

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. 2010-0582

**ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS**

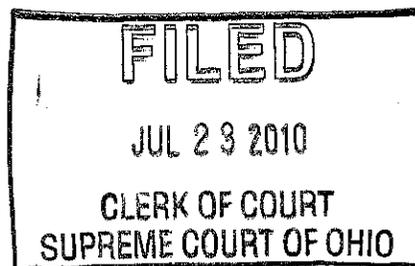
MERIT BRIEF OF RELATORS

Frederick R. Nance (0008988)
Counsel of Record
 Joseph C. Weinstein (0023504)
 Stephen P. Anway (0075105)
 Joseph P. Rodgers (0069783)
SQUIRE, SANDERS & DEMPSEY LLP
 4900 Key Tower
 127 Public Square
 Cleveland, OH 44114-1304
 (216) 479-8500 (phone)
 (216) 479-8780 (fax)
 fnance@ssd.com
 jweinstein@ssd.com
 sanway@ssd.com
 jrodgers@ssd.com

John D. Parker (0025770)
Counsel of Record
 Lora M. Reece (0075593)
BAKER & HOSTETLER LLP
 3200 PNC Center
 1900 East Ninth Street
 Cleveland, OH 44114-3485
 (216) 621-0200 (phone)
 (216) 696-0740 (fax)
 jparker@bakerlaw.com
 lreece@bakerlaw.com

**COUNSEL FOR THE CORPORATE
RELATOR, AMERICAN GREETINGS
CORPORATION**

**COUNSEL FOR THE INDIVIDUAL
RELATORS**



David H. Kistenbroker
Carl E. Volz
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661-3693
(312) 902-5362 (phone)
(312) 577-4729 (fax)
david.kistenbroker@kattenlaw.com
carl.volz@kattenlaw.com

Richard H. Zelichov
KATTEN MUCHIN ROSENMAN LLP
2029 Century Park East, Suite 2600
Los Angeles, CA 90067-3012
(310) 788-4680 (phone)
(310) 712-8433 (fax)
richard.zelichov@kattenlaw.com

OF COUNSEL FOR THE INDIVIDUAL
RELATORS

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INTRODUCTION

This original action presents an opportunity for the Court to provide guidance on the proper application of an essential element of its Commercial Rules; namely, the mandatory transfer of derivative cases.¹ Although the Commercial Rules *require* common pleas court judges with commercial dockets to transfer derivative actions to the Commercial Docket, the trial court in the underlying derivative action did not comply with that mandatory obligation.

The only conceivable basis for declining to transfer the underlying derivative action was the sole argument advanced by the plaintiff—the Electrical Workers Pension Fund Local 103 I.B.E.W. (the “Pension Fund”)—that it fell within the “labor organization” exception in the Commercial Rules and that transfer was not required. Before the labor organization exception applies, however, two independent elements must be met: (i) the party must be a “labor organization,” and (ii) the “gravamen of the case” must relate to a party’s alleged status as a labor organization. Neither requirement is met here.

The underlying action is a derivative case. Thus, the Pension Fund’s alleged status as a labor organization does not relate to the “gravamen of the case” in any conceivable way. The Pension Fund, a shareholder, is bringing claims *on behalf of* American Greetings, which is the real plaintiff in interest. The transfer of derivative actions to the Commercial Docket must be determined on the substance of the claims, not the alleged status of the nominal shareholder representative.

Indeed, the trial court’s apparent interpretation of the Commercial Rules will produce glaring inconsistencies. A derivative action with the *same* facts against the *same* defendants

¹ The Commercial Rules are formally referred to as “The Temporary Rules of Superintendence of the Courts of Ohio Governing Commercial Dockets.”

brought on behalf of the *same* company by an individual shareholder will be treated differently than one brought by a pension fund shareholder claiming to be a labor organization.

