SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

OMNIVERE, LLC,

Plaintiff,

-against-

SAUL N. FRIEDMAN, SAUL N. FRIEDMAN & CO., SIMEON FRIEDMAN, BEN FRIEDMAN, INTELLIGNET DISCOVERY MANAGEMENT, LLC, and BALINT BROWN & BASRI, LLC,

Defendants.

Index No.: 154544/2016
(*Omnivere v Friedman*)

DECISION & ORDER

----------X

ROSENFELD CONSULTING, LLC,

Plaintiff,

-against-

OMNIVERE, LLC and ERIC S. POST,

Defendants.

Index No.: 651650/2015
(*Rosenfeld v Omnivere*)

----------X

MARCIE BALINT,

Plaintiff,

-against-

KOPY INTERNATIONAL LLC d/b/a SUPERIOR DISCOVERY, INTELLIGENT DISCOVERY MANAGEMENT, LLC, SIGHT, SEARCH & SELECTION, LLC, SUPERIOR GLACIER, INC., B3 LEGAL LLC, SAUL N. FRIEDMAN, EVA FRIEDMAN, SIMEON FRIEDMAN, BEN FRIEDMAN, and MORRIS FRIEDMAN,

Defendants.

Index No.: 652230/2014
(*Balint v Kopy*)

----------X

KOPY INTERNATIONAL LLC d/b/a SUPERIOR DISCOVERY, INTELLIGENT DISCOVERY MANAGEMENT, LLC, SIGHT, SEARCH & SELECTION, LLC, SUPERIOR GLACIER, INC., B3 LEGAL LLC, and MORRIS FRIEDMAN,

Third-Party Plaintiffs,

-against-

GADI ROSENFELD,

Third-Party Defendant.

----------X

MARCIE BALINT,

Index No.: 653666/2014
(*Balint v Omnivere*)

Plaintiff,

-against-

OMNIVERE, LLC,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

Saul N. Friedman, Eva Friedman, Morris Friedman, Simeon Friedman, Ben Friedman, Saul N. Friedman & Co., Intelligent Discovery Management, LLC (IDM), Balint Brown & Basri, LLC (B3), Kopy International, LLC (Kopy), Sight Search & Selection, LLC, Superior Glacier, Inc., (collectively, the Friedman Parties), and Gadi Rosenfeld move to disqualify Robert Bernstein and Eaton & Van Winkle LLP (EVW) from representing Marcie Balint and OmniVere, LLC (Omnivere) in the above actions.[1] Balint and Omnivere oppose the motions, which are consolidated for disposition.[2] For the reasons that follow, the Friedman Parties' motions are denied and Rosenfeld's motions are held in abeyance pending a hearing.

---

[1] The Friedman Parties and Rosenfeld are represented by separate counsel (respectively, Schlam Stone & Dolan LLP and Steven J. Harvis), but submitted a joint motion. The Friedman Parties, unlike Rosenfeld, were never represented by Bernstein or EVW. Thus, their standing to seek disqualification of Bernstein and EVW is addressed herein.

[2] The disqualification motion was originally filed by order to show cause on August 9, 2016 as motion sequence 001 in *Omnivere v Friedman*. While the motion purportedly seeks disqualification in all of the above captioned actions due to their relatedness, only the pleadings in *Omnivere v Friedman* were submitted to the court. To apply the motion to all of the actions,

I. Factual Background & Procedural History

While these cases are seemingly complex and have metastasized into multiple actions in this court and federal district courts in New York and Delaware, for the purposes of the instant disqualification motions, it is sufficient to explain that the actions arise from Balint's sale of her legal staffing company (B3) to the Friedman Parties. The Friedman Parties, in turn, sold B3 and another e-discovery business (IDM) to Omnivere. In 2014, Balint sued the Friedman Parties for money allegedly owed on a consulting agreement (*Balint v Kopy*), and in 2015, she sued Omnivere on those claims under a successor liability theory (*Balint v Omnivere*). These cases have been consolidated and were, until the events giving rise to the instant motions, proceeding in discovery. In September 2015, Balint settled with Omnivere, but not with the Friedman Parties. The result and terms of that settlement (which the court has reviewed and a redacted copy of which has been provided to the Friedman Parties) contributed to the conflict at the heart of the disqualification motions. In accordance with the settlement, Balint and Omnivere have joined forces, and both are now represented by Bernstein.

