IN THE SUPREME COURT OF OHIO

ORIGINAL

THE STATE OF OHIO, EX REL. AMERICAN GREETINGS CORPORATION, ET AL.,	)	Case No. 2010-0582
Relators,	)	Original Action in Prohibition and Mandamus
vs.	)	
JUDGE NANCY A. FUERST, ET AL.,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS

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IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL. AMERICAN GREETINGS CORPORATION, ET AL.,	)	Case No. 2010-0582
Relators,	)	Original Action in Prohibition and Mandamus
vs.	)	
JUDGE NANCY A. FUERST, ET AL.,	)	**RESPONDENTS' MOTION TO DISMISS**
Respondents.	)	

Pursuant to S.Ct.Prac.R. 10.5, respondents Judge Nancy A. Fuerst and Judge Peter J. Corrigan ("respondents") respectfully move this Court to dismiss the Complaint for Writs of Prohibition and Mandamus and this cause. The grounds in support of this motion are that the Complaint fails to state claims for relief in prohibition or mandamus.

A memorandum in support of this motion is attached hereto and incorporated herein.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL. AMERICAN GREETINGS CORPORATION, ET AL.,	)	Case No. 2010-0582
Relators,	)	Original Action in Prohibition and Mandamus
vs.	)	**BRIEF IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS**
JUDGE NANCY A. FUERST, ET AL.,	)	
Respondents.	)	

STATEMENT OF FACTS AND PROCEEINDGS

This original action in prohibition and mandamus contests Common Pleas court rulings that denied motions to transfer the underlying civil case from the assigned trial court judge to a commercial docket judge. Insisting that the derivative action now pending in the Cuyahoga County Court of Common Pleas should be on the court's commercial docket, relators American Greeting Corporation and the individually named relators (hereafter collectively referred to as "relators") seek extraordinary writs of prohibition and mandamus against respondents Judge Nancy A. Fuerst and Judge Peter J. Corrigan. But for the reasons discussed hereafter, relators' Complaint for Writs of Prohibition and Mandamus (hereafter "Complaint") does not state good claims for these extraordinary writs. Accordingly, respondents respectfully request that the relators' Complaint and this cause be dismissed.

According to the Complaint, plaintiff Electrical Workers Pension Fund, Local 103, I.B.E.W. (hereafter "plaintiff") filed a shareholder action derivatively on behalf of relator American Greetings Corporation on March 20, 2009, naming the relators as defendants. See Complaint at paras. 2, 13. The case was docketed in the Cuyahoga County Court of Common Pleas as Electrical Workers Pension Fund, Local 103, I.B.E.W. vs. Morry Weiss, et al., Case No.

09 CV 687985. See Complaint at para. 13 and Exhibit F. The case was randomly assigned to respondent Judge Corrigan. See Complaint at para. 12.

On April 17, 2009, the relators removed the derivative action to the United States District Court for the Northern District of Ohio. See Complaint at para. 15.

On February 17, 2010, the United States District Court granted the plaintiff's motion to remand the derivative action back to the Cuyahoga County Court of Common Pleas. See Complaint at para. 15.

On March 2, 2010, the relators moved to transfer the derivative action to the "commercial docket" established pursuant to Temporary Rules 1.01 through 1.11 of the Rules of Superintendence for the Court of Ohio, for which the Cuyahoga County Common Pleas Court had been designated as a pilot project court. See Complaint at paras. 17, 22. On March 3, 2010, the plaintiff opposed the relators' motion to transfer the case to the commercial docket. See Complaint at para. 23. On March 4, 2010, the relators filed a reply brief in support of their motion to transfer the case to the commercial docket. See Complaint at para. 24.

On March 5, 2010, respondent Judge Corrigan denied the relators' motion to transfer the case to the commercial docket. See Complaint at para. 28.

On March 10, 2010, the relators appealed Judge Corrigan's order denying transfer to respondent Judge Fuerst, who is the Administrative and Presiding Judge of the Cuyahoga County Court of Common Pleas. See Complaint at paras. 11, 29 and Exhibit 2. The parties submitted further legal briefs for the appeal to Judge Fuerst. See Complaint at para. 29 and Exhibits 2, 3, and 4.

