committed to a special statutory proceeding.”** There is thus no special statutory proceeding being by-passed.

Intervenor seeks to enjoin Relators’ illegal and ultra vires investigation. The OCRC’s conduct is not above the scrutiny implicit under Ohio’s constitutional scheme of checks and balances. Intervenor further asks Respondent to declare the lawfulness of any number of other investigatory steps taken by Relators. The relief sought is well within the subject matter jurisdiction of Respondent.

On the other hand, the OCRC cannot issue declaratory judgments or injunctive relief. Nor is an appeal of any ultimate unlawful and ultra vires finding by the OCRC under R.C. 4112.06 of any value or detriment to Intervenor. The availability of such an appeal is not an adequate remedy at law which could deprive Intervenor of declaratory or injunctive relief. “[W]hether or not the availability of an appeal from the commission’s findings constitutes an adequate remedy at law is immaterial in light of the commission’s unambiguous lack of

jurisdiction and the principle announced in *State, ex rel. Adams v. Gusweiler* (1972), 30 Ohio St.2d 326, 285 N.E.2d 22.” *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Com.*, 44 Ohio St. 2d 178, 815 (1975).

For a writ of prohibition to issue, the exercise of judicial power by Respondent must be unauthorized by law. Respondent has jurisdiction; the OCRC does not. Respondent, a judge of the common pleas court, a tribunal of general jurisdiction, can determine his court’s own jurisdiction. Respondent has done so by overruling Relators’ motion to dismiss. Relator OCRC has no jurisdiction.

Having failed to persuade Respondent that it has jurisdiction to investigate Intervenor, or that the Deference Rule applies, Relators now make a rather transparent attempt to expand the doctrine beyond “special statutory *proceedings*” which must clearly be of an adjudicative nature, to now cover “an *investigation* governed by special statutory *procedures*.” Complaint {¶8}. One cannot rewrite the law to fit one’s facts.

Based upon an unambiguous lack of jurisdiction to investigate, the absence of a “special statutory proceeding” being by-passed, and the fact that Intervenor seeks no declaration relating to whether Intervenor committed an unlawful discriminatory practice — the only determination to be made in any such special statutory proceeding, Intervenor is entitled to judgment on the pleadings. Relators can prove no set of facts in support of their claim that would entitle them to relief. No material factual issues exist and Intervenor is entitled to judgment as a matter of law.

V. Respondent’s exercise of judicial power is authorized by law.

Relators’ cannot adduce any set of facts to overcome the fact that Respondent is a judge in the Cuyahoga County Court of Common Pleas which is a tribunal having general subject-

matter jurisdiction in civil actions, R.C. 2305.01, including the jurisdiction to grant injunctions, R.C. 2727.03, Civ.R. 65, and to render declaratory judgments. R.C. 2721.02 and Civ. R. 57.

Absent a patent and unambiguous lack of jurisdiction it “can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy in the ordinary course of law by appeal. See *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St. 3d 104, 2006 Ohio 3670, 850 N.E.2d 1197, P 10.” *State ex rel. Scott v. City of Cleveland*, 112 Ohio St. 3d 324, 326 (2006). See, also, *State ex rel. Lipinski v. Cuyahoga County Common Pleas Court*, 74 Ohio St. 3d 19 (1995). Having admitted that Respondent already overruled Relators’ Motion to Dismiss for want jurisdiction, Relators’ complaint, ¶8, the instant complaint must be dismissed. Relators have the right to appeal.

VI. There is no special statutory proceeding to be by-passed in the first instance.

Relators claims are limited to, and wholly dependent upon, the existence of a “special statutory proceeding.” See, Relators’ complaint, ¶15 (“relator ... is an agency seeking to prevent a court from interfering with a *special statutory proceeding*.” (Emphasis added)) For numerous reasons there is no such special statutory proceeding to be by-passed in the first instance. Because Relators can prove no set of facts by which such a special statutory proceeding exists Intervenor is entitled to judgment on the pleadings as a matter of law.

