IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Case No. 1:04-CV-1522 (RMC)**
UNITED STATES SECURITIES AND EXCHANGE COMMISSION, 450 Fifth Street, N.W. Washington, D.C. 20549,	)	
Defendant.	)	

DEFENDANT'S MOTION TO TRANSFER THIS ACTION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States of America (the "Chamber") brought this action seeking review of a Securities and Exchange Commission ("SEC") rule promulgated under the Investment Company Act of 1940 ("ICA"), 15 U.S.C. 80a-1 *et seq.* Simultaneous with the filing of this action, the Chamber also filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), seeking review of the same rule and on the same basis as in this Court. As set forth below, jurisdiction is lacking in this Court, as the judicial review provisions of the ICA provide for review exclusively in the federal courts of appeals. Under 28 U.S.C. 1631, a district court may, among other things, transfer to a court of appeals an action filed in the district court seeking review of agency rulemaking, whenever such review properly lies in a court of appeals. The SEC therefore moves, pursuant to 28 U.S.C. 1631, that this Court transfer this

action to the D.C. Circuit.[1]

BACKGROUND

The Chamber's Complaint seeks review of the SEC's recently-promulgated exemptive rules under the ICA – the Investment Company Governance; Final Rule, 69 Fed. Reg. 46378 (August 2, 2004) (the "Investment Company Governance Rule"). These rules were promulgated pursuant to the SEC's statutory authority under the ICA. *See* 69 Fed. Reg. at 46389. The Chamber specifically challenges two conditions for mutual funds to rely upon these exemptions: (1) that the "chair of [its] board of directors is not affiliated with the firm that provides advisory services to the fund," and (2) that "at least 75 percent of a fund's directors be 'independent' of the fund adviser (or, in the case of funds with three-member boards, that two of the three directors be independent)." Compl. ¶1; *see* 69 Fed. Reg. at 46389 (setting forth text of these provisions). The Chamber alleges (among other things) that, in promulgating these provisions, the SEC exceeded its statutory authority under the ICA and the Administrative Procedure Act, 5 U.S.C. 701-06 ("APA"), and that the SEC's adoption of these provisions was arbitrary and capricious. Compl. ¶¶43-57. It seeks declaratory and injunctive relief invalidating the rule. *Id.* at 24-25.

The Chamber alleges that this Court has jurisdiction under the ICA (without identifying a specific provision of the ICA, however) and under the APA. *Id.* ¶5. However, in the petition for review which the Chamber filed with the D.C. Circuit (making the same arguments as are raised in

[1] By filing this motion, the SEC is not waiving its arguments why this Complaint should be dismissed outright pursuant to either Federal Rule of Civil Procedure ("Rule") 12(b)(1) or 12(b)(6). Should the Court not transfer the case, the SEC will make such a motion within the 60 days allowed under Rule 12(a)(3)(A). In addition, by making this motion on the grounds stated herein, the SEC is not waiving any other jurisdictional defenses to this action; nor is it waiving any other defenses (including standing or ripeness) that might be raised in responding to the petition for review in the D.C. Circuit.

its Complaint), it asserts with specificity that Section 43(a) of the ICA, 15 U.S.C. 80a-42(a), provides for jurisdiction in the D.C. Circuit. *See Chamber of Commerce v. United States SEC*, Case No. 04-1300, Petition for Review (D.C. Cir. Sept. 2, 2004) (attached as Exhibit 1).

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction, As Review of ICA Rulemaking Is Available Only in the United States Court of Appeals.

