

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.)
AMERICAN GREETINGS)
CORPORATION, et al.,)
)
Relators,)
)
vs.)
)
JUDGE NANCY A. FUERST, et al.,)
)
Respondents.)

Case No. 10-0582

ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS

**RELATORS' MEMORANDUM IN SUPPORT OF COMPLAINT
FOR WRITS OF PROHIBITION AND MANDAMUS**

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INTRODUCTION

This case involves the failure by a trial court to refer a commercial case to the specialized Commercial Docket despite the clear and unequivocal requirement to do so in the Temporary Supplemental Rules (“Temporary Rules”), effective July 1, 2008. Under the Temporary Rules, a trial court “*shall*” transfer a case to the commercial docket where, as here, it is a “derivative action” involving the obligations and liabilities of corporate officers and directors. Contrary to this mandate, Judge Peter Corrigan (the “Trial Judge”) denied Relators’ motion to transfer the case in a one-sentence order without reasoning or support—an order which Administrative Presiding Judge Nancy Fuerst (the “Administrative Judge”) subsequently affirmed in another one-sentence order without reasoning or support.

The trial court’s failure to transfer the case runs counter to the clear language in the Temporary Rules and frustrates the fundamental policies and objectives on which they rest. The Commercial Docket was designed to expedite the resolution of commercial cases, ease the financial burden on litigants, and provide “[a]n efficient process [that] will also improve Ohio’s business climate and promote economic growth.”¹ If allowed to stand, the trial court’s orders will undermine all three of these goals.

The only conceivable basis for the trial court’s orders was the argument by the plaintiff that filed the derivative case that it was a “labor organization” and that cases in which labor organizations are a party cannot be transferred to the Commercial Docket. As explained more fully below, that argument is based on a tortured construction of the Temporary Rules, a

¹ March 10, 2008 Memorandum from Members of the Task Force to Chief Justice Thomas J. Moyer: “Interim Report and Proposed Temporary Rules of Superintendence.”

misunderstanding of derivative actions generally, and the demonstrably false claim that the pension fund was a “labor organization.”

Because the Trial Judge has exercised, and will continue exercising, judicial power patently and unambiguously unauthorized by the Temporary Rules, Relators respectfully submit that a writ of prohibition prohibiting the Trial Judge from doing so is warranted. Because Relators have a clear legal right to have the underlying derivative action transferred to the Commercial Docket, Respondents have a clear legal duty under the Temporary Rules to effect that right, warranting mandamus relief.

With no further right of direct appeal, Relators have no adequate remedy other than this Court’s immediate intervention. Indeed, Temporary Rule 1.04(D)(2) provides that “[t]he decision of the administrative judge as to the transfer of a case under division (C) of this rule is *final and not appealable*.” (Emphasis added). Bearing in mind the goal of the Commercial Docket to expedite cases and ease the financial burden on litigants, a potential subsequent appeal after final judgment by a non-Commercial Docket Judge cannot effectively remedy the harm to Relators that flows from the patently erroneous denial of their motion to transfer. By that time, it would be too late. Accordingly, this case presents exceptional circumstances that warrant the exercise of this Court’s mandamus and prohibition jurisdiction.

BACKGROUND²

On March 20, 2009, the Electrical Workers Pension Fund, Local 103, I.B.E.W. (“Plaintiff” or “Pension Fund”) filed a Verified Derivative Complaint (“Derivative Complaint”) on behalf of American Greetings against Relators in the Court of Common Pleas of Cuyahoga County, Ohio. (¶ 13). The case was styled *Electrical Workers Pension Fund Local 103 I.B.E.W.*

² The facts are taken from the Verified Complaint, filed simultaneous herewith. “¶ ___” refers to paragraphs of the Verified Complaint.

vs. Morry Weiss, et al., Case No. 09-CV-687985 (“the Derivative Action”). (¶ 13). Consistent with the nature of derivative actions, the Pension Fund purported to sue in a representative capacity on causes of action belonging to American Greetings. (¶ 14). American Greetings, the real party in interest, was named as a nominal defendant. (Derivative Compl. at 1 (“This is a shareholder derivative action brought by a shareholder of American Greetings . . . on behalf of the Company. The derivative claims are asserted against American Greetings’ Board of Directors . . . and certain of its current and former senior executives and directors”)) (attached to Verified Compl., Ex. 1.F). The Derivative Complaint asserts that current and former senior executives and directors of American Greetings breached their fiduciary duties by approving backdated option grants, permitting the grants to be improperly recorded, and disseminating false financial statements.³ (¶ 14).

