SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS PART 53
Justice

Parker & Waichman

-v-

Napoli

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE - 03 -

FILED
DEC - 2 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/24/04

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

CHARLES E. RAMOS J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
PARKER & WAICHMAN,

Index No. 605388/01

Plaintiff,

-against-

PAUL J. NAPOLI, GERALD KAISER, MARC J. BERN, NAPOLI KAISER & ASSOCIATES, LLP, NAPOLI KAISER & BERN, LLP, NAPOLI KAISER BERN & ASSOCIATES, LLP, and LAW OFFICES OF MARC JAY BERN, P.C.,

Defendants.
----------X

Charles Edward Ramos, J.S.C.:

This action arises, in part, out of a global settlement of "fen-phen" diet drug cases, filed under the caption In re New York Diet Drug Litig., Index No. 700000/98, reached by defendant Napoli, Kaiser, Bern & Associates, LLP (NKB),[1] a court-appointed liaison counsel, and non-party American Home Products Corp. (AHP), the manufacturer/distributor of fenflurimine and dexfenfluramine. In a related action, Appel-Hole v Wyeth-Ayerst Labs., Index No. 115937/99, the Honorable Justice Helen E. Freedman of this Court issued an order, dated November 7, 2001, approving the global settlement (Settlement Approval), and clarified in a subsequent order, dated November 24, 2003, that the Settlement Approval applies to all claimants represented by NKB in the New York Diet Drug Litig..

On November 9, 2001, plaintiff Parker & Waichman (P&W)

Defendants Napoli, Kaiser & Associates, LLP and Napoli, Kaiser and Bern, LLP, along with NKB, and its three named members, will be referred to as NKB. In addition, the diet drug cases that were handled by defendant Law Offices of Marc Jay Bern, P.C. (Bern, P.C.), were thereafter handled by NKB when Marc J. Bern (Bern) became a partner of NKB.

brought this action on behalf of itself, and its referred clients, seeking its rightful share of attorneys' fees, and challenging the fairness of the amounts allocated to referred clients under the global settlement. P&W asserts eight causes of action against defendants, including: breach of contract, fraud, breach of fiduciary duty, request for an accounting, and unjust enrichment.

Motion sequence nos. 003, 004, and 006 are consolidated here for disposition. In motion sequence no. 003, defendants move to dismiss Count I (breach of contract), Count II (fraud), Count III (breach of fiduciary duty), Count IV (request for an accounting), Count VII (fraud), and Count VIII (unjust enrichment), pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5), and (a) (7), based on lack of standing, documentary evidence, failure to state a claim, failure to plead fraud with particularity, and collateral estoppel. Counts V and VI, asserting breach of contract relating to allegedly referred Auto Immune Deficiency Syndrome (AIDS) and asbestos cases, are excluded from the motion to dismiss.

In motion sequence no. 004, P&W moves for an order, pursuant to CPLR 2221, 3122, and 3124: (1) finding that defendants failed to comply with the court's conditions for time to answer or move; (2) requiring defendants to properly account for the sums due the referred clients and P&W, and to produce certain documents; and (3) demanding that defendants pay P&W the unpaid sum of $478,374.53, with interest.

In motion sequence no. 006, defendants move, pursuant to

Disciplinary Rules (DR) 2-107, 5-101, 5-102, and 5-108, for an order disqualifying Trief & Olk (T&O) and P&W.

I. Background

A. The Parties

NKB represented approximately 5,600 clients allegedly injured as the result of ingesting fen-phen. From 1997 through 2000, P&W referred approximately 400 to 500 of these clients to NKB. The parties dispute the exact number of clients that P&W referred, and that NKB agreed to represent. Aside from referred clients obtained from P&W and others, NKB also directly retained clients. NKB was appointed to serve as liaison counsel for the thousands of actions, which were brought within New York jurisdiction, and consolidated under the caption In re New York Diet Drug Litig., Index No. 700000/98.

Originally, NKB and T&O jointly represented the allegedly injured claimants in New York in seeking class certification. Subsequently, NKB recommended to many of its clients that they opt-out of a federal class action litigation against AHP. T&O advised against the recommendation, and did not continue to represent these opt-out claimants.

B. Alleged Letter Agreements

P&W maintains that it executed two letter agreements with NKB and Bern, P.C. to memorialize and supplement its contract for referral fees. The first letter agreement, dated April 1, 1998, provided that NKB agreed to pay P&W 40% of the net legal fees generated by all existing and future referred cases. The second

letter agreement, dated May 12, 1999, stated that the parties agreed that the net attorneys' fees for all new diet drug or fen-phen/redux cases referred by P&W to NKB (on May 3, 1999 and thereafter) were to be divided on a 50%-50% basis. P&W asserts that the parties understood that net legal fees were to be calculated after deducting legal expenses and disbursements incurred by both firms from the amount recovered by each client.

C. Settlement of Opt-Out Claimants' Actions

On January 25, 2001, Judge Freedman appointed Michael J. Dontzin, as Special Master, to mediate settlement negotiations in the New York Diet Drug Litig., and to review the global settlement and allocation to each plaintiff. Between May 2000 and March 2001, NKB settled all of the opt-out claimants' actions with AHP. In his affirmation, dated October 29, 2001, Spacial Master Dontzin found that: (1) the terms of the global settlement were "reasonable and fair"; (2) NKB satisfied its ethical obligations; and (3) NKB "achieved an excellent result for their clients." E. Leo Milonas Affirmation in Support (Milonas Affirmation), Ex. B, ¶¶ 7, 19.

As stated above, on November 7, 2001, Justice Freedman issued a Settlement Approval applicable to all claimants represented by NKB, adopting and confirming Special Master Dontzin's findings. Upon the parties' application, in the Appel-Hole action, Justice Freedman also issued a sealing order applicable to all of NKB's fen-phen cases in New York (Sealing Order). The Sealing Order sealed the record, and all proceedings

pertaining to the approval of the settlements with defendants, but left individual case files unsealed. Thereafter, NKB paid P&W approximately $5.3 million in referral fees.

D. Present Action

On November 9, 2001, P&W commenced this action against NKB, on behalf of itself and its referred clients, asserting breach of fee-splitting arrangements, fraud, breach of fiduciary duty, request for an accounting, and unjust enrichment. P&W alleges that: (1) NKB allowed AHP to pay lump sums for cases, rather than separately negotiating amounts for each case; (2) after receiving a lump sum, NKB allocated the settlement amount for each client, and deliberately allocated more money to its direct clients (the non-referred clients) than to comparable referred cases, in order to minimize fee-splitting and maximize its own legal fees; and (3) NKB fraudulently assessed more than $10 million of costs and disbursements to its clients, which also decreased the net settlement amount used to calculate P&W's fees.

In an order, dated December 19, 2001, defendants were granted a 30-day extension to respond to the complaint "on condition that an accounting is provided (of P&W's cases) within fifteen days from today, answer due by January 18, 2002." On January 18, 2002, defendants filed the subject motion to dismiss.

On January 30, 2002, plaintiffs filed the subject motion for accounting and other relief. On April 11, 2002, Special Master Dontzin recused himself as a mediator with the consent of the parties and Justice Freedman. T&O presently serves as P&W's

counsel in the present action, a related action, entitled Abramova v Napoli, Index No. 601332/03, and the Appel-Hole action. On July 29, 2003, defendants filed the subject motion to disqualify T&O and P&W.

E. Related Actions

Appel-Hole Action

In order to challenge the Settlement Approval and Sealing Order, P&W also moved to intervene in the above-stated Appel-Hole action. Justice Freedman denied the motion to intervene in an order, dated November 24, 2003, and decided to unseal the papers concerning the settlements of NKB's cases, upon the condition that plaintiffs in the present action and in the Abramova action, execute a confidentiality agreement reasonably satisfactory to AHP. The court also held that the Settlement Approval was still in effect.

