SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BESSEMER TRUST COMPANY, N.A., AS PRELIMINARY EXECUTOR OF THE ESTATE OF GEORGE S. KAUFMAN,

Plaintiff,

- v -

EDWARD HART, STEVEN KAUFMAN, 18-19TH ASSOCIATES LLC,19TH STREET ASSOCIATES LLC,450 7TH AVE. ASSOCIATES LLC,ABCO ASSOCIATES, KAUFMAN 8TH AVENUE ASSOCIATES, KAUFMAN ARCADE ASSOCIATES LP, KAUFMAN EASTCHESTER COMPANY, LLC,KAUFMAN TARRYTOWN COMPANY, LLC,KAUFMAN WALES ASSOCIATES LLC,KAUFWEIN-470 ASSOCIATES LLC,KWK ASSOCIATES, INC.,LUCAS BUILDING COMPANY, LLC,S.I.K. ASSOCIATES LLC,SPRINGFIELD COMPANY, LLC,STATION PLAZA COMPANY, LLC,WKK ASSOCIATES, INC.

Defendants.

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INDEX NO. 655830/2019

MOTION DATE 12/09/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 119, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 169

were read on this motion to DISQUALIFY COUNSEL.

Rule 1.9(a) of New York's Rules of Professional Conduct prohibits "[a] lawyer who has formerly represented a client in a matter" from "thereafter represent[ing] 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."[1] In this case, the law firm Olshan Frome Wolosky LLP ("Olshan") finds itself litigating against the estate of its longtime client, George S. Kaufman, in a dispute involving

[1] 22 NYCRR 1200, Rule 1.9(a).

contracts Olshan prepared at Mr. Kaufman's direction for certain of his businesses. Olshan's current clients – certain Defendants in the underlying action (the "Olshan Defendants")[2] – seek to enforce those contracts to buy out the Estate's stakes in a number of entities, over the Estate's strenuous objections. Now, the Estate's Preliminary Executor, Plaintiff Bessemer Trust Company, N.A. ("Bessemer"), moves to disqualify Olshan based in part on the firm's prior representation of Mr. Kaufman.

Olshan has a credible basis for asserting that its representation in this matter is permissible. It appears that its role in preparing the contracts at issue was limited. Nevertheless, the Court concludes that the breadth and depth of the firm's decades-long representation of Mr. Kaufman, including with respect to the entities and business relationships involved in this litigation, render its involvement as counsel in this matter incompatible with Rule 1.9. For the reasons set forth in greater detail below, the Estate's motion is granted.[3]

FACTUAL BACKGROUND

Bessemer administers Mr. Kaufman's Estate (the "Estate"), estimated to be worth over $500 million and encompassing over seventy-five business entities and substantial real estate holdings throughout New York City. Complaint ("Compl."), ¶29 (NYSCEF Doc. No. 1). Mr.

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[2] The Olshan Defendants are: Edward J. Hart, individually and on behalf of undisclosed principals; Steven J. Kaufman, individually and on behalf of undisclosed principals; ABCO Associates; Kaufman Eastchester Company, LLC; Kaufman Tarrytown Company, LLC; Kaufman Wales Associates LP; Kaufwein-470 Associates LLC; Lucas Building Company, LLC; S.I.K. Associates LLC; Springfield Company, LLC; and Station Plaza Company, LLC. The other Defendants, represented by separate counsel, are: 18-19th Associates LLC, 19th Street Associates LLC, 450 7th Ave. Associates LLC, Kaufman 8th Avenue Associates, Kaufman Arcade Associates LP, KWK Associates, Inc., and WKK Associates, Inc. (together with the Olshan Defendants, the "Defendants").

[3] The disqualification of counsel is prospective only. The Olshan Defendants need not re-file prior submissions, including the pending motion for summary judgment, made by Olshan.

Kaufman, who died in 2018, was a prominent real estate developer, investor, and philanthropist. *Id.*, ¶1.

Following his death, Mr. Kaufman's former minority business partners – Edward J. Hart and Steven J. Kaufman (Mr. Kaufman's cousin) – purported to exercise certain buyout provisions that would have the effect of divesting the Estate's interests in fourteen entities (the "Entities") at prices that Bessemer considers "unconscionable." *Id.*, ¶30. The buyout provisions, which are found in the Entities' operating and partnership agreements, generally allow a deceased member's interest to be purchased by the surviving members and partners. *Id.*, ¶31. For some Entities, the buyout provisions state that a deceased member's interest shall be calculated at "book value"; for others, at fair market value. *Id.*, ¶38. Bessemer alleges that "book valuation" is undefined in the agreements. When Hart and Steven Kaufman, on behalf of themselves and other surviving members, delivered notices purporting to exercise these buyout provisions, Bessemer rejected them. In Bessemer's view, the prices offered for the Estate's interests based on book value were "grossly depressed" and lacked contractual support.

