STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: July 20, 2018)

DAVID L. QUINN, individually and derivatively on behalf of SILVERMINE BAY, INC., Plaintiff,	:	
v.	:	
LOUIS YIP; TZE PING NG; ERIC LEUNG; PON-SANG CHAN, M.D.; PUI-O, INC.; TAI-O, INC.; TAI-O ASSOCIATES, L.P.; 501 ROOSEVELT, LLC; 501 LESSEE, LLC; 501 DEVELOPER, LLC; 521 ROOSEVELT AVENUE, LLC; T-O HC, LLC; HONG KONG NEW TERRITORIES, LLC; and E-O, INC., Defendants.	:	**C.A. No. KC-2015-0272**

DECISION

STERN, J. Three of the fourteen Defendants—Tai-O Associates, L.P. (Tai-O), Louis Yip (Yip), and Tze Ping Ng (Ng) (collectively, the Movants)—move to disqualify Partridge Snow & Hahn, LLP (PS&H) from representing the Plaintiff, David L. Quinn, individually and derivatively on behalf of Silvermine Bay, Inc. (Plaintiff) in this litigation involving a corporate ownership dispute. Plaintiff has timely objected to the motion.

I

Facts and Travel

Plaintiff filed a Verified Complaint on March 30, 2015 to enforce his rights as a twenty percent minority shareholder of Silvermine Bay, Inc. (Silvermine Bay). Verified Pet. for Appointment of Special Master and Compl. for Damages (Verified Compl.) ¶ 1. He also sued

derivatively on behalf of Silvermine Bay against the remaining shareholders: Yip, Ng, and Eric Leung (Leung) (collectively, the Shareholder Defendants), whose combined interest in the company was eighty percent. *Id.* Specifically, the action was brought to appoint a special master to secure and preserve the assets of Silvermine Bay and, if necessary, appoint a permanent receiver to liquidate its assets and business pursuant to a decree of dissolution. *Id.* at ¶ 5. Additionally, Plaintiff sought (1) access to and review of the corporate books and records pursuant to G.L. 1956 § 7-1.2-1502; (2) a full and complete accounting of the business affairs of Silvermine Bay; (3) restitution of any and all diverted corporate funds and opportunities; (4) damages deriving from Yip's alleged wrongful conduct; and (5) an award of the costs of bringing the litigation including attorneys' fees. *Id.*

Specifically, Plaintiff alleged in his Verified Complaint that the Shareholder Defendants failed to comply with demands for information made in 2011 for the purpose of evaluating his interest in Silvermine Bay and reviewing its past business activities. *Id.* at ¶¶ 17-22. Plaintiff also alleged that the Shareholder Defendants refused to provide information involving a number of business entities controlled by Yip and Ng, including but not limited to Tai-O. *Id.* at ¶ 19. Furthermore, Plaintiff also claimed that the information he was able to obtain prior to filing suit showed that the Shareholder Defendants managed and controlled the affairs of Silvermine Bay to the advantage of other various enterprises in which Yip had an ownership interest, but Plaintiff did not. *Id.* at ¶ 23. According to Plaintiff, there also appeared to be money that was transferred from Silvermine Bay, without Plaintiff's knowledge or approval, to Yip's other business organizations with no interest being charged. *Id.* at ¶ 24.

After the Shareholder Defendants answered the Verified Complaint and this Court appointed an examiner of Silvermine Bay, the Shareholder Defendants elected to purchase

Plaintiff's shares of the company. Discovery then ensued, and Plaintiff, in or about March 2017, issued a subpoena duces tecum to Tai-O seeking relevant documents. According to Plaintiff, during discovery, it was revealed that there was an unauthorized transfer of $151,632.72 from Silvermine Bay's accounts on or about July 31, 2012, allegedly to pay off a tax lien on a property owned by Tai-O in order to avoid a tax sale. Steven E. Snow Aff. (Snow Aff.) ¶ 5. There were also two other transfers from Silvermine Bay to Tai-O: one made on or about December 23, 2013 for $200,000; and the other occurred on or about January 6, 2009 for $46,350. *Id.*

After this discovery, Plaintiff amended his Verified Complaint on September 5, 2017, which included a new legal claim that an implied partnership exists between Plaintiff and the Shareholder Defendants regarding a real estate development business under the fictitious name the Tai-O Group. *Id.* at ¶ 4. The Amended Verified Complaint also added a number of related business entities comprising the Tai-O Group as named parties, as well as one additional individual Defendant, Pon-Sang Chan, M.D. (Chan). *Id.* On November 2, 2017, the Movants then filed the instant motion to disqualify PS&H from this matter.

