ORIGINAL

In the
Supreme Court of Ohio

STATE *ex rel.* OHIO CIVIL RIGHTS COMMISSION, *et al.*,	:	
Relators,	:	Case No. 2014-0295
v.	:	
THE HON. RICHARD J. McMONAGLE,	:	ORIGINAL ACTION FOR A WRIT OF PROHIBITION
Respondent.	:	

RELATORS' COMBINED RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND TO PROPOSED INTERVENOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

The Ohio Civil Rights Commission filed this prohibition case to seek this Court's aid in enforcing the rules set down by this Court and by the General Assembly; the Commission asked this Court to prevent a trial court from exceeding its jurisdiction by interfering with the Commission's special statutory proceeding. This Court has explained repeatedly that common pleas courts lack jurisdiction to interfere with "special statutory proceedings" that the General Assembly has committed to administrative agencies or other bodies. The Court has held that "actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed," that "courts have no jurisdiction to hear such actions in the first place," and that writs of prohibition are justified to enforce that limit. *State ex rel. Albright v. Delaware Cnty. Ct. of Common Pleas*, 60 Ohio St. 3d 40, 42 (1991); *see also State ex rel. Taft-O'Connor '98 v. Franklin Cnty. Ct. of Common Pleas*, 83 Ohio St. 3d 487, 489 (1998); *State ex rel. Wilkinson v. Reed,* 99 Ohio St. 3d 106, 2003-Ohio-2506.

Here, prohibition is needed because Respondent, a judge of the Cuyahoga County Common Pleas Court ("Common Pleas Court") is improperly exercising jurisdiction over a case that interferes with the Commission's exclusive jurisdiction to investigate discrimination charges filed with the Commission. As the Commission explained in its Complaint and Emergency Motion in this case, GMS Management Company, a party charged with discrimination before the Commission, was dissatisfied with the Commission's ongoing investigation. So it asked the Common Pleas Court to enjoin the proceeding, and that case is an attempted end-run around the Commission's statutory authority to investigate discrimination charges.

Both Respondent and GMS, a Proposed Intervenor, have filed Motions here arguing that prohibition is not justified, but the Motions prove instead why prohibition *is* needed. Respondent has moved to dismiss; GMS has moved for judgment on the pleadings. While each raises

different issues, between them, they both argue that the Common Pleas Court has jurisdiction, for various reasons, but all are mistaken. Both say that the underlying case does not interfere because GMS does not ask the Common Pleas Court to address the actual discrimination charge on its merits. But GMS asks to *enjoin the Commission's proceeding,* and that constitutes improper interference, regardless of the legal theory behind it. GMS says that the Commission's investigative stage does not qualify as an exclusive proceeding, and only agency adjudications are protected from interference. But this Court has already rejected that theory in *Taft-O'Connor '98.* GMS also says that it challenges the Commission's own jurisdiction, so that the Commission has no legitimate exclusivity to protect. But this Court rejected that view in *Albright.* Thus, no basis for jurisdiction below is proper, and the court below lacks it.

The Common Pleas Court and GMS are also both mistaken in claiming that the Commission has an adequate remedy at law. The Commission need not establish that element here, where the lack of jurisdiction is patent and unambiguous. In any event, the Commission has no adequate remedy, because the trial-court process itself, let alone an appeal, threatens the Commission's ability to meet R.C. 4112.05(B)(7)'s strict one-year deadline to complete its investigation. *See Ohio Civil Rights Commission v. Countrywide*, 99 Ohio St. 3d 522, 2003-Ohio-4358 ¶¶ 6-9. The Common Pleas Court addresses the wrong deadline; GMS ignores the issue.

For those and other reasons below, both Motions should be denied. Instead, the Court should rule on the Commission's Complaint and grant a writ of prohibition. This is a straightforward case of applying settled law to the facts here, as this is a textbook example of interference with the Commission's special statutory proceedings. Anything less would be

inconsistent with the Court's precedent and with the General Assembly's instruction to the Commission to investigate discrimination charges. The writ should be granted.

FACTS

The Commission agrees with the facts as summarized in the Common Pleas Court's Respondent's Motion to Dismiss (at pp. 2-3), and emphasizes the following facts as well:

GMS's complaint seeks to stop the Commission's administrative investigation and challenges both the process and the substantive merits of the ongoing investigation. GMS alleges a wide range of problems with the Commission's continuing investigation, which reflects the Commission's routine practice for all similar investigations. GMS alleges that the complainant's underlying charge was defective for not including an oath or a proper statement of the facts, *id.* ¶ 5; that the charge fails to state a claim of housing discrimination—a claim that necessarily reaches the merits of the ongoing investigation, *id.*; that the Commission's investigation "is just another indiscriminate abuse of [GMS's] statutory and constitutional rights" because, according to the complaint, only about four percent of all charges of discrimination result in a finding of probable cause by the Commission, *id.* ¶ 8-9; that the Commission "failed to initiate a fact finding conference . . . to examine the factual basis behind the charge," *id.* ¶ 28; that the Commission "did not internally vet the unsworn charge to determine if Fasanaro was financially qualified to rent [GMS's] apartment suite in the first instance," *id.* ¶ 29; that the notification of the investigation that [GMS] received did not adequately include a notice of its procedural rights, *id.* ¶ 33; that the Commission requested "voluminous documentation under the threat of punitive damages," *id.* ¶ 34; and that the Commission did not timely complete its investigation of GMS, *id.* ¶ 35.

