

ORIGINAL

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

RELATORS' REPLY MEMORANDUM

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FILED
 SEP 28 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
LAW AND ARGUMENT	2
A. The Pension Fund’s Argument Is Unsupported, Wrong, and Would Lead to Absurd Results.....	2
B. The Pension Fund is not a “Labor Organization.”.....	4
C. Under the Commercial Rules, Transfer of the Derivative Action Was Mandatory, Not Discretionary, and Mandamus Is Warranted.....	6
D. Because the Trial Judge Has No Judicial Authority over the Derivative Action, Prohibition Is Warranted.....	8
E. If The Writs Are Not Granted, Relators Will Be Damaged In A Way That is Not Correctable In Any Subsequent Appeal.....	12
F. The Floodgates Will Not Open.....	13
CONCLUSION.....	14
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

CASES

Page

<i>Berger v. Berger</i> (Cuyahoga App. 1981), 3 Ohio App.3d 125, certiorari denied (1982), 459 U.S. 834, overruled on other grounds, 106 Ohio St.3d 30, 2005-Ohio-3559	6
<i>City of Columbus v. Viereck</i> (Cuyahoga App.), 1978 Ohio App. LEXIS 8583	7
<i>Coleman v. Baker & Hostetler, LLP</i> (Cuyahoga App. Feb. 16, 2006), 2006-Ohio-685	11
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health,</i> 96 Ohio St.3d 250, 2002-Ohio-4172.....	3
<i>GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Rd., L.L.C.</i> (Franklin C.P.), 151 Ohio Misc.2d 33, 2009-Ohio-2129.....	10
<i>Lisboa v. Karner</i> (Cuyahoga App.), 167 Ohio App.3d 359, 2006-Ohio-3024	8
<i>McCaffrey v. Rex Motor Transp., Inc.</i> (1st Cir. 1982), 672 F.2d 246.....	5
<i>NECA-IBEW Pension Trust Fund v. Bays Co. LLC</i> (C.D. Ill. Apr. 1, 2010), 2010 U.S. Dist. LEXIS 31934	5
<i>Pendergraft v. Watts</i> (Cuyahoga App. July 8, 2010), 2010-Ohio-3196	10
<i>Royal Elec. Constr. Corp. v. Ohio State Univ.</i> (1995), 73 Ohio St.3d 110.....	6
<i>State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.,</i> 117 Ohio St.3d 441, 2008-Ohio-1261.....	12
<i>State ex rel. Buck v. Maloney,</i> 102 Ohio St.3d 250, 2004-Ohio-2590	9
<i>State ex rel. Carr v. McDonnell,</i> (Cuyahoga App.), 184 Ohio App.3d 373, 2009-Ohio-2488	7, 8, 9, 11
<i>State ex rel. Carr v. McDonnell,</i> 124 Ohio St.3d 62, 2009-Ohio-6165	7, 9

<i>State ex rel. Dispatch Printing Co. v. Greer</i> , 114 Ohio St.3d 511, 2007-Ohio-4643	9
<i>State ex rel. Haylett v. Bur. of Workers' Comp.</i> , 87 Ohio St.3d 325, 334, 1999-Ohio-134	11
<i>State ex rel. J.K. & E. Auto Wrecking v. Trumbo</i> (Cuyahoga App., June 11, 1991), 1991 Ohio App. LEXIS 2760	8
<i>State ex rel. Kline v. Carroll</i> , 96 Ohio St.3d 404, 2002-Ohio-4849	9, 10
<i>State ex rel. Law Office Pub. Defender v. Rosencrans</i> (2006), 111 Ohio St.3d 338.....	6
<i>State ex rel. LetOhioVote.org v. Brunner</i> , 123 Ohio St.3d 322, 2009-Ohio-4900.....	12
<i>State ex rel. Lomaz v. Court of Common Pleas</i> (1988), 36 Ohio St.3d 209.....	8, 9, 10
<i>State ex rel. Mason v. Burnside</i> , 117 Ohio St.3d 1, 2007-Ohio-6754.....	11
<i>State ex rel. McMinn v. Whitfield</i> (1986), 27 Ohio St.3d 4.....	8
<i>State ex rel. Plain Dealer Publ'g Co. v. Floyd</i> , 111 Ohio St.3d 56; 2006-Ohio-4437	9
<i>State ex rel. Plain Dealer Publ'g Co. v. Geauga County Court of Common Pleas</i> (2000), 90 Ohio St.3d 79.....	9
<i>Tupper v. United States</i> , (1st Cir. 1998), 134 F.3d 444.....	5

