

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-0582

THE STATE OF OHIO ex rel.
AMERICAN GREETINGS CORPORATION, et al.,

Relators,

vs.

JUDGE NANCY A. FUERST, et al.,

Respondents.

ORIGINAL ACTION IN PROHIBITION AND MANDAMUS

**MEMORANDUM OF THE GREATER CLEVELAND PARTNERSHIP
AS *AMICUS CURIAE* IN SUPPORT OF RELATORS' OPPOSITION
TO INTERVENOR'S MOTION TO DISMISS**

May 10, 2010

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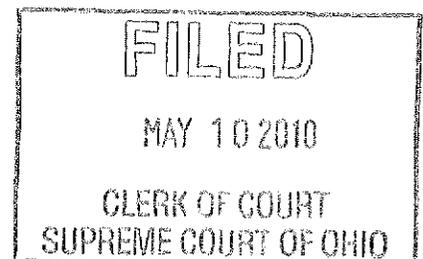
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INTEREST OF THE *AMICUS CURIAE*

Relators' Complaint for Writs of Prohibition and Mandamus raises important issues related to the faithful and consistent application of this Court's rules governing the Commercial Docket, and, in particular, the treatment of shareholder derivative actions. The Greater Cleveland Partnership ("GCP") has a significant interest in the outcome of this matter.

The GCP is one of the largest private-sector economic development organizations in Ohio and one of the largest chambers of commerce in the nation, with more than 17,000 members. The GCP serves as a catalyst to increase economic vitality in greater Cleveland and the region and works to improve the international competitiveness of the region and its companies. It also helps to attract, retain, and train talent to grow the region's economy. The GCP advocates the interests of its members in many different forums and monitors litigation and legislation raising issues of concern to the business community.

In approving the Commercial Docket Pilot Program in 2008,¹ Ohio joined a rising tide of states and cities with established business courts/commercial dockets. The principal purposes of the Commercial Docket were to create efficiencies in the administration of justice, reduce uncertainty, and allow judges with specialized knowledge and constantly increasing experience to handle complex business cases, including shareholder derivative actions. Because the Commercial Docket was designed to improve the process of commercial litigation in Ohio courts, its success is

¹ The Pilot Program was enacted by this Court via Temporary Superintendence Rules 1.01–1.11 ("Commercial Rules"), effective on July 1, 2008.

critically important to the GCP's members. A corollary benefit is that the Commercial Docket, by increasing efficiency, predictability, and fairness of business litigation, could positively impact economic development in the State of Ohio by making Ohio's legal system more attractive to business.

In the derivative action giving rise to the Complaint before this Court, the Cuyahoga County Common Pleas Court trial judge denied defendants' motion to transfer the case to the Commercial Docket, apparently because a pension fund shareholder (claiming without support to be a "labor organization") filed the complaint derivatively on behalf of American Greetings. The administrative judge affirmed that decision. Yet, if an individual shareholder filed a lawsuit asserting the *same* claims, based on the *same* set of facts, and naming the *same* defendants, the case would have been transferred to the Commercial Docket. Treating identical derivative actions (with the same real party in interest) differently based on nothing more than the claimed status of the representative plaintiff results in troubling inconsistency.

Many businesses in Northeast Ohio (indeed, across the state) and their officers and directors have been faced with derivative lawsuits. And pension fund shareholders file many derivative lawsuits across the country. This brief is submitted because the sound, fair, and consistent administration of the Commercial Docket and the treatment of derivative actions under the Commercial Rules concerns the GCP's members.

SUMMARY OF ARGUMENT

This Court designed the Commercial Docket Pilot Program to increase efficiency, fairness, and predictability in commercial disputes, which invariably involve complex issues. To that end, the Commercial Rules mandate transfer of “commercial” cases to specialized commercial dockets. Sup.Temp.R. 1.04(B).² Commercial dockets give Ohio businesses more assurance that commercial issues will be handled by experts in that area of law. Indeed, many companies prefer not to incorporate and/or locate in jurisdictions that lack a forum for expeditiously and consistently resolving business disputes.³ Confidence in the forum is important.

² One of the members of the Supreme Court Task Force for Commercial Dockets, Adrian Thompson, stated that the commercial docket would lead to faster resolution of commercial cases and that because commercial docket judges will have increased experience with such cases and specialization, they will have a more thorough understanding of the key issues and legal frameworks, leading to more consistent outcomes. See Arielle Kass, *Lawyers Make Case For Business Court*, CRAIN'S CLEVELAND BUSINESS, July 21, 2008; see also Erica Blake, *New System To Send Commercial Cases to 2 Lucas Co. Judges*, TOLEDO BLADE, Nov. 11, 2008, at B1 (John VanNorman, policy and research counsel for the Ohio Supreme Court and its staff member assigned to the project said: “I think the point is not just, are we handling these cases timely, but also do we have any good decisions. There was some concern that commercial litigation could be increasingly complex and that it would be good to have judges familiar with the process.”); Arielle Kass, *Cuyahoga’s Commercial Docket A Winner So Far*, CRAIN'S CLEVELAND BUSINESS, Nov. 30, 2009, at 01 (“Judge O’Donnell said the commercial docket cases tend to involve multiple parties and multiple issues. Still, both judges have been better able to handle increasingly complex matters as they see commercial issues more frequently. “The more comfortable you are with it, the more confident you are with it, you do develop a certain amount of expertise with that familiarity,” Judge O’Donnell said.”).

