

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. THE OHIO CIVIL)
RIGHTS COMMISSION, ET. AL.,)
)
Relators,)
)
vs.)
)
THE HON. RICHARD J. McMONAGLE,)
)
Respondent.)

CASE NO. 2014-0295

Original Action in Prohibition
Arising From Cuyahoga County
Common Pleas Court
Case No. 14 CV 820282

RESPONDENT'S MOTION TO DISMISS

MICHAEL DEWINE (0009181)
Attorney General of Ohio
ERIC E. MURPHY * (0083284)
State Solicitor
* *Counsel of Record*
STEPHEN P. CARNEY (0063460)
JEFFREY JAROSCH (0091250)
Deputy Solicitors
DAVID A. OPPENHEIMER (0063193)
SHARON D. TASSIE (0029896)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 466-8980/Fax: (614) 466-5087
eric.murphy@ohioattorneygeneral.gov

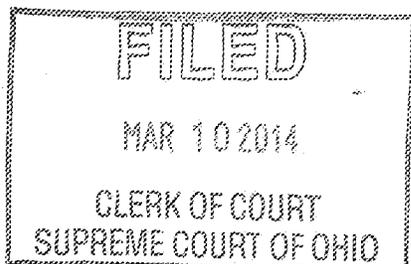
*Counsel for Relators Ohio Civil Rights
Commission, et al.*

TIMOTHY J. MCGINTY, Prosecuting
Attorney of Cuyahoga County, Ohio
CHARLES E. HANNAN * (0037153)
Assistant Prosecuting Attorney
* *Counsel of Record*
The Justice Center, Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Tel: (216) 443-7758/Fax: (216) 443-7602
channan@prosecutor.cuyahogacounty.us

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

PAUL M. GREENBERGER (0030736)
Berns, Ockner & Greenberger, LLC
3733 Park East Drive – Suite 200
Beachwood, Ohio 44122-4434
Tel: (216) 831-8838/Fax: (216) 464-4489
pgreenberger@bernsockner.com

*Counsel for Prospective Intervenor and
Amicus Curiae GMS Management Co., Inc.*



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Relators,)	Arising From Cuyahoga County
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vs.)	Case No. 14 CV 820282
)	
THE HON. RICHARD J. McMONAGLE,)	<u>MEMORANDUM IN SUPPORT OF</u>
)	<u>RESPONDENT'S MOTION TO</u>
Respondent.)	<u>DISMISS</u>

STATEMENT OF FACTS AND PROCEEDINGS

This is an original action in prohibition brought by relators The Ohio Civil Rights Commission and OCRC Akron Regional Investigator Ricky J. Boggs (hereafter collectively referred to as "the OCRC") against respondent The Honorable Richard J. McMonagle of the Cuyahoga County Court of Common Pleas (hereafter "respondent"). Alleging that respondent's exercise of judicial power is unauthorized by law, the OCRC seeks to prohibit respondent from conducting further judicial proceedings in the underlying civil action for declaratory judgment and injunctive relief captioned, GMS Management Co., Inc. vs. The Ohio Civil Rights Commission, et al., Cuyahoga County Common Pleas Court Case No. 14 CV 820282. GMS Management Co., Inc., has moved to intervene in the instant case and has additionally filed as an amicus curiae and, for purposes of this motion, will be referred to herein as "GMS."

Contrary to the OCRC's contentions, however, respondent does not patently and unambiguously lack jurisdiction to exercise judicial power in that case and the OCRC does not lack plain and adequate remedies in the law. Because the Complaint for Writ of Prohibition and Affidavit in Support (hereafter "Complaint") does not plead facts that state a proper claim for

relief in prohibition, respondent respectfully requests that the Complaint and this cause be dismissed pursuant to S. Ct. Prac. R. 12.04(C).

This case arises out of a charge that Thomas Fasanaro filed with the OCRC. See Complaint at para. 5.¹ Mr. Fasanaro alleged that GMS, a real property management company, rejected his housing application due in part to his disability. See Complaint at para. 5. Based on Fasanaro's charge, the OCRC investigators began to investigate GMS. *Id.* As part of that investigation, the OCRC sought documents pertaining to GMS's rental practices and residents. *Id.* The OCRC indicates that its investigation is ongoing and has not yet resulted in any findings or final orders.

On January 16, 2014, GMS sued the OCRC and investigator Boggs, filing a First Amended Complaint four (4) days later on January 20, 2014. See Complaint at para. 6.² Among other things, GMS alleged that Fasanaro's charge was facially defective because R.C. 4112.04(A)(6) and R.C. 4112.05(B)(1) require an unlawful discriminatory practice charge to be made "under oath," whereas Fasanaro's charge recited, presumably pursuant to Ohio Adm.Code 4112-3-01(B)(2), that "I declare under penalty of perjury that I have read this charge (including attachments) and that it is true and correct." See Complaint at para. 6; Tassie Affidavit at Exhibit 1. GMS additionally alleged that the Fasanaro charge lacked a proper statement of facts and further failed to state a claim for housing discrimination as a matter of law. See Complaint at para. 6; Tassie Affidavit at Exhibit 1. More broadly, GMS alleged that the OCRC's conduct in

¹ Although it is not material to the disposition of this case and may not be apparent from the documents filed by the OCRC here, the record below reflects that after Mr. Fasanaro's June 13, 2013 apartment rental application was denied, he filed a housing discrimination charge with the OCRC on August 8, 2013.

² The affidavit in support of the OCRC's Complaint here indicates that Exhibit 1 attached thereto is a copy of the amended complaint that GMS filed on January 20, 2014, see Tassie Affidavit at para. 3., but Exhibit 1 actually appears to be a copy of the original complaint that GMS filed on January 16, 2014.

initiating and pursuing an investigation of the disputed Fasanaro charge was itself unlawful and violative of GMS's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. See Complaint at para. 6; Tassie Affidavit at Exhibit 1.

GMS seeks declarations that Ohio Adm.Code 4112-3-01(B)(2) conflicts with the oath requirements contained in R.C. 4112.04(A)(6) and R.C. 4112.05(B)(1) and is unenforceable. See Complaint at para. 7; Tassie Affidavit at Exhibit 1. GMS further seeks declarations that the OCRC's conduct violates GMS's statutory and constitutional rights, requesting injunctive relief to redress those alleged violations but not monetary damages. See Complaint at para. 7; Tassie Affidavit at Exhibit 1.

On January 30, 2014, the OCRC moved to dismiss the common pleas action for lack of subject matter jurisdiction. See Complaint at para. 8, Tassie Affidavit at para. 4. According to the OCRC, the common pleas court lacked jurisdiction "because GMS sought to collaterally attack an investigation governed by special statutory procedures, and parties may not use declaratory judgment actions to circumvent such statutorily defined procedures." See Complaint at para. 8.

On February 18, 2014, the trial court denied that motion, contemporaneously disposing of several other pending motions within the same order. See Complaint at para. 8; Tassie Affidavit at para. 4 and Exhibit 2.

On February 26, 2014, the OCRC commenced this original action in prohibition against respondent.

ARGUMENT AND LAW

The OCRC's Complaint alleges that by creating the Commission in Chapter 4112 of the Ohio Revised Code, the Ohio General Assembly empowered the OCRC to investigate and, where applicable, prosecute and adjudicate discrimination charges filed with it. See Complaint at para. 12. The OCRC contends that "[t]hat process is a special statutory proceeding and that common pleas courts may not hear declaratory or injunctive cases that interfere with that statutory commitment to the Commission." *Id.* Because the GMS action pending below is one for declaratory judgment against the OCRC, the OCRC insists that the respondent lacks jurisdiction to hear it, warranting extraordinary relief in prohibition.

In answer, there initially can be little doubt that the respondent common pleas court possesses the basic statutory jurisdiction to hear an action for declaratory judgment. The OCRC does not suggest that its jurisdiction is exclusive so as to divest the respondent of jurisdiction to hear the declaratory judgment case. And contrary to the OCRC's contentions, the declaratory judgment action does not appear to be means to bypass the underlying Fasanaro charge proceedings before the OCRC but rather appear directed towards determining a legal dispute between GMS and the OCRC. Because the OCRC's Complaint does not furnish grounds for extraordinary relief in prohibition, respondent respectfully urges this Court to dismiss the Complaint and this cause pursuant to S. Ct. Prac. R. 12.04(C).