STATUTES & REGULATIONS

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431, et seq.....	4, 5
29 CFR § 401.12	5
29 CFR § 403.2(a).....	4
29 CFR § 403.2(d)(1).....	4

R.C. 4115.03(F)(3).....5

COMMERCIAL RULES

1.03(A).....6, 7

1.03(A)(4)3, 9

1.03(B)3

1.04(B)2

1.04(B)(3).....6, 9, 11

1.04(D)(2)11, 12

OTHER

12 OH JUR. 3D *Business Relationships* § 914.....4

INTRODUCTION

This Court’s Commercial Rules are clear: the so-called “labor-organization exception” applies only if the “gravamen of the case” relates to the party’s claimed status as a labor organization. In their Merit Briefs, Respondents give *no* meaning to that phrase, which provides that the substance of the claims—not the mere caption of the complaint—dictates whether the trial judge must transfer a case to the Commercial Docket. It is black-letter law that the identity of the nominal shareholder plaintiff (whether an individual, pension fund, hedge fund, corporation, etc.) is irrelevant in a derivative action and does not relate to the “gravamen of the case.”

Respondents provide no meaningful response to Relators’ straightforward reading of the Commercial Rules. Nor have they ever denied that their interpretation would have absurd and adverse consequences:

- a derivative action filed by a nominal individual shareholder would be transferred to the Commercial Docket, but the exact same derivative action filed by a pension fund shareholder, claiming to be a “labor organization,” would not be;
- two identical derivative actions based on identical facts—one filed by an nominal individual shareholder plaintiff and another by a nominal pension-fund plaintiff—could not be consolidated; and
- plaintiff’s counsel in derivative actions could always “end run” the Commercial Docket merely by finding a pension fund to act as a nominal plaintiff

The troubling consequences of Respondents’ interpretation would be felt beyond derivative actions. For example, the same would be true of “class action[s]” relating to or arising under federal or state securities laws. (R. 1.03(A); R. 1.03(A)(5)(k)). If Respondents’ interpretation were correct, *no class action could ever be transferred* to the Commercial Docket if a pension-fund shareholder, claiming to be a “labor organization,” brings the lawsuit or otherwise appears on the caption (which is often the case).

Unable to deny these consequences, Respondents recycle the arguments they made in their motions to dismiss, which this Court denied. They claim, for example, that Relators have an adequate remedy at law through an eventual appeal, yet never reconcile this claim with Rule 1.04(D)(2), which says the opposite. They claim that writs of mandamus/prohibition are improper vehicles through which to compel compliance with this Court's mandatory Commercial Rules, yet ignore the numerous cases where this Court has granted writs to compel compliance with the Rules of Superintendence (of which the Commercial Rules are an important part). And they try to minimize this dispute by characterizing it as simply relating to discretionary assignment of cases, yet wholly ignore the compulsory language of the Commercial Rules providing that derivative actions like the underlying case "*shall*" be transferred to the Commercial Docket.

LAW AND ARGUMENT

A. The Pension Fund's Argument Is Unsupported, Wrong, and Would Lead to Absurd Results.

The Judicial Respondents never explain the meaning of the phrase "gravamen of the case" or why they believe the Pension Fund is a "labor organization." Instead, they urge this Court not to decide the issue "without benefit of a fully developed trial court record,"¹ but never explain why "a fully developed trial court record" is necessary to resolve the *threshold* issue of whether transfer to the Commercial Docket was mandatory under the Commercial Rules. The

¹ Judicial Respondents' Merit Brief ("Judicial Resp. Br.") at 22. "Judicial Respondents" refers to the Honorable Peter Corrigan and the Honorable Nancy Fuerst. "Pension Fund" refers to the Intervening Respondent, Electrical Workers Pension Fund, Local 103, I.B.E.W. "Respondents" refers collectively to the Judicial Respondents and the Pension Fund.