The Deference Rule is simply stated. “Where, however, a specialized statutory remedy is available **in the form of an adjudicatory hearing**, a suit seeking declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed.” [Citations omitted.] *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190, 193 (1992). *Taft*, at 195, relying on *State ex rel. Iris Sales Co. v. Voinovich*, 43 Ohio App. 2d 18 (Cuyahoga County 1975), further defines the Deference Rule (with emphasis added):

A declaratory judgment action may not be brought or maintained if there is an *exclusive* statutory remedy or procedure, or if *exclusive jurisdiction* vests in some agency or some other court in the action presented. See *Dayton Transit Company v. Dayton Power and Light* (1937), 57 Ohio App. 299.

The application of the Deference Rule is thus dependent on the existence of an **adjudicatory** hearing pending before an administrative agency having exclusive jurisdiction over the matter committed to it in said hearing. All of the requisite elements are missing and Relators can prove no set of facts in support of their claim that would entitle them to relief.

C. The Fasanaro “charge” is not sufficient to invoke the OCRC’s jurisdiction.

The jurisdiction of the OCRC can only be invoked in the manner prescribed by statute, namely: by a “written charge made under oath.” R.C. §§4112.04(A)(6), 4112.05(B)(1) & 4112.05(B)(2). In the absence of a written charge under oath no jurisdiction is conferred upon the OCRC.⁷ *Powell v. Ohio Civil Rights Com.*, 51 Ohio App. 2d 197 (Franklin County 1976), syllabus. See, also, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64-65 (1984) (a charge under oath is a jurisdictional prerequisite to the issuance of a subpoena; investigative authority is tied to charges filed with the Commission). There being no written charge under oath Relators’ jurisdiction has not been invoked over the Fasanaro “charge.”

1. Only written charges under oath can invoke the jurisdiction of Relators.

On the one hand, the OCRC only has jurisdiction to “**Receive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices**.”⁸ R.C. 4112.04(A)(6) [Emphasis supplied.] On the other hand, any person may file a charge with the

⁷ “The jurisdiction of such officials and tribunals must be invoked in the manner prescribed by statute, and their proceedings must be in accordance with valid statutory requirements. They * * * can not dispense with the essential forms of procedure which condition their statutory powers, or have been prescribed for the purpose of investing them with power to act.” *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279-280 (Cuyahoga County 1973).

⁸ “Unlawful discriminatory practices” means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code.” R.C. 4112.01(A)(8).

OCRC alleging an *unlawful discriminatory practice* provided that “*the charge shall be in writing and under oath.*” §4112.05(B)(1).⁹ That a charge must be under oath is consistently stated in §§4112.04(A)(6), 4112.05(B)(1), & (B)(2).

The Fasanaro “charge” of housing discrimination is not under oath. Intervenor’s complaint, ¶¶5, 18. Instead it was made “under penalty of perjury” pursuant to OAC §4112-3-01(B)(2), which purports to permit a charge of housing discrimination to be instead signed “under penalty of perjury.” Such a charge is insufficient to invoke the jurisdiction of the OCRC. See, also, *State ex rel. General Motors Corp. v. OCRC*, 50 Ohio St.2d 111, in which this Court found a clear and unambiguous lack of jurisdiction for the OCRC’s failure to comply with yet another statutorily required prerequisite.

2. A statement signed “under penalty of perjury” is not signed “under oath.”

This Court has repeatedly held that a statement signed “under penalty of perjury” is not signed “under oath.” A statement signed under **penalty of perjury** may be sufficient for federal purposes, 28 USC §1746, but does not qualify as a statement signed “under oath” in Ohio. See, e.g., *Toledo Bar Ass’n v. Neller*, 102 Ohio St. 3d 1234, 1236-1237 (2004), *Lisboa v. Kleinman (In re Donnelly)*, 134 Ohio St. 3d 1221 (2011), *State ex rel. Brown v. Ohio Dep’t of Rehab. & Corr.*, 2011 Ohio 5401 (Franklin County Oct. 20, 2011), and *State v. Clark*, 2007 Ohio 2707, P18 (Mahoning County June 1, 2007).