On March 25, 2010, Judge Fuerst issued an order that said the following:

> Upon review by Administrative Judge of [defendants'] appeal of Judge Corrigan's 3/5/10 order denying [defendants'] motion to transfer to commercial docket, the Court finds [defendants'] appeal is without merit and Judge Corrigan's order is sustained.

See Complaint at para. 30 and Exhibit 5.[1]

On April 2, 2010, relators commenced this original action in prohibition and mandamus against respondents Judge Fuerst and Judge Corrigan.

Respondents respectfully submit this motion to dismiss the relators' Complaint.

ARGUMENT AND LAW

In *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004, the court held that extraordinary writs of prohibition and mandamus could not be used as substitutes for an interlocutory appeal to contest whether or not a case should have been assigned to a commercial docket judge. In the instant case, the relators maintain that the underlying derivative action lawsuit should have been transferred to a commercial docket judge and are here seeking extraordinary writs of prohibition and mandamus following the independent determinations of both Judge Corrigan and Judge Fuerst that the underlying case was not subject to transfer to the commercial docket and would remain assigned to non-commercial docket Judge Corrigan. The relators' action is an improper attempt to use these extraordinary writs as a substitute for their forbidden interlocutory appeal. Because the respondents do not patently and unambiguously lack jurisdiction over the underlying case and the relators do not lack adequate remedies in the ordinary course of the law, their claims in prohibition and mandamus fail as a matter of law.

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[1] The relators' Complaint mistakenly alleges at para. 30 that Judge Fuerst's order was issued on March 26, 2010. An examination of the docket of proceedings submitted as Exhibit 5 to the relators' Complaint confirms that Judge Fuerst's order was actually issued on March 25, 2010.

For purposes of this motion, respondents will first review the provisions of the Temporary Rules of Superintendence that are relevant to this case. Respondents will then separately address relators' requests for extraordinary writs of prohibition and mandamus. For the reasons that follow, respondents respectfully submit that relators' Complaint does not state claims for the extraordinary relief requested here. Accordingly, the Complaint and this cause should be dismissed pursuant to S.Ct.Prac.R. 10.5.

A. **Temporary Superintendence Rules established the commercial docket pilot project.**

On July 1, 2008, the Supreme Court of Ohio adopted Temporary Rules 1.01 through 1.11 of the Rules of Superintendence for the Court of Ohio (hereafter "Temp.Sup.R."). See Complaint at para. 17. Pursuant to Temp.Sup.R. 1.02, the Cuyahoga County Court of Common Pleas was designated to participate in the commercial docket pilot project. See Complaint at para. 17.

Before addressing the specific types of cases that are and are not to be accepted into the commercial docket, it is best to review initially the procedures established under Temp.Sup.R. 1.04 for case assignment and transfer to the commercial docket.

To begin, Temp.Sup.R. 1.04(A) provides that a case filed with a pilot project court shall be randomly assigned to a judge in accordance with the individual assignment system adopted by the court pursuant to division (B)(2) of Rule 36 of the Rules of Superintendence for the Courts of Ohio.

Temp.Sup.R. 1.04(B) establishes the procedure for transferring a case to the commercial docket and provides as follows:

(1) If the gravamen of a case filed with a pilot project court relates to any of the topics set forth in division (A) of Temporary Rule 1.03 of the Rules of Superintendence for the Courts of Ohio, the attorney filing the case shall include with the initial pleading a motion for transfer of the case to the commercial docket.

(2) If the gravamen of the case relates to any of the topics set forth in division (A) of Temporary Rule 1.03 of the Rules of Superintendence for the Courts of Ohio, if the attorney filing the case does not file a motion for transfer of the case to the commercial docket, 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.

(3) If the gravamen of the case relates to any of the topics set forth in division (A) of Temporary Rule 1.03 of the Rules of Superintendence for the Courts of Ohio, if no attorney representing a partying the case files a motion for transfer of the case to the commercial docket, and if the case is assigned to a non-commercial docket judge, the judge shall sua sponte request the administrative judge to transfer the case to the commercial docket.