On October 7, 2019, Bessemer brought this action alleging eleven causes of action against Defendants, including seeking a declaratory judgment concerning the Estate's economic interests in the Entities. *See id.*, ¶¶186-260. Understandably, the buyout provisions are the focal point of Bessemer's Complaint. Bessemer repeatedly alleges that the provisions are "poorly drafted," "inconsistent," "vague and ambiguous," "neither clear nor consistent," and "not enforceable." *Id.*, ¶¶2, 31, 38.

Olshan has appeared on behalf of Edward Hart, Steven Kaufman, and nine entities in which they hold interests. On October 25, 2019, Olshan filed a motion for summary judgment on behalf of Hart and five of the Entities which share identical book-value buyout provisions.

See NYSCEF Doc. No. 68, *et seq.* That motion has been stayed pending the resolution of the disqualification motion. NYSCEF Doc. No. 124.

Previously, for many years and for many matters, Olshan represented Mr. Kaufman. Indeed, one of the firm's founders, Marvin Olshan, "was a friend of [Mr. Kaufman] . . . who became his real estate lawyer." Olshan Mem. of Law in Opp. to Pl.'s Mot. to Disqualify ("Olshan Br."), at 3 (NYSCEF Doc. No. 143). For about twenty years, the principal Olshan attorney for the Kaufman businesses was Thomas Kearns. *Id.* Kearns represented Mr. Kaufman in his personal capacity, largely stemming from Kearns's work as a legal advisor to the real estate companies which Mr. Kaufman owned or invested in. Affidavit of Thomas D. Kearns ("Kearns Aff."), ¶20 (NYSCEF Doc. No. 136). Kearns also represented various entities across the Kaufman Organization. *Id.*, ¶4. In addition, at various times Mr. Kaufman appointed Kearns as a manager or co-manager of certain other entities in which he had interests. *Id.*, ¶24. Kearns also invested in some of Mr. Kaufman's properties and businesses from time to time. *Id.*

During the course of Olshan's representation of Mr. Kaufman and his business interests, Olshan prepared the operating agreements for six of the Entities it represents here. In the 1990's, Kearns and his Olshan colleagues converted a number of partnerships into limited liability companies. The Entities were previously partnerships, and at the direction of Mr. Kaufman, Hart, and Steven Kaufman, Olshan converted them into LLCs. According to Kearns, "these conversions were rather formulaic." Because Mr. Kaufman (and others) directed Olshan to execute a "simple conversion without 'reinventing the wheel,'" the LLC operating agreements left intact many of the terms in the partnership agreements. That includes the buyout provisions, which were mostly carried over to the LLC agreements without change. In Kearns's view, "[Mr.

Kaufman] was a sophisticated investor who well understood the operation of these clauses." *Id.*, ¶18.

Mr. Kaufman's trust in Olshan – and specifically Kearns – continued throughout his life. In Mr. Kaufman's later life, Kearns served as his attorney-in-fact, signing agreements and checks on Mr. Kaufman's behalf when he was unable to do so. *Id.*, ¶23. But Kearns, who is a real estate lawyer, did not act as Mr. Kaufman's counsel for estate planning purposes. *Id.*, ¶5. Kearns did, however, provide information to Mr. Kaufman's estate counsel in connection with estate planning. *Id.*, ¶6.

After Mr. Kaufman's death in early 2018, Olshan continued to serve as counsel to the Kaufman Organization, and their related entities, including its clients in this case. *Id.*, ¶8. At that point, Hart retained Olshan to advise him on his rights in eight of the Entities named in this action, six of which have the "book value" buyout clauses. Affidavit of Edward J. Hart, ¶3 (NYSCEF Doc. No. 125). That, eventually, led to the dispute underlying this action.

On November 4, 2019 – about a month after this action was initiated – Bessemer filed the instant motion to disqualify Olshan.

LEGAL ANALYSIS

It is a "well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter." *Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 615–16 (1999). That rule is codified in Rule 1.9(a) of New York's Rules of Professional Conduct:

> 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.[4]

Thus, "[a] party seeking to disqualify an attorney on the ground that there is a conflict between the current representation and that of a former client must establish not only the existence of the prior attorney-client relationship but also that the former and current representations are both adverse and substantially related." *Nomura Sec. Int'l, Inc. v. Hu*, 240 A.D.2d 249, 250 (1st Dep't 1997) (internal citations omitted).