“In general usage the phrase ‘under oath’ connotes something of the notion that the declarant is first sworn, or at least, that the oath is administered by someone. *That an oath is to be administered has been generally assumed.* Cf., *Warwick v. State* (1874), 25 Ohio St. 21, *State v. Jackson* (1880), 36 Ohio St. 281, and *State v. Townley* (1902), 67 Ohio St. 21. *The General*

⁹ The charge must contain a “concise statement of the facts which the complainant believes indicates an unlawful discriminatory practice.” OAC §4112-3-01(C)(3).

Assembly has indulged that assumption in creating the office of notary public, and in empowering those who hold that office to ‘administer oaths required or authorized by law.’ R. C. 147.07.” *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279 (Cuyahoga County 1973). [Emphasis supplied.]

Just as the General Assembly has *indulged* the notion that an oath is administered by creating the office of notary public, it further *indulged* that notion, with respect to the signing under oath of charges alleging an unlawful discriminatory practice, by authorizing the appropriate employees of the OCRC to administer oaths. R.C. 4112.09. Accordingly, the jurisdiction of the OCRC has not been invoked by the unsworn Fasanaro charge.

3. The OCRC cannot expand its jurisdiction contrary to statute.

Relator the OCRC is by now well aware that an administrative rule cannot conflict with the Revised Code. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm’n*, 117 Ohio St. 3d 441 (2008). Despite the foregoing the OCRC enacted OAC §4112-3-01(B)(2) by which it purports to lessen the dignity of the signature on a written charge of housing discrimination required to invoke its jurisdiction from being signed “under oath,” as required by as required by R.C. §§4112.04(A)(6), 4112.05(B)(1) and (B)(2), to being signed “under penalty of perjury.” Because that administrative rule conflicts with said statutes it is ineffective to expand the jurisdiction of the OCRC.

As a creature of statute, §4112.04, the OCRC has only such jurisdiction as is thus conferred,¹⁰ and it may not, under rules of its own making or otherwise, confer upon itself further jurisdiction or authority. *State ex rel. Byrd v. Sherwood*, 140 Ohio St. 173 (1942). Administrative rules so enacted by the OCRC cannot add to, subtract from, or otherwise conflict

¹⁰ *State ex rel. McLean v. Industrial Com. of Ohio*, 25 Ohio St. 3d 90, 92 (1986).

with the Revised Code. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008), paragraph 2, syllabus. “[A]n administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter.” *Maralgate, L.L.C. v. Greene County Bd. of Revision*, 130 Ohio St. 3d 316, 321-322 (2011) (internal citations omitted).

The phrase “under oath” is not defined in R.C. Chap. 4112. It is not a special phrase or term of art known only to the OCRC, nor one over which the OCRC has “accumulated substantial expertise.” Many statutes require written statements under oath to invoke the jurisdiction of various administrative bodies. See, e.g., *Stanjim Co. v. Board of Revision*, 38 Ohio St. 2d 233 (1974). OAC §4112-3-01(B)(2) does not supply the definition of “under oath.” Its application would further render worthless R.C. 4112.09, by which virtually every relevant official of the OCRC is authorized to administer oaths. By virtue of the foregoing Fasanaro’s “charge” should never have been “received” by the OCRC in the first place. Relators thus patently and unambiguously lack jurisdiction over the current investigation.

D. A “special statutory proceeding” contemplates an “adjudicatory hearing.”

Given that Relators’ claim is dependent upon the existence of a special statutory proceeding, the definition of “proceeding” is relevant. As the term “proceeding” implies, and as this Court has repeatedly opined, a special statutory proceeding contemplates an **adjudicatory** process. There is simply no such pending adjudicatory proceeding within the jurisdiction of Relators to which Respondent must defer.