Pursuant to the mandatory provisions of Temporary Rules 1.03 and 1.04, and because the Complaint asserted derivative claims involving the rights, obligations, and liability of American Greetings’ officers and directors, Relators moved to transfer the Derivative Action to the Commercial Docket on March 2, 2010. This was precisely the type of case for which this Court created the Commercial Docket. (¶ 22).

The Pension Fund opposed the motion. It did not dispute that it filed a derivative action that was subject to transfer. Rather, it claimed to be a “labor organization” and asserted the exception to the rule set forth in Temporary Rule 1.03(B)(7): “A commercial docket judge shall not accept a civil case into the commercial docket of the pilot project court *if the gravamen of the*

³ The Derivative Action was removed to the United States District Court for the Northern District of Ohio. On February 17, 2010, the case was remanded, which was reflected on the Cuyahoga Common Pleas Court docket on March 1, 2010.

case relates to any of the following: . . . (7) [c]ases in which a labor organization is a party[.]” (Emphasis added).

As Relators demonstrated in their Reply, however, the Temporary Rules only prohibit transfer of cases in which a labor organization is a party when the party’s identity as a labor organization relates to the “gravamen of the case.” (§ 23). Relators established—and the Pension Fund did not dispute—that its claimed identity as a labor organization was utterly irrelevant to the gravamen of the case. And finally, Relators argued that even if a party’s mere status as a labor organization were sufficient to preclude transfer to the Commercial Docket, the Pension Fund had not submitted a shred of evidence that it was a “labor organization” within the meaning of the Temporary Rules. It merely included a footnote citation to the website of the International Brotherhood of Electrical Workers (I.B.E.W.). The I.B.E.W., however, is not a plaintiff in the Derivative Action. (§§ 24–26).

Despite the unambiguous mandate of the Temporary Rules, the Trial Judge denied the motion without written analysis. (§ 28). Pursuant to Temporary Rule 1.04(C)(1), Relators appealed the Judgment Entry to the Administrative Judge. On March 26, 2010, the Administrative Judge affirmed the Trial Judge in a one-sentence entry on the docket. (§ 30).

LAW AND ARGUMENT

For a writ of prohibition to issue, the relator must show “(1) that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying a writ will result in injury for which no other adequate remedy exists in the ordinary course of law.” *State ex rel. Haylett v. Bur. of Workers’ Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134, 720 N.E.2d 901; *see also State ex rel. Knowlton v. Noble Cty. Bd. of Elections*, Slip Op. No.2010-Ohio-1115, at

¶17. Where a court or officer is patently and unambiguously without authority, a relator is not required to demonstrate the lack of an adequate remedy of law. *See State ex rel. Hunter v. Summit County Human Resource Comm.*, 81 Ohio St.3d 450, 452, 1998-Ohio-614, 692 N.E.2d 185.⁴ Furthermore, even if there were a remedy, the Court still has the power to issue a writ. *See State ex rel. Tempero v. Colopy* (1962), 173 Ohio St. 122, 123, 180 N.E.2d 273 (“This court in the exercise of its discretion will usually refuse to allow a writ of prohibition or of mandamus where the relator has an adequate remedy in the ordinary course of the law. However, it has the power to, and may in the exercise of its discretion, issue such a writ in such an instance.”).

Similarly, for a writ of mandamus to issue, the relator must show that (1) the respondent had a clear legal duty to act, (2) he has a beneficial interest, and (3) there is no adequate remedy in the ordinary course of law. *See State ex rel. Stanley v. Cook* (1946), 146 Ohio St. 348, 66 N.E.2d 207, at paragraphs one and two of the syllabus. “Mandamus will lie to permit a private individual to compel a public officer to perform an official act where he is under a clear legal duty to do so, and where such relator has an interest . . . [he] is being denied . . . by reason of the public officer’s failure to take action to perform that which he is under a clear legal duty to perform.” *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 163–64, 228 N.E.2d 631. Here, Relators meet both standards.

