

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

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

Relators,

vs.

JUDGE NANCY A. FUERST and JUDGE PETER J. CORRIGAN,

Respondents.

Case No. 10-0582

Original Action in Mandamus and Prohibition

MERIT BRIEF OF INTERVENING RESPONDENT

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FILED
AUG 31 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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I. INTRODUCTION

The request for writs of mandamus and prohibition goes awry on both procedural and substantive grounds. Relators possess “an adequate remedy by way of appeal” to challenge the judge selection ruling at issue. *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004, ¶ 2. As *Carr* established, assignment to the general or commercial docket does not rise to the level needed for an extraordinary writ. Judge Peter Corrigan is duly elected to the Cuyahoga Court of Common Pleas and, as such, has jurisdiction. Mandamus and prohibition would be stretched well beyond their proper confines if used, as Relators invite, for piecemeal interlocutory review of case assignments. This Court should not endorse such a dubious precedent (and, with good reason, has already rejected it).

Stare decisis aside, Judge Corrigan and Administrative Judge Nancy Fuerst, who upheld the assignment, correctly determined that this action should remain on the general docket. For all the bluster, Relators fail to grapple with the plain language of the Temporary Rules. “Cases in which a labor organization is a party” properly belong on the general docket. Temp.Sup.R. 1.03(B)(7). Plaintiff Electrical Workers Pension Fund, Local 103, I.B.E.W (“Local 103”) is a labor organization within the rule and, contrary to Relators’ suggestion, no “sleight of hand” is required to reach this conclusion. In the end, Relators’ proposal to dispatch *certain* cases brought by labor organizations (here, a shareholder derivative action) to a specialized business docket finds no textual support. For these and other reasons discussed below, Local 103 respectfully asks this Court to reaffirm its recent decision in *Carr* and deny the requested writs.

II. STATEMENT OF FACTS

A. This Action Alleges Unlawful Stock-Option Backdating in Violation of Relators' Stringent Fiduciary Duties

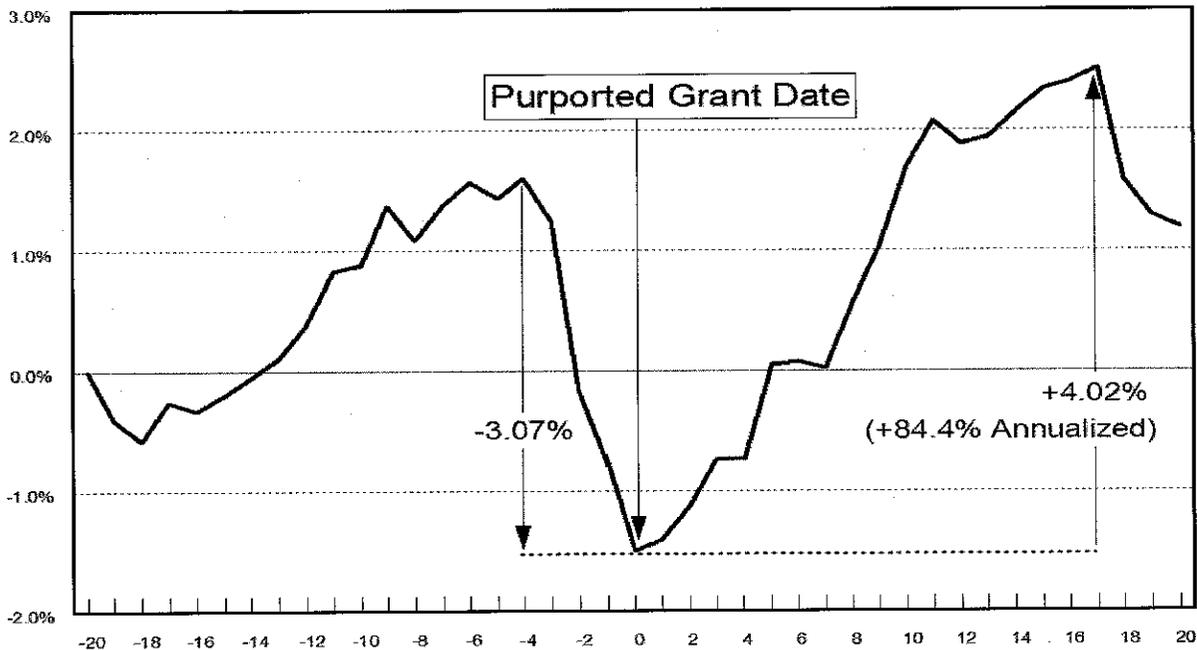
Relators are virtually silent on what this case is about. The underlying suit alleges serious misconduct by corporate officials. It is one of many arising out of the national stock-option backdating scandal that led to calls for greater transparency and scrutiny of how corporate fiduciaries are compensated.¹