Abramova Action

In 2003, P&W and certain referred claimants commenced the Abramova action, making allegations similar to those made in the present action. For example, P&W claims that NKB: (1) assigned higher settlement values to direct client cases than compared to referred cases; (2) charged their clients with fraudulent costs and disbursements; and (3) induced the referred clients to settle by making certain misrepresentations, including statements that NKB and AHP negotiated specific settlement offers for each case.

In March 2004, Judge Freedman recused herself from all three related actions.

II. Discussion

A. Motion to Dismiss

In motion sequence no. 003, NKB moves to dismiss Counts I through IV, VII and VIII, pursuant to CPLR 3211, based on lack of standing, documentary evidence, failure to state a claim, failure to plead fraud with particularity, and collateral estoppel. On a motion to dismiss, pursuant to CPLR 3211, the court affords the pleading a liberal construction, accepts the facts as alleged in the complaint as true, and accords the plaintiff the benefit of every favorable inference in order to determine whether the facts as alleged fit within any cognizable legal theory. See Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303-304 (2001).

Third-Party Standing

At the outset, Counts I through IV, VII and VIII, as asserted on behalf of the referred clients, will not be dismissed due to P&W's alleged lack of third-party standing. Generally, one litigant raising another's legal rights is prohibited. However, the principle of third-party standing allows a third party, who has suffered an "injury in fact," to assert the rights of another. See New York County Lawyers' Assn. v State of New York, 294 AD2d 69, 74 (1st Dept 2002). Three relevant factors determine whether the principle of third-party standing applies: (1) some substantial relationship must exist between the party asserting the claim and the rightholder; (2) there must be some impediment to the rightholder's ability to assert his/her own

rights; and (3) the need to avoid the right holder's loss of substantial rights. See id. at 75.

P&W's attorney client relationship satisfies the substantial relationship requirement and the obstacles the referred clients would encounter in bringing an action against NKB, such as: (1) the existence of a confidentiality agreement executed by the referred clients; (2) the lack of obvious fraud to the clients, who lack necessary information and an overall understanding of NKB's allocations; (3) the scales weighing in favor of not pursuing litigation since individual client losses may not be significant, compared to the total loss of all referred clients are considerations that would render the clients rights practically impossible to assert.

The allegation of less than equal treatment in the allocation of settlement benefits between referred and non-referred clients asserted in this and the companion actions deserve this Court's careful attention light of the recusal of both the Justice presiding and the Special Master. The final determination of whether this issue is best resolved in this action or one of the companion actions need not be decided at this preliminary stage.

Under these circumstances, P&W has alleged sufficient third-party standing to sue on behalf of its referred clients, and the motion to dismiss is denied.

Breach of Implied Covenant of Good Faith and Fair Dealing

Count I asserts breach of contract against all defendants

(except for Bern, P.C.), specifically, breach of the implied duties of good faith and fair dealing. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002).

> This covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." While the duties of good faith and fair dealing do not imply obligations "inconsistent with other terms of the contractual relationship," they do encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included."

Id. (citations omitted).

P&W sufficiently alleges a cause of action for Count I because a reasonable person in P&W's position would be justified in understanding that NKB would not: (1) fail to pay P&W its portion of participating fees on its referred cases; (2) make unqualified deductions to P&W's fee, such as deductions not chargeable to the prosecution of the actions, without P&W's prior agreement; or (3) reject certain referred clients after NKB already agreed to represent them, and informed them of settlement. In addition, the allegations of breach of implied duties of good faith and fair dealing are properly included as part of a breach of contract cause of action, rather than improperly brought as a separate cause of action. See 511 West 232nd Owners Corp., 98 NY2d at 154; 1-10 Industry Assocs., LLC v Trim Corp. of America, 297 AD2d 630, 631 (2d Dept 2002).