To explain, Bernstein, a partner at EVW, originally only represented Balint. Before Bernstein negotiated Balint's settlement with Omnivere, Rosenfeld, the former CEO of the Friedman Parties' companies (including B3 and IDM) and a post-sale consultant for Omnivere, was in an adverse litigation posture to both the Friedman Parties and Omnivere. Rosenfeld had sued Omnivere for unpaid consulting fees (*Rosenfeld v Omnivere*) and also was being sued by

---

on November 17, 2016, the Friedman Parties and Rosenfeld moved by order to show cause in *Rosenfeld v Omnivere* (Seq. 002) and *Balint v Kopy* (Seq. 003). A separate motion was not filed in *Balint v Omnivere* because, by order dated March 26, 2015 [*Balint v Kopy*, Dkt. 33], that action was joined for all purposes with *Balint v Kopy*. References to "Dkt." followed by a number refer to documents filed on the New York State Courts Electronic Filing (NYSCEF) system in *Omnivere v Friedman*. Documents filed on NYSCEF in the other above captioned actions are denoted, e.g., "*Rosenfeld v Omnivere*, Dkt. _".

the Friedman Parties (in the third-party action in *Balint v Kopy*) for allegedly committing forgery by approving a version of Balint's consulting agreement that was different from the version supposedly authorized by the Friedman Parties.

After Bernstein communicated with Rosenfeld through separate counsel (Steven J. Harvis and Ellis Mirsky), Bernstein thought Rosenfeld could aid Balint in her case against the Friedman Parties. Therefore, on October 20, 2014, Bernstein met in person with Rosenfeld and his counsel, Harvis and Mirsky. What occurred and was said at that meeting is in dispute and the contentions are discussed further below. The account in Bernstein's affirmation (Dkt. 79) contradicts the account in the affidavits and affirmations submitted by Rosenfeld (Dkt. 66 & 110), Harvis (Dkt. 111) and Mirsky (Dkt. 112). There is no question, however, that Bernstein did not receive any confidential documents from Rosenfeld that were not otherwise produced in discovery, were inevitably going to be produced in discovery, or were already in Omnivere's possession by virtue of its acquisition of B3 and IDM.[3] The issue, accordingly, is what was said.

Bernstein met with Rosnefeld to attain his cooperation as a witness for Balint. As a result of the October 20, 2014 meeting, however, Bernstein agreed to represent Rosenfeld only in his defense of the Friedman Parties' third-party claims in *Balint v Kopy*, i.e., the forgery claim. This is reflected in a retainer letter dated October 21, 2014, which was signed by Rosenfeld on October 27, 2014 (the Retainer Letter). *See* Dkt. 67. The Retainer Letter begins by referring to

[3] To the extent the documents received by Omnivere from the Friedman Parties by virtue of the sale of B3 and IDM included attorney client communications with the the Friedman Parties' counsel (no specific documents of the sort are identified on this motion), that fact is not relevant to Bernstein's possible disqualification. As noted, Bernstein never represented the Friedman Parties and, more critically, those documents would have been in Omnivere's possession regardless of whether Bernstein represented Omnivere. Any prejudice resulting from Omnivere's possession of these documents (the court is finding no such thing nor opining on their admissibility) has nothing to do with Bernstein and, therefore, is not relevant to the instant motion.

the meeting the day before and states that Rosenfeld "request[ed] that I advise you ('you') in connection with the claim asserted against you as a third party defendant in the litigation pending in New York State Supreme Court, New York County, entitled, 'Balint v. Kopy International LLC d/b/a Superior, et al, Index No. 652230/2014." *See id.* at 1. He then addresses his firm's billing ($450 to $700 per hour for him), and states that he will charge Rosenfeld $250 since he is "already representing the plaintiff, Marcie Balint" and does not expect to perform more than 20 hours work for him. *See id.*