The Movants argue in their motion to disqualify that PS&H previously represented them in real estate transactions and other matters concerning Tai-O and Defendant 521 Roosevelt Avenue, LLC (521), including the acquisition of the same real estate in which Plaintiff is now claiming an interest in his Amended Verified Complaint. Specifically, Plaintiff is now seeking a twenty-five percent interest in, *inter alia*, Tai-O and 521 at the expense of the Movants, each of whom effectively owns a one-third interest in these two entities.

Beginning in 2004, Defendants Yip and Ng consulted and hired Attorney John Boehnert (Attorney Boehnert), a partner at PS&H at the time. According to Attorney Boehnert, PS&H provided (1) legal services in preparing agreements and preparing and submitting corporate

filings to the Secretary of State; (2) legal services regarding the purchase, sale, financing, and development of real estate; (3) legal services in assisting with environmental issues and compliance; and (4) legal services regarding the creation of a land condominium. John M. Boehnert Aff. (Boehnert Aff.) ¶ 6. Specifically, in 2004, PS&H represented Yip and Ng in acquiring and developing the real property located at 521 Roosevelt Avenue, Pawtucket, Rhode Island. *Id.* at ¶ 8. According to the Movants, in June and July of 2005, PS&H then advised Yip and Ng regarding the appropriate business structure for this project and advised the creation of three entities: Tai-O General Partner, Inc., Tai-O Limited Partner, Inc., and Tai-O Associates, L.P. (the Tai-O Entities). *Id.* at ¶ 9. Yip and Ng were owners and shareholders of all three entities. On December 22, 2006, while PS&H was still representing the Movants, Tai-O purchased the real estate located at 521 Roosevelt Avenue, Pawtucket, Rhode Island, as well as real estate located at 555 Roosevelt Avenue, Pawtucket, Rhode Island. *Id.* at ¶ 10. Then, on May 18, 2007, PS&H represented Tai-O at a closing of loans from Cathay Bank. This transaction consisted of a construction loan of $6,547,500, as well as a bridge loan of $1,468,871, which were used to develop the property located on 555 Roosevelt Avenue. *Id.* at ¶ 11. At this closing, Yip, Ng, their wives, and Chan's wife each executed personal guaranties in connection with the loans from Cathay Bank. *Id.*

Attorney Boehnert represented the Movants through August 2009, and left PS&H that same month. *Id.* at ¶¶ 3, 7. However, he has continued to represent the Movants through this present date. *Id.* at ¶ 6. The Movants also allege that PS&H—through attorneys other than Attorney Boehnert—continued to represent Tai-O through September 2010. Defs.' Mot. to Disqualify (Defs.' Mot.), Ex. B.

The crux of the Movants' motion to disqualify PS&H from representing Plaintiff hinges on the following claims from Plaintiff's Amended Verified Complaint: (1) that Yip, Ng, and Chan allegedly did not include Plaintiff as a shareholder in Tai-O and a participant in the purchase and development at the 521 Roosevelt Avenue property; and (2) that the loans were allegedly made by Silvermine Bay to Tai-O and to another entity, Pui-O—where Yip, Ng, and Chan were also shareholders—which in turn lent money to Tai-O. With respect to the first claim, the Movants argue that PS&H's representation of the Movants included creating Tai-O and financing, purchasing, and developing Tai-O's property—the same property in which Plaintiff seeks an ownership interest. Regarding the second claim, the Movants contend that many of the loans which form the basis for Plaintiff's claims against the Movants and 521 occurred while PS&H was representing and advising the Movants regarding the purchase, development, and financing of the property at issue. According to the Movants, they have not consented to PS&H's representation of Plaintiff in the instant action.

