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

PRESENT: O. PETER SHERWOOD PART 49
Justice

THE GEORGETOWN COMPANY, LLC, *et al.*,

Plaintiffs,

-against-

IAC/INTERACTIVE CORP., *et al.*,

Defendants.

INDEX NO. 651304/2016
MOTION DATE June 20, 2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to disqualifying counsel.

	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 is decided in accordance with the accompanying decision and order.

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

Dated: March 3, 2017

O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

FILED
MAR 22 2017
COUNTY CLERK'S OFFICE
NEW YORK

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

PRESENT: O. PETER SHERWOOD PART 49
Justice

THE GEORGETOWN COMPANY, LLC, *et al.*,

Plaintiffs,

-against-

IAC/INTERACTIVE CORP., *et al.*,

Defendants.

INDEX NO. 651304/2016
MOTION DATE June 20, 2016
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for leave to intervene.

	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 is decided in accordance with the accompanying decision and order and accompanying motion sequence 001.

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

Dated: March 3, 2017

O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

FILED
MAR 22 2017
COUNTY CLERK'S OFFICE
NEW YORK

3/22/17 Caption corrected with approval of Sara J. Crasson, Law Clerk to Judge Sherwood MAT/IMC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

THE GEORGETOWN COMPANY, LLC; GEORGETOWN 19TH STREET PHASE I, LLC; GEORGETOWN 19TH STREET DEVELOPMENT LLC; and IAC/GEORGETOWN 19TH STREET, LLC,

Plaintiffs,

- against -

IAC/INTERACTIVECORP.; HTRF VENTURES, LLC; and IAC 19TH STREET HOLDINGS, LLC,

Defendants.

DECISION AND ORDER
Index No. 651304/2016
Mot. Seq. Nos. 001, 002

O. PETER SHERWOOD, J.:

I. BACKGROUND

In this action, the plaintiff entities (together, Georgetown) sue the defendants (together, IAC) for a declaratory judgment that Georgetown is entitled to 50% of a $35 million rights fee associated with development rights on a property in Manhattan's West Chelsea District. The fee is being held in escrow.

On these motions sequence numbers 001 and 002 each side seeks to disqualify counsel for the other based on alleged conflicts of interest based on concurrent representation of adverse parties. In April 2016, shortly after this action was filed, IAC moved to disqualify DLA Piper (DLA) as counsel for Georgetown. The next day, Joseph B. Rose filed a motion by order to show cause to intervene and disqualify Kasowitz, Benson, Torres & Friedman (Kasowitz) from acting as IAC's counsel in this matter.

II. MOTION SEQUENCE NUMBER 001

A. Facts

The facts which are largely undisputed, are taken from the parties' memoranda. Where material facts are disputed, they are noted.

In March 2015, DLA approached IAC about representing IAC in *DeWitt v Crazy Protocol Communications, Inc., et al.*, a California action brought by a pro se plaintiff complaining of violations of a California anti-spam statute. IAC believed its subsidiary, Match.com, was the proper defendant in that action, and that IAC would soon be replaced by Match.com in the case. Match.com signed a letter of engagement for DLA to represent it in the action (the Match.com Engagement Letter, attached as Exhibit C to Katz Aff, NYSCEF Doc. No. 7). DLA was already representing IAC in *DeWitt*. IAC's motion to quash DeWitt's proposed summons was granted. On October 30, 2015, DeWitt filed a notice of appeal.

His opening brief was filed on March 24, 2016. IAC states that DLA was counsel of record for IAC on the appeal.

It is unclear exactly when DLA's representation of Georgetown began. However, DLA represented Georgetown at a pre-suit settlement meeting held in New York in October 2015 (the October Meeting). DLA describes the pre-suit negotiations as being more extensive. IAC characterizes it as a single meeting, at which DLA made a presentation, and at which no negotiation was held. IAC did not object to DLA's representation of Georgetown at that meeting. DLA claims IAC was happy for DLA's involvement on behalf of Georgetown because it felt the relationship between the attorney from DLA (Anthony Coles) and IAC's Associate General Counsel (Edward Ferguson) would help negotiations.