As noted above, the Investment Company Governance Rule was promulgated pursuant to the SEC's authority under the ICA, and the Chamber has alleged that jurisdiction exists under the ICA. *See* Compl. ¶5. The judicial-review provision of the ICA, however, provides that "[a]ny person aggrieved by an order issued by the Commission . . . may obtain judicial review of such order in the court of appeals." 15 U.S.C. § 80a-42(a). The term "order," as used in the judicial-review provisions of statutes administered by agencies, has consistently been construed to encompass any agency action reviewed on the administrative record – including rulemaking. *See, e.g., Investment Co. Inst. v. Board of Governors, Fed. Reserve Sys.* ("*ICI*"), 551 F.2d 1270, 1278 (D.C. Cir. 1977) (construing the term "order" in a statute giving the court of appeals jurisdiction to review "an order of the Board" to mean "any agency action capable of review on the basis of the administrative record").[2]

Where an agency action is capable of review on the administrative record, such as with the

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[2] *See also United States v. Dunifer*, 219 F.3d 1004, 1006-07 (9th Cir. 2000) (district court lacks jurisdiction to entertain challenge to FCC regulations where statute gave court of appeals exclusive jurisdiction over "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC]"); *In re FCC*, 217 F.3d 125, 139 (2d Cir. 2000) (same); *United States v. Any & All Radio Station Transm. Equip.*, 207 F.3d 458, 463 (8th Cir. 2000) (same); *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 312-13 (7th Cir. 1980) (court of appeals had exclusive jurisdiction over challenge to an FAA regulation under statutory provision providing for judicial review of "order").

rulemaking at issue here,[3] absent some explicit statutory directive to the contrary, review is available only in the courts of appeals. This principle recognizes that where review is to be conducted on the administrative record, it would be duplicative and wasteful to have a district court, and then a court of appeals, perform an identical on-the-record review. Thus,

> jurisdictional provisions that place initial review in the courts of appeals . . . avoid the waste attendant upon this duplication of effort. . . . Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744-45 (1985) (citations omitted). Section 43(a) of the ICA expressly contemplates such on-the-record review. *See* 15 U.S.C. 80a-42(a) (noting that, if a petition for review is brought in a court of appeals, the SEC "shall file in the court the record upon which the order complained of was entered"). Indeed, in the only decision of which the SEC is aware applying this principle to challenges to rulemaking done pursuant to the ICA, the court expressly held that challenges to the SEC's promulgation of final rules under the ICA can be brought only in the courts of appeals. *See DH2 v. United States SEC,* Docket No. 04 C 789, Hearing Tr. at 8 (N.D. Ill. May 13, 2004) ("jurisdiction [for judicial review under the ICA is] committed to the Court of Appeals [and] absent here in the District Court") (attached as Exhibit 2).[4]

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[3] *See Camp v. Pitts*, 411 U.S. 138, 142 ("the focal point for judicial review should be the administrative record already in existence"); *EDF v. Reilly*, 909 F.2d 1497, 1505 (D.C. Cir. 1990) (affirming denial of request for review of rulemaking, noting that "APA review, save in rare instances, must be conducted on the administrative record"); *Clark v. CFTC*, 170 F.3d 110, 114 (2d Cir. 1999).

[4] Moreover, in challenges to SEC rules promulgated pursuant to the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. 79a *et seq.*, which contains a judicial-review provision virtually identical to that found in the ICA (*see* 15 U.S.C. 79x), appellate jurisdiction was undisputed. *See National Ass'n of Regulatory Util. Comm'rs v. SEC*, 63 (continued...)

This Court should therefore read "order" in Section 43(a) of the ICA to encompass any judicial review of SEC rulemaking done pursuant to the ICA, including the Investment Company Governance Rule at issue here.

As the ICA vests jurisdiction solely with the courts of appeals, the Chamber cannot evade this result by invoking the APA. First, as noted above, courts have consistently held that jurisdiction for on-the-record review done pursuant to the APA is properly vested with the courts of appeals. *See Lorion*, 470 U.S. at 744-45. Moreover, even assuming that the APA, standing alone, conferred district court jurisdiction, specific grants of exclusive appellate jurisdiction like that found in Section 43(a) of the ICA prevail over the more general provisions of the APA. *See Telecommunications Research & Action Ctr. ("TRAC") v. FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984).[5] In *TRAC*, the court noted that §703 of the APA, which authorizes district court review of agency rulemaking actions, and which is implicitly relied upon by the Chamber here, *see* Compl. ¶5, does not confer jurisdiction on the district court where the relevant statutory scheme provides for review in the courts of appeals. *Id.* at 78. Thus, the APA does not confer district court jurisdiction for the Chamber's Complaint.

