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

AMICI CURIAE BRIEF OF THE OHIO CHAMBER OF COMMERCE AND GREATER CLEVELAND PARTNERSHIP IN SUPPORT OF RELATORS

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STATEMENT OF INTEREST

This Court adopted the Commercial Rules to promote important statewide policies, including resolving commercial disputes efficiently, consistently, and fairly.[1] Because this case directly impacts how Ohio courts treat derivative actions involving the rights and obligations of officers and directors of Ohio businesses, the Ohio Chamber of Commerce ("Ohio Chamber") and the Greater Cleveland Partnership ("GCP") have a significant interest in its outcome.

Founded in 1893, the Ohio Chamber is Ohio's largest and most diverse statewide business advocacy organization.[2] The Ohio Chamber works to promote and protect the interests of its more than 5,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council, the Ohio Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers' compensation, and campaign finance. The advocacy efforts of the Ohio Chamber are dedicated to the creation of a strong pro-jobs environment—an Ohio business climate responsive to expansion and growth.

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1 "Commercial Rules" refers to Temporary Rules 1.01 through 1.11 of the Rules of Superintendence for the Courts of Ohio. The Commercial Rules were approved by the Supreme Court on May 6, 2008 and effective on July 1, 2008.

2 http://www.ohiochamber.com.

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 member companies.[3] It serves as a catalyst to increased economic vitality in greater Cleveland and the region and works to improve the international competitiveness of the region and its companies. The GCP is dedicated to helping attract, retain, and train talent to grow the region's economy. It also monitors legal and regulatory developments that affect Ohio's competitiveness.

The success of business dockets is critically important to the members of the Ohio Chamber and GCP. In addition to increasing efficiency, consistency, and fairness of business litigation, the Commercial Docket has a corollary benefit: it could positively impact economic development in the State of Ohio by making Ohio's legal system more attractive to businesses.[4]

In the derivative action giving rise to the Complaint before this Court, the Cuyahoga County Common Pleas Court trial judge denied a motion to transfer the

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3 http://www.gcpartnership.com.

4 *See* Grant, Alison, *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."); Kemper, Kevin, *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 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* Nees, Anne Tucker, *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.").

case to the Commercial Docket, apparently because a pension fund shareholder, oddly claiming to be a "labor organization," filed the complaint derivatively on behalf of the company. But if an individual shareholder filed a lawsuit asserting the *identical* claims, premised on *identical* facts, and naming *identical* defendants, the case *would have been* transferred to the Commercial Docket. Such disparate treatment is simply illogical. Treating identical derivative actions (with the same real party-in-interest: the company) differently based on nothing more than the claimed status of the representative plaintiff is glaringly inconsistent and precisely what the Commercial Rules were adopted to obviate.

Many businesses across the State of Ohio and their officers and directors have been faced with derivative lawsuits. And pension-fund shareholders file many derivative lawsuits across the country.[5] This case presents the Court with an

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[5] Indeed, on June 30, 2010, another fund—the New Jersey Carpenters Annuity Fund—filed a derivative action in New York state court. *New Jersey Carpenters Annuity Fund v. Meridian Diversified Fund Management, LLC*, No. 650786/2010, N.Y. Sup., New York Co. On the same day, that pension fund filed a statement in support of request for assignment to commercial division. *See* Docket *http://iapps.courts.state.ny.us/iscroll/index.jsp*. In New York, like in Ohio, shareholder derivative actions are to be assigned to the Commercial Division. *Compare* Section 202.70(d)(2) of the New York Uniform Rules for the Trial Courts ("Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought . . . (4) *Shareholder derivative actions*—without consideration of the monetary threshold . . . ." (emphasis added)), *with* Sup. R. Temp. R. 1.03(A) ("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).

important opportunity to provide much needed definitive guidance regarding the application of the Commercial Rules.

