

ORIGINAL

IN THE SUPREME COURT OF OHIO

original action in mandamus – case no. 10-2029

STATE ex rel.

DATA TRACE INFORMATION SERVICES, LLC, et al.,

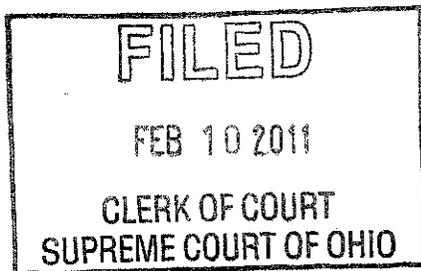
Relators,

-v-

RECORDER OF CUYAHOGA COUNTY, OHIO,

Respondent.

Amended memorandum supporting relators' motion for leave to file amended complaint for alternative and peremptory writs of mandamus



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IN THE SUPREME COURT OF OHIO

State ex rel. Data Trace Info.	(
Services, LLC, et al.,	(
	(No. 10-2029
Relators,	(
	(
vs.	(
	(Relators' <u>amended</u> memorandum
	(supporting their motion for leave to
	(file amended complaint
Recorder of Cuya. County,	(
	(
Respondent.	(

Preliminary statement

During this action the relators deposed Lillian Greene, the Cuyahoga County Recorder. They examined her about a written policy on the Recorder's website and provided to the public in the Recorder's office that effectively establishes that the relators are entitled to the relief that they seek in this suit.

Almost immediately after the relators examined Greene about that policy, the Recorder deleted it from its website and rewrote the policy, adding language to frustrate this action and to mask the Recorder's true policy.

This memorandum and the proposed amended complaint explain all of that, which explains why the relators deserve leave to amend their complaint to compel

the Recorder to restore the deleted policy.

Procedural background

1. The Parties.

Relators are two unrelated companies – Data Trace Information Services, LLP and Property Insight LLP – and Michael Stutzman and Michael Carsella. Stutzman is one of Data Trace’s managers; Carsella is one of Property Insight’s manager.

Independently of each other, Data Trace and Property Insight assemble electronic copies of recorded instruments, such as deeds, and create databases for title insurers to evaluate the quality of title and encumbrances to real estate.

The sole respondent is the Recorder of Cuyahoga County. The respondent records and indexes instruments that evidence title to, and encumbrances upon, real estate located within Cuyahoga County, such as deeds. Because of a change in the structure of county government, the county’s Fiscal Officer assumed the powers and duties of the recorder in January, 2011. Lillian Greene held the position of county recorder from July, 2008 through January 14, 2011.

2. The Recorder keeps digital images of recorded instruments on compact disc, and had provided copies on CD for over 11 years.

When someone presents a deed or other instrument to be recorded, the instrument is on paper. The Recorder scans the instrument electronically to create a digital image of that instrument and returns the original paper document to the

person who tendered it.

The Recorder then keeps that digital image in its computer system and attaches a unique number to it. The Recorder also keeps a duplicate digital image of that instrument on a compact disc, which it calls the "master CD."

From May, 1999, until the spring of 2010, the Recorder copied the images of its master CD onto blank CDs and provided them to requesters for a fee of \$50 apiece. In the spring of 2010, the Recorder told relators that it wouldn't do that anymore.

3. The crux of this suit and the proposed amended complaint.

This suit seeks a writ of mandamus to compel the Recorder to comply with written requests that Carsella and Stutzman made on October 5, 2010. Those requests asked the Recorder to do two things:

First: provide digital copies on CD of instruments that the respondent recorded in July and August, 2010.

Second: amend its policy to provide such digital copies to any requester at a fee no greater than the Recorder's costs, exclusive of employee time (which is minimal).

The relators rely on the Public Records Act, R.C. 149.43.

4. Statutory acrobatics yield six-figure copying fees.

At first, the Recorder would provide only paper copies at \$2 per page, saying that it had no statutory authority to download its digital images of recorded

instruments onto CD.

Eventually, the Recorder said that it would provide copies of recorded instruments on CD at \$2 per digital page. Applying that fee would require relator Data Trace to pay a fee exceeding \$130,000 for digital copies of the instruments recorded last July and August, and require relator Property Insight to pay more than \$130,000 for its own dub of the same digital copies.

The relators deposed Lillian Greene while she held the office of Recorder. They examined Greene about a written policy on the Recorder's website and available in the Recorder's office that set a fee of \$1 for downloading copies onto CD. Within days after deposing her, the Recorder deleted that policy and rewrote it to try to enhance the Recorder's ability to win this suit.

In their proposed amended complaint, relators seek to compel the Recorder to restore the policy that the Recorder deleted after relators deposed Greene about it. The proposed amended complaint was filed on Wednesday, February 9, 2011, under separate cover, as was the relators' motion for leave to file the proposed amended complaint.