The relief that GMS seeks in the underlying case also reaches the merits of the underlying Commission investigation and seeks to determine or undermine the resolution of that

investigation on its merits. GMS's Complaint seeks six declarations that the Commission's process generally, and its investigation of GMS specifically, is defective, and it asks the court to enjoin the Commission from completing its investigation. *Id.* ¶¶ 43, 45-48. GMS seeks injunctive relief beyond stopping the proceeding against it, seeking to reshape how the Commission operates. For example, it "seeks a mandatory permanent injunction to the effect that [the Commission] and its employees undergo further training, under the supervisions of [GMS]'s counsel," to ensure that the Commission and its staff "respect the civil rights of respondents and otherwise conform to the statutes as written and to the applicable constitutional provisions." *Id.* ¶ 49.

The Common Pleas Court has granted a joint motion filed by the Commission and GMS to stay proceedings in the common pleas court temporarily, with the hope that this Court's decision might arrive before the underlying case resumes. The hearing set for March 20, 2014 has been re-scheduled for May 2, 2014, so discovery for that hearing will resume in mid-April. Meanwhile, the mandatory one-year time period in which the Commission must complete its investigation is ongoing, and expires in August.

ARGUMENT

The Commission's entitlement to prohibition was well-established in its Complaint and Emergency Motion, and nothing in the Motions from the Common Pleas Court or GMS negates that showing. To the contrary, their respective descriptions of the underlying case, and their theories for why it should proceed, confirm why prohibition is needed. (Separately, the Commission does not oppose GMS's Motion to Intervene.)

Prohibition is warranted because the State meets all of the elements required for this type of writ. This Court grants prohibition where: (1) a trial court has undoubtedly exercised judicial power; (2) the court's lack of jurisdiction is patent and unambiguous, and (3) the Commission

has no adequate remedy at law. *See State ex rel. Ohio Dep't of Mental Health v. Nadel*, 98 Ohio St. 3d 405, 2003-Ohio-1632 ¶ 19. Moreover, the Court does not require a relator to show "no adequate remedy at law" when the lack of jurisdiction is plain in a special-statutory-proceedings case. *See Albright,* 60 Ohio St. 3d at 43 ("To permit intervening respondent to go forward with its action in the respondent court would allow it to intrude into this statutory process. Accordingly, we find that . . . the adequacy of appeal as a remedy is irrelevant."). Further, where a lower court's lack of jurisdiction is "patent and unambiguous," the Court will undo past acts by a trial court as well as prevent future ones. *Nadel,* 2003-Ohio-1632 ¶ 19 (citing *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317 ¶ 24). Neither party disputes the first element, as the Common Pleas Court intends to continue to address GMS's case against the Commission unless this Court stops it.

Both the Common Pleas Court and GMS devote most of their argument to insisting that jurisdiction is proper in the underlying case, but as shown below, they are wrong. The Common Pleas Court lacks jurisdiction over that case because it is an attempted end-run around the Commission's statutory authority to investigate charges of discrimination. It does not just interfere; GMS seeks to enjoin a Commission investigation. And this Court has already rejected each of the arguments raised as a basis for an exemption from the rule protecting special statutory proceedings, such as GMS's argument that only agency adjudications, not investigations, are protected, and GMS's claim that it may proceed because it challenges the Commission's own jurisdiction. Thus, jurisdiction is patently lacking in the underlying case.

Moreover, while the Commission need not show a lack of adequate remedy at law, it does not have such a remedy. Neither party responds at all to the one-year deadline issue that the Commission raised, and it is conclusive. As detailed below, the writ should be granted.

A. The Common Pleas Court has no jurisdiction to hear a collateral attack on the Commission's special statutory proceedings.

The Common Pleas Court here, like any common pleas court, has no jurisdiction to hear a case that infringes on special statutory proceedings that are committed to any agency such as the Commission. That rule is well-established, and it applies here.

1. A common pleas court has no jurisdiction to hear a declaratory judgment action that seeks to circumvent and enjoin the Commission's special statutory proceedings for investigating and resolving discrimination charges.

GMS's underlying case against the Commission is an improper collateral attack on the Commission's special statutory proceedings, so the common pleas court lacks jurisdiction and prohibition is warranted. The rule is well-established; the case below is such an improper attack; and none of the possible arguments for jurisdiction are viable.

First, this Court has repeatedly explained that common pleas courts have no jurisdiction to hear declaratory and injunctive actions that seek to circumvent a special statutory proceeding. *Wilkinson*, 2003-Ohio-2506 ¶¶ 15-16; *Taft-O'Connor '98*, 83 Ohio St. 3d at 489; *Albright*, 60 Ohio St. 3d at 42. The General Assembly's specific commitment of an issue to a special statutory proceeding prevails, and "courts have no jurisdiction to hear" actions for declaratory judgment. *Albright*, 60 Ohio St. 3d at 42.