II

Standard of Review

Though the Rhode Island Supreme Court has not expressly adopted a standard of review for a motion to disqualify an attorney from a case, it has expressed on numerous occasions that the proponent of a motion to disqualify has a high burden to meet. *See, e.g.*, *In re Yashar*, 713 A.2d 787, 790 (R.I. 1998) (party seeking disqualification of a judge based on alleged prejudice carries a substantial burden of establishing that the actions of the judge were affected by facts and events which were not pertinent nor before the court); *Olivier v. Town of Cumberland*, 540 A.2d 23, 27 (R.I. 1988) (quoting *Sellers v. Superior Court*, 154 Ariz. 281, 289, 742 P.2d 292,

300 (1987)) ("[T]he appearance of impropriety alone is 'simply too slender a reed on which to rest a disqualification order except in the rarest of cases.'").

Furthermore, this Court and the United States District Court for the District of Rhode Island have addressed, on numerous occasions, the standard of review for a motion to disqualify counsel. "A party seeking disqualification of an opposing party's counsel bears a 'heavy burden of proving facts required for disqualification.'" *Haffenreffer v. Coleman*, 2007 WL 2972575, at *2 (D.R.I. 2007) (quoting *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 792 (2d Cir. 1983); *see also Jacobs v. E. Wire Prods. Co.*, No. PB-03-1402, 2003 WL 21297120, at *2 (R.I. Super. May 7, 2003) ("Because motions to disqualify are viewed with disfavor a party seeking to disqualify carries a heavy burden and must satisfy a high standard of proof.").

III

Analysis[1]

A

The Movants' Motion Is Not Waived and Is Timely

Plaintiff argues that the Movants have waived their right to seek PS&H's disqualification because of their "dilatory inaction." Specifically, Plaintiff claims that Yip and Ng have been defendants in this action since the beginning, and that they were aware of Attorney Boehnert's representation of them when he was at PS&H. Furthermore, although Tai-O was added as a party in September 2017, Plaintiff claims that Yip and Ng were "keenly aware from the beginning that

[1] This Court notes at the outset that the parties disagree at various points whether Rule 1.9(a)—and thus also Rule 1.10(a)—or Rule 1.10(b) of the Supreme Court Rules of Professional Conduct applies to this case. As further elaborated below, this Court finds that there has been a Rule 1.9(a) and 1.10(a) violation with respect to the current attorneys at PS&H and thus will not discuss Rule 1.10(b).

[Plaintiff] was alleging that Yip and Ng, instead of distributing profits of Silvermine Bay to its shareholders, diverted those profits to invest in other real estate ventures they controlled."

In response, the Movants argue that it was only the filing of the Amended Verified Complaint in September 2017 that made this case substantially related to PS&H's prior representation of the Movants. The Movants contend that Plaintiff's original Verified Complaint concerned only Silvermine Bay, an entity with which PS&H had no prior involvement. According to the Movants, only after Plaintiff filed his Amended Verified Complaint did he implicate PS&H's prior Tai-O Entities' representation.

Numerous jurisdictions have held that the failure to make a reasonably prompt motion to disqualify counsel can result in waiver. *See, e.g., Campbell v. Bank of Am., N.A.*, 155 A.D.3d 820, 823 (N.Y. App. Div. 2017); *Zelda Enters., LLLP v. Guarino*, 343 Ga. App. 250, 253, 806 S.E.2d 211, 214 (2017); *Thomas v. Cook*, 170 So. 3d 1254, 1261-62 (Miss. Ct. App. 2015). However, a mere delay in bringing a motion for disqualification for a potential breach of the attorney-client privilege with respect to a former client will not bar the motion. *See Kevlik v. Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984) ("[The court] must note that it is hard to see how delay alone will benefit the plaintiffs and prejudice the defendant. In any event, the need for upholding high ethical standards in the legal profession far outweighs the problems caused by the delay in filing the disqualification motion."); *see also* R.I. Supreme Court Ethics Advisory Panel Opinion No. 1989-07 (citing with approval *Kevlik*).