In the fall of 2015, Bernstein, on behalf of Omnivere, informed the court that he intended to seek leave to amend the complaint in *Balint v Kopy* to add, *inter alia*, the claim that the Friedman Parties, aided by Rosenfeld, defrauded Omnivere by lying about the financial condition of B3 and IDM. This, of course, presented a conflict that required Bernstein to withdraw from representing Rosenfeld.[4] In November 2015, Omnivere's counsel withdrew from the case. Bernstein had previously informed Rosenfeld that he could no longer represent him in February 2015, and, initially, Rosenfeld indicated that he would consent to Bernstein's withdrawal as his counsel. Rosenfeld never provided such consent. On November 20, 2015, in *Balint v Kopy*, Bernstein moved by order to show cause to be relieved as Rosenfeld's counsel. Bernstein submitted an affirmation in which he explained that he informed Rosenfeld of his need

[4] Bernstein explains that he realized there was a conflict once he became aware that Rosenfeld (allegedly) was a participant in the fraud allegedly committed by the Friedman Parties against Omnivere. Bernstein explains in his affirmation that he sought, on multiple occasions, information from Rosenfeld that would have revealed this conflict, but that Rosenfeld and his other counsel, who continued to represent him, always refused to provide such information. If Bernstein's account is accurate, then it appears that Rosenfeld may have duped Bernstein into believing that his interests were not adverse to Omnivere. On the other hand, if Rosenfeld's account is accurate, then Bernstein, at a minimum, should have been aware of the possibility of a conflict. It should be noted that Rosenfeld did not sign a conflict wavier. Had he done so, the disqualification motion would have been denied. *See GEM Holdco, LLC v Ridgeline Energy Servs., Inc.*, 130 AD3d 506 (1st Dept 2015).

to withdraw in February upon receiving discovery indicating that Rosenfeld's interests were adverse to Balint's. *See Balint v Kopy*, Dkt. 43. Bernstein averred that Rosenfeld had requested Bernstein to represent him and had told Bernstein that his interests were aligned with those of Balint. *Id.* Bernstein contended that he would not have represented Rosenfeld otherwise and that Rosenfeld had been billed a total of $957.50, which was not paid. *Id.* at 4. Bernstein's motion to withdraw was granted by order dated December 1, 2015. *See Balint v Kopy*, Dkt. 48.[5]

On a conference call with the court on December 17, 2015, it was agreed that the complaint in *Balint v Kopy* would be amended for a second time, and that such new claims would be the subject of global mediation efforts, but that the fraud claim would not be added unless and until the mediation efforts failed. That being said, in light of a new action commenced by the Friedman Parties in Delaware federal district court [*Intelligent Discovery Mgmt. v OmniVere Holding Co.*, No. 15-cv-1134 (D Del)], Bernstein was concerned that delay in pleading the fraud claims in this court would permit the Friedman Parties to argue that such claims should only be maintained in the Delaware federal action (i.e., that dismissal should be granted under CPLR 3211(a)(4) due to a prior pending action). This was addressed in an order dated December 18, 2015, in which the court held that a motion to dismiss would not be granted on the basis of the pendency of the Delaware federal action. *See Balint v Kopy*, Dkt. 52.[6] The

---

[5] That same day, by order dated December 1, 2015, the court decided a motion to dismiss in *Rosenfeld v Omnivere*. *See Rosenfeld v Omnivere*, Dkt. 56 (order) & 57 (12/1/15 Tr.). At that time, Perkins Coie LLP, not Bernstein, represented Omnivere and Matthew L. Levine, PLLC represented Rosenfeld.

[6] By order dated July 15, 2016, the Delaware court agreed with Omnivere that the action belongs in New York and granted its motion to transfer venue to the Southern District of New York. *See Intelligent Discovery Mgmt., LLC v Omnivere Holding Co.*, 2016 WL 3876424 (D Del 2016). The Delaware court noted that the parties' contracted for a New York forum selection clause [*see id.* at *1], and also recounted the procedural history of the actions in this court to explain why the filing in Delaware was improper. *See id.* at *2 (discussing Omnivere's disclosed intent to assert

second amended complaint in *Balint v Kopy* was filed on January 14, 2016. *See Balint v Kopy*, Dkt. 55. In mid-April 2016, the court was notified that the parties' mediation efforts did not result in a settlement.[7]

On May 27, 2016, rather than add fraud claims in *Balint v Kopy* as contemplated, Omnivere commenced a new action (*Omnivere v Friedman*) in which its complaint asserts causes of action for fraud, breaches of the asset purchase agreement governing the sale of B3 and IDM to Omnivere, and conversion. *See* Dkt. 1. After *Omnivere v Friedman* was assigned to this part,[8] on August 5, 2016, the court so-ordered the parties' joint briefing schedule on the instant motions to disqualify. *See* Dkt. 61.[9] The Friedman Parties and Rosenfeld filed the motion to disqualify by order to show cause on August 9, 2016, Balint and Omnivere filed opposition on September 13, 2016, and the Friedman Parties and Rosenfeld filed their reply on September 28, 2016. The court reserved on the motion after oral argument, pending submission of additional orders to show cause in *Rosenfeld v Omnivere* and *Balint v Kopy*, which seek disqualification in all three actions. *See* Dkt. 111 (11/3/16 Tr.).

---

fraud claim in *Balint v Kopy*), *4 ("The [Friedman Parties] were aware of [Omnivere's] plans to file an amended complaint against them in the New York court. Their decision to file in Delaware before [Omnivere] could amend its complaint in New York hints at gamesmanship.") (citations omitted).

[7] In the midst of mediation, the court resolved the parties' disputes over whether the settlement agreement between Balint and Omnivere was subject to disclosure. The court's ruling on that issue is not pertinent to the instant motions.

[8] The action was erroneously assigned to a non-commercial part, but was subsequently transferred to this part pursuant to June 14, 2016 stipulation and order signed by the transferring Justice (Dkt. 59) and a June 21, 2016 order of the Administrative Judge (Dkt. 60).

[9] While the parties acted properly by only filing one motion, they did not submit the pleadings in all of the actions in which disqualification was sought. That omission was never sanctioned by the court and is the reason the supplemental orders to show cause were required.

II. Discussion

Rule 1.9 of the Rules of Professional Conduct governs the duties of attorneys to former clients. *See* 22 NYCRR 1200. A violation of Rule 1.9 warrants disqualification. *See Anderson & Anderson LLP v N. Am. Foreign Trading Corp.*, 139 AD3d 464 (1st Dept 2016). At issue here is Rule 1.9(a), which 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 interests of the former client** unless the former client gives informed consent, confirmed in writing.

(emphasis added).[10]

That being said, the right to be represented by counsel of one's choice is "a valued right [and] any restrictions must be carefully scrutinized." *Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 (1st Dept 2013), quoting *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 (1987). As repeatedly recognized by our courts, "in the context of an ongoing lawsuit, disqualification ... can [create a] strategic advantage of one party over another." *Id.* For this reason, "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts ... Such motions result in a loss of time and money, even if they are eventually denied. This Court and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused." *Solow v W.R. Grace & Co.*, 83 NY2d 303, 310 (1994). To guard against these concerns, "[c]ourts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation." *Mayers*

[10] As noted earlier, it is undisputed that the written informed consent exception is not satisfied in this case.

v Stone Castle Partners, LLC, 126 AD3d 1, 6 (1st Dept 2015). To avoid countenancing tactical disqualification motions, the "movant must meet a heavy burden of showing that disqualification is warranted." *Ullmann-Schneider*, 110 AD3d at 470, citing *Broadwhite Assocs. v Truong*, 237 AD2d 162 (1st Dept 1997). Ultimately, "[t]he decision of whether to grant a motion to disqualify rests in the discretion of the motion court." *Mayers*, 126 AD3d at 6, citing *Macy's Inc. v J.C. Penny Corp.*, 107 AD3d 616 (1st Dept 2013).

As an initial matter, Rosenfeld's reliance on this court's decision and the standard applied in *Bank Hapoalim B.M. v WestLB AG*, 2010 WL 10076076 (Sup Ct, NY County 2010), *aff'd* 82 AD3d 433 (1st Dept 2011) is misplaced. The First Department, in *Mayers*, 126 AD3d 1, reversed this court's disqualification ruling [43 Misc3d 1203(A)] that applied the traditional rule of resolving all doubts about what was said in a client meeting in favor of disqualification. The First Department noted that "[i]ssues relating to the prospective client relationship based on events that occurred after April 2009 are governed by Rule 1.18 of the Rules of Professional Conduct (22 NYCRR 1200.0), rather than the repealed DR 5-108 (22 NYCRR 1200.27)", and therefore "[c]ases from this Court addressing conduct that occurred prior to the April 2009 enactment of the new rules **are not controlling here**." *See Mayers*, 126 AD3d at 6 (emphasis added). One of those non-controlling cases cited by the First Department was *Bank Hapoalim*. *See id.* As this court understands *Mayers*, rather than simply resolving all doubts in favor of disqualification to avoid the appearance of impropriety, as was required under the old rules [*see Mayers*, 43 Misc3d 1203(A), at *5 (collecting authority)], disqualification should be denied if "**the conveyed information did not have the potential to be significantly harmful** to [the former client] in the matter from which he seeks to disqualify counsel." *See Mayers*, 126 AD3d at 7 (emphasis added). *Mayers*, therefore, appears to depart from the old rule that prejudice to

the client need not be shown. *See Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 (1996) ("**By mandating disqualification irrespective of any actual detriment**—that is, 'even when there may not, in fact, be any conflict of interest'—the rule also avoids any suggestion of impropriety on the part of the attorney."), quoting *Solow*, 83 NY2d at 309 (emphasis added). While the court may well have disqualified Bernstein under the old rules, those rules no longer apply. *See Mayers*, 126 AD3d at 6-7; *cf. Anonymous v Anonymous*, 262 AD2d 216 (1st Dept 1999) ("Even if disqualification were not mandatory under these facts, we would find it to have been accomplished as a proper exercise of the motion court's discretion, because there is substantial doubt about the propriety of the law firm continuing as defendant wife's counsel, and such doubts are to be resolved in favor of disqualification.") (citation omitted).[11]

[11] Other Appellate Division Departments still apply the rule that "[a]ny doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety." *See McCutchen v 3 Princesses & A P Trust Dated Feb. 3, 2004*, 138 AD3d 1223, 1226 (3d Dept 2016); *Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 (2d Dept 2015). Notwithstanding its holding in *Mayers*, the First Department, occasionally, continues to follow the old rules, including citing approvingly to a case [*Justinian Capital SPC v WestLB AG*, 90 AD3d 585 (1st Dept 2011)] that it supposedly disavowed in *Mayers* along with *Bank Hapoalim*. *See In re Strasser*, 129 AD3d 457, 458 (1st Dept 2015). Guidance from the First Department would be much appreciated on the applicability of the rule that doubts must be resolved in favor of disqualification and the validity of the requirement that the information conveyed be significantly harmful (and how the "significantly harmful" requirement can be squared with *Tekni-Plex*'s holding to the contrary). A thoughtful explanation of the current doctrinal confusion was recently set forth in *Lyons v Lyons*, 50 Misc3d 876 (Sup Ct, Monroe County 2015) (Dollinger, J.). While the court in *Lyons* is not in the First Department, it grappled with issues similar to those at issue in this case (albeit with wrinkles unique to matrimonial cases), including dueling affidavits. *See id.* at 887. The *Lyons* court also grappled with the trade-offs of holding a hearing [*see id.* at 890 ("This court acknowledges that other New York courts, in attempting to decide disqualification questions, have held hearings to evaluate the allegations regarding the transfer of confidential and privileged communications")], and ultimately declined to do so [*see id.* at 891]. In this case, however, this court respectfully submits the trade-offs are somewhat different and are mitigated by the fact that, as explained below, only those privy to the October 20, 2014 meeting (Bernstein, Rosenfeld, Harvis and Mirsky) will be privy to the hearing.

Turning now to the merits, on this record, the court cannot decide whether to disqualify Bernstein and EVW. While, as noted earlier, disqualification is not warranted based on the documents Rosenfeld provided to Bernstein, the conflicting affirmations and affidavits of Bernstein, Rosenfeld, Harvis and Mirsky make it impossible for the court to determine what was said at the October 20, 2014 meeting. A hearing, at which credibility determinations may be made based on live witness testimony, is the only way to resolve these issues.

In his reply affidavit, Rosenfeld addresses myriad matters about which Bernstein allegedly lied in his opposition affirmation, such as whether Bernstein was informed (and provided a copy) of the original complaint in *Rosenfeld v Omnivere*. *See* Dkt. 108 at 3. According to Rosenfeld, while Bernstein was only going to represent Rosenfeld in the forgery matter in *Balint v Kopy*, Bernstein was very much interested in using Rosenfeld's insider knowledge, gained by virtue of his position as CEO and post-sale consultant, in the dispute between Omnivere and the Friedman Parties, including aiding Balint's claim to hold Omnivere liable under her successor liability claim. Rosenfeld, moreover, was supposedly the source of information regarding the B3 and IDM sale, the details of which were used by Bernstein to structure the settlement between Balint and Omnivere which, effectively, resulted in Balint and Omnivere aligning forces against the Friedman Parties.