Indeed, this lack of jurisdiction is so well-settled that most lower courts routinely enforce it by refusing to hear cases that violate the rule, so that this Court does not need to step in and enforce the limit. For example, when a doctor tried to bypass the Medical Board and have a common pleas court examine a professional-discipline matter, the trial court declined to exercise jurisdiction, and the Tenth District affirmed. *State ex rel. Gelesh v. State Med. Bd. Of Ohio*, 172 Ohio App. 3d 365, 2007-Ohio-3328 (10th Dist.). Other courts have done likewise. *Aust v. Ohio State Dental Bd.*, 136 Ohio App. 3d 677 (10th Dist. 2000) (declaratory judgment is not available

where another equally serviceable remedy has been provided); *Tri-State Grp., Inc. v. Ohio Edison Co.*, 151 Ohio App. 3d 1, 2002-Ohio-7297 (7th Dist.) (operator of fly ash disposal site could not use declaratory judgment to circumvent regulatory schemes governing fly ash disposal); *Dayton Street Transit Co. v. Dayton Power & Light Co.*, 57 Ohio App. 299 (2d Dist. 1937) (common pleas court does not have jurisdiction to entertain an action for a declaratory judgment on questions in which the Public Utilities Commission has exclusive jurisdiction). And this Court has affirmed that principle on direct review as well. *See City of Galion v. Am. Fed'n of State Cnty. & Mun. Emps., Local No. 2243,* 71 Ohio St. 3d 620, 623 (1955) ("We have held that if there is a special statutory procedure which a party must use, an action for declaratory judgment is inappropriate.")

Second, this case involves both a legislative commitment to the Commission and a case that seeks to undermine it. The General Assembly, in enacting R.C. Chapter 4112, created a comprehensive procedure for having the Commission process *charges* of discrimination. That process provides for an administrative appeal *after* the Commission acts, not for interrupting it midway or at the outset. *See* R.C. 4112.06. The statutory process even imposes on the Commission a one-year deadline for resolving charges administratively, and this Court has applied it firmly. *Countrywide,* 2003-Ohio-4358 ¶¶ 6-9. An interim declaratory lawsuit is incompatible with this system, especially with the deadline, as the Commission could be unable to fulfill its mandated duty to process a charge while it is being dragged into court before it could conduct an investigation. Any alleged discriminator could file a declaratory-judgment action, taking the *charge* out of the Commission's hands, controlling the course and perhaps the outcome of the investigation. This is not what the General Assembly intended, and not what this Court permits under its precedent guarding the primacy of special statutory proceedings.

GMS's lawsuit against the Commission is indisputably the type of case that violates the rule. Although GMS's complaint did not identify the Declaratory Judgment Act as the basis for jurisdiction, that is the relief that GMS seeks, and it used that description in its briefing on the motion to for judgment on the pleadings. *See* GMS Motion at 20-22. And no other basis for jurisdiction in the trial court exists. GMS plainly seeks to block the Commission proceeding pending against it, as it asks for an injunction against that proceeding. *See* First Am. Compl. ("FAC") ¶ 48 ("Plaintiff is entitled to preliminary and permanent prohibitory relief enjoining defendants from further pursuit of this . . . investigation"); *see* GMS Br. in Opp. at 5 ("Given that the Fasanaro charge is not made under oath . . . defendants' investigation . . . must be declared illegal and enjoined"). It does not matter that GMS concedes that it does not ask the common pleas court to resolve the ultimate dispute over whether GMS discriminated, *id.* at 4, as the relief it seeks—enjoining the Commission's proceeding—interferes with the Commission's authority. Indeed, an outright injunction does not just "interfere with" that authority; it nullifies it.

2. The one-year deadline in *Countrywide* shows why the Common Pleas Court may not hear a declaratory-judgment action seeking to enjoin an investigation.

In *Ohio Civil Rights Commission v. Countrywide*, this Court recognized that the Commission faces a limited investigatory period that may not be tolled. Collateral attacks on an ongoing investigation are incompatible with the strictly limited time period recognized by the Court in *Countrywide*. In that case, this Court considered the effects of R.C. 4112.05(B)(7), which "states that any complaint issued by OCRC based on the filing of a charge of unlawful discriminatory practice 'shall be so issued within one year after the complainant filed the charge.'" 2003-Ohio-4358 ¶ 4 (quoting R.C. 4112.05(B)(7)). The Court held that the plain language of the statute mandated that the Commission be held to the one-year period, and must conclude any investigation and file a complaint (or decide not to) within one-year of the filing of

the charge. *Id.* ¶¶ 5-6. As the Court recognized, charges may be filed either directly with the Commission, or with the United States Department of Housing and Urban Development (HUD). *Id.* ¶¶ 7-8. The law establishes that the one-year limit setting a firm deadline that may not be tolled or extended, even in circumstances where the Commission is not immediately aware of a charge that has been filed with HUD. *Id.* ¶ 9.

Allowing common pleas courts to interfere with and enjoin Commission investigations is inconsistent with the administrative scheme established by the General Assembly and recognized by this Court in *Countrywide*. Allowing an injunction at any point in an investigation could defeat the Commission's ability to satisfy its statutory duty to complete investigations and, when probable cause is found, to file complaints within one year. The underlying case here, or any similar declaratory-judgment action, would undoubtedly undermine the time-limited investigations described by this Court in *Countrywide*.

B. None of the arguments offered in favor of the Common Pleas Court's jurisdiction has any merit on these facts and under settled law.

The Common Pleas Court and GMS offer various arguments in defense of purported jurisdiction over the underlying case, but none of those arguments survives scrutiny.

1. The underlying case seeks to bypass and nullify the Commission's investigation by seeking to enjoin the Commission from continuing the investigation and by asking the Common Pleas Court to declare the necessary outcome of that investigation.

Both the Common Pleas Court and GMS argue that the declaratory judgment action is not a means of bypassing the underlying charge and investigation, but each is wrong. The Common Pleas Court claims that GMS merely calls upon the common pleas court "to determine whether [the] agency's administrative rule conflicts with a statute." CPC Mot. at 9. The Common Pleas Court appears to characterize the action as a parallel proceeding that cannot have any effect on the Commission's investigation. CPC Mot. at 11 ("The merits of Mr. Fasanaro's charge remains

before the OCRC for determination . . . ."). But that view cannot be squared with the declarations and relief sought by plaintiff in its First Amended Complaint.

GMS does not merely seek an abstract declaration that the rule regarding the form for filing charges (Ohio Adm. Code 4112-3-01(B)(2)) conflicts with statutory requirements (in R.C. 4112.04(A)(6) and R.C. 4112.05(B)(1)), as GMS seeks that declaration as part of a much broader attack on the Commission's investigatory process and the Commission's ability to investigate Fasanaro's charge. GMS also seeks a declaration that "[t]he means adopted by the OCRC for the initiation of investigations, the conduct of said investigation, 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." FAC ¶ 43.f. GMS seeks much more than a declaration clarifying the law: It asks the Common Pleas Court to stop an ongoing investigation of discrimination in housing accommodations. FAC ¶ 48.

The broad scope of GMS's challenge is shown by the relief it seeks, specifically "a mandatory permanent injunction to the effect that defendant OCRC and its employees undergo further training, under the supervisions of [GMS]'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." FAC ¶ 49. This relief would go well beyond a declaration of law regarding the interplay between an administrative rule and a statute. To the contrary, GMS generally attacks the Commission in order to *stop* the investigation into its own housing accommodation practices. The heart of its claim is stopping the Commission's proceeding, so its claim is not merely some "separate" proceeding.

Despite GMS's goal of stopping the Commission, the Common Pleas Court mistakenly argues that this exercise of jurisdiction leaves "the merits of Mr. Fasanaro's charge . . . before the OCRC for determination, presumably unless and until a party elects otherwise pursuant to R.C. 4112.051(A)." CPC Mot. at 11. But even if that were true, it would not matter, as a request to enjoin is improper regardless of the theory behind it. Moreover, the description is wrong, for at least two reasons. *First*, since GMS seeks to enjoin the investigation, that relief, if granted, would mean that the Commission cannot ever reach the merits of the discrimination charge. So that issue is not left to the Commission. *Second*, GMS explicitly argues that the Commission lacks jurisdiction because the charge that is under investigation is not meritorious. The First Amended Complaint argues, in support of the broad declarations that GMS seeks, that Fasanaro's charge "fails to even allege an unlawful discriminatory practice." FAC ¶ 27. GMS thus expressly asks the Common Pleas Court to address the adequacy of the charge on its merits, i.e., to do the Commission's job.

Consequently, this case is not merely some freestanding, abstract dispute over what the law is, but is a naked attempt to shut down the Commission's proceeding. If that is not an attempt to bypass a special statutory proceeding, then nothing is.

2. The Commission has exclusive jurisdiction to investigate discrimination charges filed with the Commission, and the involvement of common pleas courts in other aspects of discrimination law does not change that.

Both the Common Pleas Court and GMS challenge the exclusive nature of the Commission's jurisdiction over claims of housing discrimination, pointing to the involvement of the common pleas courts in various aspects of discrimination law under Chapter 4112. Those arguments miss the mark, however, as they involve other parts of the process, and do not implicate the Commission's power over investigations when charges are filed with the Commission.

For example, charges filed with the Commission are distinct from discrimination cases filed directly in common pleas courts, in which the Commission is not involved. The Common Pleas Court is correct in noting that R.C. 4112.051(A)(1) allows an aggrieved party to choose her forum, and to pursue a claim of housing discrimination by proceeding in the court of common pleas *or* by filing a charge with the Commission. But a common pleas court's power to hear a complaint brought *initially* in that court does not mean that the court may enjoin an administrative investigation when a *charge* is filed with the Commission. The exclusive jurisdiction asserted by the Commission in this case is not the exclusive jurisdiction to adjudicate all claims of housing discrimination in the state of Ohio. Instead, the Commission more narrowly claims the exclusive jurisdiction to resolve its own investigation when a *charge* of housing discrimination is filed with the agency.

This distinction makes this case much different from *State ex rel. Taft v. Court of Common Pleas of Franklin County*, 63 Ohio St. 3d 190 (1992), and, in fact, *Taft* shows why the Commission is right. The Common Pleas Court and GMS suggest that this case is like *Taft,* because in *Taft* this Court held that the Ohio Elections Commission's jurisdiction to determine election-related matters, including whether a group was a political action committee, was not exclusive. The Elections Commission could determine that a group was a political action committee and a common pleas court could do so as well. *Id.* at 196. Here, "similarly," an aggrieved party may pursue a civil action of housing discrimination in the common pleas court or a charge before the Commission. But the similarity ends there, because the underlying declaratory-judgment action at issue in *Taft* did not seek to enjoin a proceeding of the Elections Commission, and, in fact, nothing in the statute created exclusivity. Both bodies had concurrent jurisdiction. Here, the statute provides for the charging party to choose a path, and once she

chooses the Commission, that investigation *is exclusively* the Commission's job. The Commission does not dispute that alleged victims may choose a path, and it does not claim jurisdiction over all discrimination claims—just the investigation of charges filed with the Commission.