(4) If the case is assigned to the commercial docket and if the gravamen of the case does not relate to any of the topics set forth in division (A) of Temporary Rule 1.03 of the Rules of Superintendence for the Courts of Ohio, upon motion of any party or sua sponte at any time during the course of the litigation, the commercial docket judge shall remove the case from the commercial docket.

(5) Copies of a party's motion for transfer of a case to the commercial docket filed pursuant to division (B)(1) or (2) of this rule shall be delivered to the administrative judge.

Temp.Sup.R. 1.04(B).

Temp.Sup.R. 1.04(C) establishes procedures for determining such matters and provides as follows:

(1) A non-commercial docket judge shall rule on a party's motion for transfer of a case filed under division (B)(1) or (2) of this rule no later than two days after the filing of the motion. A party to the case may appeal the non-commercial docket judge's decision to the administrative judge within three days of the non-commercial docket judge's decision. The administrative judge shall decide the appeal within two days of the filing of the appeal.

> (2) An administrative judge shall decide the sua sponte request of a non-commercial docket judge for transfer of a case made under division (B)(3) of this rule no later than two days after the request is made.

Temp.Sup.R. 1.04(C).

Temp.Sup.R. 1.04(D) provides the scope for reviewing transfer requests and states:

> (1) The factors set forth in Temporary Rule 1.03 of the Rules of Superintendence for the Courts of Ohio shall be dispositive in determining whether a case shall be transferred to or removed from the commercial docket pursuant to division (B) of this rule.
>
> (2) The decision of the administrative judge as to the transfer of a case under division (C) of this rule is final and not appealable.

Temp.Sup.R. 1.04(D).

Finally, Temp.Sup.R. 1.04(E) permits a commercial docket judge who is assigned a commercial docket case pursuant Temp.Sup.R. 1.04(B) to request the administrative judge to reassign a similar case to another judge in order to maintain a fair and equal distribution of cases.

With this procedure in mind, it is appropriate to now review briefly the rule identifying cases that are and are not eligible for transfer to the commercial docket.

In that regard, Temp.Sup.R. 1.03(A) identifies cases that are to be accepted into the commercial docket and, according to relators, required granting their motion to transfer the underlying case into the commercial docket based on the following:

> A commercial docket judge shall accept a civil case, including any *** derivative action, into the commercial docket of the pilot project court 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)(4).

Temp.Sup.R. 1.03(B) identifies cases that are not to be accepted into the commercial docket and, according to plaintiff, required denying the relators' motion to transfer the underlying case into the commercial docket based on the following:

> 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:
>
> ***
>
> (7) Cases in which a labor organization is a party ***.

Temp.Sup.R. 1.03(B)(7).

Applying these rules to the facts of this case, the record reflects that upon remand of the underlying case from the United States District Court to the Cuyahoga County Court of Common Pleas, the relators moved pursuant to Temp.Sup.R. 1.04(B)(2) to transfer the case to the commercial docket based on Temp.Sup.R. 1.03(A)(4). The plaintiff opposed the relators' motion to transfer based on Temp.Sup.R. 1.03(B)(7).

Pursuant to Temp.Sup.R. 1.04(D)(1), Judge Corrigan considered the factors set forth in Temp.Sup.R. 1.03 before denying the relators' motion to transfer the case to the commercial docket.

The relators filed their appeal to Administrative Judge Fuerst pursuant to Temp.Sup.R. 1.04(C)(1). Judge Fuerst denied their appeal and sustained Judge Corrigan's ruling. Under Temp.Sup.R. 1.04(D)(2), Judge Fuerst's decision is final and not appealable.

The question presented here is whether the relators are now entitled to extraordinary relief from this Court. For the reasons that follow, respondents respectfully submit that relators' Complaint does not state claims for extraordinary relief in prohibition or mandamus and should accordingly be dismissed pursuant to S.Ct.Prac.R. 10.5.