The Court observes, at the outset, that this analysis must be undertaken with caution. "[B]ecause disqualification of a law firm during litigation may have significant adverse consequences to the client and others, it is particularly important that the [Rules of Professional Conduct] not be mechanically applied when disqualification is raised in litigation." *Kassis*, 93 N.Y.2d at 617. "Disqualification denies a party's right to representation by the attorney of its choice" – a right that, while "not absolute," remains "a valued right and any restrictions must be carefully scrutinized." *S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987). And of course, courts must always guard against the use of disqualification motions "as an offensive tactic, inflicting hardship on the current client and delay upon the courts" without good reason. *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 310 (1994).

With those considerations in mind, the Court turns to the substance of Bessemer's motion to disqualify Olshan. As a threshold matter, the parties do not dispute that for purposes of determining Olshan's duties to its former client, the Estate "essentially stands in the shoes of"

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[4] The Rules of Professional Conduct supplanted the Disciplinary Rules of the Code of Professional Responsibility as of April 1, 2009. Therefore, cases analyzing conflicts with former clients prior to 2009 did so in reference to the old regime. However, in substance, "Rule 1.9 is the counterpart to" a provision in the former Code. *McCutchen v. 3 Princesses & A P Tr. Dated Feb. 3, 2004*, 138 A.D.3d 1223, 1226 (3d Dep't 2016).

Mr. Kaufman. *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 309 (2010); *see also Matter of Power*, 28 Misc. 3d 1208(A) (Sur. Ct., Dutchess Cty. 2010) (disqualifying attorney that represented decedent because the estate was the "legal embodiment of the decedent, and its challenge . . . [was] the same as if [the decedent] individually was challenging").

Also undisputed is the fact that, over the years, Olshan represented Mr. Kaufman, both in his personal capacity and on behalf of various constituent pieces of his business empire. *See* Olshan Mem. of Law in Opp. to Bessemer's Mot. to Disqualify ("Olshan Br."), at 12 (NYSCEF Doc. No. 143); Kearns Aff., ¶¶4, 20.

Similarly, Olshan's representation in this case is clearly adverse to Mr. Kaufman's – now the Estate's – interests. Bessemer is alleging that Defendants' purchase offers, based on the book-value buyout provisions, shortchanged Mr. Kaufman's Estate by millions of dollars. *See* Compl., ¶41 ("[T]he Estate would be compelled to relinquish significant assets . . . at an astounding discount that would materially impair the charitable intent of Mr. Kaufman's estate plan[.]"); *cf. Nomura*, 240 A.D.2d at 250 (denying disqualification motion where former client "ha[d] no interest in [the] outcome" of current litigation). Moreover, according to the Estate, the Entities are now "treat[ing] the Estate as having been divested of all rights, title, and interests in the Entities by, among other things, withholding distributions to the Estate," "refus[ing] to provide unfettered access to the Entities' books and records," and "fail[ing] to respond to specific document requests related to the Entities." *Id.*, ¶¶34-35.

Bessemer's motion, then, turns on whether Olshan's prior representation is "substantially related" to the current action. Comment 3 to Rule 1.9 explains that "[m]atters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk

that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Courts have found matters to be "substantially related" where a law firm represented an individual or entity in the negotiation or drafting of an agreement that later became the subject of the dispute in the action. *See Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 134 (1996) (finding matters "substantially related" where attorneys represented former client "during negotiation of the Merger Agreement," which contained provisions "that are the subject of the arbitration"); *Casita, LP v. Maplewood Equity Partners (Offshore) Ltd.*, 11 Misc. 3d 1054(A), at *9 (Sup. Ct. N.Y. Cty.), *aff'd sub nom. Casita, L.P. v. MapleWood Equity Partners (Offshore) Ltd.*, 34 A.D.3d 251 (1st Dep't 2006) (disqualifying attorney "given [attorney's] extensive participation in the drafting of the very documents which are the subject of this action"); *Credit Index, L.L.C. v. RiskWise Int'l, L.L.C.*, 192 Misc. 2d 755, 765 (Sup. Ct. N.Y. Cty.), *aff'd*, 296 A.D.2d 318 (1st Dep't 2002) (disqualifying law firm which advised on agreement "closely intertwined" with agreement at issue in case).