SUMMARY OF ARGUMENT[6]

Transfer of commercial cases to the Commercial Docket is mandatory, and justifiably so. Even where no party requests transfer, a non-commercial docket judge has a *duty* to order transfer. This requirement allocates commercial disputes before a limited number of Commercial Docket Judges, who have specialized training, have experience with similar cases, and are required to adhere to Commercial Docket procedures. Through this allocation, Commercial Docket Judges develop an even greater mastery in commercial practices, techniques, and substantive law. Commercial Dockets likewise give Ohio businesses assurance that commercial disputes will be handled consistently and predictably, from beginning to end. Such confidence in the forum and the process is important to Ohio businesses.[7]

The Commercial Rules are clear: "derivative action[s]" involving the rights, obligations, and liabilities of officers and directors of companies are commercial cases and *must* be transferred to the Commercial Docket. Respondents unfortunately have not explained through their decisions why they did not transfer the underlying derivative action to the Commercial Docket. They presumably accepted the pension-fund plaintiff's (only) argument, *i.e.*, that its purported status

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6 Amici adopt Relators' "Background" section.

7 "As used in Temporary Rules 1.01 through 1.11 of the Rules of Superintendence for the Courts of Ohio, 'business entity' means a for profit or nonprofit corporation, partnership, limited liability company, limited liability partnership, professional association, business trust, joint venture, unincorporated association, or sole proprietorship." Temp. Sup. R. 1.01.

as a "labor organization" was sufficient to remove the derivative action from Commercial Docket jurisdiction.

In determining what constitutes a commercial case, however, the Commercial Rules focus on the essence of the claim, not the caption of the complaint. In a shareholder derivative suit, the shareholder plaintiff's identity is irrelevant for a simple reason: the company is the real party in interest. The shareholder bringing the suit—whether the shareholder is an individual or pension fund—is merely a representative of the corporation. A representative shareholder plaintiff's purported status as a "labor organization" (even if it actually were one) does not disqualify a shareholder derivative action from mandatory transfer to the Commercial Docket. Allowing a representative shareholder to so easily circumvent the Commercial Docket is contrary to the plain language of the Commercial Rules and promotes the sort of inconsistency and unpredictability that the Commercial Rules were enacted to prevent.

The Ohio Chamber and GCP respectfully submit that this case is an opportunity for the Court to provide necessary guidance on how to interpret these rules and, in particular, how derivative actions should be treated by Ohio courts with commercial dockets, especially since the Court will consider the success of the Commercial Docket pilot program in 2012 and potentially make it permanent.

ARGUMENT

I. Respondents Had a Duty to Comply with the Mandatory Transfer Provision and Transfer the Derivative Action to the Commercial Docket.

The Commercial Rules mandate that non-commercial docket judges transfer commercial cases to the Commercial Docket. *See* Sup. R. Temp. R. 1.04(B). Mandatory transfer is an essential feature of the Commercial Docket program. The goals of efficiency and predictability are possible only if all commercial cases are consistently transferred to Commercial Dockets. Thus transfer is mandatory.

The Commercial Rules enumerate the types of cases that are commercial cases and thus subject to the mandatory transfer provisions. Sup. R. Temp. R. 1.03(A). Included is a "derivative action . . . if . . . the gravamen of the case relates to [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." Sup. R. Temp. R. 1.03(A)(2). The underlying derivative action is such a case. Commercial Rule 1.04 specifies that commercial cases *must* be transferred to the Commercial Docket, even when no party requests transfer.

The Commercial Rules are relatively new, and few appeals courts have had the opportunity to consider them. In one of the few cases, the Eighth District Court of Appeals held not only that a derivative action had been properly transferred to the Commercial Docket, but that if the defendant had not moved to transfer the trial judge would have 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. If a case is a commercial case, then a non-commercial docket judge has a duty to transfer the case to the Commercial Docket.

Respondents in *Carr*—both Cuyahoga County Common Pleas Court judges—argued before this Court that transfer was mandatory and 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 (*Carr*), at 10, 13 (emphasis in original).[8]

Citing the Commercial Rules, this Court remarked that "Judge O'Donnell does not patently and unambiguously lack jurisdiction to proceed in these cases." *Carr*, 2009 Ohio 6165, at ¶ 2. 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 heightened jurisdictional significance.