Regardless of whether delay alone can waive a party's disqualification motion, this Court finds that the Movants did not delay in bringing their motion to disqualify PS&H. The Movants are correct that the original Verified Complaint, filed on March 30, 2015, only sought claims involving Silvermine Bay and did not make any claims involving the Tai-O Entities. *See*

Verified Compl. ¶¶ 1, 5. The Movants have conceded, and this Court has confirmed through the evidence presented before it, that PS&H had no prior involvement with Silvermine Bay. It was not until September 5, 2017 when Plaintiff amended his Verified Complaint and added claims involving the Tai-O Entities that PS&H assisted in forming and structuring. *See* Am. Verified Compl. ¶¶ 1, 7. Nearly two months later, on November 2, 2017, the Movants filed their disqualification motion. Therefore, a disqualification motion would not have been ripe until the Amended Verified Complaint was filed when the Tai-O Entities were added to the case. *See Richman v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 2013 WL 3357115, at *4 n.2 (Nev. 2013) (finding that defendants' motion to disqualify plaintiffs' counsel was timely because defendants could not adequately file such motion before plaintiffs filed complaint since its contents would have been unknown). Furthermore, Plaintiff has provided no evidence indicating that the Movants were expecting Plaintiff to claim an ownership interest in the Tai-O Entities before the Amended Verified Complaint was filed. *See Valencia v. Ripley*, 128 A.D.3d 711, 713 (N.Y. App. Div. 2015) (record reflected that defendant was aware of potential conflict for at least eight months before bringing disqualification motion, and court thus determined she waived any objection to plaintiff's choice of counsel). For these reasons, this Court finds that the Movants' motion to disqualify is timely.

B

Substantial Relationship Between the Prior and Current Representations

Movants argue that PS&H's prior representation of the Movants is substantially related to this matter wherein PS&H is representing Plaintiff, an adverse party to the Movants. Specifically, Plaintiff is seeking a declaration that he has "an equal ownership interest in all of the entities comprising the Tai-O Group and in the real estate owned by those entities." Am.

Verified Compl. ¶ 7. The Movants argue that PS&H not only incorporated the Tai-O Entities and documented the allocation of ownership interests therein, but also represented them in acquiring the very same real estate in which Plaintiff is now seeking an ownership interest. In response, Plaintiff argues that notwithstanding the Movants' review of the files in PS&H's possession, they have failed to prove that the work Attorney Boehnert and other PS&H attorneys performed involved the same matter or was substantially related to the issues at bar in this case.

Rule 1.9(a) of the Supreme Court Rules of Professional Conduct states:

> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Supreme Court R. of Prof. Conduct 1.9(a) (emphasis added).

"[T]he test for determining whether matters are substantially related has been 'honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is patently clear or when the issues are identical or essentially the same.'" *Brito v. Capone*, 819 A.2d 663, 665 (R.I. 2003) (quoting *Am. Heritage Agency, Inc. v. Gelinas*, 62 Conn. App. 711, 774 A.2d 220, 230 (2001) (internal quotation marks omitted)).

From 2004 to 2010, PS&H represented the Movants as well as Tai-O General Partner, Inc. and Tai-O Limited Partner, Inc. Said representation was for a variety of business matters, including the following: (1) the structuring of the Tai-O Entities, including determining how particular corporate structures would serve or harm the particular interests of the individual clients; (2) the formation of the Tai-O Entities, including the drafting of articles of incorporation, bylaws, and partnership agreements, and the allocation of ownership interests and corporate responsibilities among particular individuals; (3) Tai-O's financing and acquisition of its real

estate; and (4) researching issues of Rhode Island law, including equitable interests in real property. At least four attorneys involved in the prior representation still work at PS&H today, and, as recently as 2014—only one year before Plaintiff filed the instant suit—PS&H was retrieving and sending copies of its Tai-O files to the Tai-O Entities. *See* Defs.' Resp. in Supp. of Mot. to Disqualify (Defs.' Response), Ex. A.

As noted, in September 2017, Plaintiff amended his Verified Complaint and claimed an ownership interest in the Tai-O Entities and their real estate. *See* Am. Verified Compl. at ¶ 7 ("Plaintiff seeks . . . a declaratory judgment that an implied partnership exists in which Plaintiff has an equal ownership interest in all of the entities comprising the Tai-O Group and in the real estate owned by those entities . . . ."). PS&H not only incorporated the Tai-O Entities and documented the allocation of ownership interests therein, but also represented them in acquiring the very same real estate in which Plaintiff is now seeking an ownership interest.