That being said, if this were all Rosenfeld was claiming, the court would not disqualify Bernstein. The remaining issues in these actions for which Rosenfeld stands to be adversely affected pertain to his role in the forgery alleged by the Friedman Parties and the fraud alleged by Omnivere. Any disclosure Rosenfeld made to Bernstein regarding the Friedman Parties is not, in First Department's parlance, "significantly harmful" to Rosenfeld. That such disclosures may harm the Friedman Parties is not a basis for disqualification. To the extent the Friedman

Parties believe they have standing to seek disqualification due to the advantage Balint and Omnivere procured by obtaining information from Friedman, the court rejects that notion, as explained below.

Rosenfeld, however, alleges more. He claims that he confided his litigation strategy to Bernstein, including matters beyond the strict scope of the representation set forth in the Retainer Letter (which was not drafted and executed until *after* the meeting), including issues relating to the fraud allegations asserted by Omnivere. *See* Dkt. 108 at 5.[12] If this is true, Bernstein may have been privy to confidential legal discussions pertinent to the claims that Rosenfeld was complicit in the Friedman Parties' fraud. According to Rosenfeld, this meets the requirements of Rule 1.9 because Bernstein's prior representation is substantially related to the matter in which Bernstein represents parties adverse to Rosenfeld.

That said, it is unclear from Rosenfeld's affidavits whether he actually made Bernstein aware of information regarding his involvement in the Friedman Parties' alleged fraud. *See Balint v Kopy*, Dkt. 81 at 2 ("I … disclosed the strengths and weaknesses of my claims against Omnivere [] and discussed my litigation strategies in *Rosenfeld v Omnivere*."). Bernstein denies that Rosenfeld provided any such information. Indeed, Bernstein takes the position that the only privileged information that Rosenfeld conveyed related to the forgery issue, and that such information is not relevant to the fraud claims asserted by Omnivere. *See* Dkt. 78 at 26. In other words, even if Rosenfeld disclosed privileged information, that information cannot possibly be used by Omnivere to prejudice Rosenfeld.

The court agrees that if all Rosenfeld told Bernstein pertained to the Friedman Parties, but not Rosenfeld's own involvement in the Friedman Parties fraud, then disqualification is not

[12] Rosenfeld repeats this claim in his affidavit in support of his November 17, 2016 order to show cause filed in *Balint v Kopy*.

warranted. Rosenfeld cannot seek Bernstein's disqualification merely because he prejudiced the Friedman Parties. The Friedman Parties' liability does not necessary hurt Rosenfeld. If it does, then Rosenfeld has no one to blame for providing this information at a pre-retention meeting where he was counseled. He knew and consented to information being given to Bernstein for use against the Friedman Parties. Thus, implicitly, he consented to the adverse implications of the Friedman Parties' liability. The only thing Rosenfeld is entitled to not have used against him is information regarding his own wrongdoing. If no such information is found to have been conveyed to Bernstein in the context of retention, Bernstein will not be disqualified.

Information conveyed pertaining to the forgery alleged by the Friedman Parties, the fraud alleged by Omnivere, and the structure of the sale of B3 and IDM unquestionably prejudices the Friedman Parties. The court, nonetheless, finds that prejudice to the Friedman Parties is not a basis to disqualify Bernstein. Some courts have suggested that a non-client may have standing to disqualify another party's counsel for committing an ethical violation, even though the attorney owed no ethical duties to that non-client.[13] This court, however, is not an ethics board, nor does it have plenary jurisdiction to sanction attorneys for ethical violations. "That power ... is