Furthermore, P&W is not barred by the doctrine of collateral

estoppel from asserting its breach of contract claim in Count I. Defendants claim that: (1) the underlying issue of whether defendants fairly assigned settlement values to the so-called direct cases and referred cases was allegedly addressed and decided in the New York Diet Drug Litig.; and (2) even though P&W was not a party to the prior litigation, it was a party with derivative rights and is bound by the prior adjudication.

For estoppel purposes, a judgment is binding on an attorney when he or she claims an interest in the subject matter of the previous action in which he or she represented his or her client. See e.g. In re Hofmann, 287 AD2d 119, 122-24 (1st Dept 2001); Wood v Wood, 21 AD2d 627, 633 (1st Dept 1964) ("an attorney, who participates in proceedings before the court to determine the reasonable value of his services, is bound by the court's determination even though he is not formally named a party to the proceedings"); Weidlich v Richards, 276 App Div 383, 385 (1st Dept 1950). Here, the doctrine of collateral estoppel does not apply because P&W's mere status or appearance as referral attorneys in the New York Diet Drug Litig. may not be regarded as participation in the prior litigation to preclude P&W from asserting that NKB breached their contractual fee arrangement for referring the individual claimants. See Goodman v Solack Estates, Inc., 78 AD2d 512 (1st Dept 1980) ("[w]e do not believe that collateral estoppel is appropriately applied to a law firm on the basis of a judgment entered against a client in a proceeding in which the law firm was not a litigant but was

acting solely as counsel"); Hinman, Straub, Pigors & Manning, P. C. v Broder, 124 AD2d 392, 393 (3d Dept 1986) (finding law firm's position, in prior settlement proceeding, was merely as client's representative, which did not present law firm with a full and fair opportunity to assert its own claims for breach of retainer agreement). P&W was not given a full and fair opportunity to assert its own claim for breach of contract against NKB in the prior litigation.

The motion to dismiss Count I is denied.

Breach of Fiduciary Duty

In Count III, P&W fails to allege that NKB owes it a fiduciary duty separate and beyond any contractual duties. See Kursman Karelsen & Frank, LLP v Kaiser, 283 AD2d 330 (1st Dept 2001) (affirming dismissal of breach of fiduciary duty claim allegedly arising out of fee sharing agreement, in light of breach of contract claim). The relationship between P&W, the referring counsel, and NKB, the trial counsel, is "an arms-length business relationship" between sophisticated parties, arising out of a contractual fee-splitting arrangement. WIT Holding Corp. v Klein, 282 AD2d 527, 529 (2d Dept 2001). The April 1, 1998 and May 12, 1999 letter agreements convey no present interest and assign no portion of the client's recovery to P&W to support a breach of fiduciary duty claim.

Therefore, the motion to dismiss Count III as asserted on behalf of P&W is granted.

Fraud

Counts II and VII both allege claims of fraud and misappropriation. In Count II, P&W seeks to recover its portion of attorneys' fees for its referred diet drug cases. P&W alleges that its fraud claims are collateral to, and independent of, the contract, such as NKB's intentional improper manipulation of the settlement figures and fraudulent statements to P&W. P&W maintains that NKB made the following misrepresentations: (1) settlements were individually made and negotiated; (2) settlement offers were fair and reasonable because the settlements were mediated and overseen by Special Master Dontzin; (3) board certified medical specialists and a trained nurse in the area evaluated each case; and (4) settlement orders were final.

P&W argues that it relied on NKB's alleged misrepresentations and omissions, and failed to: (1) object to the settlement or the referred clients' execution of their releases; (2) question costs and disbursements; and (3) seek relief from the court or notify the disciplinary committee. In Count VII, P&W alleges that: (1) it relied on NKB's representation that the attorneys' fees for asbestos cases would be paid to P&W; and (2) NKB falsely represented to third-party Wilentz, Goldman & Spitzer that NKB were the referring attorneys, accepted the fees, and refused to pay P&W.