Moreover, the Pension Fund is not a “labor organization”—it is a “multiemployer pension plan” within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37). Not only has the Pension Fund repeatedly acknowledged that fact in government reports, it has also explicitly distinguished itself from a labor organization in judicial filings. Accordingly, the so-called labor-organization exception does not apply, and transfer is required. The trial court lacks authority to preside over the Derivative Action and remains obligated to transfer it to the Commercial Docket.

Relators respectfully urge this Court to grant their request for a writ of prohibition preventing the trial judge from exercising judicial authority over the underlying Derivative Action and a writ of mandamus ordering transfer of it to the Commercial Docket.

BACKGROUND AND PROCEDURAL HISTORY

The Pension Fund filed a Verified Derivative Complaint (the “Derivative Complaint”) against the Individual Relators in the Cuyahoga County Court of Common Pleas. The case was styled *Electrical Workers Pension Fund Local 103 I.B.E.W. vs. Morry Weiss, et al.*, Case No. 09-CV-687985 (the “Derivative Action”). (See Agreed Statement of Facts ¶¶ 1-2). In a derivative action the plaintiff, here the Pension Fund, sues as a shareholder on claims belonging to the corporation, here American Greetings. American Greetings, the real party in interest, was named as a nominal defendant. (Derivative Compl. at 1).² The Derivative Complaint asserted that

² As the court explained in *Boedeker v. Rogers*, “the stockholder, as a nominal party, has no right, title or interest in the claim itself.” (Cuyahoga App. 2000), 140 Ohio App.3d 11, 20 (internal quotation and citation omitted). The “heart of the action is the corporate claim,” and any proceeds recovered in a derivative action belong exclusively to the corporation. *Ross v. Bernhard* (1970), 396 U.S. 531, 538-39.

current and former senior executives and directors of American Greetings breached their fiduciary duties to the company. (See generally Derivative Compl. (attached as Exhibit A to Agreed Statement of Facts)).³

Pursuant to the mandatory provisions of Commercial Rule 1.03, and because the Complaint asserted derivative claims involving the rights, obligations, and liability of officers and directors, Relators moved to transfer the Derivative Action to the Commercial Docket. (See Agreed Statement of Facts ¶ 8). The Pension Fund opposed the motion, citing the labor organization exception within Commercial Rule 1.03(B)(7). (Nance Aff. Ex. 3, at 1-2).⁴ The only “support” for its contention that it was a labor organization was a lone footnote cite to the website of a *different* entity, the International Brotherhood of Electrical Workers, which is not a plaintiff or party in the Derivative Action. (Nance Aff. Ex. 3, at 2 n.1). Relators established—and the Pension Fund could not dispute—that, as a nominal plaintiff suing in a derivative capacity on behalf of American Greetings, the Pension Fund’s claimed identity as a labor organization was irrelevant to the “gravamen of the case.” (See Nance Aff. Ex. 4, at 2-4).

Despite the mandatory transfer provisions in the Commercial Rules, the trial judge⁵ denied the motion to transfer without written opinion. (See Agreed Statement of Facts ¶ 9 & Ex. B thereto). On March 26, 2010, the administrative judge⁶ affirmed the Trial Judge in a one-sentence docket entry. (See Agreed Statement of Facts ¶ 11 & Ex. C thereto).

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. (See Agreed Statement of Facts ¶¶ 6-7).

⁴ “Nance Aff. Ex.” refers to Relators’ Submission of Evidence and, in particular, the Exhibits attached to the Affidavit of Frederick R. Nance.

⁵ Honorable Peter Corrigan (“Trial Judge”).

⁶ Honorable Nancy Fuerst (“Administrative Judge”).

On March 10, 2010, Relators filed a verified Complaint for Writs of Mandamus and Prohibition with this Court against the Trial Judge and the Administrative Judge. On April 28, 2008, the Pension Fund filed a motion to intervene and a motion to dismiss Relators' Complaint. On May 5, 2010, the Trial Judge and the Administrative Judge filed a motion to dismiss Relator's Complaint. Relators filed Oppositions to these motions to dismiss on May 10, 2010 and May 17, 2010, respectively.