There is no Rhode Island case law brought to this Court's attention that further defines whether matters are substantially related for Rule 1.9(a) purposes, nor any that squarely address real estate transactions and corporate formation in the context of Rule 1.9(a).[2] However, the Rhode Island Supreme Court Ethics Advisory Panel has compared the subject matter of the prior and current representation to determine whether they were substantially related under Rule 1.9. *See* Rhode Island Ethics Op. 2001-08, 17 Law Man. Prof. Conduct 744 (2001); *see also McKinney v. McMeans*, 147 F. Supp. 2d 898, 900 (W.D. Tenn. 2001) (noting that deciding a motion to disqualify requires the court to compare the subject matter of the earlier and current

[2] This Court notes that our Supreme Court adopted the Supreme Court Rules of Professional Conduct in November 1988. *See Petition of Almond*, 603 A.2d 1087, 1088 (R.I. 1992) ("Thereafter [the Rhode Island Supreme Court] entered an order dated November 1, 1988, adopting the proposed Rules of Professional Conduct as an amendment to Supreme Court Rule 47 effective November 15, 1988.").

representations). With this approach in mind, this Court turns to other jurisdictions for guidance. In *R & D Muller, Ltd. v. Fontaine's Auction Gallery, LLC*, the plaintiff sought to pierce the corporate veil of two defendant business entities alleging that they failed to secure corporate formalities, had nonfunctioning offices or directors, and failed to maintain corporate records. 906 N.E.2d 356, 357-58 (Mass. App. Ct. 2009). The defendants then filed a motion to disqualify the plaintiff's attorney because approximately twenty years prior to the suit, he had helped incorporate one of the business entities, advised on the proper maintenance of the corporate formalities, and reminded the owner of the entity to maintain the corporate records. *See id.* at 358. The Appeals Court of Massachusetts affirmed the disqualification of the plaintiff's counsel, finding that the attorney advised the owner and the business entity with respect to corporate formalities and provided them with "backdated corporate resolutions to facilitate [the owner's] belated compliance." *Id.* at 359. For these reasons, "the judge could conclude in his discretion that [the attorney] had been exposed to confidential information germane to the present dispute and that the current and former matters are substantially related . . . ."[3] *Id.*; *see also Avigdor v. Rosenstock*, 16 N.Y.S.3d 791, at **12-13 (N.Y. Sup. 2015) (holding that—in lawsuit where plaintiff sought a twenty percent stake in defendant corporation—defendant's allegation that subject real estate had been purchased with embezzled funds was substantially related to defendant's attorney's prior representation of plaintiff with the attempted sale of the same real estate); *Burnett v. Olson*, No. CIV.A 04-2200, 2005 WL 711602, at **5-6 (E.D. La. Mar. 18, 2005) (holding that counsel for plaintiff—an investor of defendant cruise ship corporation—was

[3] With respect to conflicts with former clients, Massachusetts has adopted the same rule that this jurisdiction follows. *See* Mass. R. Prof. C. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

properly disqualified in lawsuit seeking to pierce the corporate veil where attorney previously represented one of the shareholders in creating and structuring a different cruise ship corporation during the same time period). These cases, therefore, demonstrate that a prior representation regarding a corporation's structure and formation is substantially related to a current representation attacking that same corporate form and structure.

Here, PS&H represented the Movants in structuring and forming the Tai-O Entities, and PS&H is now representing Plaintiff—a party materially adverse to the Movants—who questions the very structure and formation of the Tai-O Entities the law firm created approximately thirteen years ago. *See R & D Muller, Ltd.*, 906 N.E.2d at 359; Rhode Island Ethics Op. 2001-08. Importantly, it is now clear to this Court that one attorney who is still at the law firm—Attorney Cassara—performed significant work in structuring and forming the Tai-O Entities. On November 12, 2004, Attorney Cassara received an email from Attorney Boehnert asking for his assistance in creating the Tai-O Entities. *See* Defs.' Response, Ex. 1. On December 6, 2004, Cassara instructed a PS&H paralegal as to the scope of the Tai-O partnership's purpose, which was to

> "acquire (by purchase, lease, or otherwise), hold, own, develop, construct, invest in, subdivide, improve, operate, maintain, assign, sell, convey, lease, mortgage, hypothecate, dispose of, and otherwise deal with the Property and to engage in any and all other activities permitted under the Act which the Partners shall deem necessary to the foregoing or in the best interests of the Partnership."[4] Defs.' Response, Ex. C.

Cassara thereafter drafted and revised Tai-O's partnership agreement and shareholder contribution agreement, and forwarded a copy to Attorney Boehnert on December 6, 2004. *See*

[4] As noted above, the Amended Verified Complaint has placed the Tai-O Entities' scope and purpose directly into issue in connection with Plaintiff's new allegations that he was (or should be deemed) a partner in the Tai-O Entities. *See* Am. Verified Compl. ¶ 7.