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8 Available at http://www.sconet.state.oh.us/tempx/650746.pdf.

Here, a shareholder filed a suit on behalf of a corporation against its officers and directors asserting claims related to the duties and responsibilities of those officers and directors to the corporation.[9] Such a derivative action is clearly a commercial case. Neither Respondents nor the Pension Fund have ever disputed this point. Rule 1.04 specifies that all commercial cases must be transferred to the commercial docket.

II. The Plaintiff's Alleged Status as a Labor Organization is Irrelevant to the Substance of the Derivative Action and Thus the Derivative Action is a Commercial Case Subject to the Commercial Rules Mandatory Transfer Provision.

By declining to transfer the underlying derivative action, Respondents failed to fulfill their duties and obligations and denied parties their right to have a case adjudicated by a designated Commercial Docket Judge pursuant to the specially designed procedures set forth in the Commercial Rules.[10]

The pension-fund plaintiff's sole argument against transfer was that it was a "labor organization," which it claimed disqualified the derivative action from Commercial Docket jurisdiction. But accepting this argument leads to an absurd and unjust result that cannot be reconciled with fundamental principles characterizing derivative actions.[11] On the one hand, if officers and directors are sued derivatively by a pension-fund or labor-organization shareholder, the case cannot be transferred. On the other hand, if the *same* officers and directors of the *same* corporation are sued

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9 *See* Rel. Submission of Evidence, Ex. 1.

10 *See* Rel. Submission of Evidence, Ex. 5.

11 It is disputed whether the Pension Fund is, as it alleges, actually a labor organization. *See* Rel. Submission of Evidence, Exs. 9-15.

derivatively by an individual shareholder on the *same* claims, the case must be transferred. This would be true even though the "represented" party (that is, the real party in interest) is the same: the company that issued the shares. Transferring a case in one instance and not the other is indefensible, inconsistent, and undermines the Commercial Docket. That cannot be what the Task Force and this Court intended in 2008.

The relevant inquiry is not whether a named party is a "labor organization," but whether a party's status as a "labor organization" relates to the substance—or "gravamen"—of the dispute. *See* Sup. R. Temp. R. 1.03.[12] The narrow exceptions in Commercial Rule 1.03 are explicitly limited to instances related to the "gravamen of the case," which fits the purposes of the Commercial Rules. *Id.* Only if something in

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[12] (B) Cases not accepted into the commercial docket

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*:

(1) Personal injury, survivor, or wrongful death matters;
(2) Consumer claims against business entities or insurers of business entities, including product liability and personal injury cases, and cases arising under federal or state consumer protection laws;
(3) Matters involving occupational health or safety, wages or hours, workers' compensation, or unemployment compensation;
(4) Environmental claims, except those arising from a breach of contractual or legal obligations or indemnities between business entities;
(5) Matters in eminent domain;
(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).

the enumerated list relates to the substance of the suit does it effect whether a case is a commercial case subject to mandatory transfer. Conversely, if something is merely tangential to the key issues, it has no effect on whether the case must be transferred.

Here, the representative plaintiff's alleged status as a labor organization is immaterial to the claims. As a matter of black-letter law, 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 citation omitted); *Koster v. (American) Lumbermens Mut. Casualty Co.* (1947), 330 U.S. 518, 522-23 ("The cause of action which such a plaintiff brings before the court is not his own but the corporation's. It is the real party in interest . . . .") (footnote omitted); *Taylor v. Swirnow* (D. Md. 1978), 80 F.R.D. 79, 82 ("However, it is clear that in a derivative action the corporation for whose benefit suit is brought is a necessary party to the action; the corporation is 'the real party in interest, the stockholder being at best the nominal plaintiff.'") (quoting *Ross v. Bernhard* (1970), 396 U.S. 531, 538; *see also* Intervenor's Mot. to Dismiss at 2 (stating that the plaintiff is "[s]uing derivatively on the Company's behalf"). Indeed, the stockholder bringing the action has "no right, title, or interest in the claim itself":