This action was filed on March 11, 2016. Five days later, IAC wrote to DLA, asserting a conflict of interest, declining to waive the conflict, and asking DLA to withdraw. DLA declined. On March 17, DLA reached out to Match.com's General Counsel seeking a waiver. He declined, on the grounds that Match.com did not speak for IAC, and referred DLA to IAC. On March 28, DLA filed a motion to be relieved as IAC's counsel in the DeWitt appeal. IAC objected, claiming, among other things, that DLA was dropping it like a hot potato in order to avoid a conflict with a preferred client.

On April 28, IAC filed the instant motion to disqualify DLA as Georgetown's counsel. On the same day, DLA's motion to withdraw from the California action was granted by the First Appellate District, Division Two, of the Court of Appeal for the State of California. The parties make divergent assertions about why that court granted the motion, but the court's decision is bare of explanation.

B. Arguments

IAC argues that filing of this suit violated New York Rules of Professional Conduct, as DLA had a disabling conflict of interest, representing one client in litigation against another existing client. Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> > (1) the representation will involve the lawyer in representing differing interests; or
> >
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> 3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

"The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent" (Rule 1.7, Comment 6).

IAC argues that DLA represented IAC concurrently with suing it, which is "prima facie improper" (*Hempstead Video, Inc. v Inc. Vil. of Val. Stream*, 409 F3d 127, 133 [2d Cir 2005] ["If the representation is concurrent, it is 'prima facie improper' for an attorney to simultaneously represent a client and another party with interests directly adverse to that client." (quoting *Cinema 5, Ltd. v Cinerama, Inc.*, 528 F2d 1384, 1387 [2d Cir.1976])] *see Merck Eprova AG v ProThera, Inc.*, 670 F Supp 2d 201, 208 [SDNY 2009]). It maintains that "the attorney must be disqualified unless he can demonstrate at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation" (*Hempstead Video, 409* F 3d at 133, internal quotations omitted). Accordingly, IAC seeks to have DLA disqualified.

DLA argues that this motion is late, and IAC has waived any conflict by waiting five months after the October Meeting to file the motion. DLA also points to the conflict waiver in the Match.com Engagement Letter, which DLA argues also applies to IAC (*see Macy's Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616, 617 [1st Dept 2013][advance conflict waiver in retainer agreement found enforceable][1]. DLA claims the argument made by IAC in response to DLA's motion to withdraw, that the Match.com Engagement Letter did not bind it, was so ludicrous, and so damaged their relationship, that DLA declined to further represent IAC in the *DeWitt* appeal, ending the relationship. DLA claims the California court discredited IAC's arguments by granting DLA's motion to withdraw.

DLA argues that the Match.com Engagement Letter applies to IAC, as this is the only retainer agreement covering DLA's work for both Match.com and IAC. DLA claims it was instructed by IAC to discuss terms of the engagement with Match.com and cites a letter in which IAC's assistant general counsel told DLA to work out the details with Match.com's counsel because "we'd like you to represent us in this

[1] The conflict waiver reads: "you acknowledge and agree that the Firm and its affiliated entities may, now or in the future, represent other persons or entities on matters adverse to you or any of your current or future affiliates, including, without limitation, in . . . litigation, arbitration or other dispute resolution procedure, other than those for which the Firm had been or is engaged by you' (Match.com Engagement Letter, Terms of Service, ¶4).

matter" (Opp at 6, quoting Ferguson e-mail to Katz dated March 13, 2015, attached as Exhibit B to Katz Aff). Further, the Match.com Engagement Letter describes representation "in connection with the claims brought against the Company," when the claims were, at that point, brought against IAC. DLA represented IAC in the *DeWitt* action, and invoiced Match.com, as per IAC's instructions. DLA's invoices were paid, however, by IAC. DLA also argues that Curtis Anderson, Match.com's General Counsel, who signed the Match.com Engagement Letter, had "both actual and apparent authority to sign . . . on IAC's behalf" (Opp at 16). To interpret the Match.com Engagement Letter not to bind IAC would be contrary to the intent of the parties (Opp at 17, citing *Cole v Macklowe*, 99 AD3d 595, 596 [1st Dept 2012], affd, 125 AD3d 44 [1st Dept 2014] [it is a "well settled principle that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties"]). Additionally, as IAC used and paid for DLA's services, it accepted the benefits of the contract, and should be bound by its terms (*see Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363 [1st Dept 2008]).

DLA argues that, even without a conflict waiver, IAC's motion to disqualify should be denied, as IAC will not suffer any prejudice, and the balance of equities tips in Georgetown's favor. DLA contends there is no "mandatory disqualification" rule, and that counsel must have the "opportunity to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation" (*Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 153 [1st Dept 2006]). Additionally, as the representation in the *DeWitt* action is now terminated, there is no longer a concurrent representation, and so an assumption that the representation is prima facie improper would no longer apply (*see MSKCT Trust v Paraneck Enterprises Inc.*, 296 AD2d 769, 770 [3d Dept 2002]). DLA notes that IAC points to no specific prejudice which would be caused if DLA continues to represent Georgetown, and argues that "there is no risk of divided loyalties or diminished vigor" in the *DeWitt* litigation, while Georgetown will be prejudiced by the loss of DLA as its counsel (Opp at 23-25).

IAC replies that the Match.com Engagement Letter cannot apply to IAC, since, by its terms, it "does not create an attorney-client relationship with any other entity or person, including, without limitation, your corporate parents, subsidiaries, affiliates . . . unless such entities or persons are specifically named in [the engagement letter]" (Match.com Engagement Letter, Terms of Service, ¶ 2). As the terms of the agreement specifically exclude binding any other entity, Match.com's General Counsel's alleged authority (which is denied by IAC) to bind IAC is irrelevant. IAC denies that Anderson instructed DLA on how to write the engagement letter, or that it should omit mention of IAC. Anderson, in fact, crossed out the phrase "or your affiliates" in a section of the Terms of Service which would have represented that Match.com "agree[d] that an Allowed Adverse Representation does not breach any duty that the Firm owes to you or any of your affiliates" (Match.com Engagement Letter, Terms of Service, ¶ 4). IAC also claims

to have been ignorant of the existence of the Match.com Engagement Letter until March 2016. Accordingly, IAC never consented to DLA's representation of Georgetown, and would not have consented, as that is not its practice.

IAC further disputes that the Match.com Engagement Letter binds it, by its terms, and that the document, drafted by DLA, should be construed against DLA. It denies Anderson had actual or apparent authority to bind IAC, and the document clearly shows him signing only on behalf of Match.com. IAC claims that disqualification is warranted because "DLA opportunistically dropped IAC as a client - - via its withdrawal from the *DeWitt* Litigation – only after IAC declined to provide it a waiver to allow it to represent Georgetown in this apparently more attractive and lucrative engagement" (Reply at 13-14).

C. Standard

"[W]hether to disqualify an attorney rests in the sound discretion of the Court" (*Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). An attorney "may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship" (*Flores v Willard J. Price Assoc., LLC*, 20 AD3d 343, 344 [1st Dept 2005], quoting *Matter of Kelly*, 23 NY2d 368, 376 [1968]), and "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification" (*Justinian Capital SPC v WestLB AG, NY Branch*, 90 AD3d 585, 585 [1st Dept 2011], quoting *Rose Ocko Found. v Liebovitz*, 155 AD2d 426, 428 [2nd Dept 1989]). However, "[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Campolongo v Campolongo*, 2 AD3d 476, 476 [2nd Dept 2003] [citations omitted]; *see Horn v Municipal Info. Servs.*, 282 AD2d 712 [2nd Dept 2001]). The party seeking disqualification "bears the burden of establishing that" standard (*O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154 [1st Dept 1993]; *NYK Line (N. Am.) Inc. v Mitsubishi Bank, Ltd.*, 171 AD2d 486, 488 [1st Dept 1991]).