B. Relators' claim for extraordinary relief in prohibition fails as a matter of law.

Relator's request for a writ of prohibition fails as a matter of law because respondent Judge Corrigan does not patently and unambiguously lack jurisdiction to hear the derivative action lawsuit; Judge Corrigan can determine his own jurisdiction; and appeal is an adequate remedy available in the ordinary course of the law to contest the alleged improper assignment of the judge. Because the relators cannot establish the grounds necessary for this extraordinary writ, their claim for such relief fails as a matter of law.

It should be recalled initially that an action in prohibition tests only the jurisdiction of the lower court. See *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265; *State ex rel. Staton v. Common Pleas Court* (1965), 5 Ohio St.2d 17, 21, 213 N.E.2d 164. "Jurisdiction" means the court's power to adjudicate a case and encompasses jurisdiction over the subject matter, the person, and the particular case. See *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, at ¶¶ 11-12.

To be entitled to a writ of prohibition, the relators must show that (1) the respondent was exercising or about to exercise judicial or quasi-judicial power; (2) the exercise of that power was unauthorized by law; and (3) denial of the writ would cause injury for which no other adequate remedy exists in the ordinary course of the law. See *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, at ¶ 12.

"In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal." *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, at ¶ 12. "Prohibition will not issue as a substitute for appeal to review mere errors in judgment." *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-

4907, 775 N.E.2d 522, at ¶ 28. Thus "[a]ppeal, not prohibition, is the remedy for the correction of errors or irregularities of a court having proper jurisdiction." *Smith v. Warren*, 89 Ohio St.3d 467, 468, 2000-Ohio-223, 732 N.E.2d 992.

When deciding a prohibition case, this Court need not determine the merits of the underlying jurisdictional issue, for its review "is limited to whether jurisdiction is *patently and unambiguously lacking*." *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 431, 2001-Ohio-301, 751 N.E.2d 472 (emphasis in original; internal punctuation omitted). See, also, *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, at ¶ 12 "[O]ur duty in prohibition cases is limited to determining whether jurisdiction is patently and unambiguously lacking.")

For purposes of this case, there is no dispute that respondent Judge Corrigan is exercising judicial power in the underlying case.

There additionally can be no dispute that the Cuyahoga County Court of Common Pleas is a court of general subject matter jurisdiction that, under R.C. 2305.01, has original jurisdiction in all cases in which the sum or matter in dispute exceeds the exclusive jurisdiction of county courts. In *BCL Enterprises, Inc. Ohio Dept. of Liquor Control*, 77 Ohio St.3d 467, 1997-Ohio-254, 675 N.E.2d 1, the Supreme Court of Ohio stated: "It is well settled that '[t]he court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it." Id. at 469, 1997-Ohio-254, 675 N.E.2d 1 (quoting *Saxton v. Seiberling* (1891), 48 Ohio St. 554, 558-559, 29 N.E. 179).

Thus to the extent that Judge Corrigan has jurisdiction over both the subject matter of and parties to the underlying derivative action lawsuit, there can be no doubt that Judge Corrigan has the basic statutory jurisdiction to hear the underlying derivative action lawsuit.

The relators nevertheless insist that Judge Corrigan patently and unambiguously lacks jurisdiction over the case because transfer of the case to the commercial docket was mandatory and non-discretionary under the Temporary Rules. For the reasons that follow, the relators' contention is not well taken.

By their terms, the Temporary Rules authorizing the commercial docket pilot project establish procedures to facilitate specialized disposition of commercial disputes but do not alter the fundamental subject matter jurisdiction of the common pleas courts. Indeed, one court participating in the pilot project has stated:

> The temporary rules of superintendence do not demand that commercial cases only be decided by a commercial judge, failing which they are void or voidable. Instead, those rules are concerned with case-assignment and case-management procedures. They do not – indeed could not – alter the jurisdiction of the court.

GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Road, 151 Ohio Misc.2d 33, 2009-Ohio-2129, 906 N.E.2d 517 at ¶6. The court continued:

> The jurisdiction of common pleas courts is established by Section 4, Article IV of the Ohio Constitution and, secondarily, by various statutes, including R.C. 2305.01. Courts of common pleas are ones of original and general jurisdiction. The temporary rules creating commercial dockets neither purport to alter this court's jurisdiction, nor could they have such an impact under the Ohio Constitution.