Under Ohio law, an action in prohibition tests only the jurisdiction of the lower court. *See State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265; *State ex rel. Staton v. Common Pleas Court*, 5 Ohio St.2d 17, 21, 213 N.E.2d 164 (1965). To be entitled to the writ, the relator must show that (1) the respondent Court was exercising or about to

exercise judicial or quasi-judicial power; (2) the exercise of that power was unauthorized by law; and (3) denial of the writ would cause injury for which no other adequate remedy exists in the ordinary course of the law. See *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, at ¶ 12.

“In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal.” *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, at ¶ 12. “Prohibition will not issue as a substitute for appeal to review mere errors in judgment.” *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522 at ¶ 28. Thus “[a]ppel, not prohibition, is the remedy for the correction of errors or irregularities of a court having proper jurisdiction.” *Smith v. Warren*, 89 Ohio St.3d 467, 468, 732 N.E.2d 992 (2000).

In reviewing this Complaint, the Court need not determine the merits of the OCRC’s jurisdictional contentions, for its “duty in prohibition cases is limited to determining whether jurisdiction is patently and unambiguously lacking.” *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, at ¶ 12. See also *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 431, 751 N.E.2d 472 (2001).

In this case, there is no dispute that the respondent is exercising judicial power in the underlying case. However, because the OCRC’s Complaint fails to plead facts demonstrating that the exercise of judicial power is unauthorized by law – much less that the respondent patently and unambiguously lacks jurisdiction to exercise such power – and that the OCRC lacks plain and adequate remedies in the ordinary course of the law, the Complaint does not state the grounds necessary for extraordinary relief in prohibition.

To begin, there can be little doubt that the trial court possesses the basic statutory jurisdiction to hear an action for declaratory judgment that additionally seeks injunctive relief. Under R.C. 2305.01, Ohio common pleas courts have original jurisdiction in all cases in which the sum or matter in dispute exceeds the exclusive jurisdiction of county courts. In *Schucker v. Metcalf*, 22 Ohio St.3d 33, 488 N.E.2d 210 (1986), the court observed: “The court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it.” *Id.* at 34, 488 N.E.2d 210.

Pursuant to R.C. 2721.02, the court of common has basic statutory jurisdiction over actions for declaratory judgment. *See State ex rel. CNG Financial Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, 855 N.E.2d 473, ¶ 15. The three elements necessary to obtain a declaratory judgment are (1) a real controversy between adverse parties (2) that is justiciable in character and (3) warrants speedy relief to protect rights that might otherwise be impaired or lost. *See Burger Brewing Co. v. Liquor Control Commission, Dept. of Liquor Control*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). Determining whether or not a justiciable controversy exists is within a trial court’s discretion. *See Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586.

The OCRC’s Complaint does not plead any facts to dispute that there exists a real controversy between GMS and the OCRC that is justiciable in character and warrants speedy relief to protect rights that might otherwise be impaired or lost. So at least insofar as the OCRC’s Complaint here is concerned, there is no reason to doubt that the respondent at least possesses the basic statutory jurisdiction to hear an action for declaratory judgment like the one pending below.

The OCRC nevertheless insists that because Chapter 4112 of the Ohio Revised Code empowers it with the authority to investigate and, where applicable, prosecute and adjudicate discrimination charges, presumably like that filed by Mr. Fasanaro. To be sure, there is no dispute that the OCRC is authorized to “[r]eceive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices ***.” R.C. 4112.04(A)(6). Under R.C. 4112.04(B)(3), the OCRC is give broad but by no means unlimited investigatory authority, expressly constrained in part to “comply with the fourth amendment to the United States Constitution relating to unreasonable searches and seizures.” See R.C. 4112.04(B)(3)(a).

Where the charge is for housing accommodations discrimination in violation of R.C. 4112.02(H), the OCRC’s preliminary investigation is subject to R.C. 4112.05(B)(3). In the case of contumacy or refusal to obey a subpoena, the OCRC or person at whose request the subpoena was issued “may petition for its enforcement **in the court of common pleas** in the county in which the person to whom the subpoena was addressed resides, was served, or transacts business.” (Emphasis added.) R.C. 4112.04(B)(3)(e).

