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

PRESENT: HON. RICHARD B. LOWE, III PART 56

Index Number : 600667/2007

DEEPHAVEN MARKET

VS

SCHNELL, ROBERT

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE 7/18/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
DEC 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 12/12/07

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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DEEPHAVEN MARKET NEUTRAL MASTER FUND, LP, DEEPHAVEN RELATIVE VALUE EQUITY TRADING, LTD., and DEEPHAVEN LONG/SHORT EQUITY TRADING, LTD.,

Plaintiffs,

Index No. 600667/07

- against -

ROBERT SCHNELL,

Defendant.

----------X



LOWE, J.:

Plaintiffs seek a declaratory judgment that they are not obligated to indemnify defendant for expenses that he incurred defending claims in other actions. Defendant moves to dismiss the complaint on the ground of lack of personal jurisdiction, arguing that a forum selection clause does not apply to him. Alternatively, defendant moves to dismiss on the ground that there is another declaratory judgment action in Minnesota between the same parties concerning the same indemnification question. Plaintiffs oppose the motion and contend that New York is the proper forum, pursuant to the forum selection clause.

**I. Background**

The three plaintiffs are investment companies and subsidiaries of a nonparty, Deephaven Capital Management, LLC (Deephaven). Deephaven figures in this case because it engaged defendant Robert Schnell to work for two of the plaintiffs. Deephaven is a Delaware company with its principal place of business in Minnesota, where plaintiffs also have offices and where Schnell resides. Plaintiffs Deephaven Market Neutral Master Fund, LP (Deephaven Market) and

Deephaven Relative Value Equity Trading, Ltd. (Deephaven Relative) were formed under the laws of the British Virgin Islands and have their registered offices in Tortola. Plaintiff Deephaven Long/Short Equity Trading, Ltd. (Deephaven Long) was formed under the laws of the Cayman Islands and has its registered office in Grand Cayman.

Schnell began working for Deephaven in 2001. He acted as portfolio manager for Deephaven Relative and Deephaven Long. He was fired in January 2006. Schnell then sought to enforce his rights to some monies that he believed were due to him under his employment contract with Deephaven. Deephaven sued Schnell in February 2006 in the United States District Court for the District of Minnesota (the federal action), alleging that Schnell violated federal securities laws and otherwise mismanaged his duties.

In response to discovery demands, Deephaven produced agreements between itself and its subsidiaries, including the plaintiffs in this action, that contain indemnification and forum selection clauses. Allegedly, that was when Schnell first learned of the agreements and their forum and indemnification provisions. Schnell's motion to dismiss the federal action was granted in January 2007. The federal court determined that Deephaven failed to state a claim in the two causes of action concerning securities violations, and declined to exercise jurisdiction over the third cause of action, a claim to recover lost management fees.

In June 2006, Schnell sued Deephaven in the Minnesota District Court, Fourth Judicial District (the first Minnesota action), for breach of the employment contract, unjust enrichment, defamation, and other things (Ex. J [all of the exhibits are attached to the notice of motion]). Deephaven counterclaimed.

On March 1, 2007, Schnell filed a second Minnesota action (the second Minnesota

action) against Deephaven and the plaintiffs for which he had worked, Deephaven Long and Deephaven Relative, seeking a declaratory judgment that the agreements between the Deephaven entities obligated them to indemnify him against legal expenditures. On March 2, 2007, plaintiffs filed the instant action, seeking a declaratory judgment that the agreements do not obligate them to indemnify Schnell.

On March 30, 2007, Schnell removed this action to the United States District Court, Southern District of New York. The federal court remanded the case to this court, on the basis of lack of diversity jurisdiction. Schnell then moved in the second Minnesota action to consolidate that case with the first Minnesota action. Deephaven cross-moved to dismiss or to stay the second Minnesota action pending the determination of this action. By decision dated September 20, 2007, the Minnesota court reserved decision on the motion to consolidate and the cross motion to dismiss, and granted the cross motion to stay pending the determination of the instant motion to dismiss.

