

IN THE SUPREME COURT OF OHIO

Case No. 10-2029

Original Action in Mandamus

State ex rel. Data Trace Information Services, LLC, et al.,

Relators,

v.

Recorder of Cuyahoga County, Ohio,

Respondent.

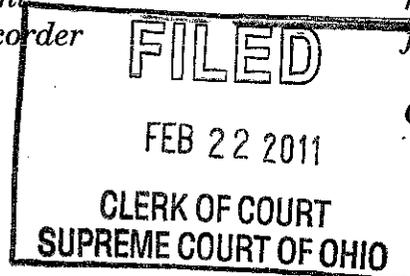
**Cuyahoga County Recorder's Memorandum Opposing
Relators' Motion For Leave To Amend Its Complaint**

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Respondent the Recorder of Cuyahoga County, Ohio (the "Recorder") hereby opposes Relators' motion for leave to amend their complaint, which they filed on February 10, 2011.

This case presents a single legal issue for which there is almost no relevant factual issues. That single legal issue is whether Relators have to pay \$2 per page for copies of recorded documents as required by the Recorder Statute (R.C. 317.32), or whether they can obtain copies of those documents "at cost" under the Public Records Act (R.C. 149.43). Despite the straight-forward nature of that single controlling question, Relators are seeking leave to plead what amounts to their third complaint.

The Court should deny Relators' motion as not required by the interests of justice because Relators do not seek any relief beyond that which they already have pled and instead should set this case for briefing on the merits.

I. Introduction

Relators are two out-of state companies¹ whose business is based in part on reselling copies of publicly-available information, including deeds, mortgages, and similar instruments recorded by the recorders offices throughout Ohio. For years, Relators were able to turn a significant profit reselling copies of documents recorded in Cuyahoga County thanks to a deal they struck with a prior elected recorder to purchase digital copies of every instrument recorded during a given day for a flat-fee of \$50, regardless of the number of instruments or the total number of pages.

¹ Relators also have named two of their employees as nominal relators.

During that same time, the only option for other business and members of the public to obtain copies of those same documents was to pay the \$2-per-page statutory fee established by the General Assembly.

The immediate-past Recorder, Judge Lillian Greene, discovered the side-deal between her predecessor and Relators shortly after taking office. Concerned with the legality of the deal, Judge Greene conducted extensive legal research under the Recorder Statute and the Public Records Act. She correctly concluded that the Recorder Statute controlled and required her office to charge Relators the same \$2-per-page fee that it charges everyone else. She thus ended her predecessor's special practice of providing deeply-discounted copies in early 2010 and instead informed Relators that they would have to pay the \$2-per-page statutory fee going forward.

Dissatisfied with having to pay the same rate as everyone else, Relators responded by requesting copies of two months worth of recorded instruments under the Public Records Act. Shortly thereafter, Relators filed their first complaint in mandamus asking the Ohio Supreme Court to compel production of the recorded instruments "at cost." Relators, however, dismissed that case after the Cuyahoga County Recorder moved to dismiss based on their failure to register to do business in Ohio and to pay registration fees. *See State ex rel. Data Trace Information Systems, LLC v. Recorder of Cuyahoga County, Ohio*, Case No. 10-1823.

Relators then filed the instant action – their second complaint – adding the two employees who signed their records request as additional parties. This, their second lawsuit, seeks a writ of mandamus compelling the Recorder to do three

things: (1) to provide electronic copies of recorded documents at “cost” under the Public Records Act, rather than the \$2.00 per-page fee dictated by the Recorder’s Statute, R.C. 317.32(D); (2) “to amend its policy and practice” to “conform with Ohio law”; and (3) to pay Relators’ attorneys’ fees. (Compl., Prayer for Relief.)

The Recorder moved to dismiss the two individual relators (Michael Stutzman and Michael Carsella) because each, according to their own complaint, acted solely on behalf of their employers, and therefore are not “aggrieved” as individuals under the Public Records Act. That motion remains pending. The Recorder otherwise answered the complaint, and discovery is nearly complete.

On February 10, 2011, Relators moved to amend their second complaint. The next day, February 11, they filed a motion for leave to file an amended memorandum supporting their motion to file amended complaint. The Recorder does not oppose Relators’ motion for leave to file an amended memorandum, and therefore this memorandum will address arguments made in both memoranda.

Oddly, Relators’ proposed amended complaint – which would be its third – does not address the infirmity attacked by the Recorder’s motion to dismiss; namely, the individuals’ lack of standing. It also does not seek any new relief. Instead, it includes a redundant claim for relief it already pled, along with unnecessary additional factual detail and improper argument that more properly belongs in its merits brief. Thus, Relators’ amended complaint would needlessly clutter the Court’s docket and make more busywork for the parties and their attorneys without adding anything to the substance and merits of this case.

For these reasons, as set forth below, Relators' proposed amendments are mere surplusage and justice does not require amending under Rule 15 of the Ohio Rules of Civil Procedure. The Court therefore should deny their motion for leave.

II. Law and Argument

A. Amendments Are Allowed Only "When Justice So Requires"

Once a responsive pleading is served, a party only may amend its complaint "when justice so requires." Civ. R. 15(A). Justice does not require amendments that are futile, *i.e.*, amendments that serve no useful purpose. *Central Motors Corp. v. City of Pepper Pike* (1983), 9 Ohio App.3d 18, 20-21, *citing Forman v. Davis* (1962), 371 U.S. 178, 182; *see also Darby v. A-Best Prods. Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, ¶ 36 (affirming denial of futile amendment). The Court should deny Relators' motion because the proposed amendments serve no useful purpose.

