EFiled: Mar 25 2004 3:26PM EST
Filing ID 3322129

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT I. UNANUE, FRANCISCO R. UNANUE and GOYA FOODS, INC.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 204-N
JOSEPH A. UNANUE,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: March 9, 2004
Decided: March 25, 2004

William J. Marsden, Jr., Esquire of FISH & RICHARDSON P.C., Wilmington, Delaware, Attorneys for Plaintiffs

Collins J. Seitz, Jr., Esquire of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware, Attorneys for Defendant

PARSONS, Vice Chancellor.

This action arises out of a dispute over the control of Goya Foods, Inc. ("Goya"). Goya is closely held by the Unanue family. Before the actions at issue in this litigation, the Goya board of directors consisted of three Unanue family members, Joseph A. Unanue ("Joseph"), Robert I. Unanue ("Robert") and Francisco R. Unanue ("Frank"). Robert, Frank and Goya brought this action pursuant to 8 *Del. C.* § 225 seeking, among other things, a declaratory judgment that certain written consents removing Joseph from the board and as chairman of the board of directors were valid. Currently before the Court is Plaintiffs' motion to disqualify Michael A. Griffinger, Esquire and his law firm, Gibbons, Del Deo, Griffinger & Vecchione, P.C. (the "Gibbons Firm") from representing Joseph in this action. For the reasons stated below, the Court will deny the motion for disqualification.

I. BACKGROUND

Goya is a closely held Delaware corporation and the largest Hispanic owned company in the United States. It has been family owned and operated since its founding in 1936 by Spanish immigrants Prudencio Unanue ("Don Prudencio") and his wife Carolina Unanue. Don Prudencio and Carolina had four sons, Joseph, Anthony, Frank and Ulpiano (known as "Charles"), all of whom were active in the family business as stockholders, officers, and directors of Goya and related businesses. Today Goya's voting stock is owned by two estates and 17 "third generation" members of the Unanue family and related trusts.

Plaintiffs Robert and Frank are among the third generation stockholders and are members of Goya's board of directors. Between January 22 and 24, 2004, 12

stockholders representing over 62 percent of the outstanding shares of Goya purportedly executed written consents containing resolutions: (1) removing Joseph as a director; (2) removing Joseph as chairman of the board; and (3) authorizing the remaining members of the board, i.e., Robert and Frank, to take all necessary or appropriate actions to carry out Joseph's removal.

On February 3, 2004, Goya's board of directors purportedly voted to dismiss Joseph as Goya's Chief Executive Officer and his son, Andy Unanue ("Andy"), as Chief Operating Officer. On the same day, Robert, Frank and Goya filed this section 225 action for a declaratory judgment validating the removal of Joseph and related relief.[1]

On February 11, 2004, the Court granted a motion to admit Griffinger, a New Jersey attorney, *pro hac vice* on behalf of Joseph Unanue. Plaintiffs filed the present motion to disqualify Griffinger and the Gibbons Firm on the basis of Rules 1.7 and 1.9 of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") or the equivalent New Jersey ethical rules.[2]

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[1] Plaintiffs filed an amended complaint on February 6, 2004 supplementing the allegation that Joseph would contest the decision to remove him as a director and chairman of Goya's board. Plaintiffs also filed a motion for leave to file a second amended complaint seeking additional determinations that: Robert is president of Goya and chairman of its board of directors; Joseph was terminated as CEO and from all other positions that he may have held with Goya as of February 3, 2004; and Andy Unanue was terminated as COO and Vice President and from all other positions that he may have held with Goya as of February 3, 2004. Schiavone Aff. Ex. 22.

[2] There is some dispute as to whether the New Jersey or Delaware ethical rules govern this motion. Generally DLRPC 8.5 determines the choice of law with respect to the ethical rules. This is an action under section 225 of the Delaware

Griffinger represented 16 grandchildren of Prudencio Unanue, including Robert and Frank, in an action by Charles Unanue over the estate of Prudencio (the "Charles litigation"). That litigation began in 1987 and continued until 1998. Charles acknowledged that he had signed agreements in the early 1970s waiving his right to inherit from Prudencio. Charles argued, however, that Prudencio was domiciled in Puerto Rico at the time of his death and that under the governing law of Puerto Rico he could not be disinherited.[3] Because a significant portion of Charles's inheritance would have been Goya stock, the Charles litigation "related to the control of the Goya companies."[4] More specifically, it related to Prudencio's domicile at the time of his

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General Corporation Law, in a Delaware court. All parties have retained local counsel and their New Jersey counsel are admitted *pro hac vice*. However, the actions forming the basis of this motion were by New Jersey attorneys and took place in New Jersey. Because this action is in a Delaware court and the ultimate inquiry focuses on the effect of the challenged representation on the fairness and integrity of these proceedings, the Court will refer to the Delaware ethical rules. For purposes of the issues presented here, however, the rules are essentially the same.