Local 103 is a shareholder of American Greetings Corporation (“American Greetings” or “company”). (Agreed Statement of Facts filed July 13, 2010 (“Agreed Statement”), Ex. A, ¶ 15-16.) Relators are the directors and top executives who controlled the company and engaged in the alleged misconduct. (Id., ¶ 1-2, 17-46.) Suing derivatively on behalf of American Greetings, Local 103 seeks to hold Relators accountable for damaging the company through unlawful stock-option backdating. (Id., ¶ 1-2, 5.) “Stock option backdating” refers to the practice of using hindsight to date an option prior to the date the option was actually authorized, to price the option more favorably for the recipient. (Id., ¶ 2-4, 10, 65.) This is done to increase, in secrecy, the option’s value for its holder – here, the corporate officials named as defendants in the trial court.

A historical pattern emerged at American Greetings suggesting deliberate manipulation by company insiders who selected the option grant dates. Relators had an uncanny ability – too consistent for good luck or guesswork – to price stock options at low points in the trading price, thereby increasing the profit when exercised. (Id., ¶ 66-67.) This chart puts in stark visual terms how Relators dated option grants to maximize profit on the transaction:

¹ “Because this litigation has not advanced beyond the pleading stage, the facts are set forth in [plaintiff]’s complaint.” *M & M Precision Sys. Corp. v. Interactive Grp., Inc.*, 2d Dist. No. 18008, 2000 WL 262655, at *1.

Cumulative Decrease/Increase In American Greetings Stock Price In 20 Trading Days Before and After All Reported Option Dates: 1992-2007



(Id., ¶ 66.)

Local 103 alleges that Relators' backdating concealed executive compensation and falsified the company's financial filings. (Id., ¶ 92, 138-140, 147-154.) Relators hid the backdating by making false statements in proxy documents concerning compensation and stock option granting practices and policies. (Id., ¶ 94, 99-136.) Likewise, the backdating was concealed by false statements in reports on Forms 10-K and 10-Q filed with the Securities and Exchange Commission. (Id., ¶ 154-192, 195-197.) Based on these and other facts alleged, Local 103 asserts causes of action for breach of fiduciary duty and related claims under state law. (Id., ¶ 216-253.)

B. Declining to Answer the Allegations, Relators Instead Have Forum-Shopped for the Most Favorable Tribunal

In March 2009, Local 103 filed this shareholder derivative suit in the Cuyahoga Court of Common Pleas. (Agreed Statement, Ex. A.) Although the complaint asserts no federal causes of action, Relators tried to remove to the United States District Court for the Northern District of Ohio.

(Id., ¶ 6.) Rejecting Relators' stance that a federal question was presented, the United States District Court granted Local 103's motion to remand. *See Elec. Workers Pension Fund, Local 103, I.B.E.W. v. Weiss* (N.D. Ohio 2010), No. 09-CV-875, 2010 WL 597717. Relators' groundless removal thus delayed the proceedings by nearly a year.

When the case returned to state court, Relators filed their motion to transfer to the commercial docket. Respondent Judge Corrigan received full briefing. (Relators' Submission of Evidence filed July 13, 2010 ("Rel. Evid."), Tabs 2-4.) He denied the motion. (Agreed Statement, Ex. B.) Relators then took an administrative appeal as allowed by the Temporary Rules. This led to another, even more extensive, round of briefing on the same arguments. (Rel. Evid., Tabs 5-8.) The other respondent, Administrative Judge Fuerst, sustained the case assignment. (Agreed Statement, Ex. C.) Bypassing the Eighth District Court of Appeals, Relators then sought immediate review in this Court. On June 23, 2010, the Court denied Local 103's motion to dismiss and granted its motion to intervene.²

III. ARGUMENT

A. **Proposition of Law No. 1: Mandamus and Prohibition Are Unavailable to Review Trial Court Rulings on Whether to Transfer a Case to the Commercial Docket**

