STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 12 CVS 7600
WILLIAM M. ATKINSON; ROBERT BERTRAM, JEFF MITCHELL, JERROLD O'GRADY, and JACK P. SCOTT, Plaintiffs, v. WILLIAM LACKEY, ROSS SALDARINI; SCOTT S. MEHLER; BILL GRIER; BLACKHAWK TALON FUND II, LP; BLACKHAWK PACIFIC CAPITAL, LLC; BLACKHAWK PACIFIC FUND I, LLC; and BLACKHAWK MANAGEMENT, LLC, Defendants.	**ORDER**

{1} **THIS MATTER** is before the Court upon Plaintiffs' Motion to Disqualify James, McElroy & Diehl, P. A. as counsel for Defendants pursuant to Rules 1.9 and 1.10(b) of the North Carolina Rules of Professional Conduct.

{2} Having considered the pleadings; the written motions with attached affidavits and memoranda of law; the contentions of the parties at the hearing; and an in camera review of Jack P. Scott's client file with James, McElroy & Diehl, P.A., the Court **DENIES** the Motion.

FINDINGS OF FACT

{3} Plaintiff Jack P. Scott ("Scott") is a former client of James, McElroy & Diehl, P.A. ("JMD"). (Pls.' Mot. Disqualify 1; Defs.' Br. Opp. Mot. Disqualify 1.) In late July and early August, 2011, Scott contacted Edward T. Hinson ("Hinson"), a lawyer with JMD, for advice on a potential dispute with Defendants William Lackey ("Lackey) and Ross Saldarini ("Saldarini"). (Scott Aff. ¶¶ 12–15.) Scott believed that Lackey and Saldarini had wrongfully transferred funds from BlackHawk Capital Management, LLC ("BHCM"), in which all three were member-managers, to Kyck.com, a start-up venture run by Lackey and Saldarini. (Pls.' Mot. Disqualify

¶¶ 2–4; Scott Aff. ¶ 9; Defs.' Br. Opp. Mot. Disqualify 3.) For Scott, this transfer violated the terms of the BHCM operating agreement. Scott contacted his friend, Plaintiff William Atkinson ("Atkinson") about the matter and Atkinson referred Scott to Hinson for legal advice. (Scott Aff. ¶¶ 11–12; Defs.' Br. Opp. Mot. Disqualify 3.)

{4} Hinson and Scott first spoke by telephone on August 1, 2011, and then had a follow-up meeting in person on August 2, 2011. (Hinson Aff. ¶ 3.)

{5} During these meetings with Hinson, Scott described the structure of the BlackHawk entities, the events surrounding the dispute, Scott and Atkinson's investments, and sought Hinson's advice with regard to resolving the dispute. (Defs.' Br. Opp. Mot. Disqualify 3; Scott Aff. ¶¶ 16–24.) Scott also mentioned Defendant BlackHawk Talon Fund II, L.P. ("Talon Fund") and stated that he would be investigating Lackey and Saldarini further for possible future claims. (Hinson Aff. ¶ 4; Scott Aff. ¶ 20.)

{6} However, after exchanging several emails, Scott did not retain Hinson or JMD as counsel, and did not reveal to Hinson what, if anything, his investigation revealed. (Hinson Aff. ¶ 4; Pls.' Mot. Disqualify ¶ 3; Scott Aff. ¶¶ 30–32.)

{7} On October 21, 2011, Scott filed suit against Lackey, Saldarini, Kyck.com, Cherokee-Bowin Alpha, L.P., and BHCM ("First Action") alleging claims factually related to the matters discussed with Hinson. (Pls.' Mot. Disqualify ¶ 4; Scott Aff. ¶ 33.)

{8} In the course of his investigation, Scott discovered what he believed to be wrongful fund transfers between Talon Fund and BlackHawk Pacific Fund I, LLC ("BHP Fund"). (Defs.' Br. Opp. Mot. Disqualify 4.) Although related to the companies in the First Action, Talon Fund and BHP Fund represent separate entities in which Scott, Lackey, and Saldarini share an interest. (Defs.' Br. Opp. Mot. Disqualify 4.)

{9} Based on his investigation, Scott along with Atkinson, Robert Bertram, Jeff Mitchell, and Jerrold O'Grady filed suit against Lackey, Saldarini, Scott S. Mehler, Bill Grier, Talon Fund, BlackHawk Pacific Capital, LLC, BHP Fund, and

BlackHawk Management, LLC ("Defendants") ("Second Action") on April 18, 2012. (Pls.' Mot. Disqualify ¶ 5; Scott Aff. ¶ 34; Defs.' Br. Opp. Mot. Disqualify 4.)