After Schnell found out about the indemnification provisions, he requested that plaintiffs indemnify him against the legal fees that he incurred in the federal action and in the first Minnesota action. The expenses in the federal action amounted to about $168,000. Plaintiffs refused the request.

Schnell moves pursuant to CPLR 3211 (a) (8) (the court lacks jurisdiction over him) and CPLR 3211 (a) (4) (another action is pending between the same parties for the same cause of action in another jurisdiction). Schnell also makes forum non conveniens arguments against the enforcement of the forum selection clauses, pointing out that New York has no connection to the dispute. The agreements were made in Minnesota, he worked for two plaintiffs in that state, two

related cases are pending there, and all of the parties reside there. He argues that it is a waste of judicial resources to litigate the same issues in New York and Minnesota.

There is no allegation that the parties have any contact with New York. Jurisdiction over Schnell is premised entirely on the forum selection clauses, which he argues do not apply to him.

**II. The Agreements**

The forum selection clauses are found in two of the three agreements between Deephaven and various Deephaven entities, including plaintiffs. The indemnification provisions are found in all three of the agreements. There is also a fourth agreement, an employment contract, between Schnell and Deephaven.

The Investment Management Agreement (the IMA) was made between plaintiffs Deephaven Market and Deephaven Relative and nonparties Deephaven and five other Deephaven entities (Ex. D to Complaint). The Amended and Restated Investment Management Agreement (the Amended IMA) was made between plaintiff Deephaven Long and Deephaven (Ex. E to Complaint). The IMA and the Amended IMA (collectively, the IMAs) contain identical forum selection and indemnification clauses.

The Amended and Restated Advisory Agreement (the Advisory Agreement) was made between plaintiff Deephaven Relative and nonparties Deephaven and six other Deephaven entities (Ex. C to Complaint). It contains an indemnification clause very similar to the one in the IMAs, but no forum selection clause.

By their terms, the agreements are to be governed by different laws. The employment agreement provides that it shall be governed by the laws of the state of Minnesota (Ex. G). The IMAs are "made pursuant to and shall be governed by the laws of the State of New York ... " (Ex.

D to Complaint, ¶ 19; Ex. E to Complaint, ¶ 20). The Advisory Agreement "shall be governed by and enforced in accordance with the internal law of the jurisdiction of the incorporation for the [Deephaven entities] without reference to principles of conflict of law" (Ex. C to Complaint, ¶ 7).[1]

The IMAs refer to plaintiffs and the other Deephaven subsidiaries as the "Fund," to Deephaven as the "Investment Manager" of the Fund, and to Deephaven and its members, officers, employees, affiliates, and agents as the "Investment Manager Parties" (Exs. D and E to Complaint, Preamble, ¶ 7 [a]). The forum selection clauses provide as follows (in capitalized letters omitted here):

> Any action or proceeding brought by any investment manager party against one or more shareholders or the fund relating in any way to this agreement may, and any action or proceeding brought by any other party against any investment manager party of the fund relating in any way to this agreement shall, be brought and enforced in the courts in the state of New York or (to the extent subject matter jurisdiction exists therefor) in the courts of the United States for the Southern District of New York ...

(Ex. D to Complaint, ¶ 19; Ex. E to Complaint, ¶ 20).

The IMAs further provide that the Fund and the Investment Manager irrevocably submit to said jurisdiction and waive any objection to said venue (*id.*).

Schnell's second Minnesota action seeks indemnification based on the IMAs. Plaintiffs' instant action seeks indemnification based on the IMAs and the Advisory Agreement. The Advisory Agreement and the IMAs provide that Deephaven and its members, officers, employees, affiliates, and agents will be held harmless and defended by the other parties to the agreement

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[1]As no request is made that the court take notice of the laws of the places where plaintiffs are incorporated, and as it is not required to take judicial notice of foreign law (CPLR 4511 [b]), this court will not do so.

against any loss or expense, including reasonable attorneys' fees, incurred in connection with the agreement, except to the extent that the loss or expense arises from the gross negligence or intentional misconduct of the person seeking to be indemnified (Ex. C to Complaint, ¶ 3; Exs. D and E to Complaint, ¶ 7 [a]). Under the IMAs, those who have ceased to be Deephaven's officers, employees, etc., are also indemnified (Exs. D and E to Complaint, ¶ 7 [f]). Those indemnified are not liable to the Deephaven subsidiaries that are parties to the agreements, except for harm caused by gross negligence or intentional misconduct (*id.*, ¶ 7 [a]).

**II. Discussion of the Forum Selection Clauses**

CPLR 327 (b), by incorporation of General Obligations Law § 5-1402, prohibits a New York court from staying or dismissing a contract action on inconvenient forum grounds where the transaction involves $1 million or more and the contract contains a consent both to New York jurisdiction and the application of New York law. As Schnell sought indemnification for about $168,000, it does not seem likely that his legal bills will amount to $1 million. In any event, the parties are silent on the question, so this court will assume that CPLR 327 (b) does not apply.

Agreements are construed so as to give effect to the plain meaning of the words (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). The plain meaning of the forum selection clauses in the IMAs is that a lawsuit relating to an IMA that is brought by an Investor Manager Party against the Fund may be commenced in New York. However, a lawsuit relating to an IMA that is brought by the Fund against an Investment Manager Party must be commenced in New York. In regard to matters related to the IMAs, while Schnell may sue plaintiffs anywhere, plaintiffs must sue Schnell in New York. Any other forum choice by plaintiffs would violate the forum selection clauses.

A forum selection clause affords a sound basis for the exercise of personal jurisdiction over a foreign defendant (*see National Union Fire Ins. Co. of Pittsburgh v Weir,* 131 AD2d 380, 381 [1st Dept 1987]). Such clauses are prima facie valid and should be enforced unless the party resisting enforcement shows that the clause results from fraud or overreaching, that it is unreasonable or unfair, or that enforcement would violate some strong public policy of the contractual forum (*Sterling Natl. Bank as Assignee of NorVergence, Inc. v Eastern Shipping Worldwide, Inc.,* 35 AD3d 222, 222 [1st Dept 2006]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 397 [1st Dept 1996]). Unreasonableness or unfairness generally means that a trial in the contractual forum would be so difficult and inconvenient that the objecting party would, for all practical purposes, be deprived of his or her day in court (*Sterling Natl. Bank,* 35 AD3d at 222; *Shah v Shah,* 215 AD2d 287, 288 [1st Dept 1995]; *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg,* 172 AD2d 234, 234 [1st Dept 1991]).

Schnell puts forth several reasons that the forum selection clauses should not confer jurisdiction over him. He argues that the clauses are permissive, not mandatory. That is true for him, but for plaintiffs the clauses are mandatory. Each clause states that an action by plaintiffs "shall" be brought in New York. The use of "shall" renders the clause mandatory (*see Micro Balanced Products Corp. v Hlavin Indus.*, 238 AD2d 284, 285 [1st Dept 1997]). Schnell points out that the part of the forum selection clause submitting to jurisdiction and waiving objections to the forum names the Investment Manager, and not the Investment Manager Parties. He contends that, since he is one of the Investment Manager Parties, the entire forum selection clause applies only to Deephaven, the Investment Manager, and not to him. The reference to Investment Manager, rather than Investment Manager Parties, may be erroneous. It may be intentional, in

which case, Schnell has not waived objections to the selected forum. But neither possibility negates the part of the clause clearly stating that plaintiffs may sue an Investment Manager Party only in New York.