Relators give only passing attention to whether mandamus and prohibition are appropriate to challenge the case assignment. This consideration is not just of threshold importance, but reason

² On July 23, 2010, the Ohio Chamber of Commerce and the Greater Cleveland Partnership filed an *amici curiae* brief supporting relators. It is wholly duplicative of Relators' own contentions. Rather than providing any help in deciding this case, the brief merely "flaunt[s] the interest of a trade association or other interest group in the outcome of the appeal." *NOW, Inc. v. Scheidler* (C.A.7, 2000), 223 F.3d 615, 617. But, as another state supreme court observed, "the fact that powerful public officials or business or labor organizations support or oppose an appeal is a datum that is irrelevant to judicial decision making." *Kinkel v. Cingular Wireless L.L.C.* (Ill. 2006), No. 100925, 2006 Ill. LEXIS 1, at *6.

alone to deny the requested relief. The Court has long held that the challenger “possesses an adequate remedy at law by way of appeal” to “contest the issue of an improper assignment.” *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 30, 451 N.E.2d 225, 227. Although Ohio’s commercial docket was only recently established, the Court has already applied this familiar principle to reject a similar legal challenge. Relators’ grievance that Judge Corrigan was “improperly assigned” finds “an adequate remedy by way of appeal.” *Carr*, 2009-Ohio-6165, ¶ 2.³

Indeed, *Carr* should be dispositive. There, the plaintiff sought immediate review of a ruling transferring several related suits to the commercial docket. *State ex rel. Carr v. McDonnell*, 184 Ohio App.3d 373, 2009-Ohio-2488, 921 N.E.2d 251, ¶ 1-7, *aff’d*. 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E. 2d 1004. The Eighth District observed that “if a trial court possesses general subject-matter jurisdiction over a cause of action, the trial court possesses the authority to determine its own jurisdiction and an adequate remedy at law . . . [by] an appeal, exists to challenge an adverse decision.” *Id.*, ¶ 9. The panel noted that “the Cuyahoga County Court of Common Pleas is a court of general jurisdiction.” *Id.*, ¶ 13.

Just as in *Carr*, there is “no question” that the present action is a “civil case[] in which the sum or matter in dispute exceeds the exclusive jurisdiction of any county court.” *Id.* “As a duly elected or appointed judge of the Cuyahoga County Court of Common Pleas,” Judge Corrigan “possesses the authority to determine whether [this action] fall[s] within his jurisdiction.” *Id.* Just as

³ Local 103 made a summary version of this argument in its motion to dismiss relators’ original complaint. Denial of the motion does not foreclose Local 103 from renewing the procedural point. The question whether a relator has “an adequate remedy in the ordinary course of the law” can require full briefing before it is resolved. *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 19; *see also State ex rel. Edwards v. Toledo City Sch. Dist. Bd. of Educ.*, 72 Ohio St.3d 106, 108-09, 1995-Ohio-251, 647 N.E.2d 799, 802.

in *Carr*, Relators’ “claim of improper assignment of a judge must be raised through a direct appeal and not through prohibition or mandamus.” *Id.*, ¶ 20 (collecting cases).

Notably, on further review, this Court affirmed. Apart from whether Relators’ objection has merit, *Carr* makes plain that Judge Corrigan “does not patently and unambiguously lack jurisdiction to proceed.” *Carr*, 2009-Ohio-6165, ¶ 2. The Court held that “mandamus and prohibition are not substitutes for appeal to contest alleged improper assignment.” *Id.* Yet this is exactly what Relators seek, ignoring that writs are no “substitute for an appeal from interlocutory orders.” *State ex rel. Sliwinski v. Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶ 22. Relators further disregard that appellate courts do not intervene unless the trial judge’s authority is not open to legitimate debate, which certainly is not the situation here. *See, e.g., State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, 833 N.E.2d 293, ¶ 9-16.

Another decision – authored by Judge Richard A. Frye, who hears commercial docket cases in the Franklin County Court of Common Pleas – squarely rejects Relators’ suggestion that “assignment of cases to the commercial docket is a jurisdictional requirement.” *GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Rd., L.L.C.*, 151 Ohio Misc.2d 33, 2009-Ohio-2129, 906 N.E. 2d 517, ¶ 5. The Temporary Rules “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.” *Id.*, ¶ 6. As Judge Frye emphasized, the “superintendence rules relative to case assignments between judges are not jurisdictional.” *Id.*, ¶ 7. They are “only housekeeping rules which are of concern to the judges of the several courts but create no rights in litigants.” *Id.* (citations and internal quotation marks omitted).

While Relators might prefer a different description, this is nothing new. The Temporary Rules do not determine or affect Judge Corrigan's jurisdiction. The Rules of Superintendence "are purely internal housekeeping rules which do not have a force equivalent to a statute." *Krupansky v. Pascual* (1985), 27 Ohio App.3d 90, 92, 499 N.E.2d 899, 901, citing *State v. Gettys* (1976), 49 Ohio App.2d 241, 243, 360 N.E.2d 735. Relators' contrary suggestion fundamentally misconceives the font of subject matter jurisdiction in the trial courts. 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." *GLIC*, 2009-Ohio-2129, ¶ 8.

Judge Corrigan's jurisdiction arises from these sources, not from the "procedural" rules creating the commercial docket pilot project. *Carr*, 2009-Ohio-2488, ¶ 18 n.1. As procedural provisions, the Temporary Rules "neither purport to alter this court's jurisdiction, nor could they have such an impact under the Ohio Constitution." *GLIC*, 2009-Ohio-2129, ¶ 8. Consistent with the procedural essence, Relators do not identify any injury resulting from failure to assign this case to their preferred bench officer. Judge Corrigan's basic competence to preside has never been questioned, nor have Relators claimed he "has a bias or prejudice" against them. R.C. 2701.03(A). Much more is needed to obtain a reassignment. *Cf. State ex rel. Key v. Spicer*, 91 Ohio St.3d 469, 2001-Ohio-98, 746 N.E.2d 1119 (declining to intervene where probate judge heard criminal case).

The pertinent decisional law is aligned against Relators because the adverse consequences of their position are readily apparent. If this Court endorsed Relators' liberal test for mandamus and prohibition, an original proceeding would become common to second-guess orders on motions to transfer to the commercial docket. Litigants on the losing end of these motions would persistently seek immediate relief, urging appellate courts to micromanage case assignments. A routine determination that this Court envisioned would take a matter of days, *see* Temp.Sup.R. 1.04, would

instead drag out for weeks or months. The “strict timing rules” originally envisioned would go by the wayside, displaced by woeful inefficiencies at the trial level. *See* A Primer on Ohio’s New Commercial Dockets, Columbus Bar Lawyers Quarterly (Summer 2009). The accompanying burden on appellate courts would needlessly squander their resources because few assignment rulings, even if reviewed immediately, would ultimately be overturned. What Relators propose is glaringly “inconsistent with this court’s repeatedly pronounced disfavor of piecemeal appeals.” *Toledo Edison Co. v. Pub. Utils. Comm’n of Ohio* (1983), 5 Ohio St.3d 95, 449 N.E.2d 428 (collecting cases).

The scales tilt even more heavily against Relators’ position in light of the review they have already received. The Temporary Rules provide for an appeal within the Court of Common Pleas. Temp.Sup.R. 1.04(C)(1). Assignment decisions are thereby examined immediately for correctness. As they had the right to do, Relators appealed Judge Corrigan’s initial ruling on the assignment to Administrative Judge Fuerst. (Rel. Evid., Exs. 5-8.) While Relators imply that the assignment to Judge Corrigan was upheld in summary fashion, Administrative Judge Fuerst examined Relators’ contentions and rejected their appeal as “without merit.” (Agreed Statement, Ex. C.) Relators have received all process they are due before “the rendering of a final appealable order.” *Carr*, 2009-Ohio-2488, ¶ 20.

To avoid the on-point decisions in *Carr* and *GLIC*, Relators propose a broad touchstone for an extraordinary writ. They posit that any asserted violation of a “mandatory” Rule of Superintendence may be reviewed in an original proceeding. But the decisions they cite do not involve the commercial docket and, in any event, do not establish this sweeping proposition. To consider a few examples, in *State ex rel. Buck v. Maloney*, 102 Ohio St.3d 250, 2004-Ohio-2590, 809 N.E.2d 20, a jurisdictional problem was actually presented. The trial judge there was “without jurisdiction” to bar counsel from practicing law in a probate court. *Id.*, ¶ 11. Likewise, in another

case cited by Relators, the Eighth District issued a writ of mandamus to “compel respondent to rule on” certain “pending motions.” *Foster v. Friedland*, 8th Dist. No. 91888, 2008-Ohio-6505, ¶ 4. The Eighth District reasoned that “mandamus may be used to compel a court to exercise judgment or to discharge a function,” if the trial judge has refused to do so. *Id.* But, again, this is not our case.