{10} When they received notice of the lawsuit, Defendants in the Second Action sought counsel from John Buric ("Buric") an attorney with JMD. Scott's name appeared in JMD's client database, and Buric asked Hinson to run a conflicts check before Buric agreed to serve as Defendants' legal counsel in the Second Action. (Hinson Aff. ¶ 7.) After Hinson reviewed his notes, JMD requested an informal ethics opinion from the North Carolina State Bar ("State Bar") regarding the potential conflict. (Hinson Aff. ¶ 8; Defs.' Br. Opp. Mot. Disqualify 5.) Based on the information provided by JMD, on April 26, 2012, the State Bar concluded that there was no conflict. (Hinson Aff. ¶ 8; Defs.' Br. Opp. Mot. Disqualify 5.)

{11} However, the State Bar noted the following:

> Rule 1.9(c) requires the firm (one lawyers knowledge is imputed to all lawyers in the firm, see Rule 1.10) to avoid using or revealing [Scott]'s confidential information. If the information Hinson obtained about [Scott] is useful to [Lackey] and [Saldarini] . . . [and] is *not generally known*, the firm has a conflict and cannot represent [Lackey] and [Saldarini].

(Pls.' Mot. Disqualify Ex. D) (emphasis added).

{12} Upon receiving the State Bar's response, Buric agreed to represent Defendants in the Second Action without notifying Scott. (Scott Aff. ¶ 35–37.) On May 18, 2012, an article in the *Charlotte Business Journal* quoted Buric as saying the following in response to questions posed about the Second Action: "I would call this a vengeance suit. It's an effort by a former business partner to make the lives of his former business partners miserable because he wasn't invited to their next party." (Pls.' Mot Disqualify Ex. B.)

{13} Thereafter, on May 21, 2012, Defendants filed their counterclaims in the Second Action, including claims for defamation and abuse of process. (Defs.' Counterclaim ¶¶ 36–45.) Specifically, with regard to the defamation claim, Defendants alleged that Scott called Lackey and Saldarini "fraudsters" and "embezzlers." (Defs.' Counterclaim ¶ 35.)

{14} Defendants filed their counterclaims a month after Buric and JMD submitted their request to the State Bar, and, as a result, any issues raised by the counterclaims were not presented to the State Bar for consideration. (Pls.' Mot. Disqualify Ex. D.)

CONCLUSIONS OF LAW

{15} The issue of disqualification of counsel is wholly within the trial court's discretion. *Robinson & Lawing, LLP v. Sams*, 161 N.C. App. 338, 339, 587 S.E.2d 923, 925 (2003).

{16} "The goal of maintaining public confidence in our system of justice demands that courts prevent even the appearance of impropriety and thus resolve any and all doubts in favor of disqualification." *Chemcraft Holdings Corp. v. Shayban*, 2006 NCBC 13 ¶ 34 (N.C. Super. Ct., Oct. 5, 2006), http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2013.htm.

{17} Rule 1.9(a) of the Rules of Professional Responsibility addresses a lawyer's duties to former clients:

> 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.

N.C. R. Prof'l Conduct R. 1.9. The disqualification of a lawyer under this rule will be imputed to the lawyer's firm under Rule 1.10.

{18} Thus, to prevail on his motion, Scott must show: (1) "an attorney-client relationship existed"; (2) the matters are the same or substantially related; and (3) his "position is materially adverse to [Defendants'] interest." *Ferguson v. DDP Pharmacy, Inc.*, 174 N.C. App. 532, 536, 621 S.E.2d 323, 327 (2005).

{19} Here, the parties do not dispute that an attorney-client relationship existed between JMD and Scott, or that the parties' positions are materially adverse to one another. (Pls.' Mot. Disqualify 1; Defs.' Br. Opp. Mot. Disqualify 1.) Accordingly, the only issue for the Court to resolve is whether the First and Second Actions are substantially related.

{20} As defined in the comments to Rule 1.9, two cases will be deemed "substantially related" when they involve (1) the same transaction, (2) the same legal dispute, or (3) "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. R. Prof'l Conduct R. 1.9, Cmt. 3. "Furthermore, '[t]he substantially related test requires a virtual congruence of issues, and the relationship between the issues in the prior [representation] must be patently clear.'" *Classic Coffee Concepts, Inc. v. Anderson*, 2006 NCBC 21 ¶ 45 (N.C. Super. Ct., Dec. 1, 2006), http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2021.pdf (citation and internal quotations omitted).

