

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 1873

COLD SPRINGS VENTURES, LLC, a North)
Carolina Limited Liability Company;)
JAMES M. STRATHMEYER and)
BRUCE J. BOEHM,)
Plaintiffs)

v.)

GILEAD SCIENCES, INC.; a California)
Corporation; L. ERIC HALLMAN;)
DOUGLAS BAKER and NEIL JONES;)
Defendants)

**ORDER ON MOTION TO
DISQUALIFY**

THIS MATTER is before the Court upon Plaintiffs Cold Springs Ventures, LLC ("Cold Springs"), James M. Strathmeyer ("Strathmeyer"), and Bruce J. Boehm ("Boehm") (collectively, "Plaintiffs") Motion to Disqualify Womble Carlyle Sandridge & Rice, LLP, as Counsel for Defendant Gilead Sciences, Inc. ("Gilead") ("Motion"); and

THE COURT, having considered the Motion, briefs in support of and in opposition to the Motion, the evidence in the record, and the arguments of counsel, FINDS and CONCLUDES as follows:

PROCEDURAL HISTORY

1. On February 28, 2014, Plaintiffs filed an Amended Complaint seeking declaratory and injunctive relief related to an arbitration initiated against them by Gilead on or about October 7, 2013.¹ In the arbitration proceeding, Gilead seeks to recover damages from Plaintiffs for an alleged breach of a contract between Gilead and a dissolved corporation in which Plaintiffs were shareholders and directors ("NC Kyro"). Gilead

¹ The Amended Complaint also seeks a declaratory judgment disqualifying Womble Carlyle Sandridge & Rice, LLP, from representing Gilead in this matter ("Claim Three").

contends that Plaintiffs are liable based on a corporate veil piercing, or “mere instrumentality” rule, theory. Gilead further contends that although Plaintiffs are not signatories to the underlying contract which contains the arbitration agreement, Plaintiffs may nevertheless be compelled to arbitrate the breach of contract claim because of their alleged liability under the instrumentality rule. The Amended Complaint sought, inter alia, a ruling from this Court on whether Plaintiffs can be compelled to arbitrate Gilead’s breach of contract claim under the veil piercing or “mere instrumentality” rule, and a stay of the arbitration proceeding pending the court’s ruling on whether Plaintiffs can be compelled to arbitrate.

2. On March 26, 2014, this Court entered an Amended Order on Motion for Preliminary Injunction and Notice of Hearing (“Amended Order”) that granted Plaintiffs’ request for the Court to exercise its jurisdiction to rule on whether Plaintiffs can be compelled to arbitrate, and granted Plaintiff’s request for a stay of the arbitration proceeding pending the Court’s ruling on that issue. The Amended Order granted the parties a short period of time in which they could conduct limited discovery on the issue of whether Plaintiffs can be compelled to arbitrate Gilead’s breach of contract claim under the veil piercing or “mere instrumentality” theory. The Amended Order also denied certain of Plaintiff’s claims for injunctive relief.

3. On March 21, 2014, Plaintiffs filed the Motion seeking to disqualify Womble Carlyle Sandridge & Rice, LLP (“Womble Carlyle”) from representing Gilead on the grounds that Womble Carlyle previously represented some of the Plaintiffs in two separate matters. Plaintiffs allege that the matters involved in this lawsuit are substantially related to the matters for which Womble Carlyle previously represented Plaintiffs, and that the law firm has a conflict of interest preventing it from representing Gilead in this case. Gilead filed a Memorandum in Opposition to Plaintiffs’ Motion to Disqualify. Both parties also

filed numerous sworn affidavits in support their respective positions on the Motion. The Motion has been fully briefed and argued, and is ripe for determination.

FACTUAL BACKGROUND

4. Plaintiffs Cold Springs and Boehm are former shareholders of NC Kryo, a now-dissolved North Carolina corporation. Strathmeyer and Boehm were directors of NC Kryo. Strathmeyer was the principal in Cold Springs.

5. In December 2007, Plaintiffs retained G. William Joyner, III ("Joyner"), a partner at Womble Carlyle, to represent them in connection with the purchase of NC Kryo Series A Preferred Stock. ("Joyner Representation"). Joyner advised Plaintiffs regarding the financing of the Series A stock purchase, corporate governance matters such as voting rights, Boehm's election to the NC Kryo Board of Directors, and other shareholder rights attributable to the Series A stock, and NC Kryo's capitalization at that time. Joyner, Christopher J. Gyves ("Gyves"), then an associate attorney with Womble Carlyle, and a legal assistant participated in the representation. The majority of the representation was by Joyner, personally, with Gyves billing one hour to the matter.² In January 2008, Womble Carlyle sent Plaintiffs the one and only bill issued for the Joyner representation. There is no evidence that Joyner or Gyves provided any further legal representation to Plaintiffs after the Joyner Representation. Joyner left Womble Carlyle in November 2008.

6. Subsequently, in April 2010, Strathmeyer and Cold Springs engaged W.H. Johnson, III ("Johnson"), a partner at Womble Carlyle, to represent them in the purchase of convertible subordinated promissory notes from NC Kryo ("Notes") (the "Johnson

² In his Affidavit, Gyves provides a breakdown of his single hour on the NC Kryo matter as follows: 0.2 hours in conferences with Joyner regarding NC "qualified business venture" tax credit status and issues; 0.2 hours in conferences with Joyner regarding qualified business venture issues and drafting; 0.2 hours in conference with Joyner regarding Investor Rights Agreement; 0.2 hours in conference with Joyner re "the Kryosphere Financing matter"; and 0.2 hours in conference with Joyner regarding board and stockholder approvals.

Representation"). The Johnson Representation addressed issues similar to those addressed in the Joyner Representation, including stockholder rights, corporate governance issues, and the issuance of NC Kryo stock options to satisfy certain debts. Johnson also reviewed and revised documents related to the sale of the Notes, including amended and restated articles of incorporation, an investor rights agreement, and a voting agreement. Like the Joyner Representation, the final bill sent to Strathmeyer and Cold Springs in the Johnson Representation was sent just one month after the Johnson Representation began. There is no evidence that Johnson provided any further legal representation to Plaintiffs after the Johnson Representation. Johnson left Womble Carlyle in June 2012, and the hard-copy files from the Johnson Representation were sent to Johnson following his departure.

7. Gilead entered into the agreement with NC Kryo containing the arbitration agreement at issue in this action on September 1, 2010, after the Joyner and Johnson representations had ended.

8. In the Motion, Plaintiffs contend that Womble Carlyle's representation of Plaintiffs in the Joyner Representation and the Johnson Representation create a conflict of interest and should disqualify Womble Carlyle from representing Gilead in this matter.

9. In September, 2013, Womble Carlyle discovered the existence of the prior Joyner and Johnson Representations through an internal conflicts of interest check. After reviewing the matters, Womble Carlyle concluded that the prior representations of the Plaintiffs did not represent a conflict of interest, and that the firm could proceed with representation of Gilead. Womble Carlyle did not seek the consent of Plaintiffs to its representation of Gilead. In addition, through sworn affidavits, Womble Carlyle has established that it had the electronic files related to the prior representations "locked down" so that the attorneys involved with the current representation of Gilead cannot access those documents. Womble Carlyle also has established that Gilead's counsel in this matter,

Millen and Numbers, never accessed or attempted to access any electronic data related to the prior representations.

10. Womble Carlyle contends that it does not have a conflict because the subject matter and duration of the prior representations establish that they were not substantially related to the matter involved in this action. Womble Carlyle further contends that the amount of time that has lapsed since the prior representations, and the fact that all but one of the attorneys who were involved in the prior representations have left Womble Carlyle before the initiation of the arbitration proceeding support its position that no conflict of interest exists.

DISCUSSION

11. The decision to disqualify counsel is "within the discretion of the trial judge." *Robinson & Lawing, LLP v. Sams*, 161 N.C. App. 338, 339 (2003) (internal citations omitted). In considering a motion to disqualify counsel, the Court should consider not only the professional obligations imposed on attorneys by the Rules of Professional Conduct ("Rule(s)"), but also the goal of preventing the appearance of impropriety in the profession. *See Chemcraft Holdings Corp. v. Shayban*, 2006 NCBC 13 (N.C. Super. Ct. 2006). However, disqualification remains a "serious matter . . . and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified." *Plant Genetic Sys. N.V. v. Ciba Seeds*, 933 F.Supp. 514, 517 (M.D.N.C. 1996).

12. In the Motion, Plaintiffs argue that Womble Carlyle's representation of Gilead in this matter presents a conflict of interest for that firm because Plaintiffs were formerly represented by attorneys of the law firm in the Joyner and Johnson Representations. Plaintiffs contend that Womble Carlyle should be disqualified pursuant to Rules 1.9 and 1.10 of the North Carolina Rules of Professional Conduct. The relevant portions of these Rules are 1.9(a) and 1.10(b). Under Rule 1.9(a), an attorney "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." Rule 1.10(b), however, provides as follows:

- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

13. There is no dispute that Womble Carlyle had an attorney-client relationship with the Plaintiffs, or that the Womble Carlyle attorneys primarily responsible for the representations are no longer associated with Womble Carlyle. The unrebutted evidence before the Court also establishes that the Womble Carlyle attorneys who are currently representing Gilead were not involved in the Joyner or Johnson Representations. Accordingly, in order for Womble Carlyle to be disqualified from representing Gilead in the present action, Plaintiffs must establish that this matter in which Womble Carlyle represents Gilead is the same or substantially related to the Joyner or Johnson representations. If the current matter is the same or substantially related, it would be Gilead's burden to prove that there are no lawyers still associated with Womble Carlyle who have protected information that is material to this current matter. *See Ferguson v. DDP Pharm., Inc.*, 174 N.C.App 532, 539 (2005).

14. The Court finds that Plaintiff has failed to establish that this matter is the same or substantially related to the Joyner or Johnson Representations. Matters are "substantially related" for the purposes of Rule 1.9 "if they involve the same transaction or

legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.” N.C. Rules of Prof'l Conduct R. 1.9 cmt. 3 (2006). “The ‘substantially related’ test requires a ‘virtual congruence of issues,’ and the relationship between the issues in the prior [representation] must be ‘patently clear.’” *Plant Genetic Sys.*, 933 F. Supp. at 518 (internal citations omitted). The current action revolves around Gilead’s contention that Plaintiffs operated NC Kyro as a “sham” corporation, and therefore Gilead should be permitted to pierce the corporate veil and compel Plaintiffs to arbitrate. To prevail on this theory, Gilead must show that Plaintiffs so dominated the finances, policy and business practices of NC Kyro that the corporation had no separate corporate identity of its own, and that Plaintiffs’ domination of NC Kyro was undertaken to perpetrate a fraud on Gilead. *See Glenn v. Wagner*, 313 N.C. 450, 454 (1985).

15. The Joyner and Johnson Representations, however, involved relatively short, discrete engagements during which the attorneys involved provided advice and assistance with regard to relatively routine corporate transactions, and some review and drafting of corporate documents. The Joyner and Johnson Representations did not involve the day-to-day operations of NC Kyro or Strathmeyer’s or Boehm’s role in those operations. Nor do the Joyner and Johnson Representations appear to have involved advice regarding NC Kyro’s ongoing compliance with corporate formalities or other issues that are central to the proof Gilead must make in this action.

16. Even if Plaintiffs could show some relationship between this matter and the prior representations, the evidence establishes that Gyves, the one lawyer who was involved in the Joyner Representation and is still associated with Womble Carlyle, has no protected information material to this action. Defendants have produced a sworn affidavit from Gyves that states that his involvement with the Joyner Representation was limited to

one hour of billable work on January 7, 2008, that he never spoke to Boehm or any of the other Plaintiffs. In addition, Gilead has provided sworn affidavits from the attorneys representing them in this action stating that neither of them ever received or accessed any information related to the Joyner and Johnson representations, and that they have been blocked from accessing any such information in the future. Accordingly, even if Plaintiffs were entitled to a presumption that Gyves or any other Womble Carlyle attorney had or has access to protected information related to the Joyner and Johnson Representations, Gilead has met its burden of overcoming that presumption. *See Ferguson v. DDP Pharm., Inc.*, 174 N.C.App. at 539.

17. In conclusion, while Plaintiff's Motion to Disqualify appears to have been filed in good faith and for a legitimate purpose, the Court concludes that the Motion to Disqualify Womble Carlyle Sandridge & Rice, LLP, as Counsel for Defendant Gilead Sciences, Inc. must be DENIED.

THEREFORE, IT IS ORDERED that Plaintiffs' Motion to Disqualify Womble Carlyle Sandridge & Rice, LLP, as Counsel for Gilead Sciences, Inc. is DENIED.

This the 6th day of January.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases