IN THE SUPREME COURT OF OHIO

Omni Energy Group, LLC,	:	
	:	
Relator,	:	
	:	
v.	:	**Case No: 2023-0783**
	:	
Eric Vendel	:	
Chief, Ohio Department of Natural Resources, Division of Oil & Gas Resources Management,	:	
	:	
Respondents.		

RESPONDENT, CHIEF ERIC VENDEL'S MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS

Now Comes Respondent Chief Eric Vendel, by and through counsel, and respectfully moves this Court to dismiss the petition for writ of mandamus of Relator Omni Energy Resources, LLC.

The reasons for this Motion are set forth in the following memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Relator Omni Energy Resources, LLC ("Omni") seeks to use a writ of mandamus in this Court as a substitute for appeal.

To this end, Omni has filed a writ of mandamus demanding that this Court modify or strike down a 2021 order from the Chief of the Ohio Department of Natural Resources Oil and Gas Division ("Chief's Order 2021-180") setting the maximum safe injection pressure of one of Omni's injection wells in Belmont County, Ohio. Omni argues that the Chief did not properly defer to its expert report and, therefore, this Court must modify the Chief's Order to allow its well to operate at a greater (and more profitable) injection pressure than the Chief and the Division have determined to be safe.

The Court should dismiss Omni's petition because an adequate remedy was available, and Omni previously had an opportunity to be heard for relief. In fact, the Supreme Court is the *fourth* tribunal where Omni has challenged Chief's Order 2021-80 on these same grounds. Omni filed a timely and proper appeal before the Ohio Oil and Gas Commission, which it voluntarily dismissed before the hearing took place. Omni then filed an appeal in the Franklin County Court of Common Pleas, which was dismissed as untimely. Omni also filed a declaratory judgment action in the Franklin County Court of Common Pleas, which was adjudicated in favor of the Chief and Omni has appealed to the Tenth District.

Omni, after dismissing one appeal of Chief's Order 2021-80 and failing to timely bring another, now attempts to use an extraordinary writ before the Supreme Court to get another opportunity to appeal the Chief's Order. Omni likewise seeks to use this Petition to collaterally

attack the judgment of the Franklin Court of Common Pleas denying its request for declaratory judgment.

Accordingly, the Chief respectfully requests that this Court dismiss Omni's writ of mandamus in its entirety.

II. RELEVANT FACTUAL ALLEGATIONS

On December 16, 2020, Respondent Eric Vendel, Chief of the Ohio Department of Natural Resources Division of Oil and Gas Resources Management, (the "Chief") issued Omni permits to drill two Class II Saltwater Injection Wells, GMR #1 and GMR #2, in Belmont County, Ohio. The Chief proceeded to issue Omni permits to inject brine, in accordance with Orders 2021-179 (GMR #1) and 2021-180 (GMR #2), on November 5, 2021. (Petition, at Exs. I, J.)

The Chief's Orders set the Maximum Allowable Injection Pressure ("MAIP") for each well by using a formula set forth in the Ohio Administrative Code and by relying on site-specific test results provided by Omni in July of 2021. (*Id.*) The purpose of the MAIP, and the Ohio Underground Injection Control ("UIC") program and permitting process in general, is to ensure the injected brine remains contained within the intended injection zone. If the brine does not remain sequestered and instead migrates, there is a danger that the brine could contaminate drinking water.

Omni, however, wanted to inject at a greater pressure than the Chief permitted. (Petition at ¶ 102.) Therefore, on November 17, 2021, Omni appealed Chief's Order 2021-179 (GMR #1) and 2021-180 (GMR #2) to the Ohio Oil and Gas Commission contesting the MAIP for both injection wells. (*Id.* at ¶ 108.)

In the course of this litigation, the Chief retained an outside petroleum engineer to review Omni's step-rate testing analysis, which is site-specific testing that may be considered when the determining the MAIP. (*Id.* at ¶ 15.) The Chief's consultant found that the testing and analysis

that Omni had submitted in support of its injection permits was flawed. (Petition, at Ex. M.) Most concerning, the consultant found that it was likely that the GMR #1 was creating unnatural fractures in the rocks that make up its injection zone, which could allow brine migration. (*Id*.) The consultant also found that GMR#2s's formula-derived MAIP was at a safe level, and opined that it could potentially be increased from 1,315 psi to 2,558 psi without causing fractures and brine migration. (*Id.*)

In response, on May 20, 2022, the Chief revoked Order 2021-179 (GMR #1) and reissued an injection permit for GMR #1, lowering the MAIP to a safe level. (Petition, at ¶¶ 110,-112, Exs. K, L.) The Chief did not revoke or modify Order 2021-180 (GNR #2) because the formula-derived MAIP was evidenced to be at a safe level. The Chief did not raise the MAIP for GMR #2 because, relying on his and the Division's experience and expertise with Ohio wells, he found that the formula-derived MAIP was the maximum safe pressure for the specific type of Ohio geology that makes up the GMR#2's injection zone (a part of the unpredictable Ohio Shale). (*Id.* at ¶ 113, Ex. J.)

After conducting depositions and shortly before the evidentiary hearing was scheduled, Omni voluntarily dismissed its Oil and Gas Commission appeal. (*Id.* at ¶¶ 25, 26.) This dismissal came after the Division sought to continue the merits hearing before the Oil and Gas Commission because Omni had not complied with the Division's discovery requests.

Omni filed an appeal in the Franklin County Court of Common Pleas as to Order 2021-180 (GMR #2) and the new injection permit for GMR #1. (*Id.* at ¶ 25.)

The trial court divided Omni's appeal of the into two tracks: (1) an administrative appeal of the Chief's order regarding GMR#1, and (2) a declaratory judgment action challenging the Chief's overall exercise of authority and interpretation of the UIC regulations. Omni admits the

declaratory judgment action raised the exact same legal and factual arguments that Omni brings here. (*Id.* at ¶ 128.) The trial court ruled in favor of the Chief on both actions. (Petition, at prayer for relief 5.) Omni has appealed those judgments to the Tenth District Court of Appeals. (*Id.* at ¶ 25.)

With respect to Omni's direct appeal of Chief's Order 2021-180 (GMR#2), however, the trial court ruled that Omni's appeal was untimely. Omni failed to file its notice of appeal for Order 2021-180 (GMR#2) within fifteen days of the Chief's Order as required to invoke the Court's jurisdiction under R.C. 119.12. Omni was six months too late. The Court of Common Pleas accordingly held that Omni was out of time to appeal Order 2021-180. Omni did not appeal this ruling.

Omni now brings a writ of mandamus asking this Court to compel the Chief to modify Order 2021-180 and allow a higher MAIP. Omni also requests that this Court enjoin the recently-affirmed injection permit for GMR#1 and consolidate this mandamus action with the appeal currently pending before the Tenth District because "the facts and law are identical in both matters." (*Id.* at ¶ 128.)

III. STANDARD OF REVIEW

A writ of mandamus cannot be issued when there is an adequate legal remedy. R.C. 2371.05. To be entitled to a writ of mandamus, a relator needs to show that: (1) they have a clear legal right to the requested relief; (2) the respondent has a clear legal duty to provide the requested relief; and that (3) there is a lack of an adequate remedy in the ordinary course of law. *State ex re. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, ¶ 8, citing *State ex. rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983).

If the judgment for the writ of mandamus is in favor of the respondent, then all costs shall be declared against the relator. R.C. 2731.12.

IV. OMNI IS NOT ENTITLED TO A WRIT OF MANDAMUS

An adequate remedy was available to Omni through appeal. In fact, Omni filed two appeals of Chief's Order 2021-80 – but it voluntarily dismissed one and failed to timely bring the other. Omni cannot have another attempt to appeal through a writ of mandamus.

In addition, Omni cannot use a writ of mandamus to collaterally attack the judgment of the Franklin County Court of Common Pleas rejecting Omni's request for declaratory judgment. The court has issued a final ruling on the "identical" facts and law at issue here, and that judgment may only be challenged through a proper appeal.

Finally, the Chief does not have a clear legal duty to adopt the findings or recommendations of litigation consultants, whether hired by the Chief or the operator, in determining and permitting the safe injection pressure of a well. The Chief, not outside consultants, is vested with sole regulatory authority under Ohio law.

A. <u>An appeal is an adequate remedy in the ordinary course of law, and the failure to successfully appeal by Omni does not render the remedy inadequate.</u>

A party is only entitled to a writ of mandamus when there is a lack of an adequate remedy in the ordinary course of law. "The availability of an appeal is an adequate remedy sufficient to preclude a writ." *State ex rel. Luoma v. Russo*, 141 Ohio St.3d 53, 2014-Ohio-4532, ¶ 8, citing *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967), paragraph three of the syllabus. A writ of mandamus is often called extraordinary to speak to its nature of only being a tool in the absence of an adequate legal remedy. *Simmers*, 153 Ohio St.3d at ¶ 5. To sum it up, "whatever can be done without the employment of that extraordinary remedy, may not be done with it." *Id.*, citing *Ex parte Rowland*, 104 U.S. 604, 617, 26 L.Ed. 861 (1881).

If a party fails to timely appeal, that does not make the remedy inadequate. *Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, at ¶ 9. Otherwise, a writ of mandamus could be brought whenever another adequate remedy expired. *Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, at ¶ 5. "Would-be appellants could thwart the appellate process simply by ignoring it." *State ex rel. Cartmell v. Dorrian*, 11 Ohio St.3d 177, 178 (1984).