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[4] (...continued)
F.3d 1123 (D.C. Cir. 1995) (denying, on the merits, petition challenging SEC rules); *City of New Orleans v. SEC*, 137 F. 3d 638, 639 (D.C. Cir. 1998) (dismissing petition challenging an SEC rule because motion for reconsideration filed with SEC was still pending when City petitioned for review).

[5] *See also ICI*, 551 F.2d at 1279; *Assure Competitive Transp. Inc. v. United States*, 629 F.2d 467, 471 (7th Cir. 1980) ("a special statute vesting jurisdiction in a particular court cuts off jurisdiction other courts might have under a more general statute").

II. The Court Should Transfer the Chamber's Complaint to the D.C. Circuit.

As the Chamber can only challenge the Investment Company Governance Rule, if anywhere, in a United States Court of Appeals, this Court should transfer the Complaint to the D.C. Circuit pursuant to 28 U.S.C. 1631. That statute provides that

> [w]henever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Here, rather than engage in duplicative litigation over a Complaint for which district-court jurisdiction is lacking, the Court should transfer this case to the District of Columbia Circuit, where it can be consolidated with the petition for review that the Chamber has already filed. Courts have recognized that it is appropriate, under Section 1631, to transfer to the appropriate court of appeals an action seeking review of agency rulemaking. *See, e.g.*, *DH2 v. SEC*, Judgment at 1 (May 13, 2003) (transferring case to Seventh Circuit) (attached as Exhibit 3); *DH2 v. SEC*, Hearing Tr. at 10-11 (explaining basis for transferring to Seventh Circuit the challenge by DH2 to SEC rulemaking under the ICA); *Jamison v. FTC*, 628 F. Supp. 1548, 1552 (D.D.C. 1986) ("[w]hen a district court lacks jurisdiction by virtue of *TRAC*, the correct response is to transfer the case to the court of appeals under 28 U.S.C. §1631"); *Oil Chem. & Atomic Workers v. Skinner*, 724 F. Supp. 1264, 1266-68 (N.D. Cal. 1989) (transferring complaint that sought review of Department of Transportation rules, which were subject to review exclusively in courts of appeals under judicial review provision

providing for review of "orders").[6]

CONCLUSION

For the foregoing reasons, the Commission requests that this Court transfer the Chamber's Complaint to the District of Columbia Circuit. A proposed order is attached.

Respectfully submitted,

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Dated: September 9, 2004

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6 *Cf. Calumet Indus. v. Brock*, 807 F.2d 225, 227 (D.C. Cir. 1986) (noting that district court had transferred to the D.C. Circuit, pursuant to 28 U.S.C. 1631, petitioners' APA challenge to notice of interpretation issued by OSHA).

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION Respondent.	**PETITION FOR REVIEW** Case No. 04-1300

Petitioner Chamber of Commerce of the United States of America respectfully petitions this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 43(a) of the Investment Company Act of 1940, 15 U.S.C. § 80a-42(a), for review of the final Investment Company Governance rule of the United States Securities and Exchange Commission (Release No. IC-26520; File No. S7-03-4). The final rule, a copy of which is attached hereto, was published in the Federal Register on August 2, 2004. Investment Company Governance; Final Rule, 69 Fed. Reg. 46,378 (Aug. 2, 2004).

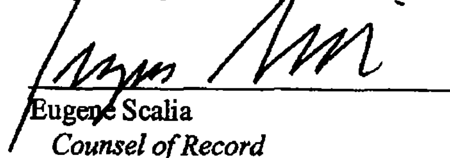
Petitioner seeks relief pursuant to the Investment Company Act of 1940 (15 U.S.C. §§ 80a *et seq.*), and the Administrative Procedure Act (5 U.S.C. §§ 701-706), on the grounds that in requiring investment companies to have an independent chair of the board of directors and a board that is composed of at least 75 percent independent directors, the Commission exceeded its statutory authority; failed to adequately justify its exercise of its rulemaking authority; and otherwise engaged in rulemaking that is arbitrary and capricious and not in accordance with the law. Petitioner asks this Court to hold the independent chair and 75 percent independent director requirements unlawful,

to set the requirements aside, and to issue a permanent injunction prohibiting the Commission from implementing and enforcing the requirements.