Likewise, the Commission does not dispute that a discrimination case may alternatively shift to a common pleas court *after* the investigation is over, if the Commission files a complaint on the charge. Either party before the Commission may invoke the option to have a common pleas court hear the complaint at the adjudicative stage. R.C. 4112.051(A); *see* CPC Mot. at 7-8. The existence of that option does not undercut the exclusivity of the Commission's power over the investigation. Nor does the Commission dispute that, during the investigation, it might need to turn to a common pleas court to enforce a subpoena. *See* CPC Mot. at 7. That is standard practice for administrative subpoenas, but it does not undermine exclusive jurisdiction. This Court found in *Taft-O'Connor '98* that the Elections Commission had exclusive jurisdiction over false-statement charges, 83 Ohio St. 3d at 488, but the Elections Commission also turns to courts to enforce subpoenas during its proceedings, R.C. 3517.153(B).

Consequently, none of these arguments undercut the Commission's exclusive jurisdiction to investigate charges filed with it.

3. This Court has already found that deference to special statutory proceedings is not limited to ongoing adjudications, so it is triggered during a pre-adjudication investigatory period.

GMS mistakenly argues that the Common Pleas Court properly has jurisdiction here because GMS seeks to enjoin an administrative proceeding when the matter is in a preliminary investigative stage rather than an adjudicatory stage. GMS's "investigation" distinction has already been rejected by this Court implicitly, by other courts explicitly, and is unworkable. In *Taft-O'Connor '98*, this Court granted a writ of prohibition to protect against interference with the Ohio Elections Commission's authority over Ohio's law against false statements made in elections. 83 Ohio St. 3d at 489. The Elections Commission process, like the Civil Rights Commission, involves an initial investigation, a probable-cause finding, then adjudication. Most important, in *Taft-O'Connor '98,* no process at all had been instigated at the Elections Commission, not even an investigation. If GMS's view were right, the Court should have denied prohibition, because no adjudication was in process or even on the horizon.

GMS does not address *Taft-O'Connor '98* at all, and the Common Pleas Court's attempt to distinguish it is mistaken. The Common Pleas Court says that case is distinct because the Commission does not have exclusive jurisdiction over all housing discrimination claims, as claims may be brought initially in the common pleas courts. That, however, is merely a repeat of the argument discussed above, applied to comparing *Taft-O'Connor '98,* so the distinction fails for the same reason that the argument generally fails. The Commission *does* have exclusive jurisdiction over its own investigations, and that makes its exclusivity the same as the Elections Commission's exclusivity in *Taft-O'Connor '98*. And again, this Court protected that exclusivity even when no adjudication was ongoing.

Moreover, the Tenth District in *Aust* expressly rejected the view GMS advances, and its reasoning is solid. The party there "attempt[ed] to make the distinction that the board's actions

cannot be considered a 'proceeding' because the board had only begun an investigation and no formal administrative proceeding was actually pending." *Aust*, 136 Ohio App. 3d at 683. But the Tenth District rejected that argument, noting that "nowhere in *Albright* does [this Court] require that the administrative proceeding be currently pending. . . . [T]he issue is whether a special statutory proceeding has been set forth by the legislature to address a particular type of case, not whether a 'proceeding' has actually commenced." *Id.* Other courts have likewise dismissed declaratory-judgment attempts in favor of special statutory proceedings, even when no adjudication was pending. *See Tri-State Grp.*, 151 Ohio App. 3d 1; *Arbor Health Care v. Jackson*, 39 Ohio App. 3d 183 (10th Dist. 1987); *Dayton Street*, 57 Ohio App. 299.

GMS's "pre-adjudication" distinction makes no sense in principle and practice. It would mean, as a practical matter, that anyone wanting to interfere with an adjudication simply needs to file early enough to "beat the clock" and get its case in before an agency completes its investigation and can reach the adjudication stage. If a doctor just committed a disciplinary violation, or a liquor licensee just committed an underage sale, he simply needs to file a declaratory action to claim jurisdictional first dibs while the agency investigates but before it files a formal complaint. And that would, of course, be easy enough, given that a regulated party routinely will know of its acts before an agency does.

4. The Court of Common Pleas lacks jurisdiction to interrupt administrative proceedings to consider the agency's jurisdiction, and *Albright* already rejected GMS's argument that an attack on an agency's own jurisdiction is exempt from the rule regarding special statutory proceedings.

GMS cannot justify common pleas court jurisdiction by claiming that the Commission's own proceeding is itself without proper jurisdiction, because this Court rejected that notion in *Albright*. There, a party sued in a common pleas court to challenge the *jurisdiction* of the Franklin County Board of Commissioners over certain annexation proceedings, arguing that the proceedings belonged before Delaware County's Board instead. This Court explained that because the issue was statutorily committed to the Franklin County Board, that Board had the right to review the facts and assess its own jurisdiction, with appeal from that body as the proper route for review: "[T]he Franklin County Board of Commissioners has determined its own jurisdiction, and the Franklin County Court of Common Pleas . . . will rule on the correctness of that determination if it is challenged by injunction after the hearing." 60 Ohio St. 3d at 43. The Court explained that "To permit intervening respondent to go forward with its action in the respondent court would allow it to intrude into this statutory process," and that was so *even though* the argument below was, as here, premised upon a lack of *proper* administrative jurisdiction. *Id.* Consequently, GMS cannot succeed on that already-rejected distinction.