Id. t ¶ 8 (citation and internal punctuation omitted).

Thus, to the extent that the relators mean to suggest here that the Temporary Rules establishing the commercial docket are jurisdictional, that is not supported by either the text of the rules or by case authority. Indeed, Ohio court decisions recognize that "superintendence rules relative to case assignments between judges are not jurisdictional, creating only housekeeping rules which are of concern to the judges of the several courts but create no rights in litigants." *GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Road*, 151

Ohio Misc.2d 33, 2009-Ohio-2129, 906 N.E.2d 517 at ¶ 7 (internal punctuation omitted). See, also, *State v. Bristow*, 4th Dist. App. Nos. 07CA3186 and 07CA3187, 2009-Ohio-523, at ¶¶ 38-40.

Pertinent to this case, Temp.Sup.R. 1.04(D) authorizes the non-commercial docket judge and/or the Administrative Judge to determine in the first place whether the case shall be transferred to the commercial docket pursuant to Temp.Sup.R. 1.04(B). Nothing in the Temporary Rules deprives the common pleas court of its general jurisdiction over cases that may be eligible for transfer to the specialized commercial docket and nothing in the rules deprives of court of its authority to determine whether a transfer to the commercial docket is warranted.

Particularly instructive to the instant case is *State ex rel. Carr v. McDonnell*, 184 Ohio App.3d 373, 2009-Ohio-2488, 921 N.E.2d 251, affirmed, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004, which warrants an extended discussion here.

In that case, the defendants moved to transfer plaintiff Carr's case to the commercial docket but the non-commercial docket judge randomly assigned to preside over the case denied that motion. The defendants appealed that decision to the Administrative Judge (Judge Fuerst's predecessor), who sustained the appeal and ordered the case transferred to a commercial docket judge. Plaintiff Carr then sought writs of prohibition and mandamus in the Court of Appeals to prohibit the commercial docket judge from hearing the case and to order the case be returned to the originally assigned non-commercial docket judge. The Court of Appeals denied both the writ of prohibition and the writ of mandamus. See *State ex rel. Carr v. McDonnell*, 184 Ohio App.3d 373, 2009-Ohio-2488, 921 N.E.2d 251.

As to the writ of prohibition, the Court of Appeals held that the commercial docket judge to whom the case had been transferred did not patently and unambiguously lack jurisdiction to

hear the case and, because the Cuyahoga County Court of Common Pleas was a court of general jurisdiction, the commercial docket judge could determine his own jurisdiction to proceed. Id. at ¶¶12-13. In particular, the Court of Appeals held that the commercial docket judge did not patently and unambiguously lack jurisdiction to conduct proceedings in the case based on both the Temporary Rules creating the commercial docket and the Administrative Judge's authority under Sup.R. 4(B) and 36 to reassign any case between different judges of the court of common pleas. Id. at ¶¶ 14-19. Beyond that, the Court of Appeals held that plaintiff Carr failed to establish the absence of adequate remedies at law inasmuch as claims of an improper judge assignment could be raised through the adequate remedy of appeal. Id. at ¶ 20.

As to the writ of mandamus, the Court of Appeals held that because the commercial docket judge had the basic jurisdiction to preside over Carr's case, there was no clear legal right or clear legal duty to transfer the case from the commercial docket judge back to the originally assigned non-commercial docket judge. Id. at ¶ 21. And to the extent that Carr's request for the writ of mandamus really sought a declaratory judgment and prohibitory injunction to prevent the case from proceeding before the commercial docket judge, the Court of Appeals lacked jurisdiction to render such relief. Id. at ¶¶ 22-24.