³ See Alison Grant, *New Court’s in Business*, CLEVELAND PLAIN DEALER, Sept. 12, 2008, at C1 (“There isn’t a business that doesn’t take into consideration the type of court system they would be dealing with,” said Franklin County Common Pleas Judge John Bessey, who co-chaired a statewide task force on commercial dockets.”); Kevin Kemper, *Ohio Supreme Court Test To Set Aside ‘Commercial Dockets’ For Biz Disputes*, BUSINESS FIRST OF COLUMBUS, July 4, 2008 (“The court’s mission here is

Despite the *mandate* that courts transfer “derivative action[s]” involving the rights, obligations, and liabilities of officers and directors of companies, Respondents erroneously refused to do so in the underlying derivative action.

The Commercial Rules commendably focus on the substance (or “gravamen”) of a case—not the caption. A representative shareholder plaintiff’s purported status as a “labor organization” should not disqualify a derivative action from Commercial Docket jurisdiction. Indeed, allowing a representative shareholder to so easily circumvent the Commercial Docket is contrary to the plain language of the Commercial Rules and promotes the very sort of inconsistency and unpredictability that the Commercial Rules were enacted to prevent.

ARGUMENT

I. Respondents Had a Duty to Transfer the Derivative Action to the Commercial Docket

The Commercial Rules require that courts transfer commercial cases to the Commercial Docket. The mandatory transfer provision is essential to the Commercial Docket’s success. Without it, the Commercial Docket is subject to uncertainty, and litigants seeking to avoid the Commercial Docket can devise ways to do so.

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.’”); *see also* Anne Tucker Nees, *Making a Case for Business Courts*, 24 Ga. St. U.L. REV. 477, 482 (“There are two main purposes for creating business courts: the primary purpose is to serve the administration of civil justice, and the secondary purpose is to attract and retain business within a state.”)

As discussed in detail in Relators' Memorandum in Support of Writs of Prohibition and Mandamus ("Relators' Memorandum"), Commercial Rule 1.03(A) defines cases that "shall" be accepted into the Commercial Docket. The list expressly includes cases such as the underlying derivative action. See Sup. R. Temp. R. 1.03(A)(4) ("shall accept a civil case, including . . . a derivative action . . . [regarding] [t]he 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."). There is no judicial discretion.

The Commercial Rules are relatively new, and few courts have had the opportunity to consider issues related to the Commercial Docket. In one of the few cases, the Eighth District Court of Appeals held that not only had a derivative action been properly transferred to the Commercial Docket, but that if the defendant had not moved to transfer, the trial judge had a duty to transfer it sua sponte. *State ex rel. Carr v. McDonnell* (Cuyahoga App.), 184 Ohio App.3d 373, 2009-Ohio-2488, 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)."), *aff'd* 124 Ohio St.3d 62, 2009-Ohio-6165.

In their motion to dismiss, Intervenor misconstrues the Court's decision in *State ex rel. Carr v. McDonnell*, 124 Ohio St. 3d 62 (2009). As set forth above, in that case, the underlying derivative action *was transferred* to the Commercial Docket, and properly so. Tellingly, respondents in *Carr* (several Cuyahoga County

Common Pleas Court judges) argued before this Court that transfer was mandatory and that there was no judicial discretion:

[T]he transfer was *required* by operation of the Temporary Rules of Superintendence. . . . The transfer of Acacia III to the commercial docket, therefore, was not a matter of judicial discretion. . . . This Court, through its Temporary Rules of Superintendence, intended for commercial cases to be heard and decided by commercial docket judges. And those Rules make clear that it is the *substance* of the case that determines whether or not a case is to be transferred to the commercial docket, not the procedure created to facilitate the transfer. . . . As noted above, transfer to the Court of Common Pleas' commercial docket pursuant to Sup. R. Temp. Rule 1.03 is an instance where transfer of the case from the original assigned judge is not only expressly authorized, but mandated.

See Merit Brief of Respondents-Appellees in *Carr* (Case No. 09-1020), at 10, 13 (emphasis in original).⁴

Citing to the Commercial Rules, this Court remarked that “Judge O’Donnell does not patently and unambiguously lack jurisdiction to proceed in these cases.” By relying on the Commercial Rules to support its finding that the Commercial Docket Judge had “jurisdiction to proceed,” the Court implied that they have jurisdictional significance, and they should.

