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CLERK OF COURT

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

|                                  |   |                                    |
|----------------------------------|---|------------------------------------|
| STATE OF OHIO EX REL.            | ) | CASE NO. 04CV001080                |
| ROBERT MERRILL, TRUSTEE, et al., | ) |                                    |
|                                  | ) | JUDGE EUGENE A. LUCCI              |
| Plaintiffs-Relators,             | ) |                                    |
|                                  | ) |                                    |
| vs.                              | ) | <b>MEMORANDUM IN OPPOSITION TO</b> |
|                                  | ) | <b>MOTION OF THE STATE OF OHIO</b> |
|                                  | ) | <b>TO DISMISS PLAINTIFFS-</b>      |
| STATE OF OHIO, DEPARTMENT OF     | ) | <b>RELATORS' FIRST AMENDED</b>     |
| NATURAL RESOURCES, et al.,       | ) | <b>COMPLAINT</b>                   |
|                                  | ) |                                    |
| Defendants-Respondents.          | ) |                                    |

**I. INTRODUCTION**

The Motion to Dismiss filed by the Defendants-Respondents (collectively, the “State”) fundamentally misconstrues Plaintiffs’ First Amended Complaint. This case is not limited to the ODNR’s leasing program, but, rather, is about the ODNR’s misinterpretation of the extent of the public trust lands extending beyond the waters of Lake Erie and about compensating landowners for the State’s unconstitutional taking of private property in contravention of both the Ohio and the United States Constitutions. In short, this is a dispute between owners of abutting property each claiming a current, overlapping ownership interest in real property lying lakeward of 573.4 feet IGLD (1985) (hereinafter, “573.4 Feet”). This type of dispute presents a ripe, justiciable dispute, and it is clearly the proper subject of a declaratory judgment action. Since Plaintiffs have standing to bring these claims and since Counts II and III of the First Amended Complaint are properly pled, the State’s Motion to Dismiss should be denied in its entirety.

**II. THIS MOTION SHOULD BE DENIED BECAUSE EACH OF THE PLAINTIFFS HAS A RIPE, JUSTICIABLE CONTROVERSY WITH THE STATE.**

At its core, Plaintiffs, each owners of parcels of real estate abutting Lake Erie, seek this Court’s interpretation and construction of Ohio Revised Code § 1506.10, which sets forth the extent of the State’s ownership of submerged lands of Lake Erie:

It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong

and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state . . .

Since the ODNR has recently refused to give this statute an interpretation consistent with the plain meaning of its words and years of legal precedent, the First Amended Complaint seeks to vindicate Plaintiffs' ownership rights by obtaining a declaratory judgment that the State's ownership extends no further than the water's edge (thereby leaving ownership of the uplands to be defined by Ohio real property law).<sup>1</sup> In particular, the First Amended Complaint alleges:

- \* All of the named Plaintiffs "are owners of record of real property abutting Lake Erie." First Amended Complaint at ¶ 3.
- \* The State has "sought and continues to seek to exercise all property rights of fee ownership as to all property lakeward of OHW,<sup>2</sup> regardless of whether that property is submerged and regardless of whether that property is privately owned." First Amended Complaint at ¶ 11.
- \* "Except pursuant to a lease, the issuance and terms of which are wholly within the power of ODNR, ODNR maintains that no littoral owner may make use of its own property, or exclude others from its property, as long as that property lies below [573.4 Feet]." First Amended Complaint at ¶ 12.

Thus, Plaintiffs seek, among other things, a declaration that: (1) the State's interest as trustee to the waters of Lake Erie and the land beneath the water does not include non-submerged lands; and (2) the ODNR does not have the authority to require Plaintiffs to lease back property already owned by them. First Amended Complaint at ¶ 32. Once the issue of current ownership has been decided, Counts II and III of the First Amended Complaint seek alternative writs of mandamus ordering the State to begin appropriation proceedings to compensate Plaintiffs for the unconstitutional taking of their real property.

