

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

PRESENT: Hon. Jacqueline Silbermann  
Administrative Order

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JAMES L. WINKLER,

Plaintiff,

- v -

INDEX NO. 601815/2008

JOHN L. ALEX and MERRILL LYNCH, PIERCE,  
FENNER & SMITH, INC.,

Defendants.

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Administrative Order:

By letter dated July 2, 2008, counsel for defendant John L. Alex timely requests a transfer of this action from I.A.S. Part 44 (Tingling, J.) to the Commercial Division pursuant to Uniform Rule 202.70. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. joins in the request. Plaintiff opposes the request on the ground that Justice Tingling has become familiar with the matter by reviewing and granting plaintiff's ex-parte application for a temporary restraining order on June 25th and has scheduled a hearing on July 9, 2008.

There is no doubt that this action meets the standards for assignment to the Commercial Division. Plaintiff's counsel himself, in filing the Request for Judicial Intervention, described this matter as "Other Matters - Breach of Contract," choosing for his own reasons not to check the box for "Commercial - Contract." Uniform Rule 202.70(b) provides that actions in which the principal claims are for breach of contract, fraud or fiduciary duty arising out of business dealings should be heard in the Commercial Division, provided that the \$100,000 monetary threshold is met or equitable or declaratory relief is sought. A review of the complaint reveals that this action involves claims of breach of contract, breach of fiduciary duty and fraud in connection with the breach of an alleged partnership agreement to operate a business in the financial services industry, and plaintiff seeks damages in excess of \$1 million. Justice Tingling's involvement in the case appears limited and does not justify denial of defendants' rights to have these clearly commercial claims heard in the Commercial Division.

Accordingly, the request for a transfer to the Commercial Division is granted. The Motion Support Office is directed to reassign this case at random to a Justice of the Commercial Division, who is directed to schedule a hearing on plaintiff's motion as soon as his or her schedule permits. Counsel for defendant Alex is directed to serve a copy of this order on the Clerk of Part 44 in order to transfer the motion file to the newly-assigned Commercial Division Justice.

Dated: July 7, 2008

ENTER: \_\_\_\_\_, A.J.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION