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UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

February 3, 2014

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed Special Masters pilot program in the Commercial Division of the Supreme Court.

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The Commercial Division Advisory Council has recommended adoption of a pilot "Special Masters" program in the Commercial Division of the Supreme Court (Exh. A). As proposed, one or more Commercial Division Justices would participate in an 18-month pilot involving referral of complex discovery issues to a pool of Special Masters comprised of seasoned former practitioners no longer active in the practice of law. Special Masters would be asked to hear and report to the court on discovery issues, and would serve pro bono. The parties would be required to consent to referral of discovery matters to a Special Master and bear any costs related thereto. Procedures would be instituted to ensure the random assignment of Special Masters and to identify and avoid obvious conflicts. The Office of Court Administration would be responsible for soliciting and vetting the Special Masters to ensure they possess appropriate experience in complex commercial matters. The Advisory Council would monitor the pilot throughout its lifetime and report back with recommendations for expansion, modification or discontinuation. This initiative was originally proposed in June 2012 by the Chief Judge's Task Force on Commercial Litigation in the 21st Century (Exh. B). The Advisory Council has endorsed the Task Force's proposal with some modification based on comments received from Justices of the Commercial Division.

Persons wishing to comment on this proposal should e-mail their submissions to CommDivMasters@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than April 4, 2014.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. The issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the court system.

EXHIBIT A

C. **Create a Pilot Program to Form a Panel of Special Masters Drawn from our State's Seasoned Commercial Litigators who are no Longer in Active Practice (Report at 11.)**

The Subcommittee recommends the implementation on a pilot basis of the Task Force's Recommendation, with certain modifications discussed below to address the comments received from Justices of the Commercial Division.

The Task Force's Recommendation

The Task Force's Recommendation to create a panel of Special Masters includes the following key elements:

a) The Special Masters are to be

b) distinguished and seasoned practitioners; and
c) no longer in active practice.

d) The parties must consent to the appointment of the Special Masters.

e) The parties must bear any costs related to the appointment of the Special Masters.

f) The Special Masters would hear and report on various discovery matters (e.g. privilege determinations) and other matters (in the Commercial Division Justice's discretion).

g) The Special Masters are to serve on a pro bono basis to satisfy the Office of Court Administration's ("OCA") desire to avoid any potential labor/management objections.

Comments From Commercial Division Justices

Several Justices of the Commercial Division have raised concerns about certain aspects of the Task Force's Recommendation. Specifically, the Justices are concerned that:

h) Special Masters, although no longer in active practice, may still be affiliated with large firms. These Special Masters may have actual or perceived "issues conflicts" based on the interests of the clients of those firms, especially where the "inactive" Special Master still maintains an office at the firm.

i) The Justices do not want to be subject to criticism for "steering" matters to certain Special Masters.

j) The Justices are concerned that many inactive practitioners would require substantial training (for which there is no identified source of funding to implement the training) before they could provide meaningful assistance on some of the complex matters that would be referred to them.

Modifications To The Task Force's Recommendation

The Subcommittee recommends the following minor modifications to the Task Force's Recommendation to address the concerns raised by the Justices of the Commercial Division and to facilitate implementation of the program:

k) OCA will identify one or more Justices of the Commercial Division who wish to participate on a pilot basis for an 18-month period in the referral of certain matters to a Pool of Special Masters to hear and report on such matters.

l) OCA will solicit and vet retired practitioners with substantial experience in complex commercial matters to ensure that the Special Masters who are assigned to the Pool

m) do not have obvious "issues" conflicts;

n) do have the requisite experience to serve as Special Masters without the need for any further training; and

o) agree to serve on a pro bono basis (other than for any costs they might incur in rendering their services) and for a sufficient duration as to deal with a potentially complex matter.

p) The Justice(s)

q) would obtain the consent of the parties to refer a given matter to the Pool of Special Masters and to bear any costs incurred by the Special Master; and

r) would refer the identified matter to the Pool (rather than to a designated Special Master).

s) The Clerk's Office would then randomly assign the matter to one of the Special Masters in the Pool.

t) The selected Special Master would provide the parties disclosure sufficient to adduce any conflicts, at which point either party could request that a different Special Master be selected randomly by the Clerk's Office.

u) The Subcommittee will monitor the implementation of the 18-month pilot program by surveying the Justice(s), counsel for the parties and Special Masters who participate in the pilot and will report back to the Advisory Council with a recommendation to either expand, modify or discontinue the program.

EXHIBIT B

THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY

Report and Recommendations to the Chief Judge of the State of New York

June 2012

2. ***Create a panel of "Special Masters" drawn from our State's seasoned commercial litigators who are no longer in active practice and are available for appointment by the court — upon the consent, and at the expense, of the parties. In addition, rehire a group of Judicial Hearing Officers with assignment to the Commercial Division.***

The complex discovery matters present in many 21st-century commercial cases impose substantial obstacles for both the parties and the court. Magistrate Judges in federal district court allow for dedicated attention to the management of discovery problems, implementation of discovery schedules and performance of discovery tasks like examining vast privilege logs and reviewing documents claimed to be protected.

Our State is blessed with the rich resource of distinguished commercial litigators who are no longer in active practice but are willing to serve. Drawing support from this reservoir of experience would invaluably enhance the visibility and capacity of our Commercial Division. Ideally, the Commercial Division could hire magistrates to support Justices on the same terms as in federal court. But recognizing potential labor-management and budget limitations, we urge the following alternative to draw on this untapped resource: recruit an all-star distinguished panel of such seasoned practitioners to serve as "Special Masters" whom Commercial Division Justices could appoint — but only with the parties' consent and at their expense — to "hear and report" on discovery and other matters. Importantly, no party would be obliged to accept appointment of a master; in the event that any party withholds requisite consent, its identity would not be reported to the judge.

The court system also should rehire Judicial Hearing Officers (JHOs) to be assigned specifically to the Commercial Division and delegated tasks to assist the Justices. JHOs are former Justices with deep experience in the court system who, until recent budget cuts, provided valuable support to the Division and other parts of the court system across the State. At the very