Ignoring the clear allegations of the First Amended Complaint, the State files its Motion to Dismiss seeking to transform those allegations from a case involving the extent of the State's ownership of real property to a case limited to the State's leasing program. Thus, the State

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<sup>1</sup> Although not important to resolution of this lawsuit, Ohio law does allow for private ownership of submerged lands of Lake Erie. See 2000 Ohio Atty. Gen. Op. No. 47, fn.3. Plaintiffs do not ask the Court to determine whether the language of their deeds give them ownership of submerged lands, *i.e.*, those lands lakeward of the low water mark. Instead, Plaintiffs merely ask the Court to find that the State cannot lawfully claim ownership of property located lakeward of 573.4 Feet.

<sup>2</sup> OHW, for purposes of the First Amended Complaint, means a level of elevation arbitrarily established by the Army Corps of Engineers as a fixed line running at an elevation of 573.4 feet International Great Lakes Datum (1985). Although ODNR has adopted 573.4 Feet as a property boundary, 33 CFR 329.11 specifically provides that this elevation is established for federal jurisdictional purposes only and has no bearing on ownership under state law.

argues that this case should be dismissed because: (1) most of the Plaintiffs have not been subjected to any adverse action by the State because they have not sought a lease (of their own property) from the State and therefore no justiciable case exists; (2) the remaining Plaintiffs who have sought leases have not exhausted their administrative remedies; (3) Plaintiffs have no standing to bring this case; and (4) Plaintiffs failed to satisfy the necessary elements for a writ of mandamus to issue. As will be set forth below, none of these assertions have any merit and therefore the State's Motion should be denied.

**A. Whether or Not Plaintiffs have Sought a Lease from the ODNR, a Ripe, Justiciable Controversy Exists Concerning the Extent of the State's Property Rights in Property Landward of Lake Erie.**

In essence, the State argues that since certain Plaintiffs have not sought a lease of their own land from the ODNR, these Plaintiffs cannot have a boundary dispute with the State. As will be set forth below, this is certainly wrong.

This case is the appropriate type of dispute for a court to resolve by way of a declaratory judgment. It is well established that the "Declaratory Judgment Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and is to be liberally construed and administered." Swander Ditch Landowners Ass'n. v. Joint Board of Huron and Seneca County Commissioners, 51 Ohio St. 3d 131, 134 (1990). Likewise, the Ohio Supreme Court has acknowledged that the intent of the legislature as stated in Ohio Revised Code 2721.03 is to broadly authorize declaratory judgments and that any judicially created limitation on the right to bring such an action "frustrates this legislative intent." Preferred Risk Ins. Co. v. Gill, 30 Ohio St. 3d 108, 111-12 (1987).

Ohio courts uniformly hold that a declaratory judgment may be considered when the case is "within the spirit of the uniform Declaratory Judgments Act and a real controversy between adverse parties exists which is justiciable in character and speedy relief is necessary to the preservation of rights that may be otherwise lost or impaired." Swander Ditch, 51 Ohio St. 3d at 135. Each of the requirements for a declaratory judgment are met here.

First, a "real controversy between adverse parties exists." See Swander Ditch, *supra*. A "controversy" exists for purposes of a declaratory judgment action where there is a genuine dispute between the parties having adverse legal interests." Wagner v. Cleveland, 62 Ohio App. 3d 8, 13 (8th Dist. 2002). Conversely, "a declaratory judgment cannot be used to obtain a

judgment which is advisory in nature or which is based on an abstract question or a hypothetical statement of facts.” Bilyeu v. Motorists Mut. Ins. Co., 36 Ohio St. 2d 35, 37 (1973).

Here, there is nothing abstract or hypothetical about the dispute that is the subject matter of this case. Plaintiffs, relying on Ohio Revised Code § 1506.10 and Ohio court decisions, contend that the State’s property interest does not extend beyond Lake Erie to a fixed line of 573.4 Feet. The State claims all ownership rights over the property extending lakeward of 573.4 Feet. Simply put, the State claims it currently owns and has the right to determine who may access or use this land for any purpose, while Plaintiffs claim that they have that right. These two positions clearly create a real controversy between two adverse parties.

