

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

MISSOURI ALLIANCE FOR FREEDOM, INC.,)	
)	
)	
Plaintiff,)	
)	Case No. 17AC-CC00365
v.)	
)	
STATE AUDITOR NICOLE GALLOWAY,)	
)	
Defendant.)	

**DEFENDANT'S SUGGESTIONS IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Earlier in 2017, the State Auditor's Office (SAO) released an audit of the State Treasurer's Office (STO), and is currently auditing the Missouri Department of Revenue (MDOR). On May 2, 8, and 26, 2017, the Missouri Alliance for Freedom (Plaintiff) sent letters to the SAO asking for all documents related to both of these audits, as well as a complete compendium of communications maintained by the office in all forms and on all subjects to and from the Auditor since taking office, including the communications office attorneys.

The only record Plaintiff identified with reasonable specificity was a particular subpoena, and it was produced within three business days. Plaintiff also requested all audit-related documents, confidential by long-standing and well-established law, and with no further specification than that, this request was denied, also within the three-day period and with specific citation to law.

Beyond those requests, Plaintiff sought office communications in the most general and broad forms, specifying no particular public record or records, but leaving Defendant to conduct a demanding and arduous search.

The first notice to the SAO of any dissatisfaction in this process was in Plaintiff's Petition. Along with the Petition, Plaintiff served discovery requests, and then two additional waves of discovery in the few weeks following its filing. Because those discovery requests sought all documents withheld from production, together with an extensive log describing each such document, Defendant sought a protective order on the grounds that the case that was not ripe for resolution.¹

As of the filing of the present motion, MAF's Sunshine requests are still pending. Even though records production has been proceeding on the schedule established in the early stages of the processing of the requests, the matter is still not ripe for resolution. The difference, a significant one, is that now MAF has offered the very first communication to Defendant about their three requests from May 2017: By letter dated November 14, 2017--just a few weeks before the projected completion date of their prior requests that are the subject of the underlying case, Plaintiff asked Defendants to stop or at least temporarily suspend all work on their requests.

1. Plaintiff's claim for relief does not present a controversy that is ripe for review.

A controversy does not become justiciable until it is "ripe" for judicial review. *Foster v. State*, 352 S.W.3d 357, 360 (Mo. banc 2011). In that case, the plaintiff's claim was dismissed for lack of ripeness when the court found that the conflict was not fully developed. *Id.* at 361. In

¹ Defendant's Motion for Protective order was filed August 25, 2017.

the case at bar, Plaintiff has rapidly pursued a court case long before Plaintiff received documents that Plaintiff knew were being produced.² Although Plaintiff alleges that some documents were withheld from production, such a claim is premature when (1) Plaintiff has not yet received all the documents requested and cannot certify that the records Plaintiff seeks have indeed been denied; (2) Plaintiff's request included documents that would be withheld in any event (attorney-client documents, audit files without limitation), and without identification of specific documents withheld, the matter is academic; and (3) Plaintiff halted the process of their own volition.

Ripeness exists "when the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a presently existing conflict, and to grant specific relief of a conclusive nature." *Id.* at 360. All three elements of the lack of ripeness are demonstrated in this case: (1) As an ongoing effort which Plaintiff has now requested at least a temporary cessation, the case is not ready for the court to make an accurate determination of the facts. (2) In the face of complaints that all records have not been delivered to Plaintiff, Plaintiff's ordering of cessation makes it impossible to conclude that production of documents is finished, and to determine that there is a conflict for the Court to resolve. (3) As an unfinished matter, and one which Plaintiff has explicitly left open for further acts, requests, or actions, the Court would be unable to grant specific relief of a conclusive character.

² As shown in the Undisputed Facts, and in Exhibits 2-4, 6, 8-9, and 16-19, Plaintiff was provided with no less than 10 pieces of correspondence on their requests, many of which included significant production of documents electronically.

In addition to the ongoing nature of the production, even leaving aside Plaintiff's demand that Defendant stop working on it, the lack of identified documents in Plaintiff's May 2017 requests and in the Petition renders the cause of action largely hypothetical: The court cannot simply order the SAO to turn over all documents since, plainly, a vast amount of the records at issue are protected by law--closed, not merely "closeable" records (e.g., audit files (§§29.070, 29.221), communications between auditor and auditee (§610.021(17)), individual tax refund records collected from the MDOR (§32.057)). A court order to turn over all records "not protected by law" simply begs the question and resolves nothing.

2. Plaintiff's actions subsequent to the filing of the Petition render the case non-justiciable.

At the time of the hearing on the Motion for Protective Order (September 29, 2017), 14,000 pages of documents were delivered out of a total of 26,000 reviewed, and with an additional 28,000 yet to be reviewed. At the end of this process, a point we now may never reach, Plaintiff will need to plead facts that put before the Court a controversy to decide. Any decision by this Court at this point would merely be an advisory opinion on some future set of circumstances. *Reeves v. Kander*, 462 S.W.3d 853, 857 (Mo. App. W.D. 2015). If a claim is based upon argument and speculation, it is not ripe for review. *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. Banc 1983). "Ripeness does not exist when the question rests solely on a probability than an event will occur. *Id.*, citing *Carriers Ass'n v. McMillian*, 406 U.S. 498, 506 (1972). Until November 14, 2017, the "probability" was that Plaintiff would find a document that should have been provided but was not. After Plaintiff's November 14, 2017 letter, it remains to be seen whether such a determination could ever be pled because whether there is

a conclusion to the facts in the case and when that time might be is entirely in the hands of Plaintiff.

3. Plaintiff's claims should be dismissed without prejudice.

The remedy for premature filing of a claim is not a judgment on the merits (e.g., summary judgment), but instead to dismiss the claim without prejudice. "[F]iling a suit prematurely should not prevent a plaintiff from proceeding with an action when it becomes ripe." *Wedgewood Square Center v. Lincoln Land Title Co.*, 217 S.W.3d 308, 312 (Mo. App. E.D. 2007), (quoting *Barket v. City of St. Louis*, 903 S.W.2d 269, 272 (Mo. App. E.D. 1995)).

Barket offers additional guidance relevant to the case at bar in case Plaintiff argues that they should be permitted some period of discovery on this motion: In that case, a trial court was reversed for granting summary judgment on a prematurely filed claim, but to the plaintiff's complaint that he should have been permitted to complete discovery prior to the dismissal was rejected. The appeals court found that issue moot based upon the premature filing, and sent the case back to the trial court to be dismissed without prejudice--not to proceed with discovery or any other aspect of the pending case. *Id.*

From the foregoing, Plaintiff's claims should be dismissed without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and related attachments were delivered via the Court's electronic filing system on November 29, 2017, to:

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