This matter is substantially related to Olshan's prior representation because, among other things, Olshan admits to preparing the very agreements and provisions that give rise to this litigation. As in *Casita* and *Credit Index*, the law firm's role in drafting the agreements compels disqualification where the litigation puts the language of the agreements squarely in issue. Trying to downplay the significance of this role, Olshan urges that the creation of the operating agreements was "simple," "formulaic," and irrelevant to Bessemer's underlying claims. None of those arguments, however, dispel the concerns raised by Olshan's representation against the estate of its longtime client. Olshan's account confirms Olshan's unique involvement in the drafting process. The Olshan lawyers, including Kearns, know the origins of the language in the

operating agreements (it was taken from the old partnership agreements), why it was in there (specific instructions to not "reinvent the wheel"), and that Mr. Kaufman "well understood the operation of these clauses." Kearns Aff., ¶18. Those are all topics on which a draftsperson could conceivably be deposed, and on which Defendants may seek to rely, if extrinsic evidence is permitted (more on that below).

In addition, Bessemer cites to evidence that Olshan represented Mr. Kaufman personally in negotiating the purchase of another deceased member's interest in two entities, one of which involved a buyout provision substantially similar to the book-value provisions at issue here. Affirmation of Zachary G. Newman, ¶8 (NYSCEF Doc. No. 148). Again, to the extent extrinsic evidence is relevant in determining the parties' intent in this case, the parties may be interested in pursuing Mr. Kaufman's role in similar transactions.

The case law Olshan cites, in opposition, is distinguishable. In *Lamotte v. Beiter*, 2006 WL 4682182 (Sup. Ct. N.Y. Cty. May 30, 2006), for example, the court denied a motion to disqualify a law firm because the movant failed to establish that a prior attorney-client relationship existed, and alternatively, that no "substantial relationship" existed between the prior and current representation. On that second point, the court found "[t]here [was] no indication that [the law firm] negotiated or drafted the operating agreement, or more importantly, the Sections of the Operating [Agreements] at issue." *Id.* Here, Olshan did both. Granted, the language of the buyout provisions did not originate with Olshan, who apparently imported them wholesale from previous partnership agreements.[5] But to the extent Olshan argues that this

[5] The original partnership agreements date back to the 1960's, around the time Marvin Olshan co-founded his law firm and became Mr. Kaufman's real estate lawyer. Although the parties do not know whether Mr. Olshan (or any other Olshan attorney) drafted the original partnership agreements, the timing raises this possibility. In any event, it further illustrates the decades-long relationship between Olshan and Mr. Kaufman.

distinction removes them from the role of drafters, that argument fails. Olshan did what drafters often do: compose a legal document, not out of whole cloth, but from an assemblage of pre-existing parts adapted to the purpose. The buyout provisions may not be original works, but Olshan's role in transposing them still illustrates the firm's intertwining conflict with Mr. Kaufman's interests in this case. *Cf. Lightning Park, Inc. v. Wise Lerman & Katz, P.C.*, 197 A.D.2d 52 (1st Dep't 1994) (denying disqualification motion where earlier representation involved different agreement and "entirely different issues") (cited in Olshan Br. at 12, 16).

Disqualification under Rule 1.9 does not, as Olshan suggests, require a showing that counsel has access to specific confidential information relevant to the dispute. If the prior matter were "substantially related," "that alone would be sufficient to warrant disqualification irrespective of whether or not the lawyer in fact obtained any confidential information in the course of the prior employment." *Cooke v. Laidlaw, Adams & Peck, Inc.*, 126 A.D.2d 453, 456–57 (1st Dep't 1987); *Town of Oyster Bay v. 55 Motor Ave. Co., LLC*, 109 A.D.3d 549, 550–51 (2d Dep't 2013) ("[R]egardless of whether [attorney] actually obtained and disseminated confidential information in connection with his former representation of the appellants, they are entitled to freedom from apprehension and to certainty that [their] interests will not be prejudiced due to [attorney's] representation[.]"). Just as true, "*[a]bsent a substantial relationship* . . . disqualification would be warranted only upon a showing that in the prior action [Olshan] had received specific confidential information substantially related to the present litigation." *Lightning Park*, 197 A.D.2d at 55 (emphasis added); *see Nomura*, 240 A.D.2d at 250. This distinction is reflected in the text of the Rule, which includes a separate prohibition against divulging confidential information of the former client. *See* Rule 1.9(c). The two inquiries ask different questions and are not interchangeable.