Second, this dispute involves a “justiciable” issue. The Ohio Supreme Court has stated that this determination is made by considering two factors: “first to determine whether the issues tendered are appropriate for judicial resolution and second, to assess the hardship to the parties if judicial relief is denied at that stage.” Burger Brewing Co. v. Liquor Control Commission, Dep’t of Liquor Control, 34 Ohio St. 2d 93, 97 (1973); Town Centers Ltd. Partnership v. Montgomery, No. 99AP-689, 2000 Ohio App. Lexis 1457, at \*8 (10th Dist. April 4, 2000).<sup>3</sup>

Both of these factors are satisfied. The issues in this case are appropriate for judicial resolution. The Court in Burger Brewing, *supra*, found that the case before it was appropriate for judicial resolution because the governmental action had a “present and direct effect on a valuable property right protected by law.” 34 Ohio St. 2d at 98 (finding a declaratory judgment action a appropriate means for certain breweries to challenge the validity of a liquor control commission’s regulation prohibiting price reductions on beer). See also Dickason v. State of Ohio, No. 01AP-1373, 2002 Ohio App. Lexis 5207, at \*17 (10th Dist. Sept. 30, 2002) (citing Defense of Deer v. Cleveland Metroparks, 138 Ohio App. 3d 153 (8th Dist. 2000), and stating that a “justiciable issue requires the existence of a legal interest or a right.”). Courts have routinely found declaratory judgment actions involving rights and title to real property to be appropriate. See City of Zanesville v. Zanesville Canal & Mfg. Co., 159 Ohio St. 203, 206-07 (1953). Here, Plaintiffs have each alleged a real property interest, which is presently being infringed upon by the State, in lands abutting Lake Erie.

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<sup>3</sup> Copies of all unreported cases are attached in the Appendix.

In addition, this case is appropriate for judicial resolution because the determination of the parties' property rights involve only issues of law. Courts recognize that disputes involving the interpretation of statutes impacting the rights or interests of parties create justiciable disputes: "[c]onstruction and interpretation of statutes is a recognized function of a declaratory action." Town Centers Ltd. Partnership, 2000 Ohio App. Lexis 1457, at \*8 (citing American Life & Accident Ins. Co. of Kentucky v. Jones, 152 Ohio St. 287 (1952)); Burger Brewing Co., 34 Ohio St. 2d at 99 ("It is the very purpose of declaratory judgment actions to provide a determination as to the validity of a statute, ordinance, or agency regulation."). The Ohio Supreme Court has also stated that cases that involve only legal issues are more appropriate for judicial resolution because there is no need for further factual development and the court is not being asked to "adjudicate rights and obligations in a 'vacuum.'" Id. at 98. Because Plaintiffs are seeking a legal interpretation as to the extent of the State's ownership and property rights vis-à-vis Plaintiffs' ownership and property rights, a declaratory judgment action is appropriate.

Further, Plaintiffs will suffer hardship if judicial relief is denied. Currently, Plaintiffs have a lack of certainty concerning the extent of their property ownership. While they might otherwise have the right to the exclusive use of this disputed property (as any other owner of land has), under the State's interpretation, that right does not exist. The right to exclude others from one's property is a right which the United States Supreme Court has described as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Dolan v. City of Tigard, 512 U.S. 374 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).<sup>4</sup> Further, as acknowledged by the State's Motion, a number of Plaintiffs have been forced to seek leases for land which they contend they already own. Other potential Plaintiff class members actually have leases with the State—leases which cost these class members money to obtain and maintain. Such leases would be unnecessary if this Court finds that the State's current interpretation and application of Ohio Revised Code § 1506.10 is illegal.