Schnell further argues that the forum selection clauses do not apply to him because he was not a party to the IMAs. It is true that the impact of a forum selection clause generally depends upon consent. By entering into an agreement with a forum selection clause, a party signifies that he or she submits to the jurisdiction of the chosen forum (*see National Union Fire Ins. Co. of Pittsburgh, Pa v Worley*, 257 AD2d 228, 231 [1st Dept 1999]). Nonetheless, a forum selection clause may be enforced against a nonparty to the agreement, if the nonparty is so "'closely related to the dispute such that it becomes foreseeable that it will be bound'" (*International Private Satellite Partners, L.P. v Lucky Cat Ltd.*, 975 F Supp 483, 485-486 [WD NY 1997] [internal quotation marks and citations omitted]; *see also Rohrbaugh v United States Mgt., Inc.*, 2007 WL 1965417, *4, 2007 US Dist LEXIS 47978, *11 [ED NY, July 2, 2007]; *Quebecor World (USA), Inc. v Harsha Assoc.*, 455 F Supp 2d 236, 245 [WD NY 2006]; *Weingrad v Telepathy, Inc.*, 2005 WL 2990645, *5, 2005 US Dist LEXIS 26952, *16 [SD NY, Nov. 7, 2005]; *Dogmoch Intl. Corp. v Dresdner Bank AG*, 304 AD2d 396, 396 [1st Dept 2003]; *L-3 Communications Corp. v Channel Tech., Inc.*, 291 AD2d 276, 277 [1st Dept 2002]). "A non-party is 'closely related' to a dispute if its interests are 'completely derivative' of and 'directly related to, if not predicated upon' the signatory party's interests or conduct" (*Weingrad*, 2005 WL 2990645, *5, 2005 US Dist LEXIS 26952, *16 [citations omitted]).

Schnell is seeking indemnification under the IMAs. His interest in those agreements derives entirely from Deephaven's interests. Therefore, Schnell's argument that he is not closely

related to the dispute concerning the indemnification provisions in the agreements is untenable. According to the principle of mutuality, if he is entitled to enforce the IMAs against plaintiffs, they should be able to enforce them against him (*see In re Lloyd's Am. Trust Fund Litig.*, 954 F Supp 656, 669 [SD NY1997]). In addition, the IMAs provide that they are binding upon and inure to the benefit of Deephaven, and all the parties "indemnified hereunder" (Ex. D to Complaint, ¶ 18; Ex. E to Complaint, ¶ 19), of whom Schnell claims to be one.

Plaintiffs assert that Schnell is seeking third-party beneficiary rights under the IMAs. A party seeking third-party beneficiary status under an agreement must show that the agreement was intended for his or her benefit (*see 243-249 Holding Co. v Infante,* 4 AD3d 184, 184 [1st Dept 2004]). Since Schnell argues that the indemnification provisions were intended to benefit employees such as himself, plaintiffs' assertions are valid.

Therefore, the forum selection clause is enforceable against Schnell and this court may exercise jurisdiction over him. Schnell does not allege any of the traditional reasons for not litigating in the selected forum, such as health or age (*see 3H Enterprises v Bennett,* 276 AD2d 965, 966 [3d Dept 2000]), a public policy violation, or the denial of his day in court (*see Yoshida v PC Tech U.S.A. & You-Ri, Inc.*, 22 AD3d 373, 373 [1st Dept 2005]). Schnell does not submit an affidavit testifying to the difficulty or expense of litigating in New York. In fact, as related above, Schnell removed this case to the United States District Court, Southern District of New York. Clearly, a New York venue does not pose an insuperable burden to him.

However, the matter does not end here. Schnell's objections to proceeding with the New York litigation that are based on the connection, or rather, the lack of connection between this action and New York are valid.

**III. Doctrine of Forum Non Conveniens**

Discussion now turns to Schnell's objections based on the doctrine of forum non conveniens. New York's inconvenient forum statute allows the court to dismiss or stay an action, upon a determination that "substantial justice" demands that the action be heard in another forum (CPLR 327 [a]). The doctrine is based upon the equitable principles of justice, fairness, and convenience (*Intertec Contr. A/S v Turner Steiner Intl., S.A.*, 6 AD3d 1, 4 [1st Dept 2004]; *Grizzle v Hertz Corp.*, 305 AD2d 311, 312 [1st Dept 2003]).

A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and no one factor is controlling (*Phat Tan Nguyen v Banque Indosuez,* 19 AD3d 292, 294 [1st Dept 2005]). The party challenging the forum must show that the action would be best adjudicated elsewhere (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). Although not every factor is necessarily articulated in every case, collectively, the courts consider the existence of an adequate alternative forum, the situs of the underlying transaction, the residency of the parties, the potential hardship to the defendant, the location of documents, the location of a majority of the witnesses, and the burden on New York courts (*id.*; *Nguyen,* 19 AD3d at 294; *World Point Trading PTE, Ltd. v Credito Italiano,* 225 AD2d 153, 158-159 [1st Dept 1996]). New York courts are not obligated to entertain causes of action lacking a substantial nexus with New York (*Martin v Mieth,* 35 NY2d 414, 418 [1974]; *Nguyen,* 19 AD3d at 294).

There is a rule that the forum non conveniens doctrine is precluded where jurisdiction is based upon a forum selection clause (*Sterling Natl. Bank,* 35 AD3d at 223; *National Union Fire Ins. Co.*, 257 AD2d at 232). It is rare that such clauses do not prevail over the doctrine (*ZPC 2000, Inc. v SCA Group, Inc.,* 86 F Supp 2d 274, 278 [SD NY 2000] [discussing 28 USC § 1404

[a], the federal transfer of venue statute, and forum selection clauses]). An exception, of a sort, was made in *National Union Fire Ins. Co.* (131 AD2d at 381), where the forum selection clause named New York. The Court determined that the forum selection clause was enforceable and declined to dismiss the complaint on the grounds of lacking jurisdiction over the defendant and forum non conveniens. But the Court stayed the action, as there was a pending Texas action involving the same issues and the Court found "that convenience and judicial economy would be better served if [plaintiff's] claim against Weir were filed as a counterclaim in the Texas action" (*id.* at 382).

Even as courts enforce forum selection clauses and dismiss forum non conveniens arguments, they often engage in a discussion of the doctrine and take pains to show that the selected forum is, in fact, the convenient forum as well. The Court in *National Union Fire Ins. Co.*, (257 AD2d at 232), while upholding a New York forum selection clause, noted that the plaintiff was a New York resident, that a bond was issued in New York, that a note was negotiated to a New York bank, and that the plaintiff made payments to the New York bank. In *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.* (26 AD3d 286, 288 [1st Dept 2006]), retention of the case in New York was mandated by the forum selection clause and other factors, such as the role of the defendant's New York branch, related litigation in the Southern District of New York, and the discovery available in New York. In *Shah* (215 AD2d at 289), the Court enforced a New York forum selection clause, pointing out that the plaintiff and one defendant were New York residents, and that the second defendant traveled frequently to New York on business. In *Sterling* (35 AD3d at 223), it was noted that a party had its principal headquarters in New York, the forum named in the clause.

Although, in these cases, the discussions of forum non conveniens are dicta, they indicate the considerations that may apply when enforcing a forum selection clause. The forum selected in the parties' contract generally has some relation to at least one party's residence or business (*see also Van Deventer v CS SCF Mgt. Ltd.*, 37 AD3d 280, 281 [1st Dept 2007]; *Humitech Dev. Corp. v Comu*, 16 Misc 3d 1109(A), *10, 2007 NY Slip Op 51354(U), *30 [Sup Ct, NY County, July 11, 2007]). Convenience also figures in the enforcement of forum selection clauses that name foreign, instead of New York venues. The Court in *Dogmoch* (304 AD2d at 397) dismissed the New York action because of a forum selection clause naming Switzerland, noting that the plaintiffs kept accounts in Swiss banks, that the parties resided mostly in Europe, and that the corpus was located in Switzerland. Upholding an English forum selection clause, the Court in *Blueye Navigation, Inc. v Den Norske Bank* (239 AD2d 192, 192 [1st Dept 1997]) noted that all of the defendants were citizens and residents of the foreign jurisdiction, where most of the underlying events took place, that the parties were to perform the contract in London, and that the bulk of the witnesses and evidence needed to defend the action were in London. In *Union Bancaire Privee v Nasser* (300 AD2d 49, 49 [1st Dept 2002]), a forum selection of Brazil was upheld, and the New York case dismissed based on the lack of connections between the action and New York.

The examples furnished by United States' courts are also instructive. Federal courts have transferred cases to more convenient forums, pursuant to 28 USC § 1404 (a), despite enforceable forum selection clauses. A district court may transfer a civil action "[f]or the convenience of parties and witnesses, in the interest of justice" (28 USC § 1404 [a]). In determining whether to transfer pursuant to 28 USC § 1404 (a), courts apply the same factors as applied in a forum non

conveniens determination (*see Beatie and Osborn LLP v Patriot Scientific Corp.*, 431 F Supp 2d 367, 394-395 [SD NY 2006]; *Dwyer v General Motors Corp.*, 853 F Supp 690, 691-692 [SD NY 1994]). The decision is discretionary (*Beatie*, 431 F Supp 2d at 394). The determination whether to change venue considers the forum selection clause as a significant factor weighing against transferring the action, but does not afford it dispositive power (*id.; Silverman v Aptekar*, 1990 WL 124512, *3, 1990 US Dist LEXIS 10844, *5-6 [SD NY, Aug. 21, 1990]).

In the following cases, a forum selection clause providing for a New York venue was not enforced and the case was transferred because of lack of connections between the action and New York (*Foothill Capital Corp. v Kidan*, 2004 WL 434412, *3-5, 2004 US Dist LEXIS 3634, *14 [SD NY, Mar. 8, 2004]); *Mitsui Sumotomo Ins. Co. v Nippon Express U.S.A. (Illinois), Inc.*, 2003 WL 22097438, *2, 2003 US Dist LEXIS 15761, *5 [SD NY, Sept. 10, 2003]; *Capital Venture Intl. v Network Commerce, Inc.*, 2002 WL 417246, *2, 2002 US Dist LEXIS 4450, *6-7 [SD NY, Mar. 15, 2002]; *Orix Credit Alliance, Inc. v Paul*, 1994 WL 75024, *3, 1994 US Dist LEXIS 2450, *7-8 [SD NY, Mar. 4, 1994]; *Falconwood Fin. Corp. v Griffin*, 838 F Supp 836, 843 [SD NY 1993]; *First Interstate Credit Alliance, Inc. v Alliance Leasing, Inc.*, 1990 WL 67445, *5, 1990 US Dist LEXIS 5744, *13 [SD NY, May 15, 1990]).

The only connection between this case and New York is the forum selection clause that binds plaintiffs. The second Minnesota action deals with the exact subject matter as this one. The first Minnesota action deals with related matters that may have an impact upon any rulings in the second Minnesota action and this action. Plaintiffs claim that the lack of New York connections does not matter, because this case rests upon a construction of documents. Plaintiffs claim that this case is unlikely to raise factual disputes, and that it will probably be resolved by a dispositive

motion before trial, obviating the need for much travel to New York. In addition, New York is the only place that they can sue Schnell.

The agreements upon which plaintiffs base their claims exclude indemnification for losses caused by gross negligence and intentional misconduct. Plaintiffs' statements in this action give the impression that they do not intend to argue for nonindemnification based on Schnell's actions. Rather, it seems that they intend to argue that the agreements do not provide for them to indemnify Schnell, regardless of his actions. Whether the agreements will support such a reading need not be determined now. If plaintiffs are mistaken and this case is not just a matter of construing documents, whether plaintiffs must indemnify Schnell will depend upon his actions. Such factual questions as whether Schnell was negligent are precisely the ones raised in the first Minnesota action. Whatever witnesses or evidence may be required are in Minnesota. If the first Minnesota action ends in a determination that Schnell engaged in negligence or misconduct, then the indemnification question could be speedily handled in the second Minnesota action. Plaintiffs would not need to come to New York, armed with a Minnesota ruling on Schnell's conduct. Similarly, a determination that Schnell did no wrong could be dealt with in Minnesota. As Minnesota has two actions related to this action, it is expedient for these claims to be handled in the same place as the others, rather than to have duplicative litigation proceeding in two places.