Commercial Rules require that courts decide this issue at the outset of the case—*before* “a fully developed trial record.” (R. 1.04(B)).²

As Relators have shown, the Commercial Rules are unambiguous. To fall within the so-called labor-organization exception, two independent requirements must be satisfied: the party must be a labor organization *and* the “gravamen of the case” must relate to the party’s status as one. (Relators’ Merit Br. (“Rel. Br.”) at 8-9). This phrase—placed prominently in the introductory sentence of Commercial Rule 1.03(B)—explicitly limits the labor-organization exception to cases in which a party’s status as a labor organization relates to the gravamen of the case. (Rel. Br. at 10).³

Ignoring a bedrock principle of statutory constructions—that words must not be ignored⁴—the Pension Fund claims that the “gravamen of the case” phrase is meaningless, but never explains why. (Pension Fund Br. at 11). From this flawed premise, the Pension Fund contends that qualifying language (such as “except for shareholder derivative actions”) could have been, but was not, included after the labor-organization exception. (Id. at 11-12). Nonsense. Explicit qualifying language was incorporated *before* the labor organization exception. (R.

² Relators have not delayed the underlying case at all. (Pension Fund Br. at 4). They removed the case to federal court (which was based on the well-settled principle that federal courts have jurisdiction where state-law claims substantially depend on, or require the interpretation of, federal law). When the case was remanded, Relators promptly filed a motion to transfer to the Commercial Docket, as the Commercial Rules require.

³ As the amici point out, respondents in *Carr*—Judges McDonnell, Gallagher, and O’Donnell—emphasized that, under the Commercial Rules, “the *substance* of the case,” not the caption “determines whether or not a case is to be transferred to the commercial docket.” (Amici Curiae Brief of the Ohio Chamber Of Commerce and Greater Cleveland Partnership In Support of Relators (“Amici Curiae Br.”), at 7) (citation omitted).

⁴ See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶ 26.

1.03(B) (“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 . . .*”) (emphasis added)). Additional language would have been superfluous.

Respondents do not dispute that the gravamen of this case (alleged breaches of fiduciary duties by officers and directors of American Greetings) does not relate to the Pension Fund’s supposed status as a “labor organization.”⁵ The Pension Fund’s response—that a “shareholder plays a meaningful role” and that derivative suits are “important” (Pension Fund Br. at 12)—misses the point. Derivative suits are important, but, as a matter of law, the identity of the nominal shareholder bringing the action on a company’s behalf is not. No basis exists to discriminate among nominal shareholder plaintiffs who have “no right, title, or interest in the claim itself.” 12 OH JUR 3D *Business Relationships* § 914; see also Pension Fund Br. at 13 (“[T]he company is the party to whom any relief will go.”).

B. The Pension Fund is not a “Labor Organization.”⁶

Ironically, the Pension Fund faults Relators for focusing on the fact that it is not a “union.” (Pension Fund Br. at 15-16). However, as the Pension Fund will recall, in opposing Relators’ motion to transfer in the trial court, the Pension Fund cited a *union’s* website as the sole evidence supposedly supporting its claimed status as a “labor organization.” (Rel. Evidence

⁵ The Pension Fund claims that Relators avoid discussing the facts of the underlying case. (Pension Fund Br. at 2). The facts are irrelevant, except to consider whether this case belongs on the Commercial Docket. The Pension Fund’s self-serving synopsis of the claims that the Individual Relators have fiercely denied only confirms that the case—a derivative action involving the rights, obligations, and liability of officers and directors—qualifies for transfer to the Commercial Docket pursuant to Commercial Rule 1.03(A)(4).

⁶ If this Court agrees with Relators regarding the legal issue of interpreting the Commercial Rules and giving meaning to the phrase “gravamen of the case” (discussed above), then it need not decide whether the Pension Fund is a “labor organization.” The issue becomes moot.

Ex. 3, at 2 & n. 1). Regardless, the Pension Fund has never previously claimed to be a “labor organization”; it has consistently characterized itself in judicial filings and elsewhere as an “employee pension benefit plan” under ERISA and has distinguished itself from a “labor organization.” (Rel. Br. at 12-13).