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<sup>4</sup> Various Ohio courts have acknowledged this point as well. See Miller v. Foos, Case No. E-80-29, 1980 Ohio App. Lexis 12470, at \*9 (6th Dist. Oct. 10, 1980); State v. Cleveland-Pittsburgh Ry. Co., 21 Ohio C.A. 1 (8th Dist. 1914) (noting that proprietor's "immemorial right has always been to prevent the public coming upon his private property without consent, either from a highway or the water."), aff'd, 94 Ohio St. 61 (1916); Cleveland v. Cleveland C.C. & St. L. Ry., 19 Ohio Dec. 372, 376, 8 Ohio N.P. (n.s.) 457 (Cuyahoga Common Pleas 1909) (noting no public access at properties abutting to Lake Erie). See also Massachusetts v. New York, 271 U.S. at 93 ("there are no public rights in the shores of non-tidal waters"); Pollock v. Cleveland Ship Bldg. Co., 56 Ohio St. 655 (1897), syllabus ¶ 3 (with regard to riparian property, "the right of the public does not extend to use of lands of the owner not covered by water.")

Finally, speedy relief is necessary “in order to preserve rights that may be otherwise impaired or lost.” Swander Ditch, *supra*. Without a declaration as to their ownership interest in lands abutting Lake Erie, Plaintiffs will have land taken from them to which their rights should otherwise be exclusive. In the event that this Court finds that the State’s interpretation and application of Ohio Revised Code § 1506.10 is improper, then an unconstitutional taking of private property will have occurred. Such a situation entitles Plaintiffs to compensation for a temporary taking of their private property:

[w]hen the burden on the landowner results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a temporary one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.

State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St. 3d 59, 67 (2002) (citing First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304, 321 (1987)). Each day the State’s policy deprives Plaintiffs of the exclusive use of their property is another confiscation of Plaintiffs’ property for which they are entitled to compensation.

Given this overwhelming authority, the State’s claim that this declaratory judgment is improper is simply wrong.

**B. There is No Requirement for Plaintiffs to Exhaust Administrative Remedies.**

The State also contends that the Complaint should be dismissed because Plaintiffs allegedly have failed to exhaust administrative remedies. As a preliminary matter, even if true, this defense is not a jurisdictional defect to a declaratory judgment action. Jones v. Village of Chagrin Falls, 77 Ohio St. 3d 456 (1997), syllabus ¶ 1. Thus, the State’s Motion, to the extent it is based upon Civil Rule 12(B)(1), has no merit.

To the extent the State’s Motion relies upon Civil Rule 12(b)(6), Plaintiffs have no obligation to resort to any administrative procedure prior to filing this case. Even if there were such an obligation, it is clear that recognized exceptions to the rules requiring the exhaustion of administrative remedies apply under these facts. Further, to the extent this Court considers this Motion to Dismiss pursuant to Civil Rule 12(B)(6), its consideration must be limited to the facts

stated in the First Amended Complaint and must disregard the extrinsic evidence discussed in the State's Motion to Dismiss and the documentation attached to it.

Exhaustion in this case is not necessary because the First Amended Complaint clearly challenges the ODNR's policy of expanding the State's ownership of land beyond the waters of Lake Erie to 573.4 Feet. Such policy, without the payment of just compensation, violates both the United States and Ohio Constitutions: "[t]he United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St. 3d 59, 63 (2002). In these instances, the Ohio Supreme Court clearly holds that exhaustion is not necessary: "[w]e have long held that failure to exhaust administrative remedies is not a necessary prerequisite to an action challenging the constitutionality of a statute, ordinance, or administrative rule." Jones v. Village of Chagrin Falls, 77 Ohio St. 3d 456, 460 (1997) (emphasis supplied). Here, the State's administrative rule has resulted in an unconstitutional taking of private property and, thus, exhaustion is unnecessary.

Likewise, although there has been no showing whatsoever that exhaustion is required in this context (all the cases cited by the State are zoning cases), even when exhaustion is required, exceptions exist to this rule. The Court in Karches v. City of Cincinnati, 38 Ohio St. 3d 12, 17 (1988) (a zoning case) set forth two such exceptions: "[f]irst, if there is no administrative remedy available which can provide the relief sought or if resort to administrative remedies would be wholly futile . . . and [s]econd, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive." Id.