⁴ *See also State ex rel. Hunter*, 81 Ohio St.3d at 452 (“If, however, the tribunal patently and unambiguously lacks jurisdiction over the matter, prohibition will lie to prevent the unauthorized exercise of jurisdiction.”); *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 99–101, 1996-Ohio-340, 671 N.E.2d 236 (holding that a judge patently and unambiguously lost jurisdiction over a divorce case upon the death of one of the parties, even in the absence of a statute on point).

I. The Trial Judge Had an Affirmative Duty to Transfer the Derivative Action to the Commercial Docket and Has No Authority to Continue Exercising Judicial Authority over the Derivative Action.

A. Commercial Dockets Were Designed to Promote Efficiency and Predictability, to Encourage Economic Development, and Should Be Treated Accordingly.

In the 1990s, business courts emerged in a variety of jurisdictions throughout the country. Generally, the purpose was to develop judicial expertise in business disputes, resolve issues promptly, and promote consistent outcomes. The Chief Justice announced the formation of the Supreme Court Task Force on Commercial Dockets in his April 25, 2007 Annual State of the Judiciary Address. The Task Force was charged with assessing the best method of establishing commercial civil litigation dockets in Ohio Common Pleas Courts. (§ 16). The Task Force's work culminated in the Supreme Court adopting the Temporary Rules, which mandate that certain cases be transferred to commercial dockets. (§ 16).

The goals of the project were two-fold: efficiency and predictability. "Cases on the commercial docket will be decided more quickly than cases that remain on the standard docket because of specific timing rules. Consistency and predictability of decision will come from having the same limited number of judges deciding commercial issues. With these improvements, the hope is that Ohio will become more hospitable toward business, strengthening the state's economy." (*Primer on Ohio's New Commercial Dockets*, COLUMBUS BAR LAWYERS QUARTERLY (Summer 2009); *Ohio Supreme Court Test To Set Aside "Commercial Dockets" For Biz Disputes*, BUSINESS FIRST (July 4, 2008) ("The Court's mission here is to create efficiencies in the administration of justice," said state Supreme Court spokesman Christopher Davey. "But it could have a positive impact on economic development in the state at a time when it's sorely needed.")).

Only cases designated by Temporary Rule 1.03 qualify for the Commercial Docket. Pursuant to Temporary Rule 1.02(C)(1), only “Commercial Docket Judges” can hear and decide cases assigned to the Commercial Docket. These Rules are designed to ensure the success of the Pilot Project by requiring that commercial cases be assigned to Commercial Docket Judges who are trained in handling commercial cases under specialized case management plans. (*See* Temp. Sup. R. 1.02(C)(2) and 1.07).

B. The Commercial Docket Transfer and Review Procedure Mandates Transfer of Certain Cases.

Temporary Rule 1.03 identifies a select group of cases that must be transferred to the Commercial Docket, including derivative actions involving the rights, obligations, liability, or indemnity of officers and directors of corporations. Rule 1.03 provides that “[a] *commercial docket judge shall accept a civil case, including . . . any derivative action*, into the commercial docket . . . if the case is within the statutory jurisdiction of the court and the gravamen of the case relates to any of the following . . . (4) The rights, obligations, liability, or indemnity of an officer, director, manager, trustee, partner, or member of a business entity owed to or from the business entity[.]” (Temp. Sup. R. 1.03(A) (emphasis added)).

Temporary Rule 1.04(B) outlines the procedure for transfer.⁵ Temporary Rule 1.04(B)(3) reinforces that the rules are mandatory. In fact, even if neither of the parties moves for transfer to the Commercial Docket “the judge shall sua sponte request the administrative judge to transfer the case to the commercial docket.”

⁵ If the gravamen of a case relates to any of the topics set forth in subsection (A) of Temporary Rule 1.03, “the attorney filing the case shall include with the initial pleading a motion for transfer of the case to the commercial docket.” If the attorney filing the case does not file a motion for transfer, and if the case is assigned to a non-commercial docket judge, “an attorney representing any other party shall file such a motion with that party’s first responsive pleading or upon that party’s initial appearance, whichever occurs first.” (Temp. Sup. R. 1.03(B)(1) & (2)).