D. Discussion

At the time this action was filed, DLA was involved in simultaneous representation of and against IAC. A conflict, if any, must be assessed as of that time (*see Burda Media, Inc. v Blumenberg*, 1999 WL 1021104, at *3 [SDNY Nov. 8, 1999] ["It is well settled that whether an adverse attorney-client relationship is simultaneous or continuing is to be determined as of the time that the conflict arises, and not at the time the motion to disqualify is finally brought before the court"]; *see also Chemical Bank v Affiliated FM Ins. Co.*, 1994 WL 141951, at *11 [SDNY, Apr. 20, 1994]; *Strategem Dev't Corp. v Heron Int'l N.V.*, 756 FSupp 789, 793 [SDNY 1991]; *Fund of Funds, Ltd. v Arthur Anderson & Co.*, 435 FSupp 84, 95 [SDNY], aff'd in part, rev'd in part on other grounds, 567 F2d 225 [2d Cir 1977]).

DLA asserts that the waiver clause of the Match.com Engagement Letter applies. IAC responds that the letter is not binding on it. "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the court (*id.* at 67). The court should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The terms of the Match.com Engagement Letter are clear and unambiguous that it only binds Match.com. DLA contends that the circumstances indicate the parties intended something else but that circumstance does not create an ambiguity in the document. Further, as DLA drafted the agreement, "applying standard principles of contract construction, we construe ambiguities against the draftsman" (*Morrison Cohen Singer & Weinstein, LLP. v Network Indus. Corp.*, 292 AD2d 153, 154 [1st Dept 2002]). If DLA had wanted to bind IAC to that document, it knew how to write an engagement letter that would so provide. It did not. Accordingly, DLA cannot base its conflict waiver defense on the terms of the Match.com Engagement Letter.

Even without finding a prima facie conclusion of conflict due to the concurrent representation (*see Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 152 [1st Dept 2006]["Since . . . the only simultaneous representation here involves totally unrelated cases . . . , there was no prima facie showing of a conflict"]), there is an evidence of actual conflict. While DLA claims there is no diminution in representation, and no prejudice to IAC, the argument is akin to the defendant facing sentencing for killing his parents pleading for leniency because he's an orphan. IAC has already lost its preferred counsel for the *DeWitt* case because of this conflict. While DLA blames their parting of the ways on IAC's position that the Match.com Engagement Letter does not bind it, that position was raised in reference to DLA's attempt to withdraw from representing IAC so as to clear the conflict and represent a preferred client. Accordingly, IAC has already suffered prejudice. The controversy before the court is a prime example of what was intended to be avoided by Rule 1.7, which provides that "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's

ability to represent the client effectively" (Rule 1.7, Comment 6). Additionally, the parties are at an early stage of the litigation, and prejudice to Georgetown from ending DLA's representation now will be limited.

III. MOTION SEQUENCE NUMBER 002

Joseph B. Rose moves to intervene pursuant to CPLR section 1012 and 1013 and to disqualify Kasowitz, Benson, Torres & Friedman LLP (Kasowitz) from representing IAC as counsel in this action.

A. Facts

Rose alleges that he has a substantial ownership interest in Georgetown, was heavily involved in the events giving rise to this action, has millions of dollars at stake in the outcome, and will be a key Georgetown witness. Kasowitz, who represents IAC in this action, has also represented Rose for six years in a separation and divorce proceeding. As of the time of oral argument on these motions, that trial had been adjourned. As a result of that representation, Kasowitz has been privy to Rose's personal and financial information, including information about Georgetown and the fees at issue in this litigation. Rose learned of Kasowitz's representation of IAC on or around March 14, 2016, and his counsel, Michael Feldberg, conferred with Marc Kasowitz (M Kasowitz) about a possible conflict on March 25. M Kasowitz took the position that there was no conflict. On April 15, Feldberg asked Kasowitz to withdraw from representing IAC. Kasowitz declined.