> [A]s distinguished from actions in which a shareholder brings an action based on his or her own individual interest, a shareholder may, under certain circumstances bring an action on behalf of, and to redress an injury to, the corporation itself. *Such actions are commonly referred to as shareholders' "derivative actions" because the*

> *primary right of redress is in the corporation itself, and the right of the shareholder to bring the action is secondary; the corporation is not a mere formal party, but is an indispensable or necessary party to the action, and the stockholder, as a nominal party, has no right, title, or interest in the claim itself.*

12 OH JUR BUSINESS RELATIONSHIPS § 914 (footnotes omitted; emphasis added).

Accordingly, the corporation is the real plaintiff-in-interest and the pension fund plaintiff in the underlying case has no right, title, or interest in the claim. Therefore, the identity of the nominal shareholder plaintiff does not impact any substantive aspect of the case.

III. Extraordinary Writs Are Warranted to Provide Guidance to the State on the Commercial Rules' Meaning and Application.

The Commercial Rules are not mere housekeeping guidelines or procedures for assigning cases to judges. They fundamentally alter how commercial disputes are resolved in Ohio counties with a commercial docket and they impose mandatory duties onto trial courts. They enjoy special status, constitute a unique subset of the Superintendence Rules, include mandatory language (unlike mere guidelines), impose new duties onto trial courts, and provide litigants with an individual right of immediate appeal to the administrative judge.

Furthermore, Ohio courts, including this Court, have regularly granted mandamus relief based on the violation of mandatory 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).

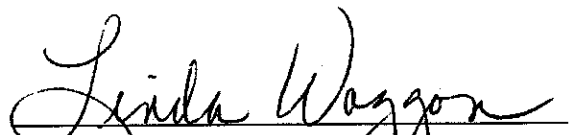
Nor does transfer to the Commercial Docket involve the routine "assignment" of a judge, as Respondents have previously asserted. Understandably, a party in a routine civil lawsuit has no right to dictate individual judicial assignment. But under the Commercial Rules, a non-commercial judge has a clear legal duty to transfer qualifying commercial cases to the Commercial Docket.

CONCLUSION

Confidence in the Commercial Rules is critically important to the State of Ohio. As set forth above, this Court adopted the Commercial Rules to promote important statewide policies, among them: resolving commercial disputes efficiently, consistently, and fairly. There is no rational reason—not one—to transfer a derivative action brought by an individual shareholder on behalf of the company, but not one brought by a pension fund shareholder on behalf of the company. As shown, the stockholder—regardless of its status—has no right, title, or interest in the claim.

DATED: July 23, 2010

Respectfully submitted:



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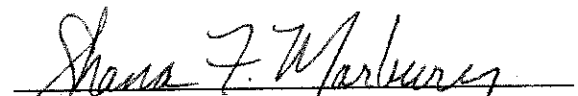

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The undersigned does hereby certify that a true and accurate copy of the foregoing was served by e-mail on July 23, 2010.

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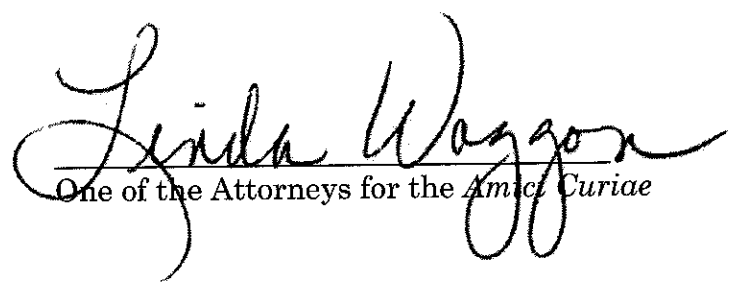

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