This action and Schnell's second Minnesota action are both declaratory judgment actions concerning identical indemnification provisions in the IMAs. The Advisory Agreement also figures in this action. It is not mentioned in the Minnesota action. However, since the indemnification provision in the Advisory Agreement is identical to that contained in the IMAs, the actions may safely be regarded as having the same cause of action and seeking the same relief.

It is true that the IMAs prevent plaintiffs from commencing suit in Minnesota. The Advisory Agreement, under which plaintiffs also seek relief, does not. As noted, plaintiffs are seeking the same relief under all three agreements. Plaintiffs could conceivably sue in Minnesota pursuant to the Advisory Agreement. In addition, plaintiffs do not argue that they cannot counterclaim for the same relief as sought here in the second Minnesota action. There appears to be no reason that they cannot. It is further noted that by letter dated May 16, 2007, Schnell agreed to waive any objections to plaintiffs bringing suit in Minnesota and agreed to the addition of Deephaven Market as a party in the second Minnesota action.

As to parties, the actions are not identical. Deephaven is a defendant in the second Minnesota action, but is not a party here. Deephaven Relative, a plaintiff here, is not in the Minnesota action, most likely because, unlike the other plaintiffs in this action, it did not employ Schnell. Schnell is the defendant in this action but the plaintiff in the second Minnesota action. Two of the plaintiffs in this action, Deephaven Long and Deephaven Market, are defendants in the second Minnesota action. This recitation makes the difference in parties appear more of an impediment than it actually is. In the second Minnesota action, if necessary, Deephaven Relative could be added as a party. Most likely, a decision regarding indemnification that is binding on Deephaven, Deephaven Long, and Deephaven Market will bind Deephaven Relative. The Deephaven entities are sufficiently united in interest for a ruling in the Minnesota action to affect all of the plaintiffs in this action.

The above factors militate against enforcing the forum selection clause and in favor of Minnesota as the appropriate forum for these claims. This case presents one of the rare instances

where the forum selection clause should not prevail.

**IV. Discussion of the Selection of New York Law**

The IMAs provide for the application of New York law. The Advisory Agreement does not. This difference is just one reason for not adhering to plaintiffs' argument that the provision for New York law dictates a New York venue. There is no reason to believe, nor is it argued, that New York law cannot be competently applied in Minnesota. Minnesota courts allow parties to a contract to control the choice of law by express contractual provision (*OT Industries, Inc. v OT-tehdas Oy Santasalo-Sohlberg Ab,* 346 NW2d 162, 168 [Minn 1984]; *Milliken and Co. v Eagle Packaging Co., Inc.,* 295 NW2d 377, 380 n 1 [Minn 1980]; *Hagstrom v American Circuit Breaker Corp.,* 518 NW2d 46, 48 [Minn Ct of App 1994]). The contractual requirement that Minnesota apply New York law in interpreting the IMAs does not present an impediment to litigation in Minnesota.

**V. Discussion of CPLR 3211 (a) (4)**

Schnell argues that this action should be dismissed because the second Minnesota action began before this one. Plaintiffs argue that this case began first. CPLR 3211 (a) (4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties for the same cause of action (*Whitney v Whitney,* 57 NY2d 731, 732 [1982]; *White Light Productions v On the Scene Productions,* 231 AD2d 90, 99-100 [1st Dept 1997]). Barring dismissal, the court "may make such order as justice requires" (CPLR 3211 [a] [4]). A major consideration in deciding which case should be heard is the risk that two cases bearing on the same or similar issues may ultimately issue conflicting rulings (*White Light Productions,* 231 AD2d at 93).

New York generally follows the first-in-time rule, which instructs that if New York took jurisdiction before the other case, the New York case will proceed (*id.* at 96). Exceptions to that rule abound, however, as the practice of determining priorities between pending actions on the basis of dates is not applied in a mechanical way, regardless of other considerations (*id.* at 96-97; *see also Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005]).

Consideration under CPLR 3211 (a) (4) does not require strict identity between parties and issues in the respective actions. Rather, the court will ask if the parties and claims are sufficiently alike, so that the New York case need not proceed because the other case will dispose of all the same issues (*White Light Productions,* 231 AD2d at 93; *Koren-DiResta Constr. Co., Inc. v Albert B. Ashforth, Inc.*, 100 AD2d 760, 761 [1st Dept 1984]). Here, as stated above, this action and the second Minnesota action are sufficiently similar so that the latter action will dispose of the same issues as here, and the rulings in that case will probably apply to all of the plaintiffs in this case.

Although Schnell filed his case one day before plaintiffs filed theirs, plaintiffs contend that the first to file rule favors them. In New York, a plaintiff commences an action by filing the summons and complaint or the summons with notice (CPLR 304). By contrast, under the Minnesota Rules of Civil Procedure, an action is commenced by service of the summons on the defendant, by acknowledgment of service if service is made by mail, or by delivery of the summons to the sheriff in the county where the defendant resides for service, followed by service of the summons on the defendant or publication within 60 days (Minn R Civ P 3.01; *Save Our Creeks v City of Brooklyn Park,* 699 NW2d 307, 311 [Minn 2005]; *Haugland v Mapleview Lounge & Bottleshop, Inc.*, 666 NW2d 689, 694 [Minn 2003]). Schnell filed his case on March 1,

2007 and, according to the September 20, 2007 decision of the Minnesota court, accomplished service on March 23, 2007. Plaintiffs filed this action on March 2, 2007. That means that plaintiffs commenced this action 21 days before Schnell commenced his.

Priority in the bringing of an action is not necessarily controlling when the commencement dates are reasonably close (*San Ysidro Corp. v Robinow,* 1 AD3d 185, 187 [1st Dept 2003]; *Flintkote Co. v American Mut. Liability Ins. Co.,* 103 AD2d 501, 505 [2d Dept 1984], *affd* 67 NY2d 857 [1986]). Here, the fact that the competing actions were begun within days of each other diminishes the importance of plaintiffs' earlier filing date. In addition, plaintiffs' temporal priority, although quite valid, is due to the difference in rules between Minnesota and New York. Under New York rules, Schnell began his case one day before plaintiffs began this one. In light of these circumstances and the other reasons that plaintiffs' claims should be heard in Minnesota, the fact that New York took jurisdiction first does not matter.

The above discussion about forum non conveniens is appropriate on a motion based on CPLR 3211 (a) (4). Courts often undertake an analysis similar to that employed in applying the doctrine, that is, whether the litigation and the parties have sufficient contact with New York to justify the burdens imposed on this court system (*White Light Productions,* 231 AD2d at 95; *Flintkote Co.*, 103 AD2d at 506).

This action will be stayed in case there is any reason that plaintiffs cannot proceed in Minnesota. The stay will be lifted after the resolution of defendant's second Minnesota action, or sooner, upon the stipulation of both sides.

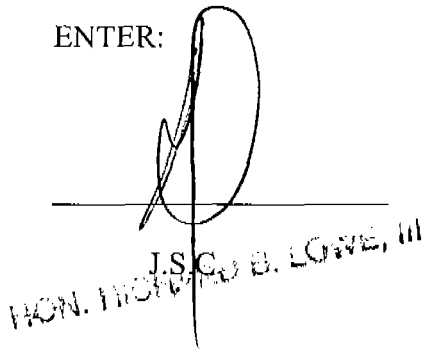
In conclusion, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that this action is stayed, pending the resolution of *Schnell v Deephaven Capital Management, LLC, Deephaven Long/Short Equity Trading, Ltd. Fund, and Deephaven Relative Value Equity Trading, Ltd. Fund,* File No. 27-CV-07-11319, State of Minnesota District Court, County of Hennepin, Fourth Judicial District.

Dated: December 12, 2007

ENTER:



HON. HOWARD B. LOWE, III J.S.C.