On June 23, 2010, this Court denied the motions to dismiss and granted an alternative writ (1) prohibiting the trial court from exercising jurisdiction over the Derivative Action and (2) setting a briefing schedule and a deadline for the submission of evidence.⁷

PROPOSITIONS OF LAW & ANALYSIS

For a writ of prohibition to issue, the relator must show “[i] that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, [ii] that the exercise of that power is unauthorized by law, and [iii] 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; *see also State ex rel. Knowlton v. Noble Cty. Bd. of Elections*, 125 Ohio St.3d 82, 2010-Ohio-1115, ¶ 17.

The third element—lack of an adequate remedy—is not required where the court against which the writ is sought is patently and unambiguously without authority over the matter. *State ex rel. Hunter v. Summit Cty. Human Resource Comm.*, 81 Ohio St.3d 450, 452, 1998-Ohio-614

⁷ On July 13, 2010, Relators and the Pension Fund submitted evidence to this Court. Respondents did not separately submit evidence. The Affidavit of Drew Legando inaccurately states that the Pension Fund is the “Respondent.” The Pension Fund is, in fact, an intervening party. Judges Corrigan and Fuerst are “Respondents.”

(issuing a writ of prohibition even where there was an adequate remedy at law because the court patently and unambiguously lacked jurisdiction).⁸

For a writ of mandamus to issue, the relator must show (i) that relator has a clear right to the relief prayed for, (ii) that respondent is under a clear legal duty to perform the official act sought by relator, and (iii) that relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119, 120. “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.

Each requirement is satisfied in this case, thus compelling the issuance of both a writ of prohibition and a writ of mandamus.

I. IN COURTS WITH A COMMERCIAL DOCKET THE RANDOMLY ASSIGNED COMMON PLEAS COURT JUDGE HAS NO AUTHORITY TO PRESIDE OVER A DERIVATIVE ACTION AND HAS AN AFFIRMATIVE DUTY TO TRANSFER IT TO THE COMMERCIAL DOCKET.

A. The Objective and Purpose of the Commercial Docket.

During the 1990s, business courts were created elsewhere around the nation to develop judicial expertise in commercial disputes, to efficiently resolve business issues, and to promote consistency. Many of these courts were modeled after the most well-known business court, Delaware’s Chancery Court.

Recognizing the need for commercial dockets in Ohio, the late Chief Justice Moyer announced the formation of the Ohio Supreme Court Task Force on commercial dockets in his

⁸ See also *State ex rel. Haylett v. Bur. of Workers’ Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134 (same); *State ex rel. Lilly v. Leskovyansky*, 77 Ohio St.3d 97, 99-101, 1996-Ohio-340 (same); *State ex rel. Tempero v. Colopy* (1962), 173 Ohio St. 122, 123 (same).

Annual State of the Judiciary Address on April 25, 2007. The task force was charged with establishing commercial dockets in Ohio Courts of Common Pleas. (Operating Guidelines for the Task Force on Commercial Dockets, ¶ 2).⁹ The Task Force’s work culminated in the Commercial Rules, which this Court adopted on May 6, 2008.¹⁰

The objective of the Commercial Rules is to promote consistency, efficiency, and predictability by creating a forum for resolving business disputes. For example, a limited number of judges are authorized to decide commercial cases. Commercial Rule 1.02(C)(1) provides that only “Commercial Docket Judges” can hear and decide cases assigned to the Commercial Docket. Under the Commercial Rules, Commercial Docket Judges must be trained in handling commercial cases (R. 1.02(C)(2)), and administer the case under specific Commercial Docket case management plans. (R. 1.06).

Efficiency and predictability, in turn, make Ohio more hospitable to business disputes and positively impact the state’s economy. See A Primer on Ohio’s New Commercial Dockets, Columbus Bar Lawyers’ Quarterly (Summer 2009). “The Court’s mission here is to create efficiencies in the administration of justice. . . . But it could have a positive impact on economic development in the state at a time when it’s sorely needed.” Ohio Supreme Court’s Test to Set Aside ‘Commercial Dockets’ For Biz Disputes, Business First (July 4, 2008).

B. The Scope of the Commercial Rules.

1. Mandatory Transfer Requirements.

Commercial Rule 1.03 governs the “Scope of the Commercial Docket.” Subsection (A) provides that a case is subject to the Commercial Docket if the case satisfies two requirements:

⁹ <http://www.sconet.state.oh.us/boards/commDockets/> (last visited July 21, 2010).

¹⁰ Commercial Rule 1.11 provides that the Rules “shall take effect on July 1, 2008 and shall remain in effect through July 1, 2012, unless extended, modified, or withdrawn by the Supreme Court prior to that date.”

(i) it is a “civil case”; and (ii) the “gravamen of the case relates” to any of the subject matters identified in Rule 1.03(A)(1)-(5).

Regarding the first requirement, Rule 1.03(A) provides a list of “civil cases.” In particular, Rule 1.03(A) specifically lists a “derivative action.” *Id.* (“A commercial docket judge shall accept a civil case, including any. . . *derivative action*” (emphasis added)). There is no dispute that the underlying case is a derivative action. (Agreed Statement of Facts ¶ 1). Therefore, the first requirement for transfer is satisfied here.¹¹

The second requirement in Rule 1.03(A) is that the “gravamen of the case” relates to one of the subject matters identified in Subsections (1) to (5). Here, the relevant provision is Subsection (4), which specifically refers to civil cases where the gravamen of the case relates to “the obligations [or] liability . . . an officer [or] directors . . . of a business entity owed to or from the business entity[.]” (R. 1.03(A)). There is also no dispute that the Derivative Action relates to the obligations and liability of officers and directors of American Greetings. Accordingly, the second requirement for transfer also is satisfied.

¹¹ Rule 1.03 provided in pertinent part:

(A) Cases accepted into the commercial docket

A commercial docket judge shall accept a civil case, including any jury; non-jury; injunction, including any temporary restraining order; class action; declaratory judgment; or *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 . . .*

(Emphasis added).

2. Exceptions to Transfer.

If the two requirements under Rule 1.03(A) are satisfied—as all parties agree they are—then the case “shall” be referred to the Commercial Docket unless it falls under one of the limited exceptions enumerated under Rule 1.03(B). The Pension Fund argues that the “labor organization” exception in Rule 1.03(B) applies:

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[.]

(R. 1.03(B) (emphasis added)).

To fall within this exception, two separate requirements must be satisfied: (i) one of the parties must be a labor organization, and (ii) the gravamen of the case must relate to a party’s alleged status as a “labor organization.”

a. The “Gravamen of the Case” Has Nothing To Do With a “Labor Organization.”

The gravamen of the Derivative Action does not relate to the Pension Fund’s alleged status as a “labor organization,” and, consequently, the exception in Rule 1.03(B) does not apply. The Pension Fund, as a shareholder, brought the Derivative Action to redress wrongs allegedly sustained by American Greetings. The breach of fiduciary duty claims belong to American Greetings; any qualifying shareholder—individual, trust, pension fund, etc.—could have brought them.

“[G]ravamen” means “[t]he substantial point or essence of a claim, grievance, or complaint.” BLACK’S LAW DICTIONARY 721 (8th ed. 1999). “[T]he substantial point or essence” of the underlying case is not the Pension Fund’s identity. As the court explained in *Boedeker v. Rogers* (Cuyahoga App. 2000), 140 Ohio App.3d 11, “in [a] stockholders’ derivative action the

right of the plaintiff to maintain the action is derivative or secondary.” *Id.* at 20. The “heart of the action is the corporate claim,” and any proceeds recovered in a derivative action belong exclusively to the corporation. *Ross v. Bernhart* (1970), 396 U.S. 531, 538-39; 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). Indeed, “the stockholder, as a nominal party, has no right, title or interest in the claim itself.” *Boedeker*, 140 Ohio App.3d at 7 (internal quotation and citation omitted). To the contrary, 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 538-39.

If the Pension Fund were correct that its identity in a derivative lawsuit could disqualify the lawsuit from transfer to the Commercial Docket jurisdiction, it would result in troubling inconsistencies and could promote “plaintiff shopping.” A derivative action alleging the *identical* facts against the *identical* defendants brought on behalf of the *identical* company by an individual shareholder would be transferred, but one brought by a pension fund, claiming to be a labor organization, would not be. This Court adopted the Commercial Rules to eliminate inconsistencies—not create them.¹² Thus, the rule focusing on the “gravamen” of the case is born of good reason and any exception should be narrowly applied.¹³

¹² This is not a theoretical exercise; pension funds frequently file derivative actions. To name a few recent examples: *Oklahoma Police Pension & Retirement Sys. v. BP PLC*, No. 2:10-cv-02013 (E.D. La.) (filed July 19, 2010); *New Jersey Carpenters Annuity Fund v. Meridian Diversified Fund Management, LLC*, No. 650786/2010, N.Y. Sup., New York Co. (filed June 30, 2010); *Plumbers & Pipefitters Local 572 Pension Fund v. Cook* (S.D. Ohio Sept. 22, 2004), 2004 U.S. Dist. LEXIS 30530 (Plumbers & Pipefitters, Local 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 &

b. The Electrical Workers Pension Fund Local 103 I.B.E.W. Is Not a “Labor Organization.”

The Pension Fund is not a “labor organization.” By its own admission, it is a multiemployer pension plan within the meaning of Section 3(37) of ERISA, 29 U.S.C. §

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).

¹³ Two or more derivative actions are often filed and later consolidated. What happens if a (real) “labor organization” shareholder files a complaint and an individual shareholder files a virtually identical one? Based on the Pension Fund’s interpretation, the actions could not be consolidated because only one of them could be transferred to the Commercial Docket. That is arbitrary, inefficient, and undermines the intent of the Commercial Rules.

1002(37). (See Nance Aff. Ex. 9, Form 550, Annual Report of Employee Benefit Plan). The Pension Fund has represented in submissions to courts that it is an “‘employment pension benefit plan’ within the meaning of § 3(2)(A) of ERISA.” (Nance Aff. Exs. 11 ¶ 4; 12 ¶ 4; 13 ¶ 4; 14 ¶ 4).¹⁴ And it has further represented itself as a “large sophisticated institutional investor” with “vast resources.” (Nance Aff. Ex. 15, at 8). The Pension Fund is managed by a board of trustees that, by law, must be made up by an equal number of representatives from the union *and* from management. 29 U.S.C. § 186(c)(5).

Given these irrefutable facts, and to avoid the Commercial Docket, the Pension Fund has tried to assume the identity of a different party: a union that is a “labor organization,” but one that is not a party in the Derivative Action. In a thinly veiled sleight of hand, the Pension Fund deceptively attempted to create the appearance that it is a labor organization before the trial court by dropping a footnote to a website of a legally distinct non-party, the union. (Nance Aff. Ex. 3, at 2 n.1).

Yet, even the evidence that the Pension Plan submitted to this Court demonstrates that it is separate and distinct from Local 103, I.B.E.W. (the “Union”):

- The Restated Agreement and Declaration of Trust: Electrical Workers Pension Fund, Local 103, I.B.E.W. (“Agreement/Declaration”) defines the “Fund” and “Plan” as separate from the “Union.” (Affidavit of Drew Legando (“Legando Aff.”) Ex. A §§ 2.6, 2.9, 2.13).
- Article IV of the Agreement/Declaration provides that no amounts in the Fund may be paid to the Union. (Id. at 5). The Union cannot remove an Employer Trustee. (Id. § 5.4). The Trustees can require the Union to furnish records to the Trustees. (Id. § 6.4).

¹⁴ See *NECA-IBEW Pension Trust Fund v. Bays Co. LLC*, (C.D. Ill. Apr. 1, 2010), 2010 U.S. Dist. LEXIS 31934, at *4-*5 (accepting argument by plaintiffs NECA-IBEW Pension Trust Fund and NECA-IBEW Welfare Trust Fund “that they are not ‘labor organizations’ as defined by 29 U.S.C. § 152(5), but rather “ ‘not-for-profit employee benefit plans’ ”).

- The Agreement/Declaration restricts the entities into which the Fund may be merged, which does not include the Union. (Id. § 6.14). Article XI does not permit the Union to unilaterally amend the Fund, and Article XII does not permit the Union to unilaterally terminate the Fund. (Id. at 14). The Union, moreover, has no right, title or interest in the Fund. (Id. § 12.1).¹⁵

Furthermore, the Pension Fund and Union have explicitly distinguished between themselves in court filings—one being an “employee benefits plan” and the other being a “union.” In *Sheehan v. Nigro Electrical Corp.*, 1:05-cv-11495 (D. Mass.), the Pension Fund alleged:

1. This is an action brought pursuant to §§502 and 515 of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§1132(a)(3) and (d)(1) and 1145 and §301 of the Labor Management Relations Act (“LMRA”), as amended, 29 U.S.C. Sec.185 *by employee benefit plans and a union* to enforce the obligations to make contributions to such plans due under the terms of a collective bargaining agreement and the plans and to pay dues.

* * *

4. Plaintiff Russell F. Sheehan is the Administrator of the Electrical Workers’ Pension Fund, Local 103, I.B.E.W. The Electrical Workers’ Pension Fund, Local 103, *I.B.E.W. is an “employee pension benefit plan”* within the meaning of §3(2) of ERISA, 29 U.S.C. §1002(2)(A). The Fund is administered at 256 Freeport Street, Boston, Massachusetts, within this judicial district.

* * *

11. Plaintiff Local 103, *International Brotherhood of Electrical Workers is a labor organization* within the meaning of §301 of the LMRA, 29 U.S.C. §185. Local 103 is administered at 256 Freeport Street, Boston, Massachusetts.

¹⁵ Likewise, the Summary Plan Description (SPD) continuously provides that all questions relating to the Fund be directed to the Fund Office, not the Union. (Legando Aff. Ex. B). The SPD makes clear that the Plan is administered and maintained by the Trustees, not the Union. (Id. at 69). The Trustees are identified as the plan administrator (not the Union), and the Fund Office is identified as the place for service of legal process (not the Union office). (Id. at 71, 72).

(Nance Aff. Ex. 10 ¶¶ 4, 11 (emphasis added); see also *id.* at 1-2 (alleging in the first paragraph of the Complaint that the action is brought “by employee benefit plans and a union . . .”). This is not an aberration: the Pension Fund continually, in other forums, distinguishes itself from the Union. (Nance Aff. Ex. 11 ¶¶ 4, 11; Ex. 12 ¶¶ 4, 11).

In sum, the Pension Fund’s and the Union’s judicial admissions conclusively show that they are legally distinct. Hence, the second requirement in Rule 1.03(B) does not apply either.

c. Transfer of the Case to the Commercial Docket Is Mandatory.