Moreover, that distinction, too, would be unworkable in practice, and would eviscerate the principle of protecting the primacy of special statutory proceedings. A party seeking to evade an agency's process could merely allege that the agency did not properly acquire jurisdiction, claiming that whatever procedural objection it has amounts to a jurisdictional flaw. Even if a court rejects the characterization of the alleged flaw as jurisdictional in the end, the interference with a proceeding is already largely achieved if the court even hears the case on the merits, as the delay alones interferes with the administrative proceeding. The only way to

protect against interference is to insist, as this Court did in *Albright,* on following the process set forth in the statute governing the agency's actions, giving the agency the first chance to determine its jurisdiction, with any errors corrected on appeal. Though the Commission raised this argument in its motion for emergency relief, GMS does not address it in its motion now. The Common Pleas Court mentions the case, but does not explain why it is does not apply here. *See* CPC Mot. at 9-10. It turns to discussing *Taft-O'Connor '98,* but that does not distinguish *Albright* on *this* point (or apply at all, as shown above).

Furthermore, GMS's attempted interference with the proper process is not only unwarranted, but also unnecessary. GMS has an adequate remedy in the ordinary course. Not only could GMS appeal anything the Commission might do, but other parties have already raised the same issues that GMS raises here in administrative appeals. For example, one party challenges the oath issue in a pending case. *Grybosky v. Ohio Civil Rights Comm.,* Ashtabula Common Pleas Court Case No. 2013-CV-0823. Another party claimed, on administrative appeal, that the Commission had not met its statutory duty to conciliate, and thus did not have jurisdiction to file an administrative complaint. *Ohio Civil Rights Comm. v. Triangle Investment Co.,* 2012-Ohio-1069 (10th Dist.). Similarly, errors alleged regarding non-charge processes, such as whether a Commission subpoena should be modified or quashed may be, and should be, raised before the Commission, and reviewed on appeal.

Because the rule protecting special statutory proceedings does not contain an exemption for attacks upon an agency's underlying jurisdiction, the Court need not go further to reject that alleged basis for the Common Pleas Court's jurisdiction. Nevertheless, the Commission notes that the attack upon its jurisdiction, based on GMS's argument about the "oath" requirement, would not amount to a jurisdictional attack upon the Commission's power anyway. That is, even

if "under oath" is interpreted as GMS seeks it to be, the oath requirement is not jurisdictional. A charge need not be signed or verified in order to vest jurisdiction with the agency. *Wheat v. State Board of Chiropractic Examiners*, 1988 WL 131444 (9th Dist. 1988) (lack of verification did not deprive the State Board of Chiropractic Examiners of jurisdiction over a charge filed against a chiropractor).

Moreover, Ohio Adm. Code 4112-3-01(G) states that a "charge may be amended to cure technical defects or omissions, including failure to swear or affirm to the charge . . . ." The United States Supreme Court has approved a similar EEOC regulation. "The issue here is the validity of an EEOC regulation permitting an otherwise timely filer to verify a charge after the time for filing has expired. We sustain the regulation." *Edelman v. Lynchburg College*, 535 U.S. 106, 109 (2002). The Court found that even though the statute required a charge to be verified, it did not mandate that an unverified charge cannot later be amended to cure the lack of verification. *Id.*

Courts have uniformly accepted the lack of verification as a technicality that can be corrected and not a jurisdictional defect requiring dismissal of the charge. *See, e.g. Blue Bell Boots v. EEOC*, 418 F.2d 355, 357 (6th Cir. 1969); *Baker v. Siemens*, 820 F. Supp. 1050, 1057 (S.D. Ohio 1993); *Aly v. Mohegan Council, Boy Scouts of America*, 711 F.3d 34, 43 (1st Dist. 2013); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968); *Lane v. Wal-Mart Stores East, Inc.*, 69 F. Supp.2d 749, 752 (D. Md. 1999); *Cross v. Foods Inc.*, 881 F. Supp. 2d 1012, 1014, 1016 (S.D. Iowa 2012); *Price v. City of New York*, 797 F. Supp. 2d 219, 226-227 (E.D. N.Y. 2011); and *Urgansky v. Flynn and Emrich Co.*, 337 F. Supp. 807, 810 (D. Md., 1972).

Thus, even if GMS were right in attacking the underlying Fasanaro charge as not properly filed under oath, the defect is curable, and thus does not divest the Commission of jurisdiction. (Separately, the argument is wrong on the merits, as shown in Part D below.)

C. The Commission need not show a lack of adequate remedy at law, but it has no such remedy, as it cannot meet its one-year deadline if court proceedings interfere.

While the State need not show a lack of adequate remedy at law, it has none. As noted above, this Court has dispensed with the requirement in cases such as this, for the intrusion into special statutory proceedings per se justifies prohibition. *Albright,* 60 Ohio St. 3d at 43; *see State ex rel. Willacy v. Smith,* 78 Ohio St. 3d 47, 51 (1997). Neither the Common Pleas Court nor GMS refutes that point, nor could they.