The Pension Fund cites no authority that, as a multiemployer pension plan under ERISA, it is simultaneously a “labor organization.” The Pension Fund generally refers to federal law, but “labor organizations” are required to file specific labor organization annual financial reports. See Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431, et seq.; 29 CFR § 403.2(a); *id.* § 403.2(d)(1). The Pension Fund has never claimed to have done so; it files a Form 5500, the Annual Report of Employee Benefit Plan. (See Rel. Br. at 10-11). Regulations implementing the Labor-Management Reporting and Disclosure Act distinguish between a “labor organization” and a “trust.” 29 C.F.R. § 401.12. The Pension Fund concedes that it is a trust. (Pension Fund Br. at 16; see also Restated Agreement and Declaration of Trust, Affidavit of Drew Legando, Ex. A, at 2 (EWPF0006) (“This Trust shall be known as the Electrical Workers Pension Fund, Local 103, I.B.E.W.”)).⁷

No matter how broadly the term “labor organization” is construed, the Pension Fund is not one. See *Tupper v. United States*, 134 F.3d 444, 446 n.1 (1st Cir. 1998) (stating that even with a broad interpretation of “labor organization,” a multiemployer pension plan trust and an annuity plan trust would not be labor organizations). The Pension Fund states, irrelevantly, that

⁷ The Pension Fund cites R.C. 4115.03(F)(3). (Pension Fund Br. at 15). That section does not define “labor organization,” but rather “Interested party” with respect to public improvements. (R.C. 4115.03(F)(3) (“Any bona fide organization of labor . . . which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment or employees.”) (emphasis added)). The Pension Fund does not, and cannot, claim that it negotiates with employers.

employers make contributions to the plan and that it has participated in a lawsuit to enforce payment obligations. (Pension Fund Br. at 15). It cannot seriously claim, however, that it deals with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, which is its own definition of a “labor organization.”⁸ Besides, virtually any pension fund could make that boilerplate claim. If the Pension Fund were correct, despite the scores of derivative lawsuits pension funds file each year, *none* could be transferred to the Commercial Docket. That makes no sense.

C. Under the Commercial Rules, Transfer of the Derivative Action Was Mandatory, Non Discretionary, and Mandamus Is Warranted.

As they did in their unsuccessful motions to dismiss, Respondents all but ignore whether Relators are entitled to mandamus relief. Beyond generally acknowledging the standard (Judicial Resp. Br. at 10-11), the Judicial Respondents dedicate a few sentences at the end of their brief to whether mandamus relief is available. And there, all they claim is that it should be rendered “judiciously.” (Id. at 24).

It is undisputed that the Commercial Rules impose a *non-discretionary* duty upon Common Pleas Judges to transfer certain classes of cases to the Commercial Docket. (See R. 1.04(B)(3) (“[T]he judge *shall sua sponte* request the administrative judge to transfer the case to the commercial docket.”) (emphasis added); see also R. 1.03(A) (“A commercial docket judge *shall* accept a civil case, including any . . . derivative action . . . if the case is within the statutory

⁸ See generally *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”). Cf. *McCaffrey v. Rex Motor Transp., Inc.* (1st Cir. 1982), 672 F.2d 246, 249. (stating that the New England Teamsters and Trucking Industry Pension Fund “does not appear to fall within the definition of a “labor organization”).

jurisdiction of the court and the gravamen of the case relates to any of the following: . . .”) (emphasis added)). “[T]he word ‘shall’ establishes a mandatory duty.” *State ex rel. Law Office Pub. Defender v. Rosencrans* (2006), 111 Ohio St.3d 338, 344 (internal quotation marks and citation omitted).⁹ Nor is there any dispute that trial courts have a duty to comply with Superintendence Rules. (See Sup. R. 77 (stating that the failure to comply with the Rules of Superintendence “may result in sanctions as the court may direct.”); *Berger v. Berger* (Cuyahoga App. 1981), 3 Ohio App.3d 125, 128 (stating that Sup. Rule 36, governing transfer of cases generally, “should not be read to mean that . . . the original assigned judge has authority to take action under any circumstances.”) (citing former analogous provision), certiorari denied (1982), 459 U.S. 834, overruled on other grounds, 106 Ohio St.3d 30, 34, 2005-Ohio-3559, at ¶ 28); *City of Columbus v. Viereck* (Cuyahoga App.), 1978 Ohio App. LEXIS 8583, at *7 (stating that the Rules of Superintendence are “mandatory and must be complied with”). Yet, Respondents are practically silent regarding the precedent holding that mandamus is proper where a judge fails to fulfill a mandatory duty, including a duty arising under the Rules of Superintendence. (Rel. Br. at 15-16).

Both the Pension Fund and the Judicial Respondents also conspicuously ignore the underlying facts and fundamental holding in *State ex rel. Carr v. McDonnell*. There, unlike in the underlying Derivative Action here, the administrative judge transferred the shareholder derivative action to the Commercial Docket, thereby complying with her clear legal duty. *Carr*, 2009-Ohio-2488, at ¶ 6. The Court of Appeals confirmed that transfer of derivative actions involving alleged breaches of fiduciary duties “*was mandated.*” *Id.* at ¶ 18 (emphasis added). Because the derivative action was not improperly transferred to the Commercial Docket and the

⁹ See also *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 115 (stating that the use of the word “shall” eliminates discretion); see also Rel. Br. at 13-14.

Commercial Docket Judge possessed the necessary jurisdiction to preside over the case, the Court of Appeals denied the request for a writ of mandamus (*id.* at ¶ 21). This Court affirmed. 124 Ohio St.3d 62, 2009-Ohio-6165. In claiming that “the instant case differs slightly” from *Carr* because *Carr* was transferred to the Commercial Docket and this case was not (Resp. Br. at 21), the Judicial Respondents miss the pivotal point. The Court of Appeals did not issue a writ of mandamus in *Carr* precisely because respondents complied with their clear legal duty and transferred the derivative action pursuant to the mandatory Commercial Rules.¹⁰ Respondents in *Carr* had an obligation to comply with the Commercial Rules, and the Judicial Respondents here do too.

D. Because the Trial Judge Has No Judicial Authority over the Derivative Action, Prohibition Is Warranted.

By focusing on a narrow definition of “jurisdiction,” Respondents fundamentally misconceive the scope of prohibition. Prohibition will be granted to prevent common pleas judges—even those who possess “basic statutory jurisdiction”—from otherwise exceeding their judicial authority. (See Relators’ Opp’n to Intervenor’s Mot. to Dismiss (“5/10/10 Relators’ Opp’n Mem.”), at 4-5; see also *State ex rel. McMinn v. Whitfield* (1986), 27 Ohio St.3d 4; *State ex rel. Lomaz v. Court of Common Pleas* (1988), 36 Ohio St.3d 209, 212 (granting a writ of prohibition where a case had been improperly transferred to a domestic relations judge); see also *Lisboa v. Karner* (Cuyahoga App.), 167 Ohio App.3d 359, 2006-Ohio-3024, at ¶ 13 (holding that the domestic relations division of the common pleas court did not have jurisdiction over non-domestic-relations or collateral issues and, because the court was “patently and unambiguously

¹⁰ Moreover, as the amici demonstrated, three Common Pleas Court Judges argued before this Court that “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.” (Br. of the Amici Curaie, at 7-8 (citing Merit Brief of Respondents-Appellees (*Carr*), at 15)).

without jurisdiction,” granting a writ of prohibition); *State ex rel. J.K. & E. Auto Wrecking v. Trumbo* (Cuyahoga App., June 11, 1991), 1991 Ohio App. LEXIS 2760 (holding that the housing division of the municipal court had exclusive jurisdiction over the underlying cause of action to the exclusion of the general division and therefore granting writ of prohibition against the general division trial court)).

Similar to limits placed on Common Pleas Judges’ divisional authority, this Court, through its non-discretionary Commercial Rules, explicitly limited a non-Commercial Judge’s authority to adjudicate certain classes of commercial cases, including a “derivative action[.]” relating to the “rights, obligations, [and] liability . . . of an officer [or] director . . . of a business entity.” (R. 1.03(A)(4)). Because specific judges may lack judicial authority despite having “basic statutory jurisdiction,” this Court has looked beyond general statutory jurisdiction in determining whether to issue writs of prohibition. Writs are warranted based upon a broader concept of judicial authority.¹¹ It is therefore well settled that violating mandatory Rules of Superintendence can warrant prohibition. See *State ex rel. Dispatch Printing Co. v. Greer*, 114 Ohio St.3d 511, 2007-Ohio-4643; *State ex rel. Buck v. Maloney*, 102 Ohio St.3d 250, 2004-Ohio-2590.¹²

¹¹ See *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, at ¶ 27 (granting a writ of prohibition where the Presiding Judge of the Cuyahoga County Court of Common Pleas had transferred a case where the Rules of Superintendence gave that power only to the Chief Justice); see also *State ex rel. Lomaz v. Court of Common Pleas* (1988), 36 Ohio St.3d 209, 212; *State ex rel. Plain Dealer Publ’g Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437 (granting writ of prohibition where the court had subject matter jurisdiction, but the judge lacked authority to close proceedings); *State ex rel. Plain Dealer Publ’g Co. v. Geauga County Court of Common Pleas* (2000), 90 Ohio St.3d 79 (same).

