COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

LISA MCQUEEN, et al.,	:	**Case No. A-13-1595**
Plaintiffs,	:	**Judge Robert Winkler**
and	:	
CITY OF CINCINNATI ex rel. LISA McQUEEN, et al.,	:	**MEMORANDUM OF PLAINTIFFS-RELATORS IN OPPOSITION TO DEFENDANTS' MOTION FOR AUTOMATIC STAY**
Relators,	:	
v.	:	
MILTON R. DOHONEY , JR., et al.,	:	
Defendants.	:	

Plaintiffs-Relators, by and through undersigned counsel, hereby tender the following memorandum in opposition to Defendants' Motion for Automatic Stay (filed on April 9, 2013).

It should be noted that the City Solicitor reportedly indicated to The Cincinnati Enquirer that the present motion does not seek to affect the Court's ruling as it relates to the parking lease or the referendum effort but, rather, arises from concern over the potential for severe weather. As reported by the Enquirer (and available on-line at http://news.cincinnati.com/apps/pbcs.dll/article?AID=/AB/20130409/NEWS0108/304090117/):

> Cincinnati Solicitor John Curp, though, said the request has nothing to do with the city's battle to sign a lease on its parking meters and lots that will avert planned layoffs of hundreds of police and firefighters.
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> "I'm concerned about the city's ability to respond to emergencies," Curp said Tuesday, shortly after attorneys asked Hamilton County Common Pleas Court Judge Robert Winkler for a stay on his ruling last month.
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> . . .
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> City lawyers asked the judge Tuesday to stay the earlier decision, specifically the parts about the emergency order, Curp said.
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> "It's tornado season," Curp said. "It's become apparent to us the city is severely handicapped by not being able to act on an emergency basis."

> The Tuesday filing wasn't necessarily connected to the parking lease, Curp said, because "I don't think ... the deal is in the final form to be signed."

Thus, at the outset, the City needs to clarify the scope of the relief it is seeking through the present motion – whether it simply wants the ability to react to a tornado versus whether it wants universal and omnibus relief from the Court's ruling in its entirety. For if it's the former, the injunction which this Court granted does not even impact the ability of the City to respond to tornados or other natural disasters; if it's the latter, then the City should not be telling the public something different. Yet, even if, contrary to its public pronouncements, the design of the City is to obtain universal and omnibus relief from the Court's injunction in its entirety, because this case does not involve an award of money damages, i.e., a monetary judgment, the City is not entitled to the issuance of a stay without the posting of a supersedeas bond.

In State ex rel. State Fire Marshal v. Curl, 87 Ohio St.3d 568, 722 N.E.2d 73, 2000-Ohio-248 (1999), the Ohio Supreme Court broadly stated that a "governmental entity appealing [a] civil judgment was entitled to a stay pending appeal as a matter of right without posting a supersedeas bond." Id. at 572. The Supreme Court explained that its legal basis and rationale for this conclusion "is supported by precedent, the views of state and federal experts in the field, as well as federal courts construing similarly worded rules of civil procedure." Id.; see id. at 571 ("[o]ur interpretation of Civ.R. 62(B) and (C) in Ocasek comports with the interpretation of the similarly worded Fed.R.Civ.P. 62(d) and (e) by the leading treatises and a majority of federal courts"). Yet, when consideration is given to such precedent and the supporting basis for that proposition, it becomes readily evident that the Defendants herein are attempting to grossly expand the scope of such a legal proposition to any and every matter involving the government, ignoring the critical distinction of whether what is being appealed involves a monetary judgment.

For the well-established precedent upon which the Ohio Supreme Court relied for its conclusion in State Fire Marshal involved circumstances when a money judgment had been entered against the government and an appeal was being taken therefrom. For example, the Court cited to a preeminent treatise, Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE (2d ed. 1995), to support its conclusion. Yet a review of that very treatise confirms that the stay without a bond applied when monetary judgments are being appealed:

> Under Rule 62(e) no bond, obligation, or security is required to stay the operation or enforcement of a judgment pending an appeal taken by the United States, or an officer or an agency of the government, or by direction of any department of the government. The existence of a general appropriations fund in the Treasury to pay judgments and an expedient and convenient means of collection makes the posting of a bond unnecessary.

11 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE (4th ed. 2008), § 2906.

And numerous other federal courts have acknowledged that an automatic stay arises in the context of a monetary judgment – and, if the government is the appellant, then no bond need be posted before the automatic stay becomes effective. See, e.g., Kaseman v. District of Columbia, 368 F.Supp.2d 27, 28 (D.D.C. 2005)(court's decision "constitutes a money judgment, and defendants' appeal thereof automatically stays enforcement of the underlying Court Order requiring payment of $90,926.83"); United States v. United States Fishing Vessel Maylin, 130 F.R.D. 684, 686 (S.D. Fla. 1990) ("[a] stay appears automatic under Rule 62 where the controverted subject of the judgment is money"); Donovan v. Fall River Foundry Co., 696 F.2d 524, 526 (7th Cir. 1982)("[t]he reference in Rule 62(d) to supersedeas bond suggests that had the framers thought about the point they would have limited the right to an automatic stay to cases where the judgment being appealed from was a 'money judgment'"); Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th Cir.1992)(the application of the automatic stay applicable under Fed.R.Civ.P. 62, depends on "whether the judgment involved is monetary or nonmonetary"). Yet, this

distinction was not called to the attention of the Ohio Supreme Court in State Fire Marshal and, thus, it is left for this Court to acknowledge the distinction in the first instance.

Furthermore, the City inappropriately attempts to elevate the procedural ruling of the First District in Concerned Wyoming Citizens v. City of Wyoming into being binding precedent. But precedential authority is based upon Rule 3.4 of the Supreme Court Rules for the Reporting of Opinions which declares that "[a]ll opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published." However, Concerned Wyoming Citizens does not constitute an "opinion" and, thus, has no precedential value (and should not have even been cited to by the City as though it did). Firstly, the ruling in Concerned Wyoming Citizens itself specifically declares that it "shall not be considered an Opinion of the Court pursuant to S.Ct.R.Rep.Op. 3(A)." Thus, in so explicitly stating, the First District acknowledged that its ruling was not to be considered precedential. And this was consistent with that provision of current Rule 3.1 (previously Rule 3(A)) of the Supreme Court Rules for the Reporting of Opinions which declares that the term "'opinion' shall not include orders on procedural matters." Thus, Concerned Wyoming Citizens does not dictate or compel any result. And the lack of precedential value is appropriate in light of the ruling simply being a procedural matter without full briefing and argument being had on the issue.

The bottom line is that the issue presently before the Court has not been directly addressed and resolved by any court in Ohio, i.e., whether the government against whom an injunction has issued (but for which there is no monetary judgment) is entitled to an automatic stay while the government appeals. Federal courts and treatises have repeatedly recognized that the government's entitlement to an automatic stay without the posting of a supersedeas bond is

applicable only when the judgment being appealed involved a monetary award or assessment. Accordingly, as the present judgment does not involve a monetary award, the City is not entitled to an automatic stay and the motion must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served via e-mail / regular mail on the 19th day of April 2013, upon:

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/s/ Curt C. Hartman