All exceptions apply here. No administrative remedy is available by which all littoral property owners can stop ODNR's confiscation of their property and obtain compensation for that confiscation. No remedy, other than this declaratory judgment action, is offered or available to stop ODNR from misleading members of the public into believing they can trespass on littoral owners' private property. Moreover, while some states have inverse condemnation statutes that afford private landowners a statutory or administrative process to obtain compensation for takings, the only remedy offered by Ohio is inverse condemnation by way of mandamus.

Moreover, resort to an administrative appeal would be futile. It is beyond dispute that the ODNR is not going to compensate Plaintiffs for an unconstitutional taking of private property in an administrative action. Further, the State has already made its position clear. "The

necessity [of the exhaustion requirement] is to pinpoint the final position of the decisionmaker.” Karches, 38 Ohio St.3d at 17. As alleged in the First Amended Complaint, the ODNR “has asserted and continues to assert that the state of Ohio owns all land lakeward of ‘ordinary high water mark’ or ‘OHW,’ which for administrative convenience the ODNR currently defines as wherever the U.S. Army Corps of Engineers defines Ordinary High Water for purposes of federal law.” First Amended Complaint at ¶ 11. In this case, the State has made its position abundantly clear and thus any administrative proceeding would be futile.

Further, requiring exhaustion would be onerous and unusually expensive. The Eighth District Court of Appeals has explained these terms in this context:

An administrative remedy would be considered onerous if it were burdensome or oppressive, for example, a municipality’s procedure which requires complicated proceedings in regard to an application for simple relief. Administrative relief would be considered unduly expensive whereby a procedure requires a party to make excessive expenditures for a simple determination of a building set back.

Gates Mills Invest. Co. v. Village of Pepper Pike, 59 Ohio App. 2d 155, 166 (8th Dist. 1978). In order to obtain administratively the equivalent of the declaration sought in this case, thousands of administrative actions would have to be commenced, one for each owner of land abutting Lake Erie where 573.4 Feet is not the equivalent of the natural shoreline. Based upon the experience of Tom Jordan as described in the State’s Motion at page 11, in which the State has failed for eleven years to provide him a hearing or to issue a final order concerning a lease dispute, Plaintiffs certainly cannot afford to individually pursue such onerous and costly proceedings. While ODNR understandably supports a “divide and conquer” process by which it can seek to protect its unlawful conduct by mistreating and abusing property owners individually, such a procedure would be both unreasonably complicated and excessively expensive.

For these reasons, since Plaintiffs are not required to exhaust any administrative remedy under these facts and, even if they were required, exceptions to such requirement clearly exist, this ground for dismissal should be overruled.

**C. Each of the Plaintiffs Has Standing to Bring this Case.**

The State also claims that Plaintiffs do not have standing to bring this case. The State’s argument is that Plaintiffs should not be permitted to bring “generalized grievances” of which

they have no stake in the outcome since most of them have not sought a lease from ODNR. This assertion misstates both the allegations of the First Amended Complaint and the applicable law.

The law relating to standing to bring a declaratory judgment action to contest government action solely requires a justiciable case and the plaintiff being affected by, or materially interested in, the government action. See, e.g., Pack v. City of Cleveland, 1 Ohio St. 3d 129, 131 (1982). Plaintiffs clearly have standing to bring this case. As discussed above, this case is clearly justiciable. Second, this case is about the State's confiscation of the Plaintiffs' real property all along the Lake Erie shore. Each of the Plaintiffs is an owner, or represents owners, of such property. Therefore, they each have an interest in the outcome of this case. Thus, Plaintiffs have standing.

Further, Plaintiffs do not have to violate the ODNR's leasing policy before they have standing to contest that policy. When a violation of a statutory scheme may subject a person to sanctions or penalties (such as those authorized by Ohio Revised Code 1506.09) a person need not violate such statute before having standing to bring a declaratory judgment action seeking a construction or interpretation of the statute. State ex rel. Taft v. Court of Common Pleas of Franklin Cty., 63 Ohio St. 3d 190, 196 (1992). Plaintiffs should not have to violate the State's leasing policy to determine whether a lease is required in the first place.

For these reasons, it is clear that Plaintiffs have standing in this case.

