

In the
Supreme Court of Ohio

STATE OF OHIO EX REL.)	Supreme Court of Ohio
GLEN P. STEWART, et al.,)	Case No. 2014-1792
)	
Relators,)	Original Action in Mandamus
)	
vs.)	
)	
THE OHIO LOCAL GOVERNMENT)	
INNOVATION COUNCIL, et al.)	
)	
Respondents.)	

**RESPONDENTS' MEMORANDUM IN OPPOSITION
TO RELATORS' MOTION TO STRIKE**

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MEMORANDUM IN OPPOSITION TO RELATORS' MOTION TO STRIKE

Relators' Motion to Strike the Affidavit of Daryl Hennessy Attached to Respondents' Motion to Dismiss or, In the Alternative, to Stay Proceedings in the Case (the "Motion") should be denied for two reasons. First, the Motion is an ill-disguised attempt to respond out of time to Respondent's Motion to Dismiss or, in the Alternative, to Stay Proceedings in This Case (the "Combined Motion"). Second, Relators misunderstand the purpose that Mr. Hennessy's affidavit serves in the context of the Combined Motion.

As a threshold matter, the Court should not entertain the Motion because it is an untimely attempt to oppose the Combined Motion. The fact that the Motion is directed at the Combined Motion cannot be disputed—the Motion's title explicitly says so. Supreme Court Practice Rule 12.04(B)(2) states that a "relator may file a memorandum in response to a motion to dismiss ... within ten days of the filing of the motion." (Emphasis added.) The Combined Motion was filed on December 17, 2014. As Relators neither requested nor received an extension of time, any memorandum in opposition to the Combined Motion was required to be filed on December 29, 2014. Having failed to file a memorandum in response on a timely basis, Relators should not be permitted to attempt to undercut the Combined Motion out-of-rule.

As to the merits of the Motion, Relators misunderstand the purpose for which Mr. Hennessy's affidavit was submitted. Relators have again jumped the gun and are trying to argue the merits of issues that are not yet before the Court.

First, Mr. Hennessy's affidavit authenticates three documents—a letter from Mr. Hennessy to the regional council of governments dated November 17, 2014 and two emails from Jonathan Stock to Relators' own trial counsel in this case. Mr. Hennessy certainly is in a position to authenticate his own letter. Similarly, while Mr. Hennessy did not author the two

emails in question, they were sent by the Chief Counsel for the Ohio Development Services Agency (“Development”) to Relators’ own trial counsel, Adam Miller, and Mr. Miller does not allege (through either his own affidavit or the Motion itself) that Exhibits B and C to Mr. Hennessy’s affidavit are not accurate copies of the email he received.¹

Second, while Respondents reserve all rights regarding any arguments they might wish to make on the merits, Mr. Hennessy’s affidavit is being used to establish the following facts: (1) the Local Government Innovation Council (“LGIC”) is planning to reconsider the grant application that is the subject of this litigation; (2) the reason for this is because, *in Development’s official view*, the LGIC’s initial approval of the grant application was based on misinformation; and (3) Development initially intended for the LGIC to reconsider the grant application at a meeting on December 4, 2014, but due to scheduling issues the LGIC is expected to reconsider the application on February 26, 2015.

The Motion is devoted almost exclusively to arguing why or how various statements in the November 17 letter are either factually inaccurate or based on hearsay evidence. That is entirely beside the point—as those facts are not at issue for purposes of the Combined Motion. Mr. Hennessy’s affidavit is being used to establish Development’s and LGIC’s current, official positions *vis a vis* the grant application (*i.e.*, the approval is not final and the LGIC is expected to reconsider the application) and when it is anticipated that this will occur (previously, December 4, 2014 and now February 26, 2015). Those facts are important because the Combined Motion requests that this Court either dismiss Relators’ Complaint on mootness grounds or stay further proceedings until after February 26, 2015.

¹ To the extent there is an actual dispute regarding these emails, Mr. Stock is willing, if necessary, to execute an affidavit attesting to their authenticity.

Mr. Hennessy is the Chief of the Business Services Division for Development—or the head of the division that oversees the Local Government Innovation Program on behalf of Development. *See* Affidavit, ¶ 2. Thus, any suggestion that Mr. Hennessy lacked the authority to communicate Respondents’ position in the November 17 letter, that the LGIC does not really intend to reconsider the grant application, that the anticipated date of review is something other than February 26, 2015, or that Mr. Hennessy lacks personal knowledge of these facts are without merit and inaccurate.

By contrast, Mr. Hennessy’s affidavit is *not* being used to establish the truth of the matter asserted in the November 17 letter—*i.e.*, the facts underlying Development’s and the LGIC’s decision to reconsider the grant application. As noted in the Combined Motion, while Relators may *disagree* with the LGIC reconsidering the grant application, there is no dispute that the LGIC’s prior approval is not final and that the application likely will be reconsidered at the next LGIC meeting (depending, of course, on the outcome of the negotiations between Relators and Wayne and Ashland Counties). Relators are trying to confuse the issue before the Court.

If and when this case proceeds to merit briefing, Relators will have every opportunity to present their arguments on the merits. Respondents will have that opportunity as well, and the Court should be assured that Respondents will rely on much more than the November 17 letter. Again, Mr. Hennessy’s affidavit is being used solely to support Respondents’ fairly modest position that this case either should be re-filed in, or temporarily stayed for, approximately six weeks so that the uncertainties underlying the council of governments and the grant application have a chance to work themselves out.

For all the foregoing reasons, the Court should deny the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via email, this 16th day of
January, 2015, upon the following:

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