Although Intervenor attempts to relegate the Commercial Rules to the mere “housekeeping” measures and guidelines, the Commercial Rules enacted in 2008 are far more important than that. They enjoy special status, constitute a unique subset of the Superintendence Rules, include mandatory language (unlike mere guidelines),

⁴ Available at <http://www.sconet.state.oh.us/tempx/650746.pdf> (last visited May 9, 2010).

and provide litigants with an individual right of immediate appeal to the administrative judge. Accordingly, they cannot be fairly characterized as housekeeping rules, and treating them as if they were trivializes their significance. Furthermore, courts have granted mandamus relief based on mandatory, versus discretionary, Rules of Superintendence. *See Smith v. Lucas County Common Pleas Court*, 2005 Ohio App. LEXIS 1778, 2005 Ohio 1885, at ¶¶ 3-4 (Lucas County App. Apr. 15, 2005) (emphasizing “shall” language); *Selway v. Court of Common Pleas Stark County*, 2007 Ohio App. LEXIS 4086, 2007 Ohio 4566, at ¶¶ 13, 18 (Stark County App. Sept. 4, 2007).

Nor does transfer to the Commercial Docket involve the routine “assignment” of a judge. Intervenor’s Mem. at 7. Understandably, a party in a routine civil lawsuit has no right to dictate individual judicial assignment. But under the Commercial Rules, a non-commercial judge has a clear legal duty to transfer qualifying commercial cases to the Commercial Docket. Intervenor cannot argue otherwise.

II. The Pension Fund Plaintiff’s Alleged Status as a “Labor Organization” Is Irrelevant to the Mandatory Transfer Provisions of the Commercial Rules.

In this case, Respondents erred in refusing to transfer the derivative action. In doing so, they did not comply with their duties and denied Relators their right to have the case adjudicated by a qualified Commercial Docket Judge pursuant to a Commercial Docket case management plan. The harm cannot possibly be remedied later; the error below should be corrected now. In its motion, Intervenor hardly

tries to defend Respondents' rulings. Although Respondent provided no written analysis to support their decisions, they presumably accepted the pension fund plaintiff's (only) argument that it was a "labor organization" and that its alleged status disqualified the derivative action from Commercial Docket jurisdiction. But accepting this argument leads to an absurd result. If officers and directors are sued derivatively by a pension fund/labor organization shareholder, the case cannot be transferred. Conversely, if officers and directors are sued derivatively by an individual shareholder on the same claims, the case must be transferred. In both cases, the "represented" party is the same: the company that issued the shares. Transferring a case in one instance and not the other undermines the Commercial Docket. That cannot be what the Task Force and this Court intended.⁵ To further demonstrate the absurdity, it is common for multiple shareholder derivative actions to be filed and then consolidated into a single suit. Would the fact that one is filed by a pension fund/labor organization prevent consolidation? Under Respondents' logic, it apparently would.

Even if the pension fund plaintiff is a "labor organization"—which it never demonstrated with any competent or credible evidence below—the Temporary Rules are clear that this alone is irrelevant. The analysis under Commercial Rule 1.03 is whether the plaintiff's status relates to the "gravamen of the case." Or, as

⁵ The "gold standard" of business courts is the Delaware Court of Chancery. The Chancery Court hears countless derivative lawsuits each year, including those where a pension fund acts as a representative plaintiff. In fact, the latest was filed on or about April 23. See *New Jersey Building Laborers Pension Fund v. Blankenship*, CA5430, Delaware Chancery Court (Wilmington).

respondents argued in *Carr*, “the *substance* of the case that determines whether or not a case is to be transferred to the commercial docket. . . .” Merit Brief of Respondents-Appellees (*Carr*), at 13 (emphasis in original). Here, the representative plaintiff’s alleged status as a labor organization is irrelevant to its claims. As Relators in this case convincingly demonstrated, derivative actions are brought by shareholders on behalf of the corporation itself. “[I]n [a] stockholders’ derivative action the right of the plaintiff to maintain the action is derivative or secondary. . . . The stockholder, as a nominal party, has no right, title or interest in the claim itself.” *Boedeker v. Rogers* (Cuyahoga App. 2000), 140 Ohio App.3d 11, 20; *see also* Intervenor’s Mem. at 2 (stating that the plaintiff is “[s]uing derivatively on the Company’s behalf”). The corporation is the real plaintiff-in-interest. No substantive aspect of the case changes based upon the identity of the shareholder plaintiff.

Furthermore, for the Commercial Docket to be uniformly successful, Relators’ interpretation must be correct. If a crafty litigant can avoid the Commercial Docket merely by including a pension fund or labor organization as the named representative plaintiff, there is no predictability at all.

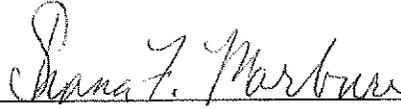
Finally, the GCP appreciates that mandamus/prohibition is extraordinary relief. But these are extraordinary rules. They change the landscape for business litigation in Ohio and must be enforced.

CONCLUSION

Amicus curiae respectfully urges this Court to deny Intervenor's Motion to Dismiss and grant Relators' request for writs of prohibition and mandamus.

DATED: May 10, 2010

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served by e-mail on May 10, 2010 upon:

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