C. The Temporary Rules Mandate the Transfer of the Derivative Action to Commercial Docket.

The Derivative Action unquestionably qualified for the Commercial Docket and there was no basis for the Trial Judge to deny Relators' motion. Indeed, even if Relators had not moved for transfer, the Trial Judge had an affirmative duty to request transfer sua sponte. There is nothing vague or discretionary about a non-Commercial Docket Judge's duty under the Temporary Rules.⁶

The Eighth District Court of Appeals recently considered the propriety of an order transferring a similar shareholder derivative case to the Commercial Docket and concluded that transfer was not just proper, it was required. *State ex rel. Carr v. McDonnell* (Cuyahoga App.), 184 Ohio App.3d 373, 2009-Ohio-2488, 921 N.E.2d 251, at ¶¶14, 19 ("Clearly, the gravamen of *Acacia II* and *Acacia III*, a shareholders derivative action and breach of a fiduciary duty claim, fall within the parameters of Temp.Sup.R. 1.03(A)."), affirmed 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004.

In *Carr*, the administrative judge had properly transferred a derivative case to the Commercial Docket, and the plaintiff sought a writ of mandamus ordering the Commercial Docket Judge to refer the case back to the non-Commercial Docket. The Eighth District Court of Appeals concluded that the derivative actions *were* properly transferred to the Commercial Docket and that the Commercial Docket Judge therefore possessed "the necessary jurisdiction to

⁶ "[T]he word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." *Ohio Civ. Rights Comm. v. Countrywide Home Loans, Inc.*, 99 Ohio St.3d 522, 2003-Ohio-4358, 794 N.E.2d 56, at ¶4 (citations omitted); *Bergman v. Monarch Constr. Co.*, Slip Opinion No. 2010-Ohio-622, at ¶26. Furthermore, "[i]t is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is *mandatory*." *Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 1992-Ohio-17, 605 N.E.2d 368.

preside over the” derivative actions. *Id.* at ¶ 21.⁷ In so concluding, the court recognized that the transfer of the derivative action to the Commercial Docket was not a matter of judicial discretion. A non-Commercial Docket Judge would have been patently and unambiguously lacking judicial authority to preside over the case.

D. The “Labor Organization” Exclusion Is Inapplicable.

The Pension Fund’s sole ground for opposing the motion to transfer was that Temporary Rule 1.03(B)(7) prohibited transfer because the Pension Fund was purportedly a “labor organization.”⁸ This argument was baseless. Temporary Rule 1.03(B)(7) only prohibits transfer where the “gravamen” of a party’s claim is related to its status as a labor organization. (Temp. Sup. R. 1.03(B)(7); *see also* BLACK’S LAW DICTIONARY 721 (8th ed. 1999) (defining “gravamen” as “[t]he substantial point or essence of a claim, grievance, or complaint”). The “gravamen” requirement in the Rule must be given meaning. To hold otherwise would violate well-established principles of statutory construction, including the principle that courts must give effect to all of the words and phrases in a statute or rule. *See E. Ohio Gas Co. v. Pub. Utils.*

⁷ In briefing before this Court, two Cuyahoga County Common Pleas judges and the then-presiding judge made an argument that applies with equal force to this case: that transfer of the derivative action “was *required* by operation of the Temporary Rules of Superintendence. . . . [The case] *had to be transferred to the commercial docket*. This has to be if the Pilot Project is to have any chance of success. The Temporary Rules are written so as to assure that commercial cases are assigned to trained commercial docket judges. . . . [T]ransfer to the Court of Common Pleas’ commercial docket pursuant to Sup. Temp. R. 1.03 is an instance where transfer of the case from the original assigned judge is not only expressly authorized but mandated.” (Merit Br. of Respondents-Appellees, at 10, 11, 15 (emphasis in original)).

Available at <http://www.sconet.state.oh.us/tempx/650746.pdf> (last visited March 30, 2010).

⁸ Temporary Rule 1.03(B) provides that “A commercial docket judge shall not accept a civil case into the commercial docket of the pilot project court if the *gravamen of the case relates to any of the following*: . . . (6) Employment law cases, except those involving owners described in division (A)(3) of this rule; (7) Cases in which a labor organization is a party” (Temp. Sup. R. 1.03(B) (emphasis added)).

Comm. (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (stating that basic rule of statutory construction requires that no words in statutes be ignored).