{21} Although the First Action and Second Action present similar facts and claims, each arose from separate and distinct transactions surrounding potential fraud within different organizations. (Pls.' Mot. Disqualify ¶¶ 2–5; Scott Aff. ¶ 9, 34; Defs.' Br. Opp. Mot. Disqualify 3–4.) The presence of three overlapping parties in these actions does not mandate a finding that the two actions are related.

{22} Since the organizations involved in the First and Second Actions are connected, Scott first argues that the information he disclosed to Hinson regarding the company structure and the relationship between himself, Lackey, and Saldarini will materially advance Defendants' position in the Second Action. (Pls.' Mem. Law Supp. Mot. Disqualify 11–12.) However, consistent with the State Bar's informal opinion, a lawyer should not be disqualified from representing another client for using "generally known information." N.C. R. Prof'l Conduct R. 1.9, Cmt. 8; *see also* (Pls.' Mot. Disqualify Ex. D.) "If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered 'generally known.'" N.C. R. Prof'l Conduct R. 1.9, Cmt. 8 (citation omitted). Here, given the parties' roles in the organizations, Lackey and Saldarini would have equal access to information regarding the company structure as well as knowledge of their relationship with Scott. Although this information may be useful to Defendants, the Court concludes that the information was generally known to the parties.

{23} Furthermore, the Court's in camera review of Scott's client file revealed little information impacting the Second Action beyond a general reference to Talon Fund, a defendant in the Second Action. What little information Scott provided to Hinson was of a general nature that would be of little or no assistance to Defendants. This Court cannot conclude that the relationship between the issues in the Second Action and the prior representation is patently clear. And, there is little risk that information from the prior representation would materially advance Defendants' position in the Second Action such that JMD's disqualification would be warranted.

{24} Scott next argues that JMD should be disqualified based on the counterclaims asserted by Defendants for defamation and abuse of process. With regard to the abuse of process claim, Scott relies on the statement attributed to Buric in the *Charlotte Business Journal* article as proof that Defendants' basis for the abuse of process claim derives from issues related to the First Action. (Pls.' Mot Disqualify Ex. B; Pls.' Mem. Supp. Mot. Disqualify 12–13.) However, at the hearing on this motion, Defendants stipulated that the counterclaim referred solely to matters in the Second Action. Furthermore, the allegations in the counterclaim do not suggest a "congruence of the issues" such that the information obtained from Hinson's representation in the First Action would materially advance Defendants' position on the counterclaim in the Second Action. (Defs.' Counterclaim 15–17.)

{25} Turning to Defendants' defamation claim, Scott asserts that the defense of truth will require addressing the issues raised in the First Action that he discussed with Hinson. In an action for defamation, the truth of the statements alleged in connection with the claim will provide a complete defense. *See Long v. Vertical Techs.*, 113, N.C. App. 598, 603, 439 S.E.2d 797, 801 (1994). Here, Defendants' allegations in support of their defamation claim refer to statements made by Scott that Lackey and Saldarini were "fraudsters" and "embezzlers." (Defs.' Counterclaim ¶ 35.) To advance his defense, Scott argues he will have to prove the fraud alleged in the First Action that he previously discussed with Hinson. (Pls.' Mem. Supp. Mot. Disqualify 11.) Asserting this defense, however, does not necessarily require

disqualifying JMD based on the information shared with Hinson. In fact, and perhaps most fatal to Scott's argument, all of the facts and allegations of fraud in the First Action are, and remain, a matter of public record. Thus, the information shared with Hinson in the initial meeting is readily available to Defendants.

{26} Furthermore, as discussed above, the Court's in camera review of Scott's client file revealed only general information regarding the fraud alleged in the First Action, as would normally be obtained in an initial meeting. Indeed, the client file did not contain any helpful information that was not later included in the complaint from the First Action. As such, any information that would materially advance Scott's defense of truth is generally known to the parties.

{27} The Court concludes, therefore, that the claims in the First and Second Actions are not substantially related, or are based on information generally known to the parties such that Rule 1.9 and 1.10 would not require JMD's disqualification.

{28} **WHEREFORE**, for the reasons given, the Court **DENIES** Plaintiffs' Motion to Disqualify JMD as Counsel for Defendants in this action.

SO ORDERED, this the 9th day of October, 2012.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge for
Complex Business Cases