To properly plead a cause of action for fraud, plaintiffs must allege: (1) a representation of material fact; (2) the falsity of that representation; (3) knowledge by the party that made the representation that it was false when made; (4) reliance

by the plaintiffs; and (5) injury. See Kaufman v Cohen, 307 AD2d 113, 119 (1st Dept 2003). CPLR 3016 (b) also requires fraud to be pleaded in sufficient detail to give adequate notice to the defendants. See Houbigant, Inc. v Deloitte & Touche LLP, 303 AD2d 92, 97 (1st Dept 2003).

This Court grants defendants' motion to dismiss Counts II and VII as asserted on behalf of P&W. First, P&W's fraud claims fail to allege any special damages, "including those for foregone opportunities, that would not be recoverable under a contract measure of damages." Coppola v Applied Elec. Corp., 288 AD2d 41, 42 (1st Dept 2001); see also Metropolitan Transp. Auth. v Triumph Adv. Prods., Inc., 116 AD2d 526, 527 (1st Dept 1986). Second, P&W fails to plead a breach of duty separate from a breach of contract. Thus, the fraud claim is redundant. As to Count VII, P&W alleges that NKB made certain misrepresentations to a third party, which is insufficient to support a fraud claim asserted by P&W.

Unjust Enrichment

"A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter." Goldstein v CIBC World Mkts. Corp., 6 AD3d 295, 296 (1st Dept 2004). P&W argues that it sufficiently states a claim for unjust enrichment in Count VIII, and that NKB fails to acknowledge that a contractual fee arrangement between them exists.

This Court grants defendant's motion to dismiss Count VIII.

First, the record shows that NKB may dispute whether P&W signed retainers with the referred individual claimants, but that it is undisputed that NKB contracted with P&W to form a referral fee arrangement. Second, P&W asserts the same allegations for unjust enrichment as it does under its breach of contract claim, and fails to show that the alleged wrongdoing would not be covered by the alleged terms of the parties' contract. Third, as stated above, P&W fails to sufficiently allege a fraud claim "or breach of a duty distinct from, or in addition to, the breach of contract cause of action." Express Home Care Agency, Inc. v VIP Health Servs., Inc., 275 AD2d 759, 760 (2d Dept 2000).

Accounting

Defendants' motion to dismiss Count IV is resolved by the court's determination of P&W's motion for an accounting set forth below

B. Motion for Accounting and Other Relief

Judge Freedman's interlocutory order, dated December 19, 2001 and duly entered on February 11, 2002, granted an accounting as to P&W's cases only. NKB already attempted to render an accounting with respect to P&W's referred clients. P&W now contests: (1) the sufficiency of the documents and information turned over by NKB; and (2) the fact that its rights to an accounting, granted by the December 19, 2001 order, are limited to referred clients.

This Court finds that: (1) the December 19, 2001 order established P&W's right to an accounting as to its referred

clients; (2) a determination as to P&W's alleged right to an accounting as to non-referred clients is held in abeyance at this juncture; (3) an examination of a long account is necessary, pursuant to CPLR 4317(b), since the accounts are the immediate object of the action, and a jury would have great trouble in reviewing the information pertaining to 400 to 500 referred client cases; (4) the contested accounting is referred to a Special Referee, who will, in his or her discretion, pass on the accounting; (5) given Judge Freedman's November 24, 2003 interlocutory order in the Appel-Hole action, certain previously sealed documents concerning the settlement of NKB's cases, pertaining to P&W's referred clients only, should also be included in the accounting; and (5) the interlocutory order, dated December 19, 2001, is hereby modified to include such unsealed settlement documents.

C. Motion to Disqualify Parker & Waichman and Trief & Olk

"The disqualification of an attorney is a matter that rests within the sound discretion of the court." Nationwide Assoc., Inc. v Targee St. Internal Medicine Group, P.C., 303 AD2d 728 (2d Dept 2003). "[S]uch motions are often used as a litigation tactic, 'inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client.'" Talvy v American Red Cross in Greater New York, 205 AD2d 143, 149 (1st Dept 1994), affd 87 NY2d 826 (1995) (citation omitted). Caution should also be taken in granting disqualification since

it denies a party of its right to representation by the attorney of its choice. See id.