Defs.' Response, Exs. D, E, F. On December 8, 2004, Bob Buco (Buco)—Tai-O's accountant—sent an email to Attorney Boehnert with the names of the partners and shareholders and their social security numbers. *See* Defs.' Response, Ex. G. Attorney Boehnert replied, copying Cassara on the email and advising that the shareholders should seek subchapter S status. *See id.* Attorney Cassara then instructed a PS&H paralegal to revise the articles of incorporation to conform to Buco's email. *See id.* Over the next few weeks during that time, Attorney Cassara performed, *inter alia*, work regarding the drafting of the shareholder contribution agreements and company formations and structures, and a PS&H paralegal would inform Attorneys Cassara and Boehnert of conversations she would have with Buco. *See R&D Muller, Ltd.*, 906 N.E.2d at 359; Defs.' Response, Exs. F, H, I, J, K, L, M.

The subscriptions for shares that Attorney Cassara had participated in drafting, and which were ultimately executed, expressly stated that "Mr. Yip and Mr. Ng are all of the shareholders of TAI-O General Partner, Inc." and "Mrs. Ng, Mrs. Chan, and Mrs. Yip are all of the shareholders of TAI-O Limited Partner, Inc." Defs.' Response, Exs. N, O. These provisions are being challenged by Plaintiff through PS&H, the same law firm that represented the Movants in drafting these documents. *See Brito*, 819 A.2d at 666; Am. Verified Compl. ¶ 7; *see also Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 933 (8th Cir. 2014) (current representation adverse to former client was substantially related to prior representation where it involved lawyer attacking own work for former client); *In re Taylor*, 67 S.W.3d 530, 533-34 (Tex. App. Ct. 2002) (same). Furthermore, the bylaws that Attorney Cassara and a paralegal drafted during this time frame also contained restrictions on the transfer of shares in the Tai-O Entities, and the Certificate of Limited Partnership reiterated such transfer restrictions. *See* Defs.' Response, Exs. P, Q, R. In addition to limiting the shareholders to the individuals mentioned above, Attorney

Cassara also inserted provisions into both shareholder contribution agreements providing that any shareholder who failed to make contributions of capital when due would see his or her ownership interest reduced proportionately. *See* Defs.' Response, Exs. N, O. Furthermore, on July 6, 2005, Attorney Cassara and his paralegal billed two hours for a meeting with Ng to review and execute the Tai-O formation documents and to instruct him to obtain the signatures of all the other shareholders and directors. *See* Defs.' Response, Ex. S. These consents, which Attorney Cassara drafted, stated that the undersigned were "all of the shareholders and all of the directors," and omitted Plaintiff's name.[5] *See* Defs.' Response, Ex. T.

Based on this evidence, this Court finds that these provisions in the bylaws and subscription agreements—which Attorney Cassara and a PS&H paralegal drafted—are directly relevant to the subject matter of Plaintiff's claim in this case that, notwithstanding that he never contributed funds to the Tai-O Entities and notwithstanding that the other shareholders never consented to transferring any shares to him, he has been a shareholder in each of the Tai-O Entities. *See R & D Muller, Ltd.*, 906 N.E.2d at 359; *Avigdor*, 16 N.Y.S.3d 791, at **12-13; *Burnett*, 2005 WL 711602, at **5-6; Am. Verified Compl. ¶ 7. This claim is substantially related to the documents that Attorney Cassara—a present PS&H attorney—previously drafted and effectuated on the Movants' behalf. *See R & D Muller, Ltd.*, 906 N.E.2d at 359; *Avigdor*, 16 N.Y.S.3d 791, at **12-13; *see also* Supreme Court R. of Prof. Conduct 1.9, cmt. 1 ("Under this Rule . . . a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.").

Moreover, this Court finds that Attorney Cassara's affidavit is inconsistent with the evidence presented. Attorney Cassara stated in his affidavit that he "had no interaction

[5] After not hearing from Ng for the next few months, Cassara and his paralegal sent a follow-up letter in September 2005 to Yip and Ng. *See* Defs.' Response, Ex. V.

whatsoever with the client or its agents and communicated only with Mr. Boehnert." *See* Attorney Cassara's Aff. ¶ 5. While this Court accepts PS&H's claim that the attorneys involved did not review the files delivered to the Movants with respect to this motion "to avoid a Catch-22 type predicament in the event that the files contained information protected by Rules 1.6 and 1.9(c)," it is well settled that "'a lawyer may not represent an adversary of his [or her] former client if the subject matter of the two representations is substantially related, which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second.'" *Kevlik*, 724 F.2d at 851 (quoting *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983)) (internal quotation marks omitted); *see also* R.I. Supreme Court Ethics Advisory Panel Opinion No. 1989-07 (citing with approval *Kevlik* and finding that even though inquiring attorney did not believe he learned anything from former client which was pertinent to his representation of present client's adverse interests, attorney could not represent present client's position without both clients' informed consent). Based on evidence above presenting Attorney Cassara's prior representation, it is clear that he could have, and arguably did, obtain confidential information that is relevant to Plaintiff's representation.[6] For the foregoing reasons, this Court finds that PS&H's prior representation of the Movants and its current representation of Plaintiff are substantially related.

[6] While this Court appreciates the PS&H attorneys submitting their respective affidavits, based on the newly presented evidence this Court finds them to be equivocal and inconsistent. Specifically, Attorney Hahn states in his affidavit that Attorney Boehnert drafted his opinion letter and that Attorney Boehnert billed for a conference with him. *See* Attorney Hahn Aff. ¶¶ 4-5. However, it was actually two other attorneys who are no longer at PS&H that performed such work. *See* Defs.' Response, Exs. W, X, Y. Moreover, Attorney Hahn, Attorney Darigan, and Attorney Kessimian assert most of their testimony by information and belief, and all PS&H attorneys insist that they have not reviewed the evidence for fear of being exposed to confidential information. As further elaborated below, while this Court accepts PS&H's position and considers their affidavits as a good faith attempt to resolve the issue, the matters are nonetheless substantially related and thus carry with them an irrebuttable presumption that client confidences were obtained in the prior substantially related matter.

Regardless, even if the PS&H files did not contain client confidences, many jurisdictions find that if the prior matter is substantially related to the present matter, there is an irrebuttable presumption that client confidences were obtained in the prior matter. *See, e.g.*, *In re Marriage of Newton*, 955 N.E.2d 572, 583 (Ill. App. Ct. 2011); *Attorney Grievance Comm'n of Md. v. Siskind*, 930 A.2d 328, 337 (Md. 2007); *Sullivan Cty. Reg'l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 757-58 (N.H. 1996); *Chrispens v. Coastal Ref. & Mktg., Inc.*, 897 P.2d 104, 114 (Kan. 1995). For example, Rule 1.9 of the Oklahoma Rules of Professional Conduct[7] seemingly includes an irrebuttable presumption when it has been proven that an attorney-client relationship exists and that the present litigation involves a matter that is substantially related to a prior matter. *See United States v. Stiger*, 413 F.3d 1185, 1196 (10th Cir. 2005) *rev'd on other grounds, Alleyne v. United States*, 570 U.S. 99, 112-13 (2013). This irrebuttable presumption recognized by the Tenth Circuit was found to be consistent with a comment to Rule 1.9 of the Oklahoma Rules of Professional Conduct, which states:

> "'A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.'" *Accounting Principals, Inc. v. Manpower, Inc.*, 599 F. Supp. 2d 1287, 1292 (N.D. Okla. 2008) (quoting Okla. R. Prof. C. 1.9(a), Cmt.).

Importantly, Rule 1.9 of the Rhode Island Supreme Court Rules of Professional Conduct has the same comment. *See* Supreme Court Rules of Prof. Conduct 1.9, cmt. 3. Therefore,