The parties have stipulated that the Court's decision on the motion in this litigation will also control the disposition of a similar motion in a related action in Bergen County, New Jersey. The Court does not have all the papers in the New Jersey action or the authority to regulate the conduct of the attorneys in the New Jersey proceedings. Therefore, the Court will address only the facts alleged in the action before it.

3 *See In re Unanue*, 605 A.2d 279, 281 (N.J. Super. L. Div. 1991), *aff'd*, 710 A.2d 1036, 1039 (N.J. App. Div. 1998).

4 Plaintiffs' Opening Brief ("POB") at 24. Goya intervened in the action and sought damages. POB at 9. Although Goya and the grandchildren were represented by separate counsel, the litigation was conducted under a joint defense agreement with Griffinger as lead counsel. Furthermore, Goya paid the counsel fees. POB at 9.

death. Robert testified at trial regarding his childhood memories of Prudencio's home and his health in 1974.[5] Griffinger prepared Robert for his trial testimony and defended Robert's credibility in post-trial briefing.[6]

After the Charles litigation concluded, related litigation continued throughout the 1990's and even through 2003.[7] Griffinger represented the grandchildren in the original post-trial proceedings and the collection efforts arising out of the various judgments ultimately entered. Skadden, Arps, Meagher, Slate & Flom LLP represented the Goya side in most of the later proceedings related to the Charles litigation. The Gibbons Firm did appear, however, in certain proceedings in New Jersey.[8]

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5 Griffinger Aff. ¶ 6 and Ex. B.

6 Schiavone Aff. Exs. 8 and 10.

7 On September 8, 2003, Griffinger notified Goya that his firm's most recent representation had concluded. Griffinger Aff. Ex. D. The opposing party, however, subsequently filed a motion for reconsideration. Griffinger filed Goya's response to this motion. Thereafter, on November 19, 2003, Griffinger again wrote to Goya and indicated that the representation had concluded. *Id.* Ex. E. The court decided the motion on December 10, 2003. Defendant alleges that, in light of Joseph's dispute with his fellow directors and family members, Robert and Frank, the Gibbons Firm was attempting to clarify the status of its attorney-client relationship as recommended in comment 4 to Rule 1.3 of the Rules of Professional Conduct. *See* Defendant's supplemental letter brief ("DSLB") at 6. Plaintiffs characterize Griffinger's actions more harshly, accusing him of trying to drop Goya as a client like a "hot potato." Plaintiffs' Reply Brief at 16-17.

8 Griffinger Aff. ¶ 10. The New Jersey proceedings included the litigation referred to in note 7, *supra*. That case involved a motion to quash a subpoena served upon Charles's former counsel in the District of New Jersey. *Id.*

Griffinger and his firm also represented Goya in other matters. They included unspecified tax counseling and local real estate tax litigation,[9] as well as corporate, estate planning, and labor and employment matters.[10]

In August 2003, Griffinger began to represent Joseph and Andy and to advise them "regarding their duties as corporate officers in connection with disputes within [Goya's] Board of Directors."[11]

In late January 2004, Robert and Frank obtained the written consents.[12] On January 29, 2004 Goya held a board meeting at which Joseph, Robert, and Frank were present. At that meeting Goya was represented by its outside counsel, Barry H. Garfinkle of Skadden Arps, and its in-house counsel, Ira Matetsky. Brian Foremny also attended as counsel for Robert and Frank, and Griffinger attended as counsel for Joseph.[13] On February 3, 2004, the written consents were delivered to Goya's registered office and notice of the actions by written consent was provided to Joseph and to those who had not

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9 Griffinger Aff. ¶¶ 11-13.

10 POB at 14-15.

11 Griffinger Aff. ¶ 14. Plaintiffs contend that Griffinger was also advising Joseph "how to delay 'final board action' on the votes taken by [Goya's] Board of Directors." Plaintiffs' supplemental letter brief ("PSLB") at 2. Plaintiffs, however, produced nothing beyond their conclusory allegations to support that accusation. *Id.* In any event, for purposes of the motion to disqualify, the Court finds it unnecessary to resolve this factual dispute.