Pursuant to R.C. 4112.051(A)(1), aggrieved persons may enforce the housing accommodations rights granted by R.C. 4112.02(H) “by filing a civil action **in the court of common pleas** of the county in which the alleged unlawful discriminatory practice occurred within one year after it allegedly occurred. ****” (Emphasis added.) If the OCRC issues a complaint for housing accommodations discrimination, R.C. 4112.051(B)(2)(a) provides that “the complainant, any aggrieved person on whose behalf the complaint was issued, or the respondent may elect *** to proceed with the administrative hearing process under [R.C. 4112.02(B)(5)] or to have the alleged unlawful discriminatory practices covered by the complaint addressed in a civil action commenced in accordance with [R.C. 4112.051(A)(1) and

(2)(b)],” i.e., **in the court of common pleas** of the county in which the alleged unlawful discriminatory practice occurred.

That the very sections of the Ohio Revised Code empowering the OCRC with broad investigatory authority simultaneously empower the courts of common pleas to hear investigatory petitions to enforce under R.C. 4112.04(B)(3)(e) and housing accommodations claims upon timely election militates against finding that the OCRC has exclusive jurisdiction over such matters. In *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, the court declared: “When the General Assembly intends to vest exclusive jurisdiction in a court or agency, it provides it by appropriate statutory language.” *Id.* at ¶ 22, quoting *State ex rel. Banc One Corp. v. Walker*, 86 Ohio St.3d 169, 171-172, 712 N.E.2d 742 (1999). So while the OCRC insists that it has jurisdiction over the Fasanaro charge – a claim that GMS contests but which has not and need not be determined for purposes of this case – even the OCRC’s Complaint here does not allege that its jurisdiction is *exclusive*.

In any case, the OCRC contends that the respondent lacks jurisdiction over the GMS declaratory judgment action “because GMS sought to collaterally attack an investigation governed by special statutory procedures ***.” See Complaint at para. 8. GMS’s pleadings below, however, indicate that it seeks a declaration that Ohio Adm.Code 4112-3-01(B)(2) conflicts with R.C. 4112.04(A)(6) and R.C. 4112.05(B)(1) and should therefore be declared unenforceable.

As indicated previously, Ohio Adm.Code 4112-3-01(B)(2) provides that housing accommodations charges under R.C. 4112.02(H) shall be in writing, with the original signed by the complainant, and affirmed by the complainant by stating: “I declare under penalty of perjury that the foregoing is true and correct.” R.C. 4112.04(A)(6) and R.C. 4112.05(B)(1), on the other

hand, provide that charges of unlawful discriminatory practices be in writing and “under oath.”
GMS insists that because the administrative rule conflicts with the statute, the former must yield to the latter and be declared unenforceable.

There can be little doubt that it is within the judicial power conferred by Article IV, Section 1 of the Ohio Constitution to determine whether an agency’s administrative rule conflicts with a statute. *See, e.g., Crawford-Cole v. Lucas Cty. Dept. of Job & Fam. Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, 906 N.E.2d 409. Regardless of the OCRC’s characterization of the GMS action as a “collateral attack,” GMS’s complaint alleging that the rule conflicts with the statute would at least appear to present a real controversy between adverse parties that is justiciable in character and warrants speedy relief to protect rights that might otherwise be impaired or lost.

GMS additionally alleges that the OCRC’s ensuing conduct violates the relevant statutory and administrative rule provisions and GMS’s constitutional rights. Without expressing any view as to the merits of these contentions, it cannot be said that a common pleas court patently and unambiguously lacks jurisdiction to hear such claims. As a court of general jurisdiction, it can determine its own jurisdiction, hearing the matter if satisfied it possesses jurisdiction or declining to hear the matter if not satisfied of its jurisdiction. In either case, appeal is an adequate remedy for parties to challenge that jurisdictional determination. *See Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, at ¶ 12.

The OCRC nevertheless maintains that the respondent lacks jurisdiction here because “actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed.” *State ex rel. Albright v. Court of Common Pleas of Delaware Cty.*, 60 Ohio St.3d 40, 42, 572 N.E.2d 1387 (1991). In *Albright*, the court explained:

[S]ince it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings, their decisions should always be reversed on appeal, except when they dismiss the actions. We find this tantamount to a holding that courts have no jurisdiction to hear the actions in the first place, and now so hold.

Id. at 42, 572 N.E.2d 1387. In that case, the court held that the common pleas court lacked jurisdiction to hear a contest over annexation proceedings because the applicable statutes conferred jurisdiction upon the board of county commissioners of the county where the largest number of voters in the territory to be annexed resided. *Id.* at 43, 572 N.E.2d 1387. *Accord State ex rel. Smith v. Frost*, 74 Ohio St.3d 107, 112, 656 N.E.2d 673 (1995).

By contrast, in *State ex rel. Taft v. Court of Common Pleas of Franklin Cty.*, 63 Ohio St.3d 190, 586 N.E.2d 114 (1992), the court declined to issue a writ of prohibition to stop a common pleas court from proceeding in a declaratory judgment action to determine whether an organization was a “political action committee” subject to a statute prohibiting corporate political contributions and criminal statutes applicable to political action committees. The court first held that the Secretary of State’s general obligation to investigate and report violations of the election laws did not impose a specific adjudicatory procedure, did not grant quasi-judicial authority, and thus did not constitute a special statutory proceeding that could not be bypassed by an action for declaratory judgment. *Id.* at 195, 586 N.E.2d 114. The court further held that the Ohio Elections Commission’s adjudication proceedings were not exclusive, permitting an aggrieved person to bring a declaratory judgment action without first having to be cited and/or penalized for violating the law. *Id.* at 196, 586 N.E.2d 114.

In the instant case, there is no dispute that Mr. Fasanaro filed a charge with the OCRC. Putting aside GMS’s objections as to the form and substance of that charge, any proceedings before the OCRC at this point would be directed towards investigating that charge to determine

whether there is probable cause to conclude that an unlawful discriminatory practice occurred and whether corrective action should accordingly be taken.

The GMS declaratory judgment action, on the other hand, does not purport to contest the merits of the Fasanaro specific charge but rather the OCRC's processes and procedures in a more generalized sense. The merits of Mr. Fasanaro's charge remains before the OCRC for determination, presumably unless and until a party elects otherwise pursuant to R.C. 4112.051(A). Again without expressing any view whatsoever as to the merits of the parties' respective contentions, the GMS action does not appear to ask the respondent to resolve any matter that is specifically and statutorily committed to the OCRC. Consequently, it could not serve to bypass any special statutory proceeding.

The OCRC's reliance on *State ex rel. Taft-O'Connor '98 v. Court of Common Pleas of Franklin Cty.*, 83 Ohio St.3d 487, 700 N.E.2d 1232 (1998), would appear to be misplaced. In that case, the court found that "[t]he Ohio Elections Commission has *exclusive* jurisdiction over the claims of fraudulent and false statements raised by Friends of Fisher in the underlying action." (Emphasis added.) *Id.* at 488, 700 N.E.2d 487. As noted previously, even the OCRC does not suggest that it has exclusive jurisdiction here.

The OCRC argues that permitting GMS's "pre-adjudication" declaratory judgment action to proceed would interfere with its ability and duty to investigate a discrimination charge. In *State ex rel. Taft v. Court of Common Pleas of Franklin Cty.*, 63 Ohio St.3d 190, 586 N.E.2d 114 (1992), however, the court recognized that a party need not have civil fines imposed for statutory violations before seeking a declaratory judgment concerning those state statutes. *Id.* at 196, 586 N.E.2d 114, citing *Peltz v. South Euclid*, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967); *Pack v. Cleveland*, 1 Ohio St.3d 129, 438 N.E.2d 434 (1982).

In short, the OCRC's Complaint does not demonstrate that respondent *patently* and *unambiguously* lacks jurisdiction to hear any or all of the issues presented by GMS's action. Respondent is a court of general jurisdiction and is mindful of the limits of and duty to determine its own jurisdiction. The OCRC's Complaint does not plead any facts to suggest that the respondent is not capable of ascertaining the proper limits of its jurisdiction.

Nor is there any reason to think that appeal would not provide a plain and adequate remedy available in the ordinary course of the law. For its part, the OCRC argues that appeal is not adequate because it would mean "time and money gone forever," while the OCRC's 100-day deadline to investigate under R.C. 4112.05(B)(3)(a) would likely expire. See Memorandum in Support at p. 10. Neither contention has merit.

As to time and money, prior decisions establish that "appeal following judgment is not rendered inadequate, such that a party may secure a writ of prohibition, due to the potential time and expense involved." *State ex rel. Vanni v. McMonagle*, 137 Ohio St.3d 568, 2013-Ohio-5187, 2 N.E.3d 243, ¶ 16, quoting *State ex rel. Jackim v. Ambrose*, 118 Ohio St.3d 512, 2008-Ohio-3182, 890 N.E.2d 324, ¶ 6.

As to the expiration of the 100-day period to investigate charges under R.C. 4112.05(B)(3)(a), even the expiration of that time period would not appear to be fatal to the OCRC's jurisdiction, since R.C. 4112.05(B)(3)(b) provides as follows:

If it is not practicable to comply with the requirements of division (B)(3)(a) of this section within the one-hundred-day period described in that division, the commission shall notify the complainant and the respondent in writing of the reasons for the noncompliance.

R.C. 4112.05(B)(3)(b). Indeed, to the extent that Fasanaro filed his OCRC charge on August 8, 2013, the OCRC's 100-day time to investigate that charge would appear to have expired on November 16, 2013, two (2) months *before* GMS even filed its action for declaratory judgment

against the OCRC on January 16, 2014. The OCRC's reliance on the 100-day investigatory period would thus appear to be dubious as best.

It is of course axiomatic that prohibition is an extraordinary remedy that requires caution and restraint, a clear and undoubted right to relief, and the absence of any adequate legal remedies. *See State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73, 424 N.E.2d 297 (1981); *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941), syllabus at paragraph three; *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.*, 137 Ohio St. 273, 277, 28 N.E.2d 641 (1940).

In this case, the OCRC's Complaint fails to plead any facts establishing that the respondent common pleas court *patently* and *unambiguously* lacks jurisdiction to hear the underlying action for declaratory judgment. The trial court has the basic statutory jurisdiction to hear such actions, and nothing in the body of law applicable to the OCRC clearly and unmistakably divests the common pleas court of its jurisdiction in such matters. To the extent the OCRC contests the respondent's jurisdictional rulings, those are matters that can be readily addressed through the plain and adequate remedy of appeal. Nothing in the circumstances of this case warrants extraordinary intervention by this Court.

Because relator's Complaint fails to establish the legal grounds necessary to issue this extraordinary writ, respondents respectfully urges this Court to dismiss the Complaint and this cause pursuant to S. Ct. Prac. R. 12.04(C).

CONCLUSION

Respondent the Honorable Richard J. McMonagle respectfully requests that this Court dismiss the Complaint and this cause pursuant to S. Ct. Prac. R. 12.04(C).

Respectfully submitted,

TIMOTHY J. McGINTY, Prosecuting Attorney
of Cuyahoga County, Ohio

By: 

CHARLES E. HANNAN * (0037153)

Assistant Prosecuting Attorney

** Counsel of Record*

The Justice Center, Courts Tower, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

Tel: (216) 443-7758/Fax: (216) 443-7602

channan@prosecutor.cuyahogacounty.us

Counsel for Respondent The Hon.

Richard J. McMonagle

PROOF OF SERVICE

A true copy of the foregoing Respondent's Motion to Dismiss was served this 10th day of March 2014 by regular U.S. Mail, postage prepaid, upon:

Michael DeWine, Attorney General of Ohio
Eric E. Murphy, State Solicitor
Stephen P. Carney
Jeffrey Jarosch
David A. Oppenheimer
Sharon D. Tassie
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for Relators Ohio Civil Rights Commission, et al.

Paul M Greenberger
Berns, Ockner & Greenberger, LLC
3733 Park East Drive – Suite 200
Beachwood, Ohio 44122-4334

*Counsel for Prospective Intervenor and Amicus Curiae
GMS Management Co., Inc.*



CHARLES E. HANNAN *
Assistant Prosecuting Attorney
* *Counsel of Record*