---

[13] *See Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 14 Misc3d 324, 331 (Sup Ct, NY County 2006) (Fried, J.) ("motions to disqualify ... have been granted, in rare instances, where the movant had no prior attorney-client relationship with the attorney sought to be disqualified, and the motion was based, instead, upon a prior attorney-client relationship between the attorney and a non-party to the action."), citing *Woodson v Mendon Leasing Corp.*, 253 AD2d 669 (1st Dept 1998). While the Friedman Parties observe that the Supreme Court of Delaware does not apply "a 'bright-line' test denying standing to all non-client litigants to challenge misconduct that taints the fairness of judicial proceedings," that Court also held that a non-client "cannot enforce an alleged technical violation of the [attorney ethical] Rules **especially where it has become apparent that it was seeking to use disqualification as a litigation tactic**." *Appeal of Infotechnology, Inc.*, 582 A2d 215, 221 (Del 1990) (emphasis added); *see Matter of Rehab. of Indem. Ins. Corp.*, 2014 WL 637872, at *1 (Del Ch 2014) ("[F]or disqualification to be appropriate, the litigant must show that the conflict prejudiced the fairness of the proceeding, not merely that a violation of the Rules had occurred."), quoting *Crumplar v Super. Ct.*, 56 A3d 1000, 1009 (Del 2012).

principally vested in the Appellate Divisions, which have the exclusive authority to conduct attorney disciplinary proceedings." *Brown v Blumenfeld*, 103 AD3d 45, 59 (2d Dept 2012). In this case, it appears that Rosenfeld subsequently may have altered his allegiances to more closely align with the Friedman Parties and that the Friedman Parties seek to leverage this into obtaining a strategic disqualification of Bernstein. Their motive is not difficult to discern. Bernstein has a strong command of the merits of these cases and has ably represented Balint and Omnivere. It would be a significant advantage for the Friedman Parties to have Bernstein disqualified. This is precisely the sort of tactical disqualification maneuver the Court of Appeals and Appellate Division have cautioned should not be countenanced. This court will not do so. Whatever public policy might otherwise militate in favor of permitting non-former clients from seeking disqualification for a supposed ethical violation committed against an actual former client, under these circumstances, the benefits of conferring standing on the Friedman Parties to do so is outweighed by the stronger public policy of preventing the cynical depravation of the effective counsel of one's choosing.

Consequently, as set forth below, a hearing to determine what confidences were revealed at the October 20, 2014 meeting and the purpose of the meeting shall be conducted by a Special Referee.[14] Given the sensitive nature of what will be testified to, only Bernstein (not his clients), Rosenfeld, Harvis and Mirsky may attend the hearing or be privy to the testimony. No other witnesses shall testify. Nor shall the Friedman Parties attend because they have no standing to seek Bernstein's disqualification. The transcript and the Referee's report shall be filed under seal, and so shall any motion to confirm or modify the report (this decision to seal may be

[14] The question, for instance, of how disqualification in *Balint v Kopy* might impact *Omnivere v Friedman* (a case where Rosenfeld is not a party), or vice versa, will not be addressed unless and until it is demonstrated that disqualification is warranted based on what was said at the October 20, 2014 meeting.

revisited after reviewing the testimony). Finally, given the unfortunate delay this motion has caused, the court respectfully requests that the hearing be conducted and that a report be issued as quickly as reasonably practicable. Moreover, any motion to confirm or modify the Referee's report shall be made by order to show cause so this action, regardless of whether disqualification is ordered, may resume as soon possible. Accordingly, it is

ORDERED that Rosenfeld's motion to disqualify Bernstein and EVW is held in abeyance pending a hearing to determine what information was revealed by Rosenfeld to Bernstein at the October 20, 2014 meeting, and such determination is referred to a Special Referee to hear and report; and it is further

ORDERED that the portion of the motions in which the Friedman Parties' seek disqualification is denied; and it is further

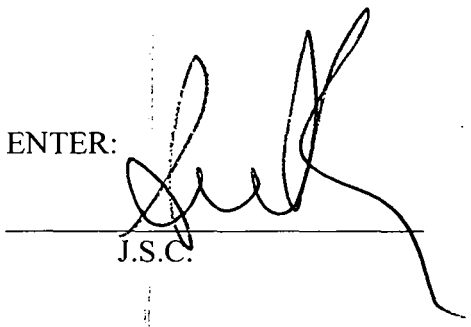
ORDERED that within two days of the entry of this order on the NYSCEF system, Bernstein shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that the hearing and all related matters, including the hearing transcript and any subsequent motion to confirm or modify the report, shall be filed under seal; and it is further

ORDERED that within 7 days of the entry of the referee's report, Rosenfeld and Bernstein shall each move by order to show cause, respectively, seeking disqualification or denial of disqualification based on the findings in the referee's report, and the parties shall file responsive papers within 7 days thereafter.

Dated: January 10, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C