12 F. Unanue Aff. ¶ 19.

13 Schiavone Aff. Ex. 18 (Transcript of February 9, 2004 interview of Matetsky at 150).

provided written consents, and Joseph was thereby removed from the board of directors and as chairman. This action under DGCL § 225 was filed the same day. Trial is scheduled for April 29 and 30, 2004.

II. ANALYSIS

Plaintiffs contend that Griffinger's representation of Joseph in this litigation violates Rules 1.7 and 1.9 of DLRPC. The Court has the inherent power to supervise the professional conduct of attorneys appearing before it.[14] Although this power includes the authority to disqualify an attorney, disqualification motions are generally disfavored.[15] For that reason, the party seeking disqualification must show that continued representation would be impermissible.[16] "A movant for disqualification must have evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice."[17] The Court also notes that it is not the primary disciplinary authority for enforcement of the ethical rules.[18]

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14 *See Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 581 (D. Del. 2001).

15 *Id.*

16 *Id.*; *see also Kanaga v. Gannett Co.*, 1993 WL 485926, at *2 (Del. Super. Oct. 21, 1993).

17 *Id.* Vague and unsupported allegations are not sufficient to meet this standard. *Elonex*, 142 F. Supp. 2d at 581.

18 In Delaware that function is served by the Delaware Supreme Court, the Board of Professional Responsibility and the Office of Disciplinary Counsel. Del. Supr. Ct. R. 62 and 64; *see also* Delaware Lawyers' Rules of Disciplinary Procedure; *In re Infotechnology, Inc.*, 582 A.2d 215, 216-17 (Del. 1990).

Disqualification of counsel is a remedy designed to ensure that a client's confidential communications to her lawyer are not used against the client when her lawyer later represents a party adverse to the former client.[19] The ethical rules provide a framework for the Court's analysis of Plaintiffs' motion. The Court's inquiry focuses on whether Griffinger's continued representation of Joseph will so undermine the integrity and fairness of the proceedings that Joseph Unanue should be deprived of the counsel of his choosing.[20]

A. The Alleged Conflicts of Interest

1. Concurrent Conflicts under Rule 1.7

Plaintiffs argue that Griffinger's representation of Joseph violates DLRPC 1.7 because it overlapped with the Gibbons Firm's representation of Goya at a time when Goya's interests were directly adverse to Joseph's.[21] Defendants counter that Joseph was not directly adverse to Goya while the Gibbons Firm was representing both clients, and

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19 *Manchester v. Narragansett Capital, Inc.*, 1989 WL 125190, at *3 (Del. Ch. Oct. 19, 1989) citing *Satellite Fin. Planning Corp. v. First Nat'l Bank*, 652 F. Supp. 1281, 1283 (D. Del. 1987).

20 *Infotechnology*, 582 A.2d at 216-17 ("Unless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice, only [the Delaware Supreme] Court has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary purposes.").

21 Plaintiffs did not raise this argument until their reply brief. At argument, therefore, the Court invited supplemental submissions on the concurrent client issues. In preparing this letter opinion, the Court has considered the additional arguments raised in Defendants' supplemental letter brief filed on March 15, 2004 and Plaintiffs' response to those arguments in a supplemental letter brief filed on March 19, 2004.

that the Gibbons Firm had terminated its relationship with Goya by November 2003 before any direct adversity had arisen.[22]

DLRPC 1.13(e) provides: "a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents subject to the provisions of Rule 1.7." DLRPC 1.7 provides (in relevant part): "a lawyer shall not represent a client if the representation involves a concurrent conflict of interests. A concurrent conflict of interests exists if: (1) the representation of one client will be directly adverse to another client . . . ."

a. During What Time Period Was There Concurrent Representation?

To evaluate Plaintiffs' claims of a concurrent conflict of interest, the Court first must determine to what extent Griffinger or the Gibbons Firm represented Goya, Robert, Frank or any of the consenting shareholders in or after August 2003, when Griffinger began representing Joseph and Andy in their personal capacities. Taking them in reverse order, the record contains no specific allegations that the Gibbons Firm represented any of the consenting shareholders in 2003. Plaintiffs point to a letter Frank's brother, Carlos Unanue, sent to the Gibbons Firm on January 23, 2004, requesting assistance on a matter relating to a Goya affiliate, Tradewind Foods.[23] Plaintiffs suggest that the letter reflects

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[22] Joseph also argues that Goya is not a proper plaintiff in this action and that, even if it were, it is not directly adverse to Joseph. As discussed in note 29, *infra*, the Court need not address the question of whether Goya is a proper plaintiff in a § 225 action

[23] C. Unanue Aff. ¶ 10.

Carlos' belief that the Gibbons Firm was the family's counsel. Griffinger sent a letter to Carlos on January 28, 2004, declining to represent Tradewind Foods in the matter in question.[24] This evidence is not sufficient to support a conclusion that Griffinger represented Joseph and Andy at the same time he or his firm was representing Carlos Unanue or any of the consenting shareholders.

As to Robert and Frank, Plaintiffs do not allege that Griffinger specifically represented either of them, as individuals, during 2003. Thus, the Court concludes that the Gibbons Firm did not concurrently represent Joseph and either Robert or Frank at any time during 2003 or 2004.

The situation with respect to Goya is more complicated. As of August 2003, when Griffinger began representing Joseph and Andy in their individual capacities, Griffinger and the Gibbons Firm had been representing Goya and its affiliates for over 15 years. Much of that representation, however, involved the Charles litigation from 1987 until approximately 1998. During 2003, the only work the Gibbons Firm did for Goya consisted of representing the company in a dispute over a subpoena in a collection proceeding stemming from the Charles litigation (the "Rennart Case") and in certain litigation in New Jersey regarding property taxes (the "Newport Case") and providing some limited general business counseling related to such things as mortgages. The

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[24] Schiavone Aff. Ex. 24.

Gibbons Firm billed Goya less than $100,000 for the work done on all of these matters collectively in 2003.[25]

In a letter dated July 17, 2003, Griffinger advised Goya that the Newport Case had been closed because the case was dismissed.[26] On September 8, 2003, Griffinger sent another letter to Goya, enclosing a "concluding bill" on the Rennart Case and noting that the Gibbons Firm considered the matter closed, since it was on appeal.[27] When the opposing side filed a motion for reconsideration, Griffinger briefly functioned on the Rennart Case again. He then sent a second "final bill" on it to Goya on November 19, 2003.[28] Based on these facts, Defendants contend that the Gibbons Firm's representation of Goya had ended by November 19, 2003.

Plaintiffs contend that Griffinger's November 19, 2003 letter to Goya did not fulfill his obligation to give written notice that he was terminating the Gibbons Firm's

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25 The total amount billed to Goya for "General Business Counseling" in 2003 was $2,205. Griffinger Aff. ¶ 13. No such work was performed after September 5, 2003, and Griffinger sent a "final bill" to Goya for that work on October 15, 2003. *Id.* Ex. G.

26 Griffinger Aff. Ex. F.

27 *Id.* Ex. D. Griffinger's Affidavit suggests that the Gibbons Firm essentially functioned in a local counsel capacity in the Rennart Case, with Goya's in-house counsel taking the laboring oar. *Id.* ¶ 10. If the Court were to treat Griffinger's letter enclosing a final bill in the Rennart Case as an attempt to withdraw from representation of Goya in that matter under DLRPC 1.16(b)(1), the question would be whether the withdrawal would have a "material adverse effect" on Goya. *See* discussion at 11, *infra*.

28 Griffinger Aff. Ex. E.

long-term, attorney-client relationship with Goya. Plaintiffs further point to the Gibbons Firm's failure to withdraw their appearance as counsel of record in the Rennart case and to return any of Goya's confidential documents to demonstrate the ineffectiveness of the purported termination. In addition, Plaintiffs argue that the Gibbons Firm should not be permitted to terminate Goya like a "hot potato" so that it can represent Joseph in this litigation.

DLRPC 1.16(b)(1) permits a lawyer to withdraw from representing a client if withdrawal can be accomplished without "material adverse effect" on the interests of the client. The "hot potato" rule is generally invoked when an attorney drops a small client in order to represent a larger client. In this case, the Gibbons Firm's relationship with Goya had long been through Joseph, as its Chairman and CEO. When Joseph's minority position on the board of directors became potentially adverse to the majority of the Goya board, Griffinger sought to distance himself and his firm from Goya. Eventually this resulted in the Gibbons Firm sending correspondence to Goya in the fall of 2003 indicating that the two or three open matters they had were now closed.

Whether the Gibbons Firm's actions were sufficient to terminate its representation of Goya in November 2003 is not entirely clear and reasonably could be questioned. The Court concludes, however, that it need not resolve that issue in the context of Plaintiffs' motion for disqualification. Griffinger's actions, while arguably close to the line, do reflect an awareness of the attendant ethical considerations. The Court also is mindful that the disputes that first appeared in the minutes of the June 30, 2003 Goya board meeting and culminated in the removal of Joseph by written consents on February 3,

2004, relate to a closely held family corporation. In such circumstances, it is not surprising that an attorney like Griffinger, who was not the company's principal outside counsel but had represented it for many years, might have a close relationship with the company's historical leadership and believe that he might be able to represent that leadership in trying to resolve various internal disagreements before any direct adversity arose between his director client and the corporation. This conclusion is buttressed by the fact that Goya is family owned and the documents in evidence reflect an apparent willingness by Robert and Frank, as well, to go to some lengths to resolve their differences with Joseph amicably without precipitating a direct confrontation. Furthermore, by the end of January 2004, at the latest, the alignment of the Gibbons Firm with Joseph should have been clear to Robert, Frank and Goya. At the board meeting on January 29, 2004, for example, Griffinger attended as Joseph's counsel and Goya, Robert and Frank each had their own separate counsel.

On the question of concurrent representation, the Court therefore concludes that for the limited purpose of the motion for disqualification Defendant has made a sufficient showing to warrant evaluating the motion on the premise that the Gibbons Firm terminated its representation of Goya by November 19, 2003. Moreover, in view of the lack of relation between the matters on which the Gibbons Firm represented Goya in 2003 and their representation of Joseph in this dispute, as well as the considerations discussed in Section II.B, *infra*, Plaintiffs failed to demonstrate any "material adverse effect" on Goya as a result of the termination of its attorney-client relationship with the Gibbons Firm in November 2003.

b. Were Joseph and Andy Directly Adverse to Goya before December 2003?

There certainly was some adversity between Joseph and a majority of the Goya board before Joseph's removal on February 3, 2004. Joseph on one hand and Robert and Frank on the other disagreed, for example, about the future business plan of Goya and about certain issues regarding salaries of family members and titles within the corporation as early as June 2003. Such disagreements are not uncommon when individuals must make decisions collectively. Robert and Frank allege that Joseph took actions to thwart the directives of a majority of the board. Joseph contends that the board had not yet finalized its decisions. The evidence on this issue is murky. One reasonable interpretation of the evidence, however, is that Joseph's interests did not become directly adverse to Goya's until after November 2003.[29]

Joseph and Robert and Frank also disagreed about actions taken by Joseph as President of Goya. In that capacity, Joseph signed certain severance agreements with five executives and three managers in late January 2004.[30] Griffinger reviewed those

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[29] There can be no dispute that by early February 2004 Goya's interests were directly adverse to Joseph's. As Griffinger admitted at oral argument, the Gibbons Firm had sued Goya by then in New Jersey seeking relief from the same actions at issue in this § 225 action. March 9, 2004 Tr. at 25-27. For this reason, the Court need not address Defendants' argument that Goya is not a proper plaintiff in this section 225 action, which appears to be a question of first impression. *See* DSLB at 3; *Agranoff v. Miller*, 734 A.2d 1066, 1070 (Del. Ch. 1999) ("I need not pass upon this issue, because plaintiffs have dropped any contention that EMS is present as 'a party asserting a statutory right to determine the composition of the board of directors of EMS'"). *See also Instituform of North America v. Chandler*, 534 A.2d 257, 270 n.11 (Del. Ch. 1987).

[30] 2d R. Unanue Aff. ¶¶ 14, 15.

agreements for Joseph and Andy after they were drafted around January 2004.[31] There is no evidence that Griffinger drafted the agreements or had authority to approve them. By late December 2003 or January 2004, however, the Gibbons Firm had terminated its representation of Goya, so there was no concurrent representation at that time.