On September 2, 2004, Petitioner filed a Complaint in the United States District Court for the District of Columbia challenging the same provisions of the Commission's final rule. While Petitioner expects that the district court will be judged to be the proper venue for such a challenge, Petitioner files this petition as a protective matter in order to preserve jurisdiction in this Court in the event it is determined that this Court has exclusive jurisdiction to review the Commission's rule. *See Investment Co. Inst. v. Board of Governors of Fed. Reserve*, 551 F.2d 1270, 1280 (D.C. Cir. 1972).

Dated: September 2, 2004

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DH2, INC.,	)	DOCKET NO. 04 C 789
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
US SEC	)	Chicago, Illinois
COMMISSION	)	May 13, 2004
Defendant.	)	8:45 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE
MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff:
MR. CHARLES BERGEN and
MR. DAVID FREEMAN

For the Defendant:
MS. DONNA McCAFFREY,
MS. MELINDA HARDY and
MR. THOMAS KARR

JESSE ANDREWS
Official Court Reporter - U. S. District Court
219 S. Dearborn Street
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* * * * * *

1 (Whereupon the following proceedings were had in part via
2 a telephone conference)
3 THE CLERK: 04 C 789, DH2 vs. U.S. SEC.
4 THE COURT: Counsel, there are some counsel here in
5 court, but would whoever you is or are on the line out in
6 telephone land please identify yourself first, and then counsel
7 in court will do the same.
8 MS. McCAFFREY: Good morning, your Honor. This is
9 Donna McCaffrey from the Securities and Exchange Commission.
10 With me, but not upon the line, are Melinda Hardy and Thomas
11 Karr, also for the SEC.
12 MR. BERGEN: Good morning, your Honor. Charles
13 Bergen for DH2. Also with me is David Freeman. And I was the
14 one who just walked in. I apologize for any delay to the Court
15 and to my opposing counsel.
16 THE COURT: No delay at all.
17 Well, I have reviewed everything that everybody has
18 filed. And I am not going to write on this one. I am going to
19 rule orally. There is no reason that people in court have to
20 shift from foot to foot while I am doing this, so you ought to
21 sit down. And to the extent that you may want to make notes,
22 do that. And then after I have indicated my views I will hear
23 from counsel.
24 As you know, DH2 points to the Investment Companies
25 Act Section 43, that's 15 U.S.C. Section 80a-42, that

1 prescribes the court review of orders in Courts of Appeals, and
2 then to the absence of any provision that prescribes court
3 review of rules and regulations, as somehow conferring
4 jurisdiction over the latter type of action by an agency in the
5 District Court. And that's the premise that I am going to
6 start from, although that does not lead to the result I believe
7 that DH2 urges.

8 DH2 has also defined something as a "rule" even
9 though it's not labeled that way by the SEC. As we know, it's
10 part of a December 24, 2003 release that accompanies an actual
11 rule that is labeled as such, the Compliance Rule. And so as
12 to make no mistake about what DH2 is seeking to do, it coins a
13 kind of manufactured label with initial capital letters, the
14 Fair (capital F) Value (capital V) Rule (capital R).

15 Now I am not going to repeat my entire Abe Lincoln
16 anecdote that I think I dealt with the last time, just the
17 concluding aphorism that I will adapt to this case, that
18 "calling a release a rule don't make it so." Instead for
19 present purposes, for this morning's purposes, I am going to
20 accept, although purely arguendo, DH2's characterization for
21 the limited purpose that's necessary to deal with the SEC's
22 motion to dismiss.