[7] With respect to conflicts with former clients, Oklahoma has adopted the same rule that this jurisdiction follows. *See* Okla. R. Prof. C. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

consistent with the reasoning of many jurisdictions in this country, this Court recognizes that Rhode Island's Rule 1.9 carries with it an irrebuttable presumption that client confidences were obtained in a prior matter if that prior matter and the current matter are the same or substantially related. *See Hybrid Kinetic Auto. Holdings, Inc. v. Hybrid Kinetic Auto. Corp.*, 643 F. Supp. 2d 819, 824-25 (N.D. Miss. 2009); *Exterior Sys., Inc. v. Noble Composites, Inc.*, 175 F. Supp. 2d 1112, 1116 (N.D. Ind. 2001); *Greig v. Macy's Ne., Inc.*, 1 F. Supp. 2d 397, 402 (D.N.J. 1998); *Prisco v. Westgate Entm't, Inc.*, 799 F. Supp. 266, 271 (D. Conn. 1992); *Green v. Montgomery Cty., Ala.*, 784 F. Supp. 841, 843-44 (M.D. Ala. 1992).[8] For these reasons, then, since this Court has found that the prior representation and the current representation are substantially related, there is an irrebuttable presumption that PS&H also obtained client confidences of the Movants in the prior representation.

Finally, no evidence has been presented indicating that Rule 1.10(a) is inapplicable to this case. Rule 1.10(a) states the following:

[8] The Movants maintain that *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Labs., Inc.*, 607 F.2d 186 (7th Cir. 1979) and *Reilly v. Comput. Assocs. Long-Term Disability Plan*, 423 F. Supp. 2d 5 (E.D.N.Y. 2006) do not permit PS&H to rebut this irrebuttable presumption. This Court agrees. Both cases were decided under old ethics canon laws that have since been repealed by their respective jurisdictions, and both jurisdictions have since adopted an irrebuttable presumption for client confidences. *See Franzoni v. Hart Schaffner & Marx*, 726 N.E.2d 719, 726 (Ill. App. Ct. 2000) ("Once a substantial relationship is found between the prior and present representations, it is irrebuttably presumed that confidential information was disclosed in the earlier presentation."); *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 707 N.E.2d 414, 416 (N.Y. 1998) (noting that even when old canon law was still in effect, that "[o]nly where the movant satisfies all three inquiries [establishing attorney-client relationship between opposing counsel and movant, matters involved in both representations are substantially related, and interests of present and former client are materially adverse] does the irrebuttable presumption of disqualification arise"); *O'Rourke v. O'Rourke*, 936 N.Y.S.2d 59, at *4 (N.Y. Sup. Ct. 2011) ("Disqualification is mandatory irrespective of any actual detriment, *i.e.* even when there may not in fact be any conflict of interest; if the criteria set forth in the Rule are found to exist, an irrebuttable presumption of disqualification arises."). Therefore, even if these jurisdictions were controlling here, an irrebuttable presumption would still exist and favor disqualifying PS&H.

> "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 Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Supreme Court R. of Prof. Conduct 1.10(a); *see also Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995) ("Rule 1.10 . . . prohibits lawyers associated in a firm from representing a client when any one of them practicing alone would be prohibited from doing so.").

The comments under Rule 1.10(a) further suggest that an example of "a personal interest of the prohibited lawyer" would be if the lawyer could not represent the client because of strong political beliefs. Supreme Court R. of Prof. Conduct 1.10(a), cmt. 3. In such a circumstance, only the lawyer would be disqualified, but the remaining lawyers in the law firm could still represent the client. *Id.* Here, the conflict is not based on personal interests, but rather from representing a former client and endangering the principle of loyalty to that former client as protected under this Rule and Rule 1.9. *See id.* at cmt. 2; *Ogden Energy Res. Corp. v. State of R.I.*, No. Civ. A. No. 92-0600T, 1993 WL 406375, at *1 (D.R.I. June 23, 1993). For this reason, in disqualifying the current lawyers at PS&H who formerly represented the Movants, this Court also finds that the entire law firm is also disqualified under Rule 1.10(a).

IV

Conclusion

For the foregoing reasons, this Court finds that PS&H is disqualified from representing Plaintiff in this matter under Rules 1.9(a) and 1.10(a) of the Rhode Island Supreme Court Rules of Professional Conduct. Counsel shall present the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**David L. Quinn v. Louis Yip, et al.**
CASE NO:	**KC-2015-0272**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**July 20, 2018**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Jeffrey H. Gladstone, Esq.** **Steven E. Snow, Esq.**
For Defendant:	**Jeffrey B. Pine, Esq.; William J. Lynch, Esq.;** **Stephen P. Sheehan, Esq.; Max Wistow, Esq.**
For Interested Parties:	**Mark T. Buben, Esq.; Stephen F. DelSesto, Esq.;** **James A. Hall, Esq.**