Because neither requirement in Rule 1.03(B) is satisfied, Rule 1.03(A) requires transfer of the Derivative Action to the Commercial Docket. To promote fairness, consistency, and uniformity, the Commercial Rules eliminate judicial discretion to transfer among the many judges on the courts of common pleas. Pursuant to Rule 1.02(C)(1), only “Commercial Docket Judges can hear and decide cases assigned to the Commercial Docket.” Commercial Rule 1.04(B) contains three sections establishing the procedure for transfer of a case to the commercial docket—each of which uses the mandatory language “*shall*.”¹⁶

This Court recently considered the propriety of an order transferring a similar shareholder derivative case to the Commercial Docket and concluded that transfer was not only proper, but *required*. See *State ex rel. Carr v. McDonnell* (Cuyahoga App.), 184 Ohio App.3d 373, 2009-Ohio-2488, ¶¶ 14, 19 (“Clearly, the gravamen of *Acacia II* and *Acacia III*, a shareholders

¹⁶ If the case falls within the scope of the Commercial Docket as defined by Commercial Rule 1.03(A), then “the attorney filing the case shall include with the initial pleading a motion for transfer of the case to the commercial docket.” (R. 1.04(B)(1) (emphasis added)). If the filing attorney does not follow this rule and the case is assigned to a non-Commercial Docket Judge, then “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.” (R. 1.04(B)(2)) (emphasis added). Third, if neither party moves to transfer, the “the judge shall sue sponte request the administrative judge to transfer the case to the commercial docket.” (R. 1.04(B)(3)).

derivative action and breach of a fiduciary duty claim, fall within the parameters of Temp.Sup.R. 1.03(A).”), affirmed by 124 Ohio St.3d 62, 2009-Ohio-6165. In that case, the Administrative Judge 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 respondents (Cuyahoga County Common Pleas Court judges) emphasized that transfer of a derivative action to the Commercial Docket “was not a matter of judicial discretion” but, rather, transfer “was required by operation of the Temporary Rules of Superintendence. . . . [The case] *had to be transferred to the commercial docket.*” (Merit Br. of Respondents-Appellees, at 10, 11, 15 (emphasis in original)).¹⁷

The Eighth District Court of Appeals agreed, concluding that the derivative actions were properly transferred to the Commercial Docket and that the Commercial Docket Judge therefore possessed “the necessary jurisdiction” to preside over the derivative actions. 2009-Ohio-2488, ¶ 21. 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 patently and unambiguously lacked judicial authority to preside over the case.

Similarly, the Trial Judge lacks judicial authority over the Derivative Action and had an affirmative duty to transfer it to the Commercial Docket under Rule 1.03(A).

II. WRITS OF PROHIBITION AND MANDAMUS ARE THE PROPER REMEDY.

This Court has held that writs of prohibition and mandamus are appropriate where a court fails to adhere to mandatory provisions of the Rules of Superintendence, which include the Commercial Rules. See *State ex rel. Dispatch Printing Co. v. Greer*, 114 Ohio St.3d 511, 2007-Ohio-4643 (granting writ of prohibition to prevent court from entering future orders without

¹⁷ <http://www.sconet.state.oh.us/tempx/650746.pdf> (last visited July 23, 2010).

allowing parties to have an evidentiary hearing required by Rules of Superintendence); *State ex rel. Buck v. Maloney*, 102 Ohio St.3d 250, 2004-Ohio-2590 (granting writ of prohibition and holding that Sup.R. 78(D) restricted a probate court's jurisdiction to bar attorneys to a particular case); *Smith v. Lucas Cty. Common Pleas Court*, Lucas App. No. L-05-1124, 2005-Ohio-1885, ¶¶ 3, 5 ("With respect to a request for continuance based upon a conflict of trial date assignments, however, the Rules of Superintendence for the Courts of Ohio are mandatory. . . . Accordingly, we hereby grant the petition for writ of mandamus."); *Foster v. Friedland*, Cuyahoga App. No. 91888, 2008-Ohio-6505 (granting a writ of mandamus and holding that a mandatory provision of the Rules of Superintendence was a clear legal duty); *Selway v. Court of Common Pleas Stark Cty.*, Stark App. No. 2007CA00213, 2007-Ohio-4566 (granting a writ of mandamus where the trial court had failed to fulfill its duty under mandatory Rules of Superintendence).