¹² The Pension Fund tries to distinguish *Buck* on the ground that “a jurisdictional problem was actually presented.” (Pension Fund Br. at 8-9). That is exactly the point. The writ of prohibition focused on a broader concept of “jurisdiction”; not subject matter jurisdiction, but judicial authority. In *Buck*, this Court held that, by acting contrary to a Rule of Superintendence,

Carr supports Relators' request for a writ of prohibition, just as it supports mandamus. Both the Court of Appeals and this Court discussed the Commercial Rules in terms of their jurisdictional significance: "The facts . . . demonstrate that the transfer of *Acacia II*, to the commercial docket was mandated by Temp.Sup.R. 1.04(B)(3). . . . Carr has failed to demonstrate that Judge John P. O'Donnell [*the Commercial Docket Judge*] is patently and unambiguously without jurisdiction." See *Carr*, 2009-Ohio-2488, at ¶ 18. *Carr* held that the *Commercial Docket Judge* did not lack jurisdiction because the "derivative action" was properly transferred to the Commercial Docket. The denial of writs in *Carr* (where the trial judge had legal authority) does not preclude the granting of writs in this case (where the trial judge *lacks* legal authority).

Respondents also cite a two-paragraph decision from a common pleas court, *GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Rd., L.L.C.* (Franklin C.P.), 151 Ohio Misc.2d 33, 2009-Ohio-2129, but fail to mention that that case *was transferred* to a Commercial Docket Judge. The originally assigned judge in *GLIC* therefore complied with his legal duty after rendering judgment on a cognovit note, which allows for an immediate confession of judgment. Nothing in the Commercial Rules prevent a non-Commercial Docket Judge from the ministerial act of entering judgment where the defendant already confessed to judgment and waived defenses (and thus had no right to insist that the case be transferred).¹³

a judge had exceeded his judicial authority; that is, his "jurisdiction." *Buck*, 2004-Ohio-2590, at ¶ 11.

¹³ Furthermore, certain statements from the decision that Respondents highlight are suspect. For example, the court's analysis of the jurisdictional significance of the Commercial Rules flowed from the flawed premise that the "temporary rules of superintendence do not demand that commercial cases only be decided by a commercial judge." *Id.* at ¶ 6. That's wrong. The Commercial Rules *do* demand that certain classes of commercial cases only be decided by Commercial Docket Judges. That was the point of enacting them. Additionally, in framing the

Finally, the Pension Fund tries to undermine the Commercial Rules, characterizing this case as involving little more than an alleged improper “assignment.” (Pension Fund Br. at 5). Despite that “[p]roper assignment, like jurisdiction over the subject matter, is required for the valid exercise of judicial power,”¹⁴ this case does not involve a re-assignment issue; it involves mandatory transfer to the Commercial Docket.

Standard re-assignment decisions by the administrative judge typically involve discretion. See *Coleman v. Baker & Hostetler, LLP* (Cuyahoga County Feb. 16, 2006), 2006-Ohio-685, at ¶ 20. The transfer provisions of the Commercial Rules, on the other hand, do not; they expressly eliminate discretion and remove the authority of a non-Commercial Docket Judge to adjudicate the dispute. (R. 1.04(B)(3); *Carr*, 184 Ohio App.3d at 380, 2009-Ohio-2488 (stating that transfer of the derivative action was mandated by Temp.Sup.R. 1.04(B)(3) “regardless of the failure of any party to file a timely request for transfer.”)).

In short, a writ of prohibition is an equitable tool to forbid judicial action where judicial authority is absent. (See Rel. Mem. at 4-5; *State ex rel. Haylett v. Bur. of Workers’ Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134). Because the Trial Judge lacks judicial authority over the Derivative Action, a writ of prohibition should be granted.

Rules of Superintendence as “housekeeping rules,” the court relied on a criminal case where the defendant sought discharge of a verdict based upon a provision of the Rules of Superintendence. *Id.* at ¶ 7. Here, Relators are not seeking dismissal of the case, but transfer pursuant to mandatory rules impacting the Trial Judge’s authority.

¹⁴ *State ex rel. Lomaz v. Court of Common Pleas* (1988), 36 Ohio St.3d 209, 212 (granting a writ of prohibition), see also *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, at ¶ 27 (citing and quoting *State ex rel. Lomaz*); *Pendergraft v. Watts* (Cuyahoga App. July 8, 2010), 2010-Ohio-3196, at ¶ 12 (same).

E. If The Writs Are Not Granted, Relators Will Be Damaged In A Way That is Not Correctable In Any Subsequent Appeal.

Given that the Trial Judge lacks authority to hear the Derivative Action and had a clear legal duty to transfer it, Ohio law does not require that Relators demonstrate that they are without an adequate remedy at law. (5/10/10 Relators' Opp'n Mem., at 7-8).¹⁵ Regardless, Relators have none.

Although they state, as they did in their motion to dismiss, that “appeal provides an adequate remedy” (Judicial Resp. Br. at 1, 20, 23), the Judicial Respondents cannot harmonize that statement with the plain language of the Commercial Rules, which they themselves recognize. (See R. 1.04(D)(2); Judicial Resp. Br. at 7 (“Judge Fuerst’s decision was final and not appealable.”)). Faced with the plain language of Rule 1.04(D)(2), the Judicial Respondents attempt to re-write this provision as well, claiming that Rule 1.04(D)(2) “forbids *interlocutory* appeals” (Judicial Resp. Br. at 21 (emphasis added)). The Commercial Rules’ no-appeal provision, however, is not limited to interlocutory appeals—it forbids all appeals.

And even if an appeal years down-the-road existed, the Judicial Respondents never explain how it could provide a meaningful remedy. An alternate remedy “must be complete, beneficial, and speedy.” *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, at ¶ 16 (internal quotation marks and citation omitted). Furthermore, the “question is whether the remedy is adequate under the circumstances.” *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, at ¶ 19. There is no meaningful appeal of the Judicial Respondents’ unreasoned and erroneous decision not to transfer the

¹⁵ The cases the Judicial Respondents cite holding that prohibition was improper often involved judicial discretion. Therefore, judicial authority existed. See, e.g., *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, at ¶ 11 (prohibition improper because courts have broad discretion over discovery).

underlying Derivative Action. The right to appeal from particular decisions at trial is inadequate when the case should not have been before a non-Commercial Docket Judge in the first place.

F. The Floodgates Will Not Open.

Predictably, Respondents speculate that a decision in Relators' favor will open the proverbial floodgates." (Judicial Resp. Br. at 22; see also Pension Fund Br. at 7). While no argument against mandamus and prohibition would be complete without some version of the "floodgates" argument, the argument here is both unrealistic and unfounded.

As Relators and their supporting amici have shown, this case, first and foremost, presents important and novel *issues of law*—not mere "factual disputes"—that will have a far reaching impact. Once the Court has addressed the novel legal issues that this case presents, there will be no need for future cases to revisit the same legal issues.

Furthermore, the Court has substantial discretion to reject subsequent original actions that do not raise similarly novel questions or, as the Judicial Respondents state, boil down to little more than "factual disputes." It does so all the time through summary denials of mandamus and prohibition petitions. (The same day the Court issued its provisional writ in this case, it summarily denied nearly a dozen other petitions for mandamus/prohibition). By deciding an important legal issue in a single original action (where the Court otherwise has no opportunity to speak to the meaning of its Rules), this Court would not somehow institutionalize a full-fledged appellate procedure for all decisions regarding the transfer of cases to the Commercial Docket.

Finally, the Pension Fund's claim that filing original actions will delay the underlying proceedings is meritless. (Pension Fund Br. at 7). There is no automatic stay of the underlying proceedings until an alternative writ is granted. Therefore, in the vast majority of cases (which are dismissed), there would be no delay in the underlying case.

Respondents' "floodgate" argument is no more persuasive here than it is in the numerous other cases where it has been raised and this Court has nonetheless granted writs of mandamus and prohibition.

* * *

For the reasons set forth above, in Relators' opening brief, and in the brief submitted by the Ohio Chamber of Commerce and Greater Cleveland Partnership, Relators respectfully urge this Court to grant Relators' request for writs of prohibition and mandamus.

Respectfully submitted:



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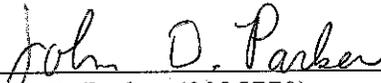
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September 28, 2010

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing, Relators' Reply, was served by electronic mail this 28th day of September 2010 upon the following:

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