B. Justice Does Not Require Relators To Amend Their Complaint

Relators seek two sets of amendments, neither of which presents any new claim for relief. First, Relators seek to add a "count 3" compelling the Recorder to "restore" a written policy statement that the Recorder previously posted on its website. Relators incorrectly read that statement as committing the Recorder to charging just \$1 per CD, regardless of the number of recorded documents copied onto the CD. (Proposed Compl. ¶ 51.) Relators also seek to add allegations that

state the contents of that policy, argue its effect and meaning, and recount deposition testimony about it. (See Proposed Am. Compl. ¶¶ 22-23, 26-29.)²

No useful purpose is achieved by adding “count 3” and its underlying allegations because Relators already have prayed for that relief. Existing “count 2” of Relators’ complaint seeks to compel the Recorder to adopt a policy that “conform[s] with Ohio law.” (Compl., Prayer for Relief ¶ 3.) So the question of the Recorder’s policy is already before the Court, which will decide what policy the Recorder must adopt and maintain, be it restoration of a prior policy as Relators identify in their proposed “count 3,” its current policy, or some other policy that the Court deems necessary to conform with Ohio law. Adding a new “count 3” therefore would not allow the Relators to present any additional evidence or arguments or entitle it to any additional relief. Amending, therefore, serves no useful purpose.

Similarly, Relators’ proposed amendment to bolster its attorneys’ fee claim with additional allegations and attorney argument would serve no useful purpose. (See Proposed Compl. ¶ 57-65.) Trying to gloss over the foreseeable consequences of their failure to register to do business in Ohio, Relators argue (through proposed amendment) that the Court should “treat” their first, voluntarily-dismissed complaint and this action “as effectively one continuous action.” (See Proposed Compl. ¶ 65.) But pleading that request in an amended complaint does not lend it

² In reality, the policy that Relators try to offer as a smoking-gun simply explained that the Recorder charges \$1 for a CD in addition to the appropriate charges for copies of documents on the disc itself. While Relators are the first to incorrectly read that policy as charging just \$1 for the CD and its contents, the Recorder since revised its policy to avoid any similar confusion.

any more credence than presenting it in its merits brief. Relators' current complaint broadly demands attorneys' fees under the Public Records Act. (Compl., Prayer for Relief, ¶ 4.) So Relators may fully present their "one continuous action" theory – including any facts, law, and attorney argument supporting it – in their merits brief, without amendment, and the Recorder will respond accordingly. Thus, amending again would achieve no useful purpose. The Court should deny Relators' motion for leave for this additional reason.

C. The Recorder Will Be Prejudiced By Amendment

Rather than explain why "justice so requires" amendment, Relators argue that the Court should grant leave to amend because, Relators conclude, the Recorder will not be prejudiced.³ But Relators are mistaken. Filing an amended complaint will prejudice the Recorder by causing it to incur extra cost, effort, and time to answer the amended complaint (which really would be Relators' third complaint) and to move a second time to dismiss the individual relators. Indeed, Relators' inefficient methods and procedural miscues in this litigation already have driven both parties' legal fees far above what they should have been to resolve a simple case of statutory construction.⁴ Yet one of the Relators' stated bases for its

³ Relators also suggest that that any prejudice to the Recorder is deserved because it had the audacity to disagree with Relators, which Relators rhetorically mock as "shenanigans," a "sham," "statutory acrobatics," and "gamesmanship." The Recorder declines to respond in kind and welcomes the opportunity to present the strength of its legal and factual position in its merits brief and at oral argument.

⁴ By way of example, the Relators dismissed and re-filed their complaint because they neglected to register with and pay fees to the state of Ohio; they rejected the Recorder's requests that the parties try to stipulate to facts as contemplated by

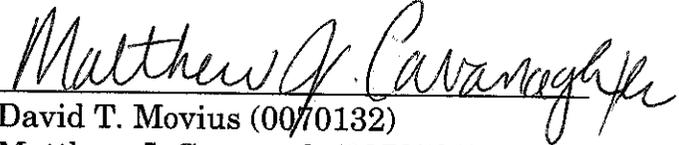
proposed amendment is to bolster its claim to force the Recorder to pay its fees incurred as a result of its own procedure machinations.

In contrast, Relators will not be prejudiced if they do not amend because, as explained here, they may seek all the relief that they want without amending. Filing an amended complaint truly serves no purpose, other than to drive up everyone's attorneys' fees, which ironically Relators want to make the Recorder pay. That is not required by the interests of justice under Rule 15 and the Court therefore should deny Relators' motion.

III. Conclusion

For the foregoing reasons, the Court should deny Relators' motion for leave to amend their complaint.

Respectfully submitted,


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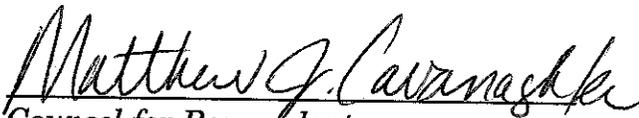
S.Ct. Prac. R. 10.7, opting instead to conduct inefficient depositions and written discovery in a piecemeal and scattered approach; they needlessly multiplied the proceedings by naming two individual relators; and, most recently, they moved for leave to amend their memorandum in support of their motion to amend their complaint.

Certificate of Service

In accordance with Rule 14.2 of the Rules of Practice of the Supreme Court of Ohio, I hereby certify that on February 22, 2011, I served a copy of the foregoing ***Cuyahoga County Recorder's Memorandum Opposing Relators' Motion For Leave To Amend Their Complaint*** by e-mail upon the following:

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