On further appeal, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals. See *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004. The Court's opinion succinctly explained its holding as follows:

> [Commercial docket] Judge O'Donnell does not patently and unambiguously lack jurisdiction to proceed in these cases. See Temp.Sup.R. 1.03 and 1.04; Sup.R. 4(B) and 36. Carr has an adequate remedy by way of appeal from Judge O'Donnell's rulings in the cases to raise his claim that Judge O'Donnell was improperly assigned to them. See *Keith v. Boddy*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067, ¶ 14; *State ex rel. Key v. Spicer* (2001), 91 Ohio st.3d 469, 746 N.E.2d 1119 ("a claim of improper assignment of a judge can generally be adequately raised by way of appeal"); *State ex rel. Berger v.*

> *McMonagle* (1983), 6 Ohio St.3d 28, 30, 6 OBR 50, 451 N.E.2d 225 (mandamus and prohibition are not substitutes for appeal to contest alleged improper assignment of judge).

State ex rel. Carr v. McDonnell, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004 at ¶ 2.

For purposes of the instant case, it is likewise true that the Cuyahoga County Court of Common Pleas is a court of general jurisdiction such that Judge Corrigan – the non-commercial docket judge randomly assigned to hear the derivative action – can determine his own jurisdiction to proceed. Beyond that, Administrative Judge Fuerst's authority over case assignments within the Cuyahoga County Court of Common Pleas pursuant to Sup.R. 4(B) and 36 and her decision to refuse to transfer the case to the commercial docket further support Judge Corrigan's authority to conduct proceedings in the case. At any rate, nothing in the applicable rules of superintendence or other Ohio law suggests that Judge Corrigan *patently* and *unambiguously* lacks jurisdiction to conduct judicial proceedings in the underlying case.

To be sure, the instant case differs slightly from *State ex rel. Carr v. McDonnell* inasmuch as that while in both bases the originally assigned non-commercial docket judge denied the defendants' motion to transfer the case to the commercial docket, the Administrative Judge sustained the defendants' appeal and thus transferred the case to the commercial docket in *Carr* while Administrative Judge Fuerst here denied the relators' appeal, sustained Judge Corrigan's ruling, and thus refused to transfer the case to the commercial docket. Nevertheless, *Carr* confirms that extraordinary writs of prohibition and mandamus may not be used as a substitute for interlocutory appeal to contest whether or not a case should be assigned to a commercial docket judge. See *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004 at ¶ 2.

For similar reasons, the relators' claim in prohibition here likewise fails as a matter of law. For purposes of this case, it is unnecessary to determine the merits of whether the plaintiff's derivative action was a case that a commercial docket judge would have to accept pursuant to Temp.Sup.R. 1.03(A)(4) or, conversely, would have to reject pursuant to Temp.Sup.R. 1.03(B)(7), for, as noted previously, this Court's review is limited to determining whether the respondent court patently and unambiguously lacks jurisdiction to proceed. See *State ex rel. Mason v. Burnside*, supra; *State ex rel. Shimko v. McMonagle*, supra. Because the Temporary Rules do not alter the general subject matter jurisdiction of the court of common pleas, Judge Corrigan and Judge Fuerst can determine Judge Corrigan's jurisdiction to proceed in the first instance and any claim of improper judge assignment may be raised through the adequate remedy of appeal. See *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004 at ¶ 2.

And although Temp.Sup.R. 1.04(D)(2) forbids interlocutory appeals to contest the Administrative Judge's decision whether or not to transfer a case to the commercial docket, the relators can still raise their claim of improper assignment on appeal after judgment. See *State ex rel. Carr v. McDonnell*, supra. Prohibition may not be employed as a substitute for appeal from an interlocutory order. See *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, at ¶ 22. Moreover, appeal is not inadequate just because it would have to await final judgment. See *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 50, 1997-Ohio-244, 676 N.E.2d 109 (rejecting contentions that appeal from subsequent adverse final judgment would be inadequate due to time and expense); *Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, 76 Ohio St.3d 374, 379, 1996-Ohio-384, 667 N.E.2d

1189 (fact that postjudgment appeal contesting jurisdiction may be may be time-consuming and expensive does not render appeal inadequate so as to justify extraordinary writ of prohibition).

It should be recalled that prohibition "is an extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies." *State ex rel. Henry v. Britt* (1981), 67 Ohio St.2d 71, 73, 424 N.E.2d 297. In *State ex rel. Ellis v. McCabe* (1941), 138 Ohio St. 417, 35 N.E.2d 571, the court said:

> A writ of prohibition will not be issued unless it clearly appears that the court or tribunal whose action is sought to be prohibited has no jurisdiction of the cause which it is attempting to adjudicate, or is about to exceed its jurisdiction.