But even if the requirement is revived, it is met here, primarily because any trial-court proceeding—and certainly the extra time for appeal—renders the Commission's one-year deadline for its investigation impossible or near-impossible to meet. Thus, it is not merely that the Commission loses time and effort as a general matter, but that the underlying discrimination claim could be lost forever, regardless of the success of any appeal.

As noted above, the Commission has a one-year deadline for resolving claims administratively, and this Court has applied it firmly—even counting against the deadline the time in which the charge was being processed by the federal government before being handed over to the Commission. *Countrywide,* 2003-Ohio-4358 ¶¶ 6-9. That deadline cannot be tolled, so a later reversal of this injunction could be too late. Indeed, the fact that the time limit does not provide for such tolling further shows that the scheme does not contemplate such interruptions. Also, a later reversal would not remedy the massive harm that would be caused if other parties were to file similar actions, stalling the Commission's work on all discrimination cases.

The Common Pleas Court fails to address this issue, addressing instead an irrelevant 100-day deadline. The Common Pleas Court is right that earlier 100-day deadline in R.C. 4112.05(B)(3)(a) is flexible; it applies only if "practicable," so it can be relaxed. But that is not the source of the time pressure on the Commission to complete an investigation. The Commission did not cite or rely on the 100-day deadline, but relied on—and still relies on—the distinct one-year deadline, which is *inflexible*. As this Court held, the Commission is *bound* to complete any investigation within one year pursuant to the *mandatory* terms of R.C. 4112.05(B)(7). *See Countrywide,* 2003-Ohio-4358 ¶¶ 6-9.

Allowing the subjects of Commission investigations to use actions in common pleas courts to delay those investigations will, at least in some instances—and surely here—prevent the investigation from being completed within the limitations period. Here, the one-year deadline expires in August 2014. It is hard to see how the time before then would allow for a Common Pleas Court decision, an appeal, and potential appeal to this Court in the ordinary course. Thus, appeal is *not* an adequate remedy at law.

D. Though the merits of the underlying complaint are not before this Court, the oath issue raised by GMS is wrong or at most disputed.

Because the sole issue here is the trial court's patent and unambiguous lack of jurisdiction, the merits of GMS's objection about the "oath" requirement, or its other complaints about the Commission's process, are not at issue. Those issues cannot be reviewed outside the administrative process without interfering with that process. For example, GMS argues that the factual allegations here, and in many Commission cases, are not adequate to support even a preliminary investigation. That cannot be assessed without looking at those factual allegations and assessing them—which is the Commission's job.

Though not before the Court in this action, the Commission notes that the "oath" issue does not support GMS, or, at a minimum, it is debatable, and that allows for the Commission to proceed. An oath may be written, rather than spoken, and "[n]o particular form of words is necessary to the taking of an oath." *Walker v. State*, 26 Ohio C.D. 627, 635 (Cir. Ct. 1910); *see also Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279-80 (8th Dist. 1973) ("[W]hether it is always necessary that an oath be administered by someone legally empowered to take oaths we need not now decide."); *Cincinnati Fin. Co. v. First Discount Corp.*, 59 Ohio App. 131, 132-33 (1st Dist. 1938) (oath need not follow a specific form).

While R.C. 4112.05(B)(1) states that a charge shall be under oath, the term "under oath" is not defined in R.C. Chapter 4112. The Commission, as the agency tasked with enforcing R.C. Chapter 4112, defined the term "under oath" in Ohio Adm. Code 4112-3-01(B) to include being affirmed under penalty of perjury for charges alleging housing discrimination. Ohio Adm. Code 4112-3-01(B) was upheld in *Dalicandro v OCRC*, Case No. 99CVF01-176 (C.P. Franklin Co., 2000). On appeal of a Commission final order, the housing providers challenged the charge filed by the complainants on the basis that the charge was not under oath because it was signed under penalty of perjury and not administered by a third party.

Consistent with R.C. 3.20, which states that "(a)n affirmation has the same effect as an oath," the *Dalicandro* court held that the charge was proper. *Dalicandro* (Attachment, pp. 11-12). Similarly, charges filed "under penalty of perjury" are "under oath" for purposes of filing with the EEOC. *See, e.g. White v. Mortgage Dynamics, Inc.*, 528 F. Supp. 2d 576, 581 & n.5 (D. Md., 2007); *Lane*, 69 F. Supp. 2d at 753-54; *Howard v. Board of Education*, 876 F. Supp. 959, 971 (N.D. Ill., 1995); and *Whitfield v. St. Louis Board of Education*, 863 F. Supp. 1008,

1012 (E.D. Miss., 1994), *aff'd without opinion Whitfield v. St. Louis Bd. of Education*, 57 F.3d 1075 (8th Cir., 1995).

In addition, in *Ohio Civil Rights Commission v. Countrywide*, 99 Ohio St. 3d 522 (2003), this Court held that when a charge is filed with the United States Department of Housing and Urban Development (HUD), it is deemed filed with the Commission. *Id.* at 522-524. HUD allows charges to be signed under penalty of perjury and without being notarized. 24 C.F.R. 103.30. Thus, the Commission must accept charges signed under penalty of perjury. Otherwise, the Commission would be in the untenable position of having to investigate a charge during a period when no jurisdiction exists.

The cases GMS cites are not on point. *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App.2d 277, 279 (8th Dist., 1973) is a case decided under R.C. 5739.13, which required letters requesting a hearing to challenge an assessment to be "verified under oath." The court analyzed the interplay of the words "verified" with "under oath" in deciding that the oath must be administered by another person. Because "[v]erification itself requires a formal declaration . . . . Verification under oath bespeaks some further formal act or presence calculated to bring to bear upon the declarant's conscience the full meaning of what he does." *Kosydar*, 33 Ohio App.3d at 280. The court in *Kosydar* further stated that "whether it is always necessary that an oath be administered by someone legally empowered to take oaths we need not now decide." *Id.* at 279-280. Thus, the *Kosydar* case is neither controlling nor instructive.

GMS also cites several cases involving the requirements for an affidavit. R.C. 2319.04, which governs affidavits, states that the oath must be made "before any person authorized to take depositions." This statute sets forth the manner in which an affidavit is made, and does not

define the term "oath." Thus, the cases GMS cites are neither applicable nor analogous to R.C. 4112.

E. The Commission's affidavit need not be stricken.

While the above discussion confirms the need for prohibition, the Commission briefly addresses GMS's attack on the Commission's affidavit. The Commission concedes that it made a clerical error, and it attached GMS's original underlying Complaint rather than GMS's First Amended Complaint (FAC) to the Commission's own Complaint in this Court. But that mistake does not undermine the Commission's filing, for several reasons.

First, GMS helpfully attached the right document to its own Answer, so even if the FAC is needed, it is properly before the Court. Striking the affidavit over the clerical error would merely force the Commission to re-file to provide the document already here.

Second, the differences between the two documents do not change anything about the basis for the Commission's request for prohibition. The original GMS Complaint already triggered a need for prohibition, because of the relief it sought. The FAC changes nothing relevant to that need. In fact, it differs from the original Complaint in only two ways. GMS added paragraph 42, which alleges that GMS "has been the subject of prior similar investigations by the OCRC . . .," and it added footnote 1, which incorporates the exhibits from the original complaint by reference. Thus, either GMS Complaint serves as a valid basis for prohibition, so a clerical error having no bearing on the merits of the case does not warrant striking the affidavit.

Third, GMS also argues that the affidavit does not specify the details of the claim, yet paragraphs 2 through 5 set forth such details. Therefore, this argument is simply wrong.

Finally, GMS argues that "said affidavit fails to affirmatively state that affiant is competent to testify to all matters stated in the affidavit," pursuant to S.Ct. Prac. R. 12.02(B)(1) and (B)(2). GMS seeks to impose a requirement that the affiant *state* that she is competent to

testify, but the rule includes no such requirement. Instead, S.Ct. Prac. R. 12.02(B)(2) states that the affidavit must "*show*[] affirmatively that the affiant is competent to testify to all matters stated in the affidavit." (emphasis added). Paragraph 1 of the affidavit states facts that show that affiant is competent to testify.

F. The need for prohibition remains urgent.

Though the Common Pleas Court has stayed proceedings temporarily, it has set a hearing in the declaratory judgment action for May 2, 2014. The Commission respectfully asks the Court to rule by mid-April so that the parties may resolve the underlying suit with certainty. It also remains urgent that this Court clear up the confusion in the law created by the Common Pleas Court's improper assertion of jurisdiction. Should this attempt to circumvent a Commission investigation go unchecked, other parties are certain to seek to evade other civil rights investigations by filing declaratory judgment actions in common pleas courts when their appropriate judicial recourse is an appeal from any final order of the Commission.

If the Court cannot rule in that time, the Commission, will, of course, ask the Common Pleas Court to stay its hand further until this Court can address these important issues. But looming in the background is also the August deadline, and the Commission must complete its investigation before then. So time remains critical, and the Commission respectfully asks the Court for a ruling as soon as practicable for the Court.

CONCLUSION

For the above reasons, the Commission asks the Court to deny the Motion to Dismiss filed by the Common Pleas Court and, if intervention is allowed, to deny the Motion for Judgment on the Pleadings filed by GMS, and instead grant the requested Writ.

Respectfully submitted,

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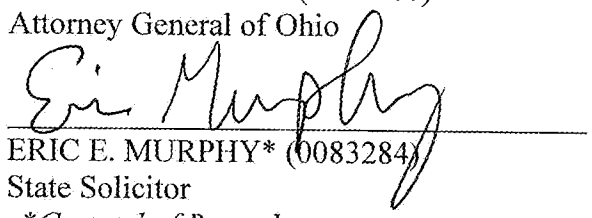

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relators' Combined Response to Respondent's Motion to Dismiss and to Proposed Intervenor's Motion for Judgment on the Pleadings was sent by regular U.S. mail and by e-mail, this 17th day of March, 2014, to the following:

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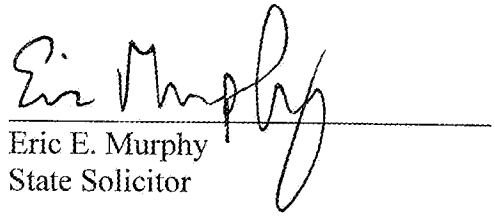

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