B. Arguments

Rose seeks leave to intervene for the purpose of making this motion and argues that Kasowitz should be disqualified as IAC's counsel because of the conflict between IAC and his interests. Rose claims his motion is timely, and prejudice to IAC will be minimized.

As discussed above, Rule 1.7 of New York's Rules of Professional Conduct, prohibits simultaneous representation of clients with differing interests without a written waiver. Rule 1.8(b) provides that a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." The conflicts covered by these rules apply to an attorney's entire firm (*see* Rule 1.10[a] ["While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein"]). An additional conflict is created here because Rose will be a key witness in this litigation, and Kasowitz can be expected to examine him, despite its possession of his confidential and privileged information. One can reasonably envision Kasowitz trying to diminish Rose's credibility at such examination and attempting the

opposite in the divorce proceeding (*see Tartakoff v New York State Educ. Dept.*, 130 AD3d 1331, 1333 [3d Dept 2015]).

Rose also argues that, if the court denies him leave to intervene, the court is now aware of the conflict and should disqualify Kasowitz (*see Flushing Sav. Bank v FSB Properties, Inc.*, 105 AD2d 829, 830 [2d Dept 1984]).

Kasowitz argues that there is no disqualifying conflict, as the matrimonial attorneys representing Rose are leaving the firm the day after the filing of their opposition brief (in May 2016) to start their own boutique firm, taking the Rose case and files with them, and leaving Kasowitz with no confidential information about Rose or his divorce litigation. At that point, Rose will no longer be a Kasowitz client, and there will be no further grounds for disqualification (*see* CPLR 1.10[b] ["When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter"]). Kasowitz claims that all the attorneys involved in representing Rose are leaving, all of the information is going with them (and all paper and electronic files will be purged from their systems), and the matrimonial group has effectively operated behind an ethical wall, so no other attorneys are privy to their matters.

Kasowitz claims that even if Rose were to be considered a current client, there is no conflict of interest between them, as diverging "economic interests" are insufficient (*see* Rule 1.7, comment 6 ["simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients"]).

Kasowitz also asserts that intervention is not permitted for a limited purpose, that intervention is for full joinder as a party, only (*see* CPLR 1013 ["any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact"]; *Rent Stabilization Ass'n of New York City v State Div. of Hous. and Community Renewal*, 252 AD2d 111, 116 [3d Dept 1998] ["The CPLR does not recognize limited intervention; rather, a successful intervenor becomes a party for all purposes. Whereas the City could have moved to intervene and simultaneously make a preanswer motion to dismiss pursuant to CPLR 3211 and 7804 (f), it could not "limit" its intervention" (quoting *Matter of Greater N. Y. Health Care Facilities Assn. v DeBuono*, 91 NY2d 716, 720 [1998])]). Rose replies that the

First Department has allowed just such an intervention (*see Anonymous v Anonymous*, 262 AD2d 216 [1st Dept 1999]).

Rose contends that this matter should be considered as a current conflict, as Rose was represented by Kasowitz when Kasowitz first appeared in this action. Rose argues that jettisoning the matrimonial practice is merely a convenient way of converting a current client into a former client, and attempting to get a more lenient standard for evaluating the conflict. Rose questions whether Kasowitz can rely on its ethical wall and other methods to safeguard Rose's personal information, after its conflicts check system failed. Rose maintains that Kasowitz will still be cross-examining Rose, and will still damage him financially if it succeeds for its other client (*id.* at 7).

As to Kasowitz' claim that there is no prejudice to Rose, because no remaining Kasowitz attorneys will have his information, Rose asserts that Kasowitz is keeping some matrimonial lawyers, and that information may have been shared already with other attorneys in the practice, even if they were not directly involved with his case. Further, matrimonial attorneys Alter and Wolff told Rose that they were leaving Kasowitz "in large part due to their concern about going to trial in the Divorce Action with the conflict issue hanging over them" (Supp Rose Aff, ¶ 7), but could not leave immediately because of their partnership agreement. Once this motion was filed, Kasowitz allowed the matrimonial attorneys to leave early. Although Kasowitz represented to the court that the matrimonial partners would vacate the premises by May 13, they actually remained at Kasowitz until May 25). Rose states that Kasowitz continued to place its own interests ahead of his by "distract[ing] Ms. Alter and Mr. Wolff from preparation for trial in the Divorce Action by, among other things, pressuring them to confirm that the Kasowitz firm can delete electronic files in its possession containing confidential information about the Divorce Action".