The stringent nature of extraordinary writs should not be watered down as Relators are inviting here. Mandamus is deliberately “extraordinary,” *State ex rel. Haylett v. Ohio Bureau of Workers’ Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134, 720 N.E.2d 901, 908, and prohibition too “is to be used with care and caution.” *State ex rel. Merion v. Court of Common Pleas* (1940), 137 Ohio St. 273, 277, 28 N.E.2d 641, 643. The necessary urgency does not exist merely because the litigant who lost an interlocutory ruling would prefer not to wait for appellate review. “The fact that postjudgment appeal may be time-consuming and expensive to pursue does not render appeal inadequate so as to justify extraordinary relief.” *Fraiberg v. Cuyahoga Cnty. Court of Common Pleas, Domestic Rel. Div.*, 76 Ohio St.3d 374, 379, 1996-Ohio-384, 667 N.E.2d 1189, 1194. Because this case does not involve the “assumption of jurisdiction” by a lower court obviously lacking it, the relief sought should be denied. *State ex rel. Hunter v. Summit Cnty. Human Res. Comm’n*, 81 Ohio St.3d 450, 452, 1998-Ohio-614, 692 N.E.2d 185, 187.

B. Proposition of Law No. 2: A Shareholder Derivative Action “In Which a Labor Organization is a Party,” Temp.Sup.R. 1.03(B)(7), Belongs on the General Docket of a Court of Common Pleas

Even if Relators’ substantive arguments are considered, their push for transfer to the commercial docket was properly rejected by Judges Corrigan and Fuerst. Relators’ unstated premise is that when a corporation is involved, the lawsuit belongs on the commercial docket. But this is incorrect. Because cases involving labor organizations are excluded, the current docket assignment is sound and should not be disturbed.

The Temporary Rules carefully distinguish between cases “accepted into the commercial docket” and those “not accepted.” Temp.Sup.R. 1.03(A), (B). Ascertaining what is excluded is easy because the drafters were specific. Fifteen types of legal disputes will *not* be assigned to the commercial docket. The seventh in the long list is controlling: “A commercial docket judge shall not accept a civil case into the commercial docket . . . if the gravamen of the case relates to . . . [c]ases in which a labor organization is a party.” Temp.Sup.R. 1.03(B)(7).

As elaborated below in the next section, plaintiff is a “labor organization.” Under the plain language, then, this case does not go to the commercial docket. “To interpret court rules, this court applies general principles of statutory construction.” *State ex rel. Law Office Pub. Defender v. Rosencrans*, 111 Ohio St.3d 338, 342, 2006-Ohio-5793, 856 N.E.2d 250, 254, ¶ 23. When the language is “plain and unambiguous and conveys a clear and definite meaning,” as here, the words used will control and “there is no need for this court to apply the rules of statutory interpretation.” *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St.3d 471, 2009-Ohio-5934, 918 N.E.2d 135, ¶ 25.

Relators float several arguments seeking to overcome the straightforward text of the Temporary Rules, but none has merit. Pointing to *Carr*, Relators assert that all shareholder derivative actions qualify for the commercial docket. Although Relators do not address the holding, *Carr* is certainly relevant for instructing that Relators possess “an adequate remedy by way of appeal.” *Carr*, 2009-Ohio-6165, ¶ 2. On the substantive side, however, *Carr* sheds no light because the exception that is pivotal here was not at issue there. While *Carr* was a derivative suit, it did not involve a “labor organization [as] a party.” Temp.Sup.R. 1.03(B)(7). A decision “should not be used as precedent” for questions simply not addressed. *State ex rel. Ramsdell v. Washington Local Sch. Bd.* (1988), 52 Ohio App.3d 4, 6 n.1, 556 N.E.2d 197, 199 n.1.