NKB maintains that P&W should be disqualified because: (1) P&W's claims are adverse to the interest of its alleged former clients; and (2) P&W's testimony will be necessary and adverse to the interests of their current clients. NKB also argues that T&O should be disqualified from representing P&W because: (1) pursuant to DR 5-101 (a) and DR 5-102 (b), T&O acts as an advocate and a witness, and will offer testimony both necessary to NKB's defense and adverse to P&W's interests; (2) T&O relies on illicitly obtained evidence, such as allegedly confidential and privileged documents provided by Stephen David Murakami (Murakami), a former employee of NKB; and (3) pursuant to DR 5-108, T&O originally served as co-counsel to individual claimants in seeking class certification, and now represents interests adverse to former clients who do not wish to vacate the Settlement Approval.

The assertion that P&W's claims are adverse to the interests of its alleged former clients will be determined at a hearing to be scheduled with the clerk of this part reasonably soon after the defendants have answered.

Defendants' argument that T&O should be disqualified from representing P&W is discussed below.

DR 5-101 (a) and DR 5-102 (b)

DR 5-101 (a) provides that an attorney "shall not accept or continue employment if the exercise of professional judgment on

behalf of the client will be or reasonably may be affected" by the lawyer's own interests, "unless a disinterested lawyer would believe that the representation of the client will not be adversely affected" and the client consents after full disclosure. DR 5-102 (b) provides that an attorney shall withdraw from representation, when he ascertains, or it becomes obvious, that he, or an attorney from his firm, ought be called as a witness "on a significant issue other than on behalf of his client, and it is apparent that the testimony would or might be prejudicial to the client."

The moving party carries the burden of establishing that continued representation would constitute a violation of DR 5-101 or DR 5-102; conclusory allegations will not suffice to deprive a party of its choice of counsel. See Lefkowitz v Mr. Man, Ltd., 111 AD2d 119, 121-22 (1st Dept 1985). "The mere possibility that counsel might be called to testify has been held by the Court of Appeals to be inadequate to justify disqualification." NYK Line (North America) Inc. v Mitsubishi Bank, Ltd., 171 AD2d 486 (1st Dept 1991).

Ted Trief, a partner at T&O, was present at the hearing before Justice Freedman on March 20, 2001, during which Murakami voiced his allegations against NKB. NKB seeks to call Ted Trief to testify regarding P&W's knowledge of Murakami's allegations prior to P&W's acceptance of referral fees and the distribution of settlement proceeds. However, a transcript of the March 20, 2001 hearing exists. Thus it is unnecessary, for NKB to call Ted

Trief to establish what P&W knew or did not know about Murakami's allegations before settlement payments were made, and before the Settlement Order was entered. This transcript constitutes the sufficient "availability of other evidence" in order to avoid the necessity of disqualification. S.S. Hotel v 777 S.H. Corp., 69 NY2d 437 (1987).

The motion to disqualify T&O is also denied as to the firm. This Court finds no basis to conclude that any other attorney from the T&O law firm ought to be called as a witness in this action. See Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64, 76 (1st Dept 2002).

Alleged Acquisition of Privileged and Confidential Material

"[A]cquisition of otherwise unobtainable privileged material to the serious disadvantage of the other parties and to the damage of their cases" may lead to suppression of the documents and disqualification of counsel, "to rectify the situation and to prevent the offending law firm from realizing any unfair advantage from its surreptitious acquisition of privileged material." Matter of Estate of Kochovos, 140 AD2d 180, 181-82 (1st Dept 1988), citing Matter of Beiny, 129 AD2d 126, 143, rearg denied 132 AD2d 190 (1st Dept 1987). Here, NKB alleges that Murakami, a disgruntled former employee of NKB, stole certain work product and client-attorney information from NKB, and turned it over to T&O and P&W. The allegedly stolen information includes documents that: (1) pertain to non-referred clients; (2) are from an early stage of litigation concerning strategy and

analysis (to which third parties such as AHP would not have been privy); and (3) do not fall within the crime-fraud exception to the attorney-client privilege because no evidence exists that documents were drafted with intent to further a client's crime.