23 But as the SEC has urged in its motion and it
24 reasserts in the reply that I received just at the beginning of
25 this week, the cases on which DH2 places its principal reliance

1 for vesting the power of review in a District Court rather than
2 a Court of Appeals have, I think, been overtaken both by time
3 and by later decisions. Indeed, the D. C. Circuit itself
4 expressly disavowed the anchor for one of the cases that DH2
5 relies on fully a quarter of a century ago in its decision in
6 Investment Company -- let me get the exact name here --
7 Investment Company Institute against the Board of Governors of
8 Federal Reserve System, 551 F.2d 1270, over at pages 1276 and
9 -77, saying in part:
10 "Although some courts persist in reading special
11 review statutes covering 'orders' as not encompassing
12 regulations [citing a Third Circuit decision], the
13 general approach taken by United Gas Pipe Line [which
14 was, as I say, the underlying decision by Judge
15 Leventhal as I recall] is no longer good law in this
16 Circuit."
17 Let me on that score add something that is not in the
18 direct line of analysis, but I think it may be appropriate to
19 mention. Investment Company expressly repudiated the approach
20 that was taken in Independent Broker Dealers, a case on which
21 DH2 places its reliance from the D. C. Circuit. Although it
22 doesn't expressly talk about that case, I think, nonetheless it
23 seems to me that DH2 really had a responsibility, if it pointed
24 to the case that it sought to rely on, it should have at least
25 apprised the Court by fronting the potential lack of

1 precedential force that results from the later decision.

2 But let me, if I may, return to the direct line of

3 analysis. That Investment Company case in the D. C. Circuit

4 not only disavowed the doctrine that DH2 advances here as a

5 matter of D. C. law, but in doing so it also expressly

6 criticized the other case on which DH2 seeks to place support,

7 the Third Circuit decision in PBW Stock Exchange. And as for

8 the Third Circuit itself, when it has had occasion to consider

9 the same question or the related question that we are looking

10 at now, it too has taken the position that's at odds with that

11 earlier PWB -- PBW, I forget which -- opinion of construing

12 statutes that don't specify the forum for review, and I quote,

13 "liberally to allow exclusive jurisdiction in the Court of

14 Appeals." That quote is from a '92 case out of D. C. -- out of

15 the Third Circuit, Conoco, Inc. against Skinner, 970 F.2d 1205

16 at 1214.

17 Now both the Conoco case and the Supreme Court

18 decision on which it placed reliance, Florida Power & Light

19 against Lorion, 470 U.S. 729 at 743-44, an '85 decision, as

20 well as what I have quoted from the D.C. Circuit, also seem to

21 me to torpedo the part of DH2's argument that seeks support in

22 what it labels "the need for fact finding at the district court

23 level." Under the APA it's the administrative record of course

24 that provides the grist for the reviewing court's mill. Suppose

25 again, purely arguendo, that we make the assumption, which is

1 by definition speculative, that DH2 can overcome the several
2 hurdles that the SEC has identified as having to be surmounted
3 before it can get to the merits -- that is, that it can
4 persuade the Court of Appeals that what it seeks to review is
5 indeed a rule (a question I repeat I have not decided
6 substantively), it can persuade the Court of Appeals that it
7 has standing in the constitutional sense (a question on which I
8 express no view, because the flaw that I am addressing is
9 jurisdictional in nature), and that it can persuade the Court
10 of Appeals that the statements that it challenges are ripe for
11 review (also an issue on which I do not opine).
12 If DH2 could successfully dodge each of those bullets
13 and could persuade the Court of Appeals on the merits that the
14 SEC did not comply with the prerequisites for adoption of the
15 rule, and that being so that the administrative record is
16 substantively inadequate to support the adoption of the
17 purported rule, the Court of Appeals (like this Court) could
18 reject the putative rule on that ground. And if you think
19 about it, any such inadequacy would be a function of what's not
20 in the record.
21 For that kind of ruling the existing administrative
22 record is the one that has to survive scrunity. So in a sense
23 it's by definition adequate for reaching the conclusion that
24 DH2 seeks here. Indeed, if you look at Florida Power & Light,
25 that's its precise teaching. So that argument seems to me in a

1 sense to be self-defeating.