In this case, the Pension Fund's identity was irrelevant to the gravamen of the Derivative Action. The Pension Fund has never contested otherwise. Indeed, derivative actions focus on the relationship between a corporation and its officers and directors. Shareholders are not parties in interest. *See Ross v. Bernhard*, 396 U.S. 531, 538–39 (1970) (observing that the corporation, not the shareholder, is the real party in interest in a shareholder's derivative suit). “[I]n [a] stockholders’ derivative action the right of the plaintiff to maintain the action is derivative or secondary.” *Boedeker v. Rogers* (Cuyahoga App. 2000), 140 Ohio App.3d 11, 20, 746 N.E.2d 625. “The stockholder, as a nominal party, has no right, title or interest in the claim itself.” *Id.* Although named as a defendant in a derivative action, the corporation “is the real party in interest, the stockholder being at best the nominal plaintiff.” *Ross*, 396 U.S. at 538. “The heart of the action is the corporate claim,” and any proceeds recovered in a derivative action belong exclusively to the corporation. *Id.*; *see also Pacemaker Plastics Co., Inc. v. AFM Corp.* (N.D. Ohio 2001), 139 F. Supp. 2d 851, 855 (owner of a derivative cause of action is the corporation itself).

Because the focus of the Derivative Action is on the relationship between American Greetings and its directors and officers, *any* qualifying shareholder could have brought the claims. The identity of the representative plaintiff is irrelevant. For that reason, the Trial Judge's unexplained Order, and the Administrative Judge's silent affirmance, are both erroneous and undermine the policy behind the creation of the Commercial Docket. Pension funds frequently file derivative actions.⁹ To exclude such derivative actions from the Commercial

⁹ To name just a few, and many recent, examples: *Plumbers & Pipefitters Local 572 Pension Fund v. Cook* (S.D. Ohio Sept. 22, 2004), 2004 U.S. Dist. LEXIS 30530 (Plumbers & Pipefitters, Local

Docket merely because a pension fund shareholder (as opposed to an individual shareholder) acts as a representative plaintiff completely distorts the Temporary Rules.¹⁰ Transfer to the Commercial Docket should depend on the substance of the claims, not the caption of the complaint. Guidance from this Court is needed.

