

**STATE OF MINNESOTA
IN SUPREME COURT**

CASE NO. _____

In re Government Shutdown Litigation

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

In re Temporary Funding of Core)
Functions of the Executive Branch)
Of the State of Minnesota)

Case Type: Civil
Chief Judge Kathleen R. Gearin
Court File No. 62-cv-11-5203

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

Canterbury Park Holding Corporation, a)
Minnesota company, and Minnesota)
Horsemen's Benevolent & Protective)
Association, Inc., a Minnesota company)

Case Type: Civil
Judge Diane M. Hanson
Court File No. 70-cv-11-13433

Plaintiffs,)

v.)

State of Minnesota and Jim Schowalter,)
Commissioner of Minnesota Management)
& Budget,)

Defendants.)

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Minnesota Zoological Gardens,)
)
 Plaintiff,)
)
 v.)
)
 Office of Minnesota Management &)
 Budget,)
)
 Defendants.)

Case Type: Civil
 Judge Jerome B. Abrams
 Court File No. 19HA-cv-11-3622

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ANOKA

TENTH JUDICIAL DISTRICT

Minnesota Harness Racing, Inc., and)
 North Metro Harness Initiatives, LLC,)
 d/b/a Running Aces Harness Park,)
)
 Plaintiffs,)
)
 v.)
)
 State of Minnesota and Jim Schowalter,)
 Commissioner of Minnesota Management)
 & Budget,)
)
 Defendants.)

Case Type: Civil
 Judge Donald J. Venne
 Court File No. 02-cv-11-4462

EMERGENCY MOTION OF THE GOVERNOR
TO CONSOLIDATE AND TO
STAY PROCEEDINGS PENDING CONSOLIDATION

INTRODUCTION

Pursuant to Rule 113.03 of the Minnesota General Rules of Practice for the District Courts and the inherent power of the judicial department to control its own proceedings, Governor Mark Dayton (“the Governor”) respectfully moves for an expedited order consolidating all cases -- including new cases in Scott, Dakota, and Anoka Counties -- involving the potential government shutdown with the proceeding in which Chief Judge Kathleen Gearin ordered relief today.

BACKGROUND

On July 13, 2011, Attorney General Lori Swanson (“the Attorney General”) filed a Petition with the Ramsey County District Court in the proceeding captioned *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Court File No. 62-cv-11-5203 (“*Executive Branch Proceeding*”), requesting an order that the executive branch receive continued funding for its core functions if appropriation bills are not enacted into law before July 1, 2011. The Attorney General also requested that the Court appoint a special master to resolve any issues regarding application of the order. The District Court -- the Honorable Kathleen R. Gearin -- issued an order to show cause setting a July 23, 2011, hearing.

In advance of the hearing, the Governor, both houses of the Minnesota Legislature, and a host of municipalities, non-profit entities, and other

organizations filed pleadings. Those pleadings took three forms. First, the Governor, Minnesota House, and Minnesota Senate filed Responses to the Attorney General's motion. Other entities, including as relevant here, the Minnesota Zoological Garden ("the Minnesota Zoo") and the Minnesota Horsemen's Benevolent and Protective Association ("the Horsemen's Association") filed motions to intervene in the proceeding. Yet more entities filed motions for leave to participate as *amici curiae*.

In its motion to intervene, the Minnesota Zoo argued that the legislature granted the Zoo a continuing appropriation pursuant to Minnesota Statutes § 85A.04. (Affidavit of Joseph J. Cassioppi ("Cassioppi Aff."), Ex. A at p. 6.) According to the Minnesota Zoo, this continuing appropriation allows the Zoo to remain open in the event of a government shutdown. Counsel for the Minnesota Zoo repeated this argument at the June 23, 2011 hearing. The Minnesota Zoo sought leave to file a petition with the special master appointed by the District Court to receive continued funding. (*Id.*)

Similarly, the Horsemen's Association argued that Minnesota Statutes § 240.155, subd. 1, provides a continuing appropriation to the Minnesota Racing Commission. (Cassioppi Aff., Ex. B at pp. 3-4.) The Horsemen's Association requested that the Court allow it to intervene to seek an order authorizing the special master "to make recommendations on allowing the continued funding of regulatory activities that are already funded and/or subject to a statutory standing appropriation." (*Id.*)

CHIEF JUDGE GEARIN'S ORDER

On June 29, 2011, the District Court issued an Order holding that the core functions of the executive branch, and the performance of those functions, may not be abridged by a lack of funding. (Cassioppi Aff., Ex. C.) The Court held that the core functions of the executive branch include matters relating to the life, health and safety of Minnesota citizens, the protection of rights of citizens under the Minnesota and United States Constitutions, and maintenance and preservation of public property. The Court ordered the Department of Management and Budget to issue checks and process funds to pay for the performance of the critical core functions of government as set forth in the Order. (*Id.* at pp. 16-17.)