Argument

- 1. This Court should grant leave to the relators to file their proposed amended complaint.**
 - A. This Court favors allowing parties in original actions to amend their pleadings.**

This Court has granted leave to amend complaints in original actions. In

State ex rel. Grendell v. Davidson, this Court granted the relator's motion for leave to amend her complaint in part because of the "general policy favoring liberal amendment of pleadings under Civ.R. 15(A)." ¹

This Court granted leave to file an amended complaint in another original action because of "the policy favoring liberal amendment of pleadings under Civ.R. 15(A), the lack of prejudice to respondents," and "the preference to resolve cases on their merits." State ex rel. Hackworth v. Hughes (2002), 97 Ohio St.3d 110, 113-114 2002-Ohio-5334, 776 N.E.2d 1050, 1055, ¶ 26.

B. This Court should allow the relators to amend their complaint to add the proposed third count along with averments that support it.

Paragraphs 22, 23, and 26 thru 29 of the proposed amended complaint effectively explain why relators seek to amend their complaint. Those paragraphs allege:

22. In 2008 or 2009, the respondent adopted a written policy governing requested copies of publicly-available records kept by respondent (Exhibit 3).

23. Section 3 of the policy said that the "charge for downloaded computer files to a compact disc is \$1.00 per disc." Section 3 in its entirety said:

¹ (1999), 86 Ohio St.3d 629, 631, 1999-Ohio-130, 716 N.E.2d 704, 707.

Section 3. Costs for Public Records.

Those seeking public records will be charged only the statutory cost of making copies.

Section 3.1. The charge for paper copies of recorded documents is \$2.00 per page.

Section 3.2. The charge for copies of administrative files and documents is \$.05 per page.

Section 3.3. The charge for downloaded computer files to a compact disc is \$1.00 per disc.

Section 3.4. There is no charge for documents e-mailed.

26. On January 5, 2011, while holding the office of Recorder, Lillian Greene testified in this action that the policy shown as Exhibit 3 applied only to "public records" under Ohio's Public Records Act, R.C. 149.43.

She also testified that she had concluded that respondent's recorded instruments, such as deeds, are not "public records" under Ohio's Public Records Act, R.C. 149.43.

27. Greene also testified that respondent's policy of charging \$1 for downloading computer files to a CD did not apply to respondent's recorded instruments because they are not "public records" under R.C. 149.43.

28. After deposing Greene, relators deposed respondent's chief of staff, John Kandah.

He testified that the Recorder's policy ("charge for downloaded computer files to a compact disc is \$1.00 per disc") *did* apply to recorded instruments.

But he said that the fee was supposed to be \$1 per CD plus \$2 for each page of each instrument that was downloaded onto the CD.

29. In January, 2011 – less than one week after relators deposed Greene – respondent deleted the \$1 fee for downloading records onto a CD from its public records policy and rewrote section 3.

Respondent replaced the substance of section 3 with the following:

Section 3. Costs for Public Records

Those seeking public records will be charged only the statutory cost of making copies.

Section 3.1 – All Public Records are available for inspection Monday – Friday from 8:30 A.M. until 4:30 P.M. Copies of such records are available upon request. The cost for copies is \$2.00 per page for recorded documents (\$17.28 for copies of sub-plats and condos) and \$.05 per page for all administrative or non-recorded documents.

We may require payment of these fees prior to processing your request.

Section 3.2 – Will permit prompt inspection of public records and provide copies of such records within a reasonable amount of time. If the requested records need to be researched, retrieved, assembled or reviewed prior to release, we will let you know approximately how long it will take.

Section 3.3 – Public Records Requests pertain to any documents that document the organization, functions, policies, decisions,

procedures and operations of the office, subject to certain exemptions under state and federal law.

Section 3.4 – Public Records Requests should be directed to the Cuyahoga County Recorder at 216-443-8194, or by visiting Room 211 (Administrative Offices) at the Cuyahoga County Administration Building, 1219 Ontario Street, with the request.

Section 3.5 – A copy of the complete Public Records Policy for this office can be obtained from the Records Manager in the Recorder's Administrative Offices.

(Proposed amended complaint, ¶s 22, 23, 26-29.)

The above paragraphs effectively allege that the Recorder's linguistic acrobatics in interpreting its \$1 fee for downloading records onto CD and hastily deleting and rewriting it justify relators' proposed third count.

That third count would compel the Recorder to reinstate the policy that it deleted after the relators deposed Greene, and compel the Recorder to apply that policy as written with no per-page fee for downloaded digital copies of recorded instruments.

Proposed count 3 says:

49. The policy that respondent adopted in January, 2011, after relators deposed Lillian Greene, is a sham.

Respondent hastily adopted that new policy to try to bolster respondent's ability to prevail in this action and to try to undermine relators' ability to prevail.

50. The respondent's *real* policy is the one shown in Exhibit 3. Respondent has given that policy inconsistent, distorted, and absurd meanings to avoid having to comply with it in this case.

51. On its face, respondent's written policy shown in Exhibit 3 allowed the public to receive electronic copies of electronically-stored recorded instruments on CD, and the fee for providing those copies on CD was \$1 per CD with no per-page fee for the downloaded copies.

52. The amount of the \$1 fee for downloading electronically-stored instruments onto a CD presumably complied with Ohio law by approximating the Recorder's actual costs of downloading those digital records.

Respondent has a clear legal duty to restore that policy – allowing the public to receive downloaded electronic copies of recorded instruments on CD for \$1 per CD and with no per-page fee for those downloaded copies.

53. Relators and the general public, therefore, have a clear legal right to require the Recorder to restore that policy.

54. Mandamus is the appropriate remedy to compel respondent to restore the policy shown in Exhibit 3 so as to comply with the Public Records Act, R.C. 149.43.

(3rd count of proposed amended complaint.)

As the parties haven't filed evidence with the Court or briefed the merits, adding the proposed third count and its foundational averments cannot prejudice the respondent. Indeed, by voluntarily engaging in the averred shenanigans during this suit, the respondent assumed the risk that the relators would advise

this Court about them and seek additional relief to nullify them.

This Court, therefore, should grant relators leave to file their proposed amended complaint to add relators' proposed third count and the averments that support it.

- C. This Court should allow relators to include in their proposed amended complaint averments that supplement relators' claim for attorneys' fees.**

Paragraphs 57 thru 65 of the proposed amended complaint supplement the relators' request for an award of attorneys' fees. The crux of the proposed supplement is this:

Relators made the written requests for digital copies of recorded instruments on Tuesday October 5, 2010; the respondent received those requests within two days. The respondent did not acknowledge those requests through October 25, when relators Data Trace and Property Insight sued to enforce those requests – Ohio Supreme Court Case No. 2010-1823.

The respondent acknowledged the October 5 requests for the first time on November 16, 2010 – more than two weeks after the respondent was served with the summons. Two days later, the respondent moved to dismiss the suit, arguing that the relator companies were not allowed to litigate in Ohio courts because they had not registered with the Ohio Secretary of State to do business in Ohio.

Before filing that motion, the respondent's counsel had communicated with relators' counsel by letter, phone, and e-mail, but had not objected to relators

seeking relief in an Ohio court – the only forum in which the relators could seek relief against an Ohio public office under the Public Records Act. Nor did respondent’s counsel mention anything about registering with the Ohio Secretary of State.

The respondent’s motion to dismiss made clear that, if the relators registered with the Secretary of State and then sought to proceed with their action, the respondent would cause the parties to expend time and resources to litigate their right to do that.

So relators promptly registered with the Secretary of State, applied to this Court for dismissal of their action without prejudice, and minutes later filed the original complaint in this suit, which in all material ways sought the same relief for which relators prayed in Case No. 10-1823.

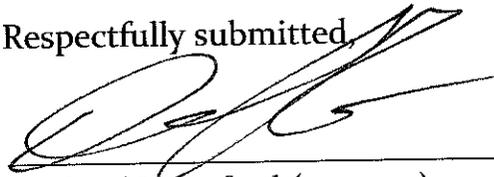
Six days later, the Ohio Supreme Court dismissed Case No. 10-1823 without prejudice. For purposes of adjudicating an award of attorneys’ fees in this action, the proposed amended complaint asks the Court to treat this action and Case No. 10-1823 as one continuous action to compel the Recorder to comply with the relators’ October 5 requests.

Those averments describe facts already on the public record of this Court or otherwise apparent to the respondent. So adding those averments to this action cannot prejudice the respondent’s defense of this action. Again, through the

respondent's unnecessary and voluntary acts of gamesmanship, the respondent assumed the risk that the relators would ask this Court to treat the two back-to-back actions as one continuous action seeking the same relief.

Therefore, this Court should allow the proposed amended complaint.

Respectfully submitted,



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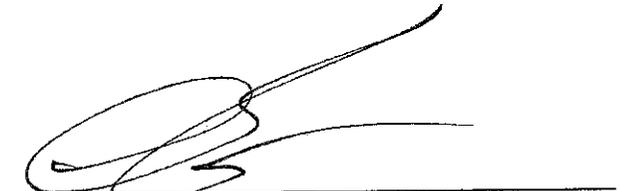
Attorneys for Relators

Certificate of Service

The foregoing *Relators'* amended memorandum supporting their motion for leave to file amended complaint has been hand delivered on this 9th day of February, 2011 to:

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