Robert and Frank assert in support of their motion that Goya did not know that Griffinger was representing Joseph and Andy with respect to the severance agreements. But there is no indication that Goya's interests were not adequately protected by its in house and corporate counsel. In addition, Griffinger denies "giv[ing] any legal advice to anyone regarding such agreements."[32] While the possibility that Goya might not have been informed that Griffinger was representing Joseph and Andy with respect to the severance agreements may raise questions about the propriety of his actions,[33] it does not justify disqualifying the Gibbons Firm from representing Joseph in this section 225 action. In addition to the lack of prejudice discussed *infra*, the severance agreements have only marginal relevance, if any, to the narrow issues presented here.

The record also indicates that as late as mid-November, 2003 there was still a prospect that the intra-family and intra-corporate disputes could be resolved amicably. For instance, on November 18, 2003, Goya's in house counsel sent a letter to Robert and Frank expressing the hope "that any disputes among the board can be amicably resolved,

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31 Griffinger Aff. Ex. H; Schiavone Aff. Ex. 19 at 1.

32 Griffinger Aff. ¶ 19.

33 *See* DLRPC 1.13 cmt. 7.

so that the company can continue to thrive and grow under united family leadership that has brought La Gran Familia Goya so much success and prosperity in the past."[34] The letters between Robert and his Uncle Joseph reflect similar hopes.[35]

The written consents were not delivered until after the January 29, 2004 board meeting at which Goya was represented by both Ira Matetsky, its in-house counsel, and Skadden Arps. Griffinger attended the meeting on behalf of Joseph. He and the Gibbons Firm clearly were not representing Goya at that time. Thus, the Court concludes that Plaintiffs have not shown that the Gibbons Firm's representation of Joseph was directly adverse to Goya at a time when the firm was concurrently representing Goya. The facts regarding that issue may be sufficiently close that one reasonably could question the Gibbons Firm's conduct, but that alone is not sufficient to warrant denying Joseph his chosen counsel. As discussed in Section II.B, *infra*, the Court must consider whether the challenged conduct will "adversely affect the fair and efficient administration of justice."[36]

2. The Alleged Conflicts of Interest with Former Clients

Plaintiffs also argue that Griffinger's representation of Joseph is a violation of Rule 1.9 of the DLRPC because Robert, Frank and Goya are former clients of Griffinger, and he cannot satisfy the requirements for appearing against them in this action. DLRPC

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34 F. Unanue Aff. Ex. 8 (Nov. 18, 2003 letter from Matetsky to Robert and Frank).

35 *Id.* Ex. 4 at 2, Ex. 9 at 4, Ex. 10.

36 *Infotechnology*, 582 A.2d at 216-17.

1.9 (a) provides: "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 interest of the former client."

It is not disputed that Griffinger represented Robert and Frank in the Charles litigation and its progeny or that the Gibbons Firm represented Goya in a number of other matters. They are all former clients. Nor is it disputed that Joseph's interests in this litigation are materially adverse to the interests of Robert and Frank. For the reasons stated in note 29, *supra*, the Court finds that Joseph's interests also are materially adverse to Goya. The issue is whether this section 225 action is "substantially related" to the prior representation of Robert and Frank or Goya.

In determining whether two representations are substantially related, courts consider three factors: (1) the nature and scope of the prior representation; (2) the nature of the present litigation; and (3) whether in the course of the prior representation, the former client might have disclosed confidences that could be detrimental to it in the present litigation.[37]

a. Nature and Scope of the Prior Representation

As discussed above, Plaintiffs focus on Griffinger's representation of 16 grandchildren, and specifically Robert, of Prudencio Unanue in support of their motion to disqualify him from representing Joseph in this section 225 action. The Charles litigation

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[37] *Kanaga*, 1993 WL 485926, at *2 citing *Manchester*, 1989 WL 125190, at *3. The third prong of this analysis reflects the concerns addressed in DLRPC 1.9(c).

concerned the domicile of Prudencio Unanue at the time of his death. Robert testified about this issue and Griffinger prepared him for that testimony and defended his credibility in the post-trial briefing.

Although Plaintiffs also point to Griffinger's representation of Goya, they do not specify what was at issue in that representation, or more importantly, how it is substantially related to this litigation. Even "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."[38]

b. Nature of the Present Litigation

The present litigation is a section 225 action seeking a declaratory judgment that the removal of Joseph from the Goya board of directors by written consent was valid and that Robert and Frank are authorized to take the necessary actions to carry out the removal. This action is a summary proceeding by statute, and is not to be used for trying collateral issues.[39] The sole issue is whether the stockholder consents of January 22-24, 2004 are valid.

c. Detrimental Client Confidences

As discussed in section II.B, *infra*, Plaintiffs contend that there are 11 specific areas of overlap between the Gibbons Firm's prior representation of Robert and Frank

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38 DLRPC 1.9 cmt. 2.