The District Court also granted the Minnesota Zoo's and Horsemen's Association's motions to intervene. The Court also, however, held that neither the Zoo nor horse racing are core functions of the government:

The Governor's Statewide Contingency Response Team decided to recommend that the only critical functions of the Minnesota Zoological Gardens are feeding the animals, and keeping the animals, the exhibits, and the zoo property safe, secure, and healthy. The Court agrees with that determination and also would add that it is necessary to fund whatever staff is necessary to make sure that none of the animals can escape and become a danger to the public. . . . The operation of a zoo, even when in large part paid for by admission charges and other receipts is [not]¹ a critical function of government sufficient to overcome the requirements of Article XI [of the Minnesota Constitution].

* * * * *

¹ The sentence of the order contained an omission, which was amended by a subsequent order. (Cassioppi Aff., Ex. D.)

The Horsemen's Benevolent and Protective Association brief in support of its motion to intervene or file an amicus curiae brief argues that if they are not able to have racing after June 30, 2011, the race meet will be destroyed, and that the reputation of the Minnesota race meet will be permanently blemished, and future race meets will be jeopardized. Nothing was presented that leads the Court to believe that their assertions are anything less than true. If the Court were to order funding of regulatory activities necessary to allow future race meets to take place, it would, in effect, be ruling that the regulation of horse racing is a core function of the government. Regulation of horse racing is not a core function of government.

(*Id.* at pp. 11-12).

**PARTIES HAVE BEGUN FILING SEPARATE LAWSUITS
AGAINST THE STATE AND THE COMMISSIONER OF THE
DEPARTMENT OF MANAGEMENT AND BUDGET**

On June 27, 2011, the Horsemen's Association, joined by Canterbury Park, filed a lawsuit ("the *Canterbury Case*") in Scott County District Court against the State of Minnesota and James Schowalter, Commissioner of Minnesota Management and Budget ("the Commissioner"). (Cassioppi Aff., Ex. E.) Schowalter reports to the Governor. The Horsemen's Association requests declaratory and injunctive relief, damages for promissory estoppel, and a writ of mandamus. A hearing for temporary injunctive relief is scheduled for 9:30 a.m. on June 30, 2011. Among other relief, the Horsemen's Association requests an order "[r]estraining Defendants from defunding, closing, or causing the closure of the Minnesota Racing Commission without statutory authority to do so during the pendency of the government shutdown." (*Id.*, Notice of Motion at p. 2.)

On June 29, 2011, the Minnesota Zoo filed a lawsuit ("the *Zoo Case*") seeking declaratory and injunctive relief and a writ of mandamus against the

Office of Minnesota Management and Budget in Dakota County District Court. (Cassioppi Aff., Ex. F.) Mere hours after the Ramsey County District Court issued its order in the *Executive Funding Proceeding* which held that the Minnesota Zoo would not be funded, the Minnesota Zoo sought a temporary restraining order during a hearing in the *Zoo Case* which would require the “Defendant [to] receive revenue in and issue checks from the ‘Zoo Concession and Revenue Account’ as directed by the Plaintiff.” (*Id.*, Notice of Motion at p.2.)

Also on June 29, 2011 Minnesota Harness Racing, Inc. and the North Metro Harness Initiative, LLC d/b/a Running Aces Harness Park filed a lawsuit (“the *Harness Case*”) against the State of Minnesota and the Commissioner in Anoka County District Court seeking relief substantially similar to that sought by the Minnesota Horsemen’s Association. (Cassioppi Aff., Ex. G.) A hearing on the plaintiffs’ request for a temporary restraining order is scheduled for 1:00 on June 30, 2011.

Finally, the Governor understands that at least one additional plaintiff is in the process of initiating an action against the Commissioner (and/or the Commissioner of the Department of Natural Resources) in Koochiching County District Court. The Governor has not received copies of any pleadings that have or will be filed in that matter.

STANDARD ON MOTION TO ASSIGN CASES TO A SINGLE JUDGE

Rule 113.03 of the Minnesota Rules of Practice for the District Courts allows a party to move the Chief Justice of the Minnesota Supreme Court to assign

“two or more cases pending in more than one judicial district” to a single judge if the cases involve “one or more common questions of fact or are otherwise related cases in which there is a special need for or desirability of central or coordinated judicial management.” The motion must identify the court, case title and number, and judge assigned for each case. The movant is also required to indicate the extent to which it believes that additional related cases may be filed. Minn. Gen. R. Prac. 113.03(b). Assignment to a single judge is appropriate when it will “eliminate duplicative litigation in different districts, prevent inconsistent rulings, conserve the resources of the parties, their counsel, and the judiciary, and facilitate resolution of the cases. *In re Minn. Intoxilyzer 5000EN Source Code Litig.*, 2010 Minn. LEXIS 12 (Minn. Jan. 11, 2010) (Magnuson, C.J.).

ARGUMENT

Assignment of these new cases, as well as any future cases related to State funding in the event of a government shutdown,² to Chief Judge Gearin is not only advisable, it is necessary to prevent the waste of party and judicial resources, unmanageable litigation, and inconsistent judgments.

Significant constitutional issues are at stake in these cases, none less than the question of when separation of powers and the inherent powers of the

² The Governor does not seek an order assigning the proceeding captioned *In re Temporary Funding of Core Functions of the Judicial Branch of the State of Minnesota*, Court File No. 62-cv-11-5361, to Chief Judge Gearin. There are good reasons to keep that matter involving the judiciary separate from the proceeding involving the executive and legislative departments.

executive and legislative branches require continued funding of essential services notwithstanding Article XI, § 1 of the Minnesota Constitution. Chief Judge Gearin has had the opportunity to analyze these issues in an adversary proceeding where the executive and legislative branches of the government were present to represent their interests. After thorough analysis, Chief Judge Gearin issued an order authorizing funding for critical government services in the event of a government shutdown, but refusing to authorize funding for non-critical services, including the Zoo and horse-racing.

The Minnesota Zoo and the Horsemen's Association, having failed to obtain their desired relief in front of Chief Judge Gearin, are attempting to take a second shot in a different forum. Other parties have, and will continue to follow their lead. It would constitute a significant waste of judicial resources to have judges in Anoka, Dakota, Scott, Koochiching and other counties decide these same issues.

Moreover, failure to consolidate these cases will impose an undue burden on the Commissioner and the Governor. All cases seek relief from the Commissioner. The Commissioner reports to the Governor. Both are deeply involved in the budget negotiations. (Declaration of James Schowalter at ¶ 2.) In addition to his usual duties and his budget negotiation duties, the Commissioner is chairing the Governor's Statewide Contingency Response Team which oversees the maintenance of critical services in the event of a government shutdown. It is that Team's plan, approved by the Governor, that is at issue in litigation. In total,

the Commissioner is currently devoting about 18 hours a day to his many responsibilities. (*Id.* at ¶¶ 1-4.) The Minnesota Zoo, the Horsemen's Association, Running Aces, and potentially countless other litigants seek to add to this schedule court proceedings in counties across the state. Consolidation of these matters before Chief Judge Gearin in Ramsey County would allow the Commissioner to participate in the proceedings without neglecting his other responsibilities. *See In re LaSalle Bank/Twin Cities Avanti Stores Litig.*, 654 N.W.2d 103 (Minn. 2002) (Blatz, C.J.) (Rule 113.03 assignment to single judge warranted because it would "conserve the resources of the parties, their counsel and the judiciary").

Rule 113.03(b) normally provides parties five days to respond to a motion to consolidate. As with any motion, however, the Court possesses discretion to waive the time limits present in the rule. *Cf.* Minn. Gen. R. Prac. 115.07. The exigent circumstances present in these cases require immediate action by the Court. Two expedited motions for injunctive relief are set for hearing on June 30, 2011. An additional motion was heard on June 29, 2011. More actions are certain to follow on June 30, July 1, and beyond. Without an order immediately consolidating these cases before Chief Judge Gearin, and staying proceedings in the new cases pending consolidation, there is a very real possibility that one or more courts may issue orders that contradict, or are inconsistent with, the order issued by Chief Judge Gearin. The Commissioner will be faced with either disobeying any new order or disobeying Chief Judge Gearin.

The Governor is providing all counsel representing parties in the *Executive Branch Proceeding*, as well as all counsel in the *Canterbury Case*, *Zoo Case*, and *Harness Case*, with a copy of these motion papers by email contemporaneously with emailing the documents to the Court. The Governor will also serve all parties with copies by messenger on the morning of June 30, 2011. The Governor proposes that all parties be required to respond by 12 noon on June 30, 2011, and the Governor agrees to waive any reply.

The circumstances of these cases, the importance of the issues involved, and the probability that additional cases will be filed in courts across the State require an emergency order consolidating all pending and future cases regarding the government shutdown. The best and most obvious location for all of the cases is before Chief Judge Gearin in Ramsey County.

Dated: June 29, 2011

Respectfully submitted,



David L. Lillehaug (#63186)
Joseph J. Cassioppi (#0388238)
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402
Telephone 612-492-7000
Email dlillehaug@fredlaw.com

SPECIAL COUNSEL TO THE
OFFICE OF THE GOVERNOR³

4952712_1.DOC

³ On June 10, 2011, the Governor retained Special Counsel solely on the matter of the potential government shutdown. Special Counsel represents only the Office of the Governor, and does not represent the State of Minnesota generally, the Attorney General, or the State's other constitutional officers, departments, entities, or subdivisions, whether executive, regulatory, legislative, or judicial.