The record shows that T&O relies on certain statements made by Murakami, the former managing attorney at NKB, in bringing this action and the Abramova action. For example, paragraph 8 of Jerrold S. Parker's Affirmation in Opposition to Motion to Dismiss, states that "[i]n addition to the misrepresentations and preferential treatment of the Direct Cases, the managing attorney informed us that clients in the diet drug litigation, including the Referred Clients, were fraudulently assessed costs and disbursements by the Napoli Partnerships," and goes on to list specific costs and disbursements.

T&O neither confirms nor denies that it received and relies on illicitly obtained evidence from Murakami. T&O merely argues that: (1) the information from Murakami would not be the only evidence of defendants' wrongdoing; (2) T&O should not be disqualified for Murakami's alleged acts; and (3) the Murakami documents are not privileged or confidential information. The court declines to grant NKB's motion to disqualify the law firm of T&O, pending an evidentiary hearing to reveal: (1) whether T&O possesses these Murakami documents; and (2) if so, whether these documents do reveal fraud and breach of fiduciary duty to the referred clients and if so, whether they should be shielded from disclosure by any privilege.

DR 5-108 (a)(1)

"Under DR 5-108 (a) (1), a party seeking disqualification of its adversary's lawyer must prove (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 131 (1996). "Only where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise." Id. at 132.

Here, NKB specifically alleges that "[b]y representing the Individual Plaintiffs and Parker & Waichman in the instant proceeding, which throws the settlements of NKB's clients and Trief & Olk's former clients into jeopardy, Trief & Olk is directly adverse to its former clients on a substantially related matter and, as such, must be disqualified." Eric Fishman Reply Affirmation in Support, Ex. B (Paul J. Napoli Reply Affirmation in Support), ¶ 7. However, NKB, the moving party, did not have a prior attorney-client relationship with T&O, and cannot, under DR 5-108 (a), deprive P&W of its choice of counsel. See Anil v Fernandez, 267 AD2d 187, 188 (2d Dept 1999); Gussack v Goldberg, 248 AD2d 671, 672 (1st Dept 1998).

Accordingly, it is:

ORDERED that the motion to dismiss is granted, to the extent of dismissing Counts II, and VII as asserted by P&W, and is

otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a long accounting is directed as to defendants regarding the settlements that defendants reached on behalf of plaintiff's referred clients in the New York Diet Drug Litig., Index No. 700000/98; and it is further

ORDERED that, within 30 days after service of a copy of this order with notice of entry, the defendants shall prepare and serve, upon all other parties hereto, a long accounting, including previously sealed documents concerning the plaintiff's referred clients that are no longer sealed due to Judge Freedman's November 24, 2003 Order in Appel-Hole v Wyeth-Ayerst Labs., Index No. 115937/99, with all appropriate schedules attached; and it is further

ORDERED that any formal objections to such accounting shall be served within 30 days after service of a copy of the accounting; and it is further

ORDERED that, pursuant to CPLR 4317 (b), the issue of the long accounting is referred for assignment to a Special Referee to hear and determine; and it is further

ORDERED that, no later than the hearing date to be assigned, a copy of the long accounting and any formal objections shall be filed with the Special Referee to whom this long accounting is assigned; and it is further

ORDERED that the motion for an accounting is held in abeyance pending the hearing and determination of the Special Referee to whom this long accounting is assigned; and it is further

ORDERED that counsel shall serve and file a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) for the purpose of arranging a calendar date for hearing and assignment of this long accounting to a Special Referee for determination; and it is

ORDERED that the motion to disqualify the law firm of Parker & Waichman is held in abeyance; and it is further

ORDERED that the motion to disqualify the law firm of Trief & Olk is held in abeyance, pending an examination of the Murakami documents by this Court.

Dated: November 24, 2004

J.S.C.

CHARLES E. RAMOS J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.