With *Carr* providing Relators no assistance on the substantive issue, they zero in on the single word “gravamen” as supposedly having talismanic significance. According to Relators, if the “gravamen” of litigation is commercial-related, then the motion to transfer should be granted. This selective interpretation is untenable because it reads the phrase “labor organization is a party” out of the Temporary Rules. Temp.Sup.R. 1.03(B)(7). Relators disregard that the “duty of the court” is “to give effect to the words used” – all, not just some. *State ex rel. Richard v. Bd. of Trs. of Police & Firemen’s Disability & Pension Fund* (1994), 69 Ohio St.3d 409, 412, 632 N.E.2d 1292, 1295. Singling out labor organizations to remain on the general docket is significant because most of the enumerated exclusions turn on, as Relators prefer, the nature of the case. When the litigants’ identity truly does not matter, the drafters were pellucid.⁴

In a corollary to their leading arguments, Relators maintain that plaintiff’s identity as a labor organization may be disregarded because American Greetings, not plaintiff, is the intended beneficiary of a shareholder derivative suit. Once more, though, there is no linguistic support in the Temporary Rules for Relators’ proposed gloss. The drafters knew what a “derivative action” was. *Temp.Sup.R. 1.03(A)*. They could have written the rules as Relators prefer but clearly did not.

If Relators were correct, the text would read differently. It would say this instead: “A commercial docket judge shall not accept a civil case into the commercial docket . . . if the gravamen of the case relates to . . . [c]ases in which a labor organization is a party, *except for shareholder*

⁴ See, e.g., Temp.Sup.R. 1.03(B)(1) (“[p]ersonal injury, survivor, or wrongful death matters”); id. at 1.03(B)(2) (“cases arising under federal or state consumer protection laws”); id. at 1.03(B)(3) (“[m]atters involving occupational health or safety, wages or hours, workers’ compensation, or unemployment compensation”); id. at 1.03(B)(4) (“[e]nvironmental claims”); id. at 1.03(B)(5) (“[m]atters in eminent domain”); id. at 1.03(B)(6) (“[e]mployment law cases”); id. at 1.03(B)(9) (“[d]iscrimination cases”); id. at 1.03(B)(11) (certain “[p]etition actions”); id. at 1.03(B)(12) (“[i]ndividual residential real estate disputes”); id. at 1.03(B)(15) (“[a]ny criminal matter”).

derivative actions.” The drafters knew how to craft this type of exception within an exception. They, in fact, did this twice. See Temp.Sup.R. 1.03(B)(4) (excluding “[e]nvironmental claims, except those arising from a breach of contractual or legal obligations or indemnities between business entities”); *id.* at 1.03(B)(6) (excluding “[e]mployment law cases, except those involving owners described in division (A)(3) of this rule”). Relators’ position ignores a cardinal admonition: “We must construe the language of the statute as written and not insert words not used.” *Lesnau v. Andate Enters., Inc.*, 93 Ohio St.3d 467, 472, 2001-Ohio-1591, 756 N.E.2d 97, 102. Adding text would flout “established axioms of statutory construction.” *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 49. The Temporary Rules specifically forbid Relators’ loose approach. “The factors set forth in Temporary Rule 1.03 . . . shall be dispositive in determining whether a case shall be transferred to . . . the commercial docket” Temp.Sup.R. 1.04(D)(1).

Relators are mistaken, moreover, that plaintiff’s identity is beside the point. True, the corporation is the intended beneficiary, but the shareholder plays a meaningful role from the moment a derivative action is filed. This Court has observed that “derivative suits originated more than one hundred years ago as actions in equity.” *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 107, 616 N.E.2d 213, 218, citing *Ross v. Bernhard* (1970), 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729. The derivative action was recognized “to permit stockholders to call corporate managers to account” – in particular, “faithless officers and directors” who “damaged or threatened the corporate properties and whom the corporation through its managers refused to pursue.” *Ross*, 396 U.S. at 534. Historically, “derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company’s interests in order to enrich themselves.” *Surowitz v. Hilton Hotels Corp.* (1966), 383 U.S. 363, 371, 86 S.Ct. 845, 15 L.Ed.2d 807.

A derivative suit is necessarily prosecuted by the stockholder because the corporate fiduciaries are too conflicted to initiate action against themselves. Plaintiff here is in an adverse posture against not just the officers and directors but American Greetings itself, for those individuals are controlling the company. Although the company is the party to whom any relief will go, American Greetings is aggressively fighting this case, without outside counsel to boot. (*See, e.g.,* Rel. Evid., Tab 6 (joinder in administrative appeal in Court of Common Pleas).) Plaintiff's role is therefore essential, not irrelevant.