572 Pension Fund); *Louisiana Mun. Police Emps. Retirement Sys. v. Fertitta* (Del. Ch. July 28, 2009), 2009 Del. Ch. LEXIS 144 (Louisiana Municipal Police Employees' Retirement System); *Am. Internatl. Group, Inc. v. Greenberg* (Del. Ch. 2009), 976 A.2d 872 (Teachers' Retirement System of Louisiana and City of New Orleans Employees; Retirement System); *In re: Countrywide Corp. S'holders Litig.* (Del. Ch., Mar. 31, 2009), 2009 Del. Ch. LEXIS 44 (Arkansas Teacher Retirement System, Fire & Police Pension Association of Colorado, Public Employees Retirement System of Mississippi, Louisiana Municipal Police Employees Retirement System, and Central Laborers Pension Fund); *Ind. Elec. Workers Pension Trust Fund v. Dunn* (N.D. Cal., Mar. 28, 2008), 2008 U.S. Dist. LEXIS 34600 (Indiana Electrical Workers Pension Trust Fund, IBEW, SEIU Affiliates' Officers and Employees Pension Plan, SEIU National Industry Pension Plan, and Pension Plan for Employees of SEIU); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.* (2d Cir. 2008), 531 F.3d 190, 194 (Teamsters Local 445 Freight Div. Pension Fund); *Louisiana Mun. Police Emps. Ret. Sys. v. Lewis* (S.D.N.Y.), No. 09 Civ. 808 (Louisiana Municipal Police Employees Retirement System); *Hollywood Police Officers' Ret. System v. Lewis* (S.D.N.Y.), No. 09 Civ. 1174 (Hollywood Police Officers' Retirement System); *West Palm Beach Firefighters Pension Fund v. Lewis* (S.D.N.Y.), No. 09 Civ. 2581 (West Palm Beach Firefighters Pension Fund); *Westmoreland Cty. Emp. Ret. Sys. v. Lewis* (S.D.N.Y.), No. 09 Civ. 2609 (Westmoreland County Employee Retirement System); *In re Unitedhealth Group S'holder Derivative Litig.* (D. Minn. 2009), 631 F. Supp. 2d 1151 (Jacksonville Police & Fire Pension Fund, Louisiana Municipal Police Employees' Retirement System, Louisiana Sheriffs' Pension & Relief Fund, Public Employees' Retirement System of Mississippi, St. Paul Teachers' Retirement Fund Association, Fire & Police Pension Association of Colorado, Public Employees' Retirement System of Ohio, State Teachers' Retirement System of Ohio, etc.); *In re NVIDIA Corp. Derivative Litig.* (N.D. Cal. Mar. 18, 2009), 2009 U.S. Dist. LEXIS 24973 (Alaska Electrical Pension Fund, Liuna Staff & Affiliates Pension Fund, and Alaska Electrical Pension Fund); *Plymouth Cty. Ret. Assn. v. Schroeder* (E.D.N.Y. 2008), 576 F. Supp. 2d 360 (Plymouth County Retirement Association); *In re Altera Corp. Derivative Litig.* (N.D. Cal. May 15, 2008), 2008 U.S. Dist. LEXIS 92157 (Alaska Electrical Pension Fund and Wayne County Employees' Retirement System); *In re Countrywide Fin. Corp. Derivative Litig.* (C.D. Cal. 2008), 554 F. Supp. 2d 1044 (Arkansas Teacher Retirement System, Fire & Police Pension Association of Colorado, and Louisiana Municipal Police Employees' Retirement System); *In re Guidant Corp. S'holders Derivative Litig.* (S.D. Ind. Mar. 27, 2008), 2008 U.S. Dist. LEXIS 24797 (Alaska Electrical Pension Fund); *Winters v. Stemberg* (D. Mass. 2008), 529 F. Supp. 2d 237 (Laborers' International Union of North America National (Industrial) Pension Fund); *Haw. Laborers Pension Fund v. Farrell* (C.D. Cal. Aug. 22, 2007), 2007 U.S. Dist. LEXIS 77777 (Hawaii Laborers Pension Fund); *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Gecht* (N.D. Cal. Mar. 22, 2007), 2007 U.S. Dist. LEXIS 26529 (Indiana State District Council of Laborers, HOD Carriers Pension Fund, and City of Ann Arbor Employees' Retirement System).

¹⁰ Furthermore, such a rule could promote gamesmanship. Attorneys could seek to avoid the Commercial Docket by filing a derivative action on behalf of a pension fund, rather than an individual shareholder. That is unfair and an illogical distinction. In both cases, the corporation is the real party in interest.

E. Irrelevant as it Is, the Pension Fund Put Forth No Evidence that it was a Labor Organization.

Even if the Pension Fund's illogical interpretation of the Temporary Rules were correct (which it is not), transfer is still required because the Pension Fund is not a "labor organization" under the Temporary Rules. Although the Pension Fund claimed that it was a "labor organization" as that term is defined in the National Labor Relations Act, its only "support" was a lone footnote citation to the website of the International Brotherhood of Electrical Workers Local 103, which states that the "mission of Local 103, I.B.E.W., is a simple one—to provide the most skilled and productive workforce in the world, while at the same time protecting the rights and benefits of every worker." This is misleading. As Relators pointed out below, the I.B.E.W. is not a party in the Derivative Action; the Pension Fund is.

As Relators further pointed out, documents the Pension Fund filed with the federal government and in other litigation demonstrate that the Pension Fund and I.B.E.W. Local 103 are legally distinct: the Pension Fund is a sophisticated institutional investor with more than a half-billion dollars in investments, whereas I.B.E.W. Local 103 is a labor union—the type of "labor organization" the Temporary Rules contemplate. (¶ 27). The Pension Fund's annual report, which it is required to file with the federal government, reveals that it is a multiemployer pension plan within the meaning of Section 3(37) of ERISA. (¶ 27).¹¹ Consistent with its filings with the federal government, the Pension Fund has stated in sworn submissions to courts in other cases that it is an "employee pension benefit plan" within the meaning of §3(2)(A) of ERISA"

¹¹ The Pension Fund's report for 2006—the most recent year publicly available—lists \$644,135,381 in investments. The report also reveals that the Pension Fund is managed by a board of trustees which, by law, must be made up of equal numbers of representatives from the union *and* management. 29 U.S.C. §186(c)(5). (Verified Compl. Ex. 1.11, at 3).

and that it is a “large, sophisticated institutional investor” with “vast resources.” (¶ 27). The Pension Fund cannot mask its true legal identity to avoid transfer to the commercial docket.

II. Writs of Prohibition and Mandamus Are the Proper Remedy In These Circumstances.

Writs such as mandamus and prohibition are proper where no adequate remedy is available. But where, as here, a trial judge is patently and unambiguously without authority to act, a relator is not required to demonstrate the lack of an adequate remedy of law. *See State ex rel. Haylett v. Bur. of Workers’ Comp.* (1999), 87 Ohio St.3d 325, 334, 1999-Ohio-134, 720 N.E.2d 901.

Furthermore, “for an alternate remedy to be considered adequate, the remedy must be complete, beneficial and speedy.” *State ex rel. Minor v. Eschen*, 74 Ohio St.3d 134, 136, 1995-Ohio-264, 656 N.E.2d 940. Here, Relators have exhausted the available remedies through the appeal procedure promulgated in the Temporary Rules. With no further right of direct appeal, Relators have no adequate remedy other than this Court’s immediate intervention. Indeed, Temporary Rule 1.04(D)(2) provides that “[t]he decision of the administrative judge as to the transfer of a case under division (C) of this rule is *final and not appealable*.” (Emphasis added). The harm, moreover, flows from the Relators’ clear right to have this Derivative Action heard before a qualified Commercial Docket Judge, as this Court and the Temporary Rules expressly contemplated—indeed mandated. In addition to a reliable and expedited process, the Temporary Rules are intended to ease the financial burden on commercial litigants.

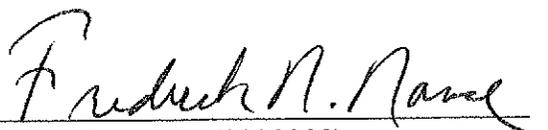
There is no meaningful appellate review of the Trial Judge’s failure to comply with his nondiscretionary obligations—the failure to transfer permanently deprives Relators of their right to have the claims asserted against them considered by a Commercial Docket Judge. Furthermore, demonstrating harmful error on appeal after a final judgment would be a practical

impossibility; the basis for seeking Commercial Docket jurisdiction will, by that time, be moot. Thus, this is precisely the sort of case in which no “adequate” later appeal is possible. Against this backdrop, the only feasible remedy available to the Relators is via prohibition and mandamus.

CONCLUSION

For the foregoing reasons, Relators respectfully request this Court issue a writ of prohibition directing the Trial Judge to refrain from exercising judicial power over the Derivative Action. Relators additionally request the Court issue a writ of mandamus ordering the Trial Judge or Administrative Judge to transfer the Derivative Action to the Commercial Docket of the Cuyahoga County Court of Common Pleas.

Respectfully submitted:



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RELATORS

DATED: April 2, 2010

PRAECIPE TO CLERK

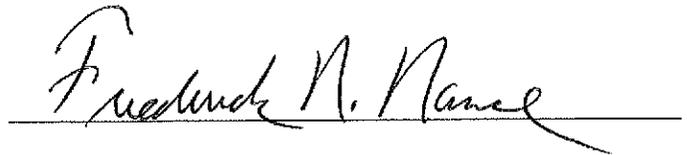
Please serve the foregoing Memorandum in Support of Relators' Complaint for Writs

Prohibition and Mandamus on the Respondents in the Verified Complaint as follows:

JUDGE NANCY A. FUERST
Cuyahoga County Common Pleas Court
1200 Ontario Street
Cleveland, Ohio 44113,

--and--

JUDGE PETER J. CORRIGAN
Cuyahoga County Common Pleas Court
1200 Ontario Street
Cleveland, Ohio 44113,

A handwritten signature in cursive script, reading "Frederick N. Nance", is written over a horizontal line.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Complaint for Writs of Prohibition and Mandamus was served by electronic mail this 2nd day of April 2010 upon the following:

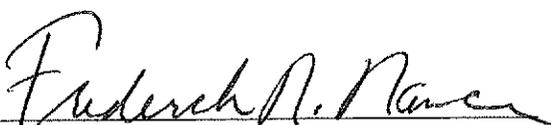
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Case No. 09-687985 (Cuyahoga C.P.)


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