In addition, Olshan improperly relies on merits arguments about the buyout provisions in order to minimize the significance of its conflict. These arguments, which contend that the provisions are so "clear and unambiguous" that any Olshan testimony would be irrelevant, *see* Kearns Aff., ¶18, will be addressed as the litigation proceeds and are central to Defendants' motion for summary judgment. But they do not change the analysis under Rule 1.9. Indeed, the fact that Kearns is in a position to aver that Mr. Kaufman "well understood" the meaning of these terms further supports the conclusion that Olshan is too close to the subject matter of this case to serve as counsel adverse to the Estate.

The case law cited by Olshan on this point is inapposite, since those cases analyze the distinct prohibitions of the advocate-witness rule. *See 1010Data Inc. v. Firestone Enterprises, Inc.*, 88 A.D.3d 627, 628 (1st Dep't 2011) (holding that defendants failed to "carry their heavy burden of demonstrating that the attorney would be a necessary witness" because, *inter alia*, "although the attorney had drafted and negotiated the agreement whose provisions are the basis of the instant dispute, [the defendant] failed to specify any ambiguity that would warrant, or even permit, interpretation by parol") (cited in Olshan Br. at 12); *Hemmings v. Ivy League Apt Corp.*, 2012 WL 5363512, at *4 (Sup. Ct. N.Y. Cty. Oct. 20, 2012) (declining to disqualify counsel under Rule 3.7 where firm drafted the resolutions at issue but where no ambiguity existed) (cited in Olshan Br. at 12).

The Court acknowledges Olshan's averments that, to the best of its attorneys' knowledge, Mr. Kaufman did not impart client confidences relevant to this particular dispute. And the Court imputes no bad faith to Olshan here. Still, Olshan's statements do not negate the risk that, at some point during the course of this litigation, client confidences related to Mr. Kaufman's intent or the language of the operating agreements could surface. In Mr. Kaufman's absence, Olshan's

account is necessarily one-sided. And the nature of Olshan's relationship with Mr. Kaufman raises the threat that confidences were exchanged. It is indisputable that Olshan has been thoroughly enmeshed in the workings of Mr. Kaufman's businesses for decades, and that Kearns was a trusted confidante to Mr. Kaufman on matters both business and personal. *See, e.g.*, Newman Aff., Ex. 3 (Kearns describing Mr. Kaufman as "a long time client and mentor") (NYSCEF Doc. No. 72). "It is critical that attorneys be acutely alert to situations where the potential for adverse interests may arise, especially since the consequences for both the parties and the attorneys are profound." *Pellegrino v. Oppenheimer & Co.*, 49 A.D.3d 94, 101 (1st Dep't 2008). In a case so closely tied to Mr. Kaufman's intent, *see, e.g.*, Compl., ¶45 (alleging that Defendants' "conduct is contrary to the parties' intentions and inconsistent with [Mr. Kaufman's] charitable intent"), prudence counsels in favor of Olshan's disqualification.

Finally, the Court is satisfied that Bessemer's motion is not merely "an offensive tactic" to disrupt the defense of this case. *Solow*, 83 N.Y.2d at 310. For the reasons set forth above, the Estate's concerns about Olshan's conflict are warranted in this case. While Bessemer knew about Olshan's representation of its current clients since at least last year, Kearns Aff., ¶¶9-10, Bessemer's previous dealings with Olshan came in the context of administering the Estate, not litigating the Estate's interests. Once litigation began, Bessemer acted without undue delay. The instant motion was filed little over a month after the Complaint was filed, and only weeks after Olshan filed a motion for summary judgment on behalf of its clients.[6]

* * * *

Accordingly, it is:

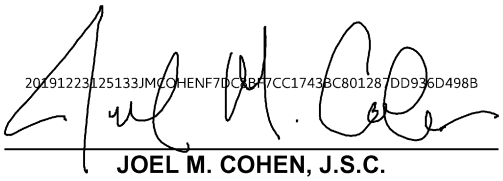
[6] The Court need not reach Bessemer's other arguments for disqualification based on Rules 1.7 and 3.7 of New York's Rules of Professional Conduct.

ORDERED that Bessemer's motion to disqualify Olshan is Granted; it is further

ORDERED that no further proceedings may be taken against the Olshan Defendants without leave of this Court for a period of 30 days from the date of this Decision and Order to permit them to retain new counsel; and it is further

ORDERED that Bessemer's deadline for filing opposition to the pending Motion for Summary Judgment (Mot. Seq. No. 002) is adjourned to 30 days from the date of this Decision and Order, with the moving Defendants' reply due 15 days thereafter.

This constitutes the Decision and Order of the Court.



12/23/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED			GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE