file

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JACQUELINE W. SILBERMANN ~~PART~~
Administrative Judge ~~Justice~~

David F. Dahlberg et al.

- v -

Clipper Holding Associates LLC

INDEX NO. 115592/2004

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Interim Order
Administrative Order

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

~~Upon the foregoing papers, it is ordered that this motion~~

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Counsel for respondent Clipper Holding Associates ("Associates") has applied to transfer this matter, a special proceeding seeking dissolution of Associates, a limited liability corporation, to the Commercial Division. It appears that this case was designated as a non-Commercial matter on the RJI, presumably as a special proceeding, and assigned accordingly at random to a General Assignment Justice. The matter was assigned to Justice Marcy Friedman. The matter came on by way of an order to show cause, which was signed by Justice Friedman and is now, after stipulation between the parties, returnable before Justice Friedman on December 16, 2004.

Also relevant is the subsequent commencement of an action, Mega Trust v. Dahlberg, Index No. 603859/2004, by two trusts that are members of

~~Dated:~~ / / / / / / / /

~~J.S.C.~~

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Associates against the petitioners in this matter. A Commercial Division index number has been purchased for that case, but no RJI has yet been filed in it. Counsel for respondents here and plaintiffs in that action indicate that they will seek to have it assigned to the Commercial Division in accordance with the Commercial index number obtained there.

Counsel for Associates contends that the action and this proceeding both involve complex legal and factual issues relating to dissolution of Associates, which is composed of multi-investor hedge funds. Counsel suggests that these matters are complicated commercial matters that belong in the Commercial Division.

Counsel for Associates cites in support of the requested transfer proposed new *Guidelines for Assignment of Cases to the Commercial Division*. These *Guidelines* would indeed include matters such as this special proceeding for a dissolution among those assignable to the Division. However, the *Guidelines* are not in effect at this time. The present application is controlled by the current *Guidelines*, which do not contain a similar provision.

Counsel for petitioners argues that under the current *Guidelines* this proceeding cannot be transferred to the Division because a request for assignment to the Division should have been made before this matter was assigned. Paragraph E of the current *Guidelines* provides that prior to assignment of a special proceeding, a party who considers the matter to be a commercial special proceeding may apply to the Administrative Judge to override the computer, which otherwise provides for assignment of special proceedings generally, and designate it as a Commercial matter if it raises issues of unusual complexity. The Division, of course, exists primarily to address complicated commercial matters.

This argument touches upon a lacuna in the current *Guidelines*. In many a special proceeding, as a practical matter, the only party who will be in a position to make a request of the Administrative Judge prior to assignment of the case will be the petitioner. The respondent will often be unaware of the proceeding prior to assignment, especially when, as here, it is commenced by petition and order to show cause. If the petitioner, for whatever reason, does not view the matter as a commercial one, or has not given thought to the question, the matter will be assigned as a special proceeding in the normal course with no application to the Administrative Judge. If petitioners' argument were dispositive, that would mean that no opportunity would be provided under the *Guidelines* for a respondent to apply for a transfer into the Division when, as here, the respondent does not agree with the non-



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Commercial preference of the petitioner. The *Guidelines* are silent as to how to address this imbalance. My approach to this question has been and is to look to Paragraph G for guidance as to how to proceed. If the respondent seeks a transfer of a special proceeding that was assigned initially as a non-Commercial matter without a request for a Commercial assignment by the petitioner, the court will consider the request pursuant to that Paragraph. That is the situation at present. The parties have in fact written to Justice Friedman and put the transfer question before her. As she had not, to my knowledge, issued a determination, I contacted her to seek her position. Ultimately, Paragraph G designates the Administrative Judge as the final word on this point, but does contemplate that the initial application shall be made to the assigned Justice.

The fact that this is a special proceeding does not mean that it cannot be transferred to the Division. This is clear from Paragraph E.

The action commenced by respondent has not yet been assigned to a Justice, no RJI having yet been filed, but it is unrealistic to ignore the existence of this case. It is beyond doubt that that case is a commercial one that properly belongs in the Division. I have reviewed the complaint in the case and that is my conclusion. Counsel for petitioners does not assert otherwise.

This means that we have a pending matter that will soon come before the Division and a related special proceeding. Petitioners do not argue that the two matters are unrelated. In my view, having reviewed the petition as well as the complaint, there is no doubt that the two are intimately related - - they arise out of the same dispute and present, one might say, different interpretations of events that have led to the present controversy. It is plain that the two cases should be assigned to the same Justice. Whether they should be formally consolidated into one case pursuant to CPLR 602 (a) is a question that can be decided by the assigned Justice if both cases are assigned to a single Justice. This is not a matter for the Administrative Judge.

We have two cases, then, that belong before one Justice. It would be anomalous to assign what is clearly a Commercial Division case outside the Division. It is plain to me that the appropriate course is to transfer the special proceeding to the Division and have both matters proceed before the same Division Justice. Counsel for petitioners argues that the special proceeding is a simple dissolution matter. However, counsel also states in his letter that affected by the litigation are the rights of shareholders in the hedge funds and that in excess of $ 70 million dollars must be distributed. Even thereafter, counsel states, Associates will have on hand millions of dollars that will be at



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stake. I note that the Operating Agreement of Associates is 54 pages long. Hedge funds are the sort of institutions the Commercial Division was established to deal with. This is not, in short, a routine dissolution proceeding involving, for example, a small family-held corporation. The special proceeding and the action together clearly involve a commercial dispute. At issue is the running of a large-scale commercial business. This entire dispute clearly belongs in the Commercial Division.

The question presented here is one of orderly assignment of the judicial business of the court. This court has established various types of assignments for the members of the court and has divided up the large volume of cases filed here among these Justices in accordance with the case type involved. Some Justices have been assigned to a Matrimonial or Medical Malpractice Part and cases of those types are assigned at random to the Justices designated to serve in those Parts. There are other similar divisions of labor in the court, one of which is the Commercial Division. In all of these instances, we attempt to assign cases in an orderly manner in accordance with standard procedures. In the case of the Commercial Division, we issued the *Guidelines* in or about 1998, as I recall, in an effort to promote orderly procedure and we have published the *Guidelines* widely in order to ensure transparency. The only issue, then, is where this matter should proceed given the particular context at hand.

Petitioners' major concern is the prospect of delay from a transfer to the Division. The parties are not in complete accord as to the degree of exigency that exists at present. However, I am sympathetic to the concerns of any litigant about potential delay. I am also concerned about the risk that delay might affect adversely shareholders in the hedge funds who are not themselves parties to the dispute. The Commercial Division was established in part to prevent delay in the processing of Commercial cases, which sometimes occurred in prior years because complex commercial cases were mixed in with a comparatively large sea of tort litigation. Petitioners further indicate that they consented to adjourn the order to show cause to December 16, 2004, but only if respondent agreed to certain conditions that were required, petitioners felt, by the exigency of the situation. Furthermore, counsel for petitioners suggests that, even with the stipulation, the December 16th deadline must be adhered to. I believe, however, that steps can be taken to address petitioners' concerns about the potential for delay while ensuring that the two matters proceed before the same Justice and, in view of the complexity of the matters, the sums at stake, and the commercial nature of the issues, that they proceed in the Division. Counsel for respondent agrees that the order to show cause should remain returnable on December 16th. A consideration in any transfer



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application is the potential for a waste of judicial resources. Here, all that has occurred is that Justice Friedman has read and signed the order to show cause. This amounts to minimal involvement on her part. There is no reason why a Commercial Division Justice cannot, between now and December 16, read the order to show cause, and indeed the subsequent papers, so as to be ready to entertain argument on December 16. Thus, this transfer does not portend, in petitioners' counsel's words, relegation of this matter "to the back burner" or consignment of the petition to "judicial limbo."

Accordingly, I hereby direct that the Motion Support Office transfer the special proceeding at random to a Division Justice. I have consulted with Justice Friedman, who does not oppose this disposition. Counsel for respondent shall immediately file an RJI in the action and designate that case as related to this one. (Pursuant to Uniform Rule 202.6, an RJI may be filed without accompanying application or with, *inter alia*, a request for a preliminary conference. Perhaps a preliminary conference can be held at the same time as the motion on December 16th. If there is not enough time for a request for a preliminary conference to be processed by the Trial Support Office prior to that date, it is suggested that counsel for the parties consult with the Commercial Division Part in question, which may advance the date for the preliminary conference and add this case to the calendar for December 16.) A copy of this order shall be annexed to that RJI. That case shall be assigned by the back office to the Division Justice to whom this proceeding is assigned. The December 16 return date of the order to show in the special proceeding shall remain. I hereby respectfully request that the assigned Division Justice retain that date and address the order to show cause on that occasion, of course in whatever manner the Justice determines the merits require.

Dated: December 2, 2004

A.J.