Id., syllabus at paragraph three. Thus "[b]ecause of its nature, the writ of prohibition is to be used with care and caution. The right thereto must be clear, and in a doubtful or borderline case its issuance should be refused." *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.* (1940), 137 Ohio St. 273, 277, 28 N.E.2d 641.

Because the relators cannot establish the grounds necessary for a writ of prohibition, their request for this extraordinary writ should be denied.

C. **Relator's claim for extraordinary relief in mandamus fails as a matter of law.**

Relators additionally seek a writ of mandamus to compel transfer of the derivative action to the commercial docket. Like their case in prohibition, the relators' case in mandamus fails as a matter of law.

"The function of mandamus is to compel the performance of a present existing duty as to which there is a default." *State ex rel. Willis v. Sheboy* (1983), 6 Ohio St.3d 167, 451 N.E.2d 1200, syllabus at paragraph two.

To obtain this writ, it must be shown that (1) the relators have a clear legal right to obtain performance of a judicial act; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relators have no plain and adequate remedy in the ordinary course of the law. See *State ex rel. MetroHealth Medical Center v. Sutula*, 110 Ohio St.3d 201, 2006-Ohio-4249, 852 N.E.2d 722, at ¶ 8.

A writ of mandamus cannot be used to control judicial discretion. R.C. 2731.03 declares: "The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of its functions, but it cannot control judicial discretion." Thus "mandamus will not lie to control judicial discretion, even if that discretion is abused." *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, at ¶ 12.

Moreover, a writ of mandamus does not lie where the relators have an adequate remedy available in the ordinary course of the law. R.C. 2731.05 declares: "The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." See, also, *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 1997-Ohio-72, 678 N.E.2d 549; *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 50, 1997-Ohio-244, 676 N.E.2d 109.

In this case, the relators cannot establish the grounds necessary for relief in mandamus. To the extent that relators' action here contests Administrative Judge Fuerst's decision not to transfer the case to the commercial docket, the relators are plainly attempting to control judicial discretion. Under such circumstances, a writ of mandamus does not lie. See R.C. 2731.03. See, also, *State ex rel. Dreamer v. Mason*, supra.

Beyond that, the relators can still raise their claim of improper assignment on appeal after judgment. See *State ex rel. Carr v. McDonnell*, supra. Mandamus, like prohibition, may not be used as a substitute for appeal from an interlocutory order. See *State ex rel. Sliwinski v.*

Burnham Unruh, supra at ¶ 22. Likewise, appeal is not inadequate just because of the time and expense involved. See *State ex rel. Willacy v. Smith*, supra; *Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, supra.

In *State ex rel. Liberty Mills, Inc. v. Locker* (1986), 22 Ohio St.3d 102, 103, 488 N.E.2d 883, the Supreme Court of Ohio said: "Mandamus is an extraordinary writ that must be granted with caution." Id. at 103, 488 N.E.2d 883. And in *State ex rel. Tarpy v. Board of Ed. of Washington Court House* (1949), 151 Ohio St. 81, 84 N.E.2d 276, the court confirmed that mandamus should not issue if the grounds for relief are doubtful. Id. at syllabus.

In the instant case, the relators cannot establish the elements necessary to grant this extraordinary writ. Accordingly, their request for such relief should be denied.

CONCLUSION

Respondents Judge Nancy A. Fuerst and Judge Peter J. Corrigan respectfully request that the court dismiss the Complaint for Writs of Prohibition and Mandamus and this cause.

Respectfully submitted,

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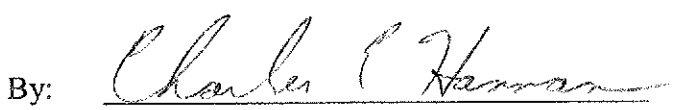
By: 

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CERTIFICATE OF SERVICE

A true copy of the foregoing Respondents' Motion to Dismiss was served this 5TH day of May 2010 by regular U.S. Mail, postage prepaid, upon:

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