39 *E.g.*, *Box v. Box*, 697 A.2d 395, 398 (Del. 1997).

and the current section 225 action. Since Joseph has been on the board of directors and an officer of Goya for 58 years and its president for half that time, there is no reason to expect that Griffinger's representation of Joseph is likely to result in the release of detrimental confidences of his former clients. Joseph and his son Andy undoubtedly will know virtually everything that Griffinger does in the subject areas Plaintiffs have identified.[40]

In summary, none of the relevant factors supports a finding that the action before this Court is substantially related to any of the matters in which the Gibbons Firm has represented Robert, Frank or Goya in the past. Accordingly, the Court concludes that DLRPC 1.9 provides no basis for disqualifying Griffinger or his firm.

B. The Alleged Prejudice to the Fairness and Integrity of this Proceeding

Importantly, Plaintiffs have failed to demonstrated any legitimate prejudice to Goya, or Robert and Frank by permitting the Gibbons Firm to represent Joseph in this section 225 action. Plaintiffs pointed to the following specific areas of overlap between this litigation and the Gibbons Firm's prior representations:

(1) The practice of promoting family members within the company;

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[40] *See* DLRPC 1.9 cmt. 3 ("In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation.").

The Court notes that Joseph has raised broad defenses to his removal in his answer. At oral argument Griffinger confirmed that these allegations all refer to conduct on or after January 29, 2004, by which time Griffinger only represented Joseph and his son Andy. March 9, 2004 Tr. at 25-26; *see also* Griffinger Aff. ¶ 21.

(2) The level of compensation of family members and the method of determining the same;

(3) The compensation of family members for services they may perform for various Goya companies;

(4) The policies and practices relating to severance and deferred compensation for executives and family members;

(5) The finances and profitability of Goya and its related companies;

(6) The purported "right" of each of the three sides of the family to have representation on the board of directors;

(7) Family members' access to Goya's business premises;

(8) Trading prices for dealings between and among Goya-related entities;

(9) The role and governance of the Goya advertising arm, Inter Americas Advertising, including Joseph Unanue's role and compensation;

(10) Decisions concerning investment regarding valuation of the shares, including the re-purchase from Anthony Unanue's family upon his death in 1976; and

(11) Valuation of shares for estate tax and other purposes.

Because Joseph has been on the board of directors and an officer of the corporation for 58 years, 28 of them as President, and is a member of the Unanue family, it is reasonable to conclude that he would know most, if not all, of this information. It is not credible, in light of the facts presented, to suggest that Griffinger knows more about

the above listed issues than his client Joseph. Having Griffinger represent Joseph in this section 225 action is therefore not likely to result in the release of detrimental client confidences. Thus, the Court concludes that Plaintiffs have failed to show that the participation of Griffinger and the Gibbons Firm in this action so threatens to undermine the fairness and integrity of the proceeding as to warrant their disqualification.[41]

III. CONCLUSION

Disqualification is a severe sanction and is not favored.[42] Although the issues may be close, Plaintiffs have not demonstrated the existence of a disqualifying conflict of interest. The current litigation is not substantially related to the Charles litigation in which the Gibbons Firm represented Robert and Frank and other members of the Unanue family. Nor have Plaintiffs clearly shown that Griffinger concurrently represented directly adverse clients. At most, they have raised some questions in that regard. Most importantly, the record does not suggest that any harm to Robert, Frank or Goya is likely to result from allowing the Gibbons Firm to represent Joseph. In contrast, because this is a summary proceeding with trial scheduled for April 29 and 30, 2004, disqualification of the Gibbons Firm, and the resulting need for Joseph to retain and educate new counsel on

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41 *See IMC Global, Inc. v. Mottett*, 1998 WL 842312, at *3 (Del. Ch. Nov. 12, 1998) ("Since the individual defendants had access to the information as a function of their past work for the Plaintiffs, use of the information by their lawyers in their defense is entirely appropriate.").

42 *Elonex*, 142 F. Supp. 2d at 581, 583; *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980); *See also* DLRPC Preamble ¶ 19.

the complicated history of Goya and the Unanue family, would cause significant prejudice to Joseph.

For these reasons, the Court will deny Plaintiffs' motion for disqualification. An appropriate order will be entered.