First, Omni possessed the adequate legal remedy of an appeal to the Oil and Gas Commission. Under R.C. 1509.36, a party can appeal a Chief's Order to the Oil and Gas Commission for a full evidentiary hearing before the Commission. If the appellant believes emergency or preliminary injunctive relief is necessary to prevent undue hardship, it "may apply to the commission to suspend or stay the execution of an order appealed from." O.A.C. 1509-1-12. After the evidentiary hearing, "[i]f the commission finds that the order appealed from was unreasonable or unlawful, it shall make a written decision vacating the order appealed from, and making the order that it finds the chief should have made or remanding the matter to the chief for further proceedings." O.A.C. 1509-1-23. Then, if the party is not satisfied with the ruling of the Oil and Gas Commission, it may appeal the Oil and Gas Commission's Order to the Court of Common Pleas under R.C. 1509.37 ("Any party adversely affected by an order of the oil and gas commission may appeal to the court of common pleas of Franklin county.")

Omni, in fact, filed an appeal of Chief's Order 2021-80 to the Oil and Gas Commission under R.C. 1509.36. Omni took multiple depositions of Division personnel and witnesses but, rather than proceed to the evidentiary hearing before the Oil and Gas Commission, Omni abruptly voluntarily dismissed its appeal in its entirety. (Petition, at ¶¶ 27, 117.) Omni explains that it did so only because it was dissatisfied with the hearing dates proposed by the Commission and with its chances of success before the then-sitting "complement of commissioners." (*Id.* at ¶ 27.)

Second, Omni had the opportunity to bring an appeal contesting Chief's Order 2021-180 to the Court of Common Pleas, as well as the opportunity to bring a declaratory judgment action challenging the Chief's interpretation of Ohio's regulations and his authority to determine the MAIP. This is evidenced by the fact that Omni *did* bring an appeal of the Chief's orders regarding GMR#1 and *did* bring a declaratory judgment action regarding the extent of the Chief's discretion in the Court of Common Pleas, both of which were fully adjudicated by the court. Omni admits that the "facts and law" in those actions "are identical" to the claims brought in Omni's current Petition. (Petition, at ¶ 128.) Accordingly, Omni's legal arguments have all been heard, considered, and rejected by the Court of Common Pleas. (*Id.*) However, Omni's appeal of Chief's Order 2021-180 (GMR#2) itself was untimely brought and was dismissed. (*Id.* at ¶ 25.) Omni, and Omni alone, missed the appellate deadline by six months.

Accordingly, Omni had an adequate remedy at law available. In fact, Omni had – and exercised – at least two. Omni simply chose to abandon its appeal of Chief's Order 2021-180 to the Oil and Gas Commission and failed to timely bring an appeal to the Court of Common Pleas.

B. Omni cannot use a writ of mandamus to collaterally attach the judgments of the Franklin County Court of Common Pleas.

There is another reason Omni's Petition must be dismissed. Once a party has a full and fair opportunity to be heard, they are not allowed to collaterally attack an adverse judgment through a writ of mandamus. Under res judicata, a "failure to pursue an appeal in the underlying case" prevents such indirect attack. *Dorrian*, 11 Ohio St.3d at 178, citing *State ex rel. Witsamen v. Maumee Valley Guidance Center, Inc.*, 6 Ohio St.3d 26, 450 N.E.2d 1180 (1983). Parties cannot avail themselves of another chance to be heard through a writ of mandamus. *State ex. rel. Schneider v. Bd. of Edn. Of N. Olmsted City School Dist.*, 65 Ohio St.3d 348, 350 (1992).

Here, as set forth above, Omni possessed an adequate remedy through a right of appeal. With respect to its direct appeal of Chief's Order 2021-180, Omni did not take advantage of this adequate remedy and is attempting to use a writ of mandamus to avail itself of another attempt at gaining relief.

But, with respect to Omni's legal challenges to the Chief's discretion to set the MAIP under the Ohio regulations that underly the Petition, Omni has already received an adverse judgment from the Court of Common Pleas and is currently appealing that ruling. As Omni admits, the facts and law at issue in that appeal is "identical" to those at issue in this Petition. (Petition at ¶ 128.) Omni goes so far as to ask this Court to enjoin the Chief's permit with respect to GMR#1 (a well that is not at issue in the Petition) despite the affirmance of the court of common pleas, and to divest the Tenth District of its jurisdiction to review the pending appeal. In short, Omni asks the Court to consolidate this mandamus action with its ordinary appeal in the Tenth District because, in both, Omni is making the same arguments and bringing the same challenges. (*Id.* at prayer for relief 5.)

Accordingly, despite currently having an active appeal in the Tenth District on the very same issues, Omni seeks to use a Writ of Mandamus as a separate collateral attack on the judgment of the Court of Common Pleas. Permitting a writ of mandamus to undermine judgments would allow "endless relitigation" when the party previously received a final ruling. *State ex rel. Peoples v. Johnson*, 152 Ohio St.3d 418, 2017-Ohio-9140. This bedrock principle prevents parties from reopening questions when they have already had their day in court – or, as here, *are still having their day in court*.

Omni has already litigated the issue of whether the Chief was required to adopt the findings of an outside consultant and the results of Omni's step-rate testing (which was later shown to be

flawed). (Petition at ¶ 83.) The Court of Common Pleas flatly rejected that argument in a final judgment. (*Id.* at ¶ 125.) Omni cannot use a writ of mandamus to collaterally attack the judgment of the Court of Common Pleas.

C. The Chief does not have a clear legal duty to provide the relief requested by Omni.

The Chief does not have a clear legal duty to grant the relief Omni seeks. The Chief is not required to grant Omni any particular MAIP for the GMR #2 well under the Ohio Revised Code and the Ohio Administrative Code. Instead, the Chief is required to use his sole regulatory authority to set the MAIP and all other permitting conditions "to ensure that underground sources of drinking water will not be endangered." R.C. 1509.22(D)(5).

The Chief has the sole and exclusive authority to permit Class II injection wells. *See* R.C. 1509.02. Under the former version of O.A.C. 1501:0-3-07(D), the Chief is explicitly permitted to set the MAIP by either the formula or "[s]uch other formula or test found to be accurate as applied to the facts presented in an application and approved by the division." If the Chief has reason to suspect the MAIP calculated based on the formula may be too high for a particular well to operate safely, the Chief can order additional tests, lower the MAIP, or close down the well entirely. Because this is a foundational requirement of the UIC program, Ohio Revised Code and the Ohio Administrative Code set forth this authority in multiple places. *See, e.g.,* R.C. 1509.03(D); R.C. 1509.03(D); R.C. 1509.22(A); R.C. 1509.06(F); O.A.C. 1501:9-3-05(D); O.A.C. 1501:9-3-05(C)(3).

Omni admits that the Chief correctly applied the specified formula in the former O.A.C. 1501:0-3-07(D) in setting the MAP for the GMR#2 well. (Petition, at ¶¶ 77, 103.) In Omni's unsuccessful declaratory judgment action in the Court of Common Pleas, the court determined that the Chief properly and lawfully applied this formula and the Ohio regulations. (*Id.* at ¶¶ 77, 128.)

This alone establishes that Omni does not have a clear right to the relief requested and the Chief does not have a clear legal duty to exercise his discretion as demanded by Omni. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, ¶ (rejecting mandamus claim where the duty sought to be compelled did not exist in statute or any administrative rule because "[i]t is axiomatic that in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the *legislative branch of government. . . .*") (original emphasis.). The Chief followed the letter of the regulations, and Court of Common Pleas has already rejected Omni's same arguments that he somehow acted unlawfully in doing so. (*Id.*)

Further, the Petition itself reveals that the Chief did not simply apply the formula without context. The Chief reviewed all relevant information, requested additional data, had an inspector visit the well location, pulled on the experience and expertise of the Division of Oil and Gas Resources Management, and then used his discretion in setting the MAIP of GMR#2. (*Id.* at ¶¶ 88, 92, 96-101.) Omni acknowledges as much, but contends the Chief is unqualified for his position and has a "lack of technical understanding" that renders his discretion meaningless. (*Id.* at ¶¶ 44-45.)

Regardless of Omni's belief that its paid consultant is more knowledgeable than the Chief and all Division personnel, nothing in the Ohio Revised Code, the Ohio Administrative Code, or the Safe Drinking Water Act requires the Chief to adopt the findings of consultants, whether they are hired by operators or by the Ohio Department of Natural Resources itself, regarding the safe injection pressure of a well. To the contrary, that discretion is vested wholly and exclusively in the Chief. *See* R.C. 1509.02. Granting outside consultants the final authority to set higher injection pressures would usurp the Chief's sole authority and upend the entire regulatory framework set

forth in the Ohio Revised Code and Ohio Administrative Code. It is common sense that only the *regulator* can and should *regulate.*

Omni's writ of mandamus should be dismissed as the Chief does not have a clear legal duty to grant the requested relief of increasing GMR#2's MAIP to a level that he believes would be unsafe and threaten Ohio's drinking water.

V. CONCLUSION

For the reasons set forth above, the Court should dismiss Omni's writ of mandamus. Further, all costs must be declared against Omni. R.C. 2731.12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2023, the foregoing document was filed with the Court's electronic docketing system which automatically sends notice to all registered parties.

s/ Kara Herrnstein
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