**D. The Mandamus Claim is Properly Stated.**

The State presents a variety of reasons regarding why it believes that Counts II and III of the First Amended Complaint, which are claims for mandamus, should be dismissed. None of these reasons have any merit.

Again, relying on its theory that this case is about the State's leasing program, the State first argues that there is no allegation that Plaintiffs have, as required for a mandamus case, a clear legal right at issue in this case nor that the State has a clear legal duty to perform any act. Again, for purposes of this Civil Rule 12(B)(6) motion, Plaintiffs' allegations that the State has confiscated their private property and that the State is obligated as a matter of law to compensate them for said taking is sufficient to withstand this Motion to Dismiss. See State ex rel. Hummel v. Sadler, 96 Ohio St. 3d 84, 86-87 (2002) (stating that "Civ. R. 12(B)(6) motions attack the sufficiency of the complaint and may not be used to summarily review the merits of a cause of action in mandamus."); State ex rel. Elsass v. Shelby County Bd. of Comm'rs, 92 Ohio St. 3d

529, 533 (2001) (“Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.”).

The State also argues that Plaintiffs have an adequate remedy at law and, therefore, this case should be dismissed. Given the State’s refusal to retract its policy concerning the extent of its ownership rights, as discussed more fully above, it is beyond dispute that Plaintiffs do not have an adequate remedy at law. Moreover, even if the State were to retract its policy and to agree that the real property at issue is privately owned, Plaintiffs would remain entitled to compensation for the period of the State’s wrongful temporary taking and relief under Count II of the First Amended Complaint would remain appropriate.

Finally, the State claims that Counts II and III should be dismissed because, if it wins the issue regarding the extent of its ownership rights, “then the State will have taken nothing” and no mandamus will be appropriate. See Motion to Dismiss at 16. This argument ignores fundamental rules of pleading civil cases. Civil Rule 8(E)(2) clearly states that parties may set forth statements of a claim in the alternative. In this case, Counts II and III are set forth in the alternative. If Plaintiffs obtain the declaratory judgment they seek in Count I of the First Amended Complaint, then they will be entitled to compensation for the State’s temporary taking of private property as set forth in Count II of the First Amended Complaint. If the Court determines that the State lawfully could confiscate the property at issue by expanding its definition of the public trust in the late 1990s,<sup>5</sup> Plaintiffs still remain entitled to compensation, as set forth in Count III of the Complaint, for the State’s confiscation of their private property. There is absolutely nothing wrong with this manner of pleading.


### **III. CONCLUSION**

For the foregoing reasons, because the State’s Motion to Dismiss has no merit, it should be denied expeditiously.

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<sup>5</sup> As recently as the early 1970s, the State’s position was that the public trust extended only to mean low water mark. See Rheinfrank v. Gienow, Case No. 72AP-298, 1973 Ohio App. Lexis 1543, at \*3 (10th Dist. May 8, 1973). And in the early 1990s the State’s position, through its Attorney General, was that the public trust extended only to water’s edge. 1993 Ohio Atty. Gen. Op. No. 025. Thus, should the State succeed in its argument that the public trust now extends to 573.4 Feet, the State will have taken private property and will be required to compensate all littoral owners for that taking through the inverse condemnation process.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Opposition to Motion of the State of Ohio to Dismiss Plaintiffs-Relator's First Amended Complaint was served, via regular U.S. mail, upon the following, this 30th day of September, 2004:

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One of the Attorneys for Plaintiffs-Relators

**APPENDIX**

TAB

Town Centers Ltd. Partnership v. Montgomery, No. 99AP-689, 2000 Ohio App. Lexis 1457 (10th Dist. April 4, 2000).....1

Dickason v. State of Ohio, No. 01AP-1373, 2002 Ohio App. Lexis 5207 (10th Dist. Sept. 30, 2002) .....2

Miller v. Foos, Case No. E-80-29, 1980 Ohio App. Lexis 12470 (6th Dist. Oct. 10, 1980).....3

Rheinfrank v. Gienow, Case No. 72AP-298, 1973 Ohio App. Lexis 1543 (10th Dist. May 8, 1973) .....4