As far as Kasowitz claims that there was an ethical screen surrounding its matrimonial practice, Rose argues that a waiver is still required, and that screens "do not arise passively based on historic conduct" (Reply at 14). Kasowitz attorneys learned his thoughts on the merits of this dispute during preparation for the divorce action, and should not be in a position to cross-examine him in that action now.

Rose argues also that Kasowitz should be disqualified, even if Rose were to be considered a former client, as the law firm has placed, and is still placing, its own interests over those of client Rose.

C. Discussion

As above, the conflict here must be evaluated as a current conflict, since Kasowitz represented Rose in the divorce action at the time it appeared as counsel for IAC. It is undisputed that Rose did not waive the conflict. "A lawyer may not both appear for and oppose a client on substantially related matters

when the client's interests are adverse. . . . The rule has been extended to provide that if one attorney in a firm is disqualified from representing a client, then all attorneys in the firm are disqualified. This is so because there is an irrebuttable presumption of shared confidences among attorneys employed by the firm which forecloses the firm from representing others in the future in substantially related matters" (*Solow v W.R. Grace & Co.*, 83 NY2d 303, 306 [1994], citing *Greene v Greene*, 47 NY2d 447, 451 [2004]).

There is a distinction between the facts and cases cited, as Rose is not a party to the instant action and Kasowitz is not precisely adverse to its own client. However, this is not a situation where there are merely adverse economic interests. Kasowitz is not proposing to represent an economic competitor of a client in an unrelated matter. In this case, Kasowitz seeks to represent a party whose interests are not merely competing but are substantially adverse to Rose.

Rose swears, and Kasowitz does not dispute, that the funds at issue in this case are also at issue in the divorce proceeding, and Rose that has discussed his opinions on the merits of this case with Kasowitz. The matters appear to be substantially related. Accordingly, an irrebuttable presumption that his matrimonial attorneys shared confidences with other attorneys at the firm would apply.

V. CONCLUSION

For the reasons discussed above, the motion to disqualify DLA must be granted as it is conflicted and the conflict has not been waived. The motion of Joseph B. Rose to intervene shall be granted for the limited purpose of objecting to the representation of IAC by Kasowitz (*see Anonymous v Anonymous*, 262 AD 2d 216 [1st Dept 1999] [granting nonparty intervenor's motion to disqualify counsel]). The motion to disqualify Kasowitz shall be granted as it already represents Rose and no waiver has been given.

Accordingly, it is hereby

ADJUDGED and DECLARED that the law firm of DLA Piper is declared to be conflicted in violation of New York Rules of Professional Conduct, Rule 1.7, and accordingly is disqualified from continuing to represent plaintiffs in this action; and it is further

ADJUDGED and DECLARED that the law firm of Kasowitz, Benson, Torres and Friedman is declared to be conflicted in violation of New York Rules of Professional Conduct Rule 1.7, and accordingly is disqualified from continuing to represent defendants in this action; and it is further

ORDERED that this matter is hereby stayed for twenty (20) days in order to permit the respective parties time to retain new counsel and new counsel are directed to enter their appearance and to appear at a scheduling conference at Part 49, 60 Centre Street, Room 252, New York, New York on March 28, 2014 at 9:30 am.

This constitutes the decision and order of the court.

DATED: March 3, 2017

ENTER

O. PETER SHERWOOD
J.S.C.

CLERK

FILED

MAR 22 2017

COUNTY CLERK'S OFFICE
NEW YORK

651304/16

Judgment

FILED
MAR 22 2017
AT 10:38 AM
N.Y., CO. CLK'S OFFICE