2 Now our own Court of Appeals, when it's had occasion

3 to come to identification of the forum that has jurisdiction,

4 has I see joined the D. C. Circuit's later rather than the

5 earlier position on the subject. None of the cases in our

6 Circuit is directly on point, but the thrust is distinctly one

7 of favoring Court of Appeals review over District Court review.

8 I am referring of course -- let me grab them, I had them all

9 here someplace. Yes. Sima Products Corporation against

10 McLucas, which is 612 F.2d 309. I am not going to extend this

11 by reading from the case, but they all have the same thrust --

12 MS. McCAFFREY: Excuse me, your Honor. I can no

13 longer hear you.

14 THE COURT: Yes, I know. I am moving away. I will

15 try to do this this way. Suburban O'Hare Commission against

16 Dole, which is 787 F.2d 186. And then most recently Clark

17 against the CFTC, which is 170 F.3d 110. I am sorry that's --

18 I beg your pardon, that's a Second Circuit decision. But the

19 two that I have referred to I think carry the same theme.

20 Indeed, in the last of those, and that's the reason that I

21 pulled that one out, because it relies in part on Seventh

22 Circuit law, that Clark case, the Court expressly said that if

23 a statute dealing with the subject is ambiguous, that there are

24 solid reasons for saying that it ought to be reviewed in the

25 Court of Appeals.

1 Note again in that respect that the Investment
2 Company Act is silent on the subject of reviewing SEC rules and
3 regulations, although everybody recognizes of course that
4 judicial review is available. Section 80a-42, Section 43 of
5 the Act, was really a necessary enactment, because without it
6 the APA would have lodged review jurisdiction in the District
7 Court, which after all is the expected forum where an order,
8 one that adjudicates the rights of an individual litigant, is
9 involved. But as the approach that's taught by the Florida
10 Power case and the Third Circuit's Conoco and the D. C.
11 Circuit's repudiation of doctrine reflects, no statute is
12 needed to direct the appellate route where settled law already
13 does that.
14 So in summary I find that the corollary of review
15 jurisdiction being committed to the Court of Appeals is that
16 jurisdiction is absent here in the District Court.
17 Now that leaves the question whether I should or
18 should not invoke Section 1631 of Title 28. Let me get that.
19 That says:
20 "Whenever a civil action is filed in a court or an
21 appeal, including a petition for review of
22 administrative action, is noticed for or filed with
23 such a court and that court finds that there is a
24 want of jurisdiction, the court shall, if it is in
25 the interest of justice, transfer such action or

1 appeal to any other court in which the action or
2 appeal could have been brought at the time that it
3 filed or noticed."
4 Now the SEC correctly points to two decisions from
5 our own Court of Appeals that say it's okay to "take a peek" at
6 the merits, despite the fact that we are dealing with
7 jurisdiction, in order to see whether everybody's time is going
8 to get wasted by a transfer. But of the two cases in which it
9 did that, one was a prisoner case in which the claim was
10 clearly out of time. It was beyond the time frame that
11 Congress has prescribed for prisoner cases. The other one was
12 a similar kind of situation, in which just looking at it told
13 you that it didn't belong in court at all. And therefore the
14 waste of resources was certainly a relevant consideration.
15 It seems to me that the issues that DH2 has posed
16 here are serious issues. I have already indicated that I am
17 not opining on several of the steps that have been set out here
18 by the SEC as prerequisites to success on DH2's part. And
19 frankly it seems to me it would be somewhat presumptuous of me
20 to essentially prescind what the Court of Appeals might do on
21 those issues. So my inclination, unless the SEC can persuade
22 me that there is some really convincing reason for saying
23 "dismiss" flat-out rather than transferring to the Court of
24 Appeals for the reasons that I have stated here orally, my
25 strong inclination would be to enter an order of transfer so

1 that the parties can have it out on the merits before our Court

2 of Appeals.

3 So let me if I may ask SEC's counsel whether the

4 position that you have taken that suggests that I do more than

5 "take a peek" -- really engage in kind of a searching

6 examination, as I would view it -- calls for an outright

7 dismissal for lack of subject matter jurisdiction.

8 MS. McCAFFREY: Your Honor, this is Donna McCaffrey

9 for the SEC. Our basis for that argument was our view that

10 they lack constitutional standing and that the claim is not

11 ripe. And there are arguments that were made in the brief.

12 This isn't a situation where we can point to a time statute and

13 say they are clearly out of time as far as I am aware.

14 THE COURT: Yes. It seems to me the issues are

15 serious. And because they are serious I am disinclined to

16 explore them, although I know the Supreme Court has expressed

17 the view a couple of years back and changed the rules really to

18 say that even where there is a lack of jurisdiction the court

19 can look at other issues first before the absence of

20 jurisdiction. Here it seems to me, although I do not -- I have

21 not -- subscribed to what DH2 has said, that the issues are

22 sufficiently serious so that the Court that has jurisdiction

23 over the case ought to be the one that decides those issues.

24 So the bottom line then is that I will order -- I am

25 finding the absence of jurisdiction for the reasons that I have

1 expressed orally, and I am ordering transfer to the Court of

2 Appeals. Among other things, that will help preserve our

3 nation's forests because of the volume of paper that both sides

4 have generated here, and that I trust will lessen the amount

5 that is going to have to be tendered up there.

6 May I hear from DH2's counsel?

7 MR. BERGEN: Your Honor, we are disappointed that we

8 won't be able to pursue this case further in this Court, but we

9 greatly appreciate the thorough and expeditious treatment that

10 this issue has gotten. It's very important to DH2 and we

11 believe to others in the industry, and we will continue our

12 efforts in the Court of Appeals.

13 Thank you very much.

14 THE COURT: Well, I will tell you it's the kind of

15 case that I am frankly reluctant to lose, because this is an

16 area that I like very much to deal with. But you know, in

17 Gertrude Stein terms, "jurisdiction is jurisdiction is

18 jurisdiction." And accordingly it seems to me that I am called

19 on to do what I have just done. And I appreciate your kind

20 thoughts, and I wish both sides luck in the Court of Appeals.

21 MR. BERGEN: Thank you, your Honor.

22 MS. McCAFFREY: Thank you, your Honor.

23 THE COURT: Thank you all.

24 (WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

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1

2 CERTIFICATE

3
I HEREBY CERTIFY that the foregoing is a true and correct
4 transcript from the report of proceedings in the above-entitled
cause.
5
____
6 JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
7 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
8 EASTERN DIVISION
DATED: May 13, 2004
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United States District Court
Northern District of Illinois
Eastern Division

DH2

JUDGMENT IN A CIVIL CASE

v.

Case Number: 04 C 789

US SEC

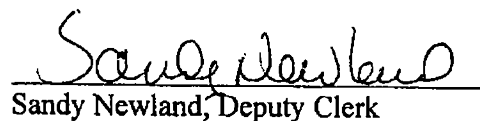
☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered transferring this action to the 7th Circuit Court of Appeals.

COPY

Michael W. Dobbins, Clerk of Court



Date: 5/13/2004

Sandy Newland, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Case No. 1:04-CV-1522 (RMC)**
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Defendant.	)	

[PROPOSED] ORDER TRANSFERRING CASE TO COURT OF APPEALS

This matter has come before the Court on the motion of the United States Securities and Exchange Commission ("SEC") to transfer this matter, pursuant to 28 U.S.C. 1631, to the United States Court of Appeals for the District of Columbia Circuit. It is hereby

ORDERED AND ADJUDGED that the SEC's motion is GRANTED, and that final judgment is entered transferring this action to the United States Court of Appeals for the District of Columbia Circuit.

____
UNITED STATES DISTRICT JUDGE

Date: ____________

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