Relators say the interpretation accepted by Judges Corrigan and Fuerst leads to absurd results. As Relators view the matter, whether a shareholder derivative action goes to the commercial docket should be unaffected by the stockholder's identity. But this was for the drafters to decide and the language they used is unambiguous. Under the Temporary Rules, the litigant's identity *does* matter in deciding whether the general or commercial docket is appropriate. For instance, the drafters also excluded "[c]ases in which a governmental entity is a party." *Temp.Sup.R. 1.03(B)(8)*. Why? Although nothing akin to legislative history exists, political subdivisions are rightly set apart based on their identity because they are governed by special laws inapplicable to other litigants. *See, e.g., R.C. 2744.02*.

The same goes for labor organizations. As discussed in the next section, in contrast to the typical private litigant, they are heavily regulated by federal law. The drafters of the Temporary Rules could have reasonably concluded that labor organizations, when litigating in state court, should remain on the general docket rather than being sent to a specialized business docket. Far from an absurdity, this actually promotes consistency. All cases in which a labor organization is a party remain on the general docket. This interpretation is fortified by other exclusions from the commercial docket where the interests of labor organizations are implicated. *See Temp.Sup.R.*

1.03(B)(3) (“occupational health or safety, wages or hours, workers’ compensation, or unemployment compensation”); *id.* at (B)(6) (“[e]mployment law cases”); *id.* at 1.03(B)(9) (“[d]iscrimination cases”). Underscoring the bright line, the letter from the Supreme Court Task Force to Chief Justice Thomas J. Moyer, before the rules became effective, stated that cases “involving consumers, labor organizations, and residential foreclosures,” among others, “would not be eligible for the commercial docket.” (Rel. Evid., Tab 7 at Ex. A.)

Indeed, the Temporary Rules reflect an overarching objective – to “set up case schedules composed entirely of fights between businesses.” Ohio Supreme Court Test to Set Aside ‘Commercial Dockets’ for Biz Disputes, *Business First* (July 4, 2008). As the Co-Chairman of the Supreme Court Task Force emphasized: “‘The effort we’re making here is dealing with business-to-business lawsuits filed.’” *Id.*, quoting Franklin County Common Pleas Court Judge John P. Bessey. This case is outside the predominant focus the drafters had in mind. Relators will have an opportunity to voice their preference for a more encompassing commercial docket when the rules come up for possible renewal in mid-2012. In the interim, there is no basis for “ignoring” the “dictates” of Temp.Sup.R. 1.03(B)(7) “as it is currently written.” *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126, ¶ 21.

C. Proposition of Law No. 3: Because Plaintiff Local 103 Is a “Labor Organization,” Temp.Sup.R. 1.03(B)(7), This Case Does Not Qualify for the Commercial Docket

Finally, Local 103 is a “labor organization.” Temp.Sup.R. 1.03(B)(7). As such, if this Court reaches the issue at all, Judges Corrigan and Fuerst did not abuse their discretion.

Because the Temporary Rules do not provide a definition, one must be imported. Relators, however, do not offer a definition. Rather, they proclaim in conclusory fashion that Local 103 is not a “union,” so it cannot be a “labor organization.” This is wrong. “When a term has not been defined by the legislative enactment in which it appears, by court decision or otherwise, it will be given its

common, ordinary and accepted meaning in the context in which it is used.” *Caygill v. Jablonski* (1992), 78 Ohio App.3d 807, 812, 605 N.E.2d 1352, 1355. In the field of labor law, the term “labor organization” carries an inclusive meaning, not a narrow one as Relators presume. In the National Labor Relations Act (“NLRA”), Congress provided: “The term ‘labor organization’ means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5). The General Assembly has codified similarly expansive definitions for slightly different terms. *See* R.C. 4115.03(F)(3) (“bona fide organization of labor”); R.C. 4117.01(D) (“employee organization”).

Labor organization, as used in both the NLRA and the Revised Code, is thus “phrased very broadly.” *N.L.R.B. v. Cabot Carbon Co.* (1959), 360 U.S. 203, 211 n.7, 79 S.Ct. 1015, 3 L.Ed.2d 1175. Relators cite no authority for their assumption that only a union will qualify as a labor organization. To the contrary, as *Cabot Carbon* confirms, “the definition is not limited to the traditional concept of a ‘union.’” 1-2 National Labor Relations Act: Law & Practice § 2.04 (Matthew Bender & Co.) (available on Westlaw).

Local 103 is an employee pension benefit plan or “Taft-Hartley fund,” covered by the Taft-Hartley Act (an amendment to the NLRA). (Rel. Evid., Tab 7 at 5.) Local 103 is also subject to the Employee Retirement Income Security Act. *See* 29 U.S.C. § 1002(2)(A). The touchstone for being treated as a labor organization, however, is not a label derived from a statute or whether Local 103 is regulated by other laws. The focus is whether Local 103, unquestionably an employee “plan,” engages in the activities of a labor organization. 29 U.S.C. § 152(5); *see also* R.C. 4115.03(F)(3); R.C. 4117.01(D). As appears below, Local 103 serves as an intermediary and champion for

employees on a crucial term of employment – their retirement benefits. This more than suffices to make Local 103 a labor organization in the current context.

First, Local 103 operates for the sole benefit of “employees” covered by a “collective bargaining agreement” or “participation agreement,” both of which mandate employer contributions to Local 103. (Affidavit of Drew Legando filed July 13, 2010 (“Legando Aff.”), Ex. B at EWPF00031.) The “Restated Agreement and Declaration of Trust,” essentially the charter for Local 103, describes its “PURPOSE” in these terms: “This Fund is created for the sole purpose of providing Participants and Beneficiaries with retirement and other similar benefits permissible in a pension plan” (Id., Ex. B at EWPF00009.) Plainly, the employees – as the beneficiaries – “participate” in Local 103’s activities. 29 U.S.C. § 152(5).

Second, Local 103 also “deals” with employers, a verb given a vast meaning. “Congress, by adopting the broad term ‘dealing’ and rejecting the more limited term ‘bargaining collectively,’ did not intend that the broad term ‘dealing with’ should be limited to and mean only ‘bargaining with.’” *Cabot Carbon*, 360 U.S. at 211. Through its trustees, Local 103 is responsible for collecting employer contributions. It has the “power to demand, collect and receive Employer contributions and all other money and property to which the Trustees may be entitled, and shall hold the same until applied to the purposes provided in this Trust Agreement.” (Legando Aff., Ex. A at EWPF00012.) Moreover, Local 103’s trustees “shall be empowered to take such steps, including the institution and prosecution of, or the intervention in, such legal or administrative proceedings as the Trustees in their sole discretion determine to be in the best interest of the Fund for the purpose of collecting such payments, money and property.” Id.

As Relators’ own evidence proves, Local 103’s role and authority here is real, not for show. For example, in *Gambino v. Bradford E. Howse d/b/a Howse Sec. & Controls*, No. 1:10-cv-10925

(D. Mass), which is illustrative, Local 103 sued an employer “to enforce the obligation to pay benefit contributions and interest due to the plans under the terms of a collective bargaining agreement and the plans.” (Rel. Evid., Tab 13 ¶ 1.) Contrary to Relators’ contention, this evidence does not distinguish Local 103 from a labor organization; it demonstrates that Local 103 *is* a labor organization. Local 103’s “purpose,” at least “in part,” is “dealing with” employers on behalf of the beneficiaries. *29 U.S.C. § 152(5)*.

Third, Local 103 deals with employers on, in particular, pecuniary terms of the employment relationship. Local 103’s “sole purpose” is to “provide[] Participants and Beneficiaries with retirement and other similar benefits.” (Legando Aff., Ex. A at EWPF00009.) To facilitate this objective, “contributions to the Fund are made by individual contributing Employers in accordance with Collective Bargaining Agreement or Participation Agreements.” (Id., Ex. B at EWPF00035.) This satisfies the requirement to deal with employers on any of the following – “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” *29 U.S.C. § 152(5)*.

Local 103 engages in activities that qualify it as a “labor organization.” *Temp.Sup.R. 1.03(B)(7)*. Judges Corrigan and Fuerst acted well within their discretion by denying Relators’ motion to transfer this case to the commercial docket.

IV. CONCLUSION

For the reasons given, the requested writs of mandamus and prohibition should be denied.

DATED: August 31, 2010

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CERTIFICATE OF SERVICE

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