“[T]he term ‘proceedings’ denotes acts or events taken between the time of commencing an action at law until the entry of a final judgment by a judicial **tribunal**. ‘**Proceedings**’ evokes a **court of law, not the investigatory action** taken by police prior to the filing of a complaint or

a juvenile's initial appearance before a tribunal.” *In re M.W.*, 133 Ohio St. 3d 309, 314 (2012). [Emphasis supplied.] Here, the Fasanaro “charge” is currently, albeit illegally, in the “preliminary investigation” stage. See, e.g., Intervenor’s complaint, ¶34 (request for “a list of all three hundred sixty (360) current residents,” etc.) An **investigation** cannot be a special statutory proceeding. There is no basis for equating the preliminary investigatory stage of Relators’ involvement to the adjudicatory stage so as to apply the Deference Rule. While this Court acknowledged the secretary of state’s lack of authority to conduct adjudicatory proceedings, it nonetheless pointed out that “*when*” Ms. Brunner issued subpoenas in furtherance *of her investigation* she did not exercise quasi-judicial authority in issuing them.

Therefore, because no statute or other pertinent law required the secretary of state to conduct a hearing resembling a judicial trial *when* she decided to issue the subpoenas to relators in furtherance of her investigation of LetOhioVote.org's 2009 campaign-finance report, the secretary of state did not exercise quasi-judicial authority in issuing them. *Scherach*, 123 Ohio St.3d 245, 2009 Ohio 5349, P 22-23, 915 N.E.2d 647; *Parrott*, 117 Ohio St.3d 175, 2008 Ohio 813, P 8-10, 882 N.E.2d 908. [Emphasis supplied.]

State ex rel. LetOhioVote v. Brunner, 125 Ohio St. 3d 420, 2010-Ohio-1895, ¶20. Similarly, here there is clearly “no statute or other pertinent law” which **at this juncture** requires Relators “to conduct a hearing resembling a judicial trial.” See, also, *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190, 193 (1992). “Where, however, a specialized statutory remedy is available **in the form of an adjudicatory hearing**, a suit seeking declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed.” [Citations omitted.] *Taft* involved an **investigation** by the secretary of state. Here, there is obviously no special statutory proceeding to bypass.

E. The OCRC's adjudicatory proceedings are not "exclusive."

The power to adjudicate unlawful discriminatory practices of housing discrimination complaints is not exclusively within the province of the OCRC. As this Court stated in *Smith v. Friendship Vill. of Dublin*, 92 Ohio St. 3d 503, 506-507 (2001), civil and administrative "proceedings" are available forums to resolve housing discrimination cases.

The General Assembly has specifically **limited** an individual's **ability to bring both an administrative and civil proceeding** in the context of **age discrimination only**. Its exclusion of other forms of discrimination from this limitation makes clear that it intended that **both remedies be available for other forms of discrimination**.

"The protection of an individual's right to pursue private remedies is too central an aspect of Ohio's commitment to nondiscrimination to be limited to, or delayed by, an administrative process." *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008 Ohio 3318, 892 N.E.2d 420, ¶43.

Should any lawful investigation of an unlawful discriminatory practice of housing discrimination ever ripen into a complaint, the charging party and Intervenor, as a respondent, have an absolute right to elect to have that complaint adjudicated in the common pleas court. R.C. §§4112.05(B)(5), 4112.051(A)(2). See, also, R.C. 4112.99.

See, also, *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 879 N.E.2d 174, 2007 Ohio 6442, ¶16, in which this Court held (with emphasis added) that where a complaint "raises genuine issues of material fact," *i.e.*, not "sham" litigation, a standard which Relators have neither raised nor challenged, the "suit ... shall proceed in court while the proceedings before the OCRC **shall be stayed**." Accordingly, even were Relators' jurisdiction properly invoked, they simply do not have the requisite exclusive jurisdiction entitling them to the application of the Deference Rule.

F. Respondent is not called upon to determine the merits of Fasanaro’s “charge.”

The Deference Rule is also dependent upon the exclusive jurisdiction of such proceedings **over the matters committed to them.** See, e.g., *State ex rel. Smith v. Frost*, 74 Ohio St. 3d 107, 112 (1995) (“it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve *matters committed to special statutory proceedings* ...”), and *Taft*, at 195. The matters so committed to a properly investigated and convened adjudicatory hearing before Relator the OCRC are simply whether “the respondent has engaged in, or is engaging, any *unlawful discriminatory practice.*” R.C. 4112.05(G). [Emphasis supplied.]

Were Fasanaro’s charge not jurisdictionally deficient but instead, properly within the jurisdiction of the OCRC, and were it ever to ripen into the administrative adjudicatory stage, that which would be decided is whether “the respondent has engaged in, or is engaging, any *unlawful discriminatory practice.*” R.C. 4112.05(G). [Emphasis supplied.] That which is at issue in the Litigation is the propriety of the conduct of Respondents, not the conduct of Intervenor. Intervenor seeks no declaration whatsoever as to whether Intervenor committed an underlying unlawful discriminatory practice of housing discrimination. Given that the OCRC cannot issue declaratory judgments or injunctive relief, and Respondent is not being called upon to determine the merits of Fasanaro’s “charge,” there is no special statutory proceeding being bypassed in the first instance.

VII. Respondent has jurisdiction over Intervenor’s declaratory judgment claims.

Intervenor seeks a declaration as to the lawfulness and constitutionality of Relators’ conduct. The propriety of such declaratory judgment actions has been consistently sustained. See, *State ex rel. Holcomb v. Wurst*, 63 Ohio App. 3d 629, 632 (Butler County 1989) (“However, the present case does not involve the application of a tax law to a particular parcel of

real property, thus the special statutory jurisdiction of the Tax Commissioner is not involved here. **Holcomb contests the constitutionality of the entire plan for interior inspection of homes. Declaratory relief is appropriate to determine the constitutionality of the governmental action.** See *Katzenbach v. McClung* (1964), 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290.”), and *State ex rel. Abx Air v. Ringland*, 150 Ohio App. 3d 194, 199 (Ohio Ct. App., Clinton County 2002) (“**The common pleas court is not being asked to correct property values or assess taxation amounts; rather, the court is being asked to decide whether the procedures set forth in R.C. 3735.65 et seq. were properly complied with.** A reading of these statutes gives no indication that they are to be exclusively interpreted and applied by the Ohio Tax Commissioner, although the commissioner clearly has jurisdiction to do so under *Zaino*.”)

There is a current real controversy which the declaratory judgment sought will resolve. That said, Intervenor is also entitled to a declaration with respect to its rights *vis a vis* any future investigations by the OCRC in similar situations, *i.e.*, where a charge is similarly not under oath, fails to allege an unlawful discriminatory practice, fails to contain the requisite concise statement of underlying facts on which the charge is based, as well as where even a lawful investigation is sidetracked by unauthorized mediation or premature conciliatory efforts. **Given the penalties for both failure to cooperate in an investigation, e.g., an award of punitive damages, OAC §4112-6-02 and §4112.05(G)**, Intervenor states valid claims for declaratory judgment and injunctive relief.

Declaratory relief is clearly available to Intervenor under the analysis set forth in *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190 (1992). Under *Taft*, one has standing to

bring a declaratory judgment action where civil fines just as severe as criminal fines for the same offense can be imposed, as follows (with emphasis added):

In *Peltz v. South Euclid* (1967), 11 Ohio St.2d 128, 40 O.O.2d 129, 228 N.E.2d 320, paragraph one of the syllabus, we held that **a person has standing to bring a declaratory judgment action concerning criminal municipal ordinances without first having had to violate the ordinances.** *Pack v. Cleveland* (1982), 1 Ohio St.3d 129, 1 OBR 166, 438 N.E.2d 434, paragraph one of the syllabus, extended this holding to state criminal statutes. **We see no reason why *Peltz* and *Pack* should not apply with equal force to prosecutions before the commission that may result in civil fines just as severe as criminal fines for the same offenses,** or may result in criminal prosecution after the hearing before the commission via referral for prosecution by the commission.

Id., 196. Given that **civil fines** for violating the provisions of R.C. Chap. 4112 **far exceed penalties for lesser criminal offenses**, Intervenor has standing to bring its declaratory judgment action not only with respect to the current investigation by defendants, but also with respect to future investigations.

The \$10,000.00 statutory cap on punitive damages awardable under §4112.05(G)(1)(a) far exceeds the \$5,000.00 statutory cap of §2929.29(A)(8) on fines for the first degree misdemeanor criminal violation by an organization for interfering with housing per R.C. 2927.03(A), despite the fact that said criminal violations involve more egregious conduct. The \$10,000.00 statutory cap on punitive damages awardable under § 4112.05(G)(1)(a) far exceeds the \$1,000.00 statutory cap of R.C. 2929.28(A)(2)(a)(i) on fines for the first degree misdemeanor criminal violation by an individual for interfering with housing per R.C. 2927.03(A), despite the fact that said criminal violations involve more egregious conduct. Because the R.C. 4112.05 administrative proceedings are not of the same type of proceedings held as exclusive by the Ohio Supreme Court, and further, because Intervenor, as respondent in such administrative proceedings, is subject to the imposition of civil damages far more severe than the criminal fines

applicable to even more egregious criminal conduct, which punitive damages are based, in part, on a respondent's failure to cooperate in an investigation, OAC §4112-6-02 and §4112.05(G), declaratory relief is available to Intervenor under *Taft*.

“Once the Commission receives a charge it has the discretion to decide whether or not to initiate an investigation,” citing *State ex rel. Westbrook v. Ohio Civil Rights Com.*, 17 Ohio St. 3d 215 (1985). But the OCRC ignores the fact that the Fasanaro “charge” is not a charge which the OCRC is authorized to receive, let alone investigate. §4112.04(A)(6). The OCRC has no discretion as to whether it may receive and investigate a charge not made “under oath.”

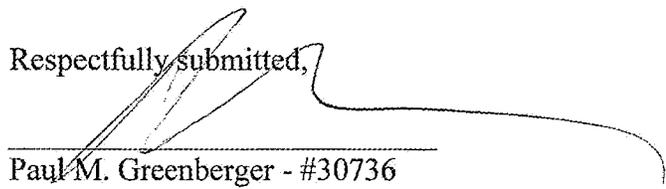
VIII. Relators have an adequate remedy at law.

Relators fail to acknowledge the adequacy of their right to appeal any adverse ruling by Respondent, Fasanaro's right to proceed independently with an action pursuant to R.C. 4112.051 or R.C. 4112.99, or the existence of other obvious and available means by which avail themselves of an adequate remedy in the ordinary course of law. Such adequate remedies can be readily found within R.C. Chap. 4112 itself. It is not Intervenor's burden to advise Relators thereof. The mere existence of such remedies deprives Relators of entitlement to the writ of prohibition sought.

IX. Conclusion.

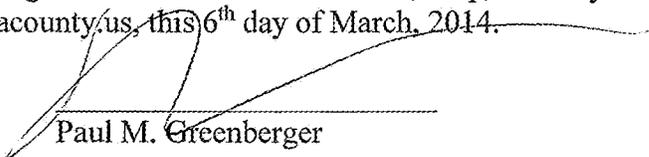
For the reasons set out above, Relators can adduce no set of facts by which they could be entitled to judgment. Accordingly, Intervenor is entitled to Judgment on the Pleadings in its favor thereby dismissing Relators' complaint.

Respectfully submitted,


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CERTIFICATE OF SERVICE

Pursuant to S. Ct. Prac. R. 3.11(B)(1) & (C)(1), a copy of the foregoing has been forwarded by e-mail to opposing counsel Eric E. Murphy, Esq., attorney for Relators, at eric.murphy@ohioattorneygeneral.gov and to Charles E. Hannan, Esq., attorney for Respondent, at channan@prosecutor.cuyahogacounty.us, this 6th day of March, 2014.


Paul M. Greenberger