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. *State ex rel. Hunter v. Summit County Human Resource Comm.*, 81 Ohio St.3d 450, 452, 1998-Ohio-614 (issuing a writ of prohibition even where there is an adequate remedy at law because the court patently and unambiguously had no jurisdiction); *State ex rel. Haylett v. Bur. of Workers' Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134 (same); *State ex rel. Lilly v. Leskovyansky*, 77 Ohio St.3d 97, 99-101, 1996-Ohio-340 (same); *State ex rel. Tempero v. Colopy* (1962), 173 Ohio St. 122, 123 (same).

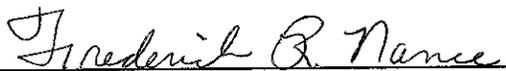
Even if Relators were required to show the lack of an adequate remedy at law, Relators lack such a remedy. Commercial Rule 1.04(D)(2) provides that "[t]he decision of the administrative judge as to the transfer of a case under division (C) of this rule is final and *not appealable.*" (Emphasis added). Thus, there is no appellate court review of the unexplained

failure to comply with the mandatory obligation to transfer the case under the Commercial Rules. With no further right of appeal, Relators have no adequate remedy and this Court's intervention is necessary to correct the clear errors below.

CONCLUSION

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

Respectfully submitted:



Frederick R. Nance (0008988)

Counsel of Record

Joseph C. Weinstein (0023504)

Stephen P. Anway (0075105)

Joseph P. Rodgers (0069783)

SQUIRE, SANDERS & DEMPSEY LLP

4900 Key Tower

127 Public Square

Cleveland, OH 44114-1304

(216) 479-8500 (phone)

(216) 479-8780 (fax)

fnance@ssd.com

jweinstein@ssd.com

sanway@ssd.com

jrodgers@ssd.com

COUNSEL FOR THE INDIVIDUAL
RELATORS

David H. Kistenbroker

Carl E. Volz

KATTEN MUCHIN ROSENMAN LLP

525 West Monroe Street

Chicago, IL 60661-3693



John D. Parker (0025770)

Counsel of Record

Lora M. Reece (0075593)

BAKER & HOSTETLER LLP

3200 PNC Center

1900 East Ninth Street

Cleveland, OH 44114-3485

(216) 621-0200 (phone)

(216) 696-0740 (fax)

jparker@bakerlaw.com

lreece@bakerlaw.com

COUNSEL FOR THE CORPORATE
RELATOR AMERICAN GREETINGS
CORPORATION

(312) 902-5362 (phone)
(312) 577-4729 (fax)
david.kistenbroker@kattenlaw.com
carl.volz@kattenlaw.com

Richard H. Zelichov
KATTEN MUCHIN ROSENMAN LLP
2029 Century Park East, Suite 2600
Los Angeles, CA 90067-3012
(310) 788-4680 (phone)
(310) 712-8433 (fax)
richard.zelichov@kattenlaw.com

OF COUNSEL FOR THE INDIVIDUAL
RELATORS

DATED: July 23, 2010

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Merit Brief of Relators was served by electronic mail this 23rd day of July 2010 upon the following:

Jack Landskroner Drew Legando Paul W. Flowers	<i>jack@lgmlegal.com drew@lgmlegal.com pwf@pwfco.com</i>	<i>Counsel for Intervenor</i>
Kevin K. Green James I. Jaconette Michael Ghozland	<i>keving@csgrr.com jamesj@csgrr.com mghozland@csgrr.com</i>	<i>Of Counsel for Intervenor</i>
William D. Mason Charles E. Hannan	<i>p4wdm@cuyahogacounty.us channan@cuyahogacounty.us</i>	<i>Counsel for Respondents</i>
Shana F. Marbury	<i>smarbury@gcpartnership.com</i>	<i>Counsel for Amicus Curiae, Greater Cleveland Partnership</i>
Linda S. Woggon	<i>lwoggon@ohiochamber.com</i>	<i>Counsel for Amicus Curiae, Ohio Chamber of Commerce</i>


Frederick R. Nance