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

PRESENT: **HON. CAROL EDMEAD** PART 35

Index Number : 600770/2006
LAMOTTE, NIKLAS
VS
BEITER, JEFFREY F.
Sequence Number : 001
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE 5/30/06
MOTION SEQ. NO. 001
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 sequence 001 and 002 are consolidated for joint disposition as follows:

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the respondent's motion to disqualify Willkie Farr & Gallagher LLP as counsel for the petitioners, Niklas Lamotte, Resolution Partner, LLC, and Resolution GP, LLC, is denied. It is further

ORDERED that the petition, pursuant to CPLR 7503(b), to nullify and stay arbitration is denied and the petition is dismissed. It is further

ORDERED that the respondent's request for attorneys' fees and costs incurred in connection with responding to the petition is denied. It is further

ORDERED that counsel for the respondent shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

The foregoing constitutes the decision and order of the court.

Dated: 5/30/06

HON. CAROL EDMEAD 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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of

NIKLAS LAMOTTE, RESOLUTION PARTNERS, LLC, and RESOLUTION GP, LLC,

Petitioners,

Index No. 600770/06

-against-

DECISION/ORDER

JEFFREY F. BEITER, EXECUTOR OF THE ESTATE OF JOHN BEITER,

Respondent.

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EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 75 proceeding, motion sequence 001, petitioners Niklas Lamotte, Resolution Partners, LLC and Resolution GP, LLC ("petitioners") seek an order, pursuant to CPLR 7503(b), nullifying the demand for arbitration served by respondent Jeffrey F. Beiter, executor of the Estate of John Beiter ("respondent" or "the Estate") and permanently staying all proceedings related to the aforementioned demand for arbitration. The respondent opposes the petition and requests costs and attorneys' fees incurred in responding to the petition. In motion sequence 002, the respondent moves for an order, pursuant to Title 22 of the New York Code of Rules and Regulations §§ 1200.24(d) & 1200.27(a), disqualifying the petitioners' counsel, Willkie Farr & Gallagher, LLP ("Willkie"), from representing the petitioners adverse to the respondent in this proceeding. The petitioners oppose the respondent's motion to disqualify.[1]

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[1] The court has consolidated motion sequence numbers 001 and 002 for disposition.

Factual and Procedural Background

Petitioner Niklas Lamotte ("Lamotte") and the respondent each hold a 50% membership interest in both petitioner Resolution Partners, LLC and petitioner Resolution GP, LLC (collectively, the "Companies"). Petitioner Resolution Partners, LLC is an investment manager of a hedge fund and petitioner Resolution GP, LLC is the general partner of Resolution Partners, LLC.

In 2002, Lamotte and John Beiter, the Estate's decedent, entered into agreements ("Operating Agreements") to share equally in the ownership and operation of the Companies. Pursuant to the Operating Agreements, the purpose of the Companies was to act as the investment manager to one or more investment funds. In addition, John Beiter was responsible for all the day-to-day decisions regarding investments operations, and Lamotte was responsible for all the day-to-day decisions regarding marketing and office management.

On August 10, 2005, John Beiter died. Section 10.01 of the Operating Agreements, in pertinent part, states the following:

> Death of a Member. Upon the death of any Member, the Company shall purchase such Member's Units from his estate, and the deceased Member's legal representative shall sell such Units to the Company, for a purchase price equal to the "Agreed Value" of the decedent's Units as determined in accordance with the procedures described set forth herein. The closing of the purchase of the deceased Member's Units shall take place within one hundred eighty (180) days of the date of death on a date agreed upon by the Company and the decedent's legal representative.

Furthermore, Section 10.02 of the Operating Agreements, in pertinent part, states the following:

> Agreed Value. The Agreed Value of a Member's Units in the Company shall be determined utilizing the following valuation procedure ("Valuation Procedure"). Each Member shall appoint an investment banking or independent accounting firm with a national reputation as an appraiser within twenty (20) days after the Valuation Procedure has been triggered pursuant to this Agreement. . . . The appraisers so appointed shall meet

> promptly to determine the fair market value, such determination to be made within thirty (30) days after the appointment of the second appraiser. If the amounts determined to be fair market value by such appraisers shall differ by five percent or less of the greater of such two appraisers' appraisals, such fair market value shall be deemed to be the average of such two appraisals. In the event that the amounts determined to be such fair market value by such two appraisers shall differ to a greater extent, a third investment banking or independent accounting firm with a national reputation as an appraiser shall be chosen within five (5) days thereafter by the mutual consent of such first two appraisers or, if such first two appraisers fail to agree upon the appointment of a third appraiser within such five (5) day period, such appointment shall be made promptly by the office of the American Arbitration Association in New York City. The appraisal of the third appraiser so chosen or appointed shall be given within fifteen (15) business days after the appointment of such third appraiser. Fair market value shall be deemed to be the average of the appraisals rendered by such three appraisers. In the event, however, that the lowest of the highest of the three appraisals, or both, varies by more than ten percent from the middle appraisal, the appraisal or appraisals so varying shall be disregarded.

In accordance with Section 10.01 of the Operating Agreements, the deadline for the closing of the purchase of John Beiter's interest in the Companies was February 6, 2006, which was 180 days after his death.

Following Mr. Beiter's death on August 10, 2005, his Last Will and Testament was offered for probate, and the Preliminary Letters Testamentary, which granted an Executor the authority to act on behalf of John Beiter's estate, were issued on October 4, 2005.

In accordance with Section 10.02 of the Operating Agreements, the Companies appointed a firm to conduct an independent appraisal of the Estate's interest in the Companies within twenty days of John Beiter's death. Upon the completion of that appraisal, on October 4, 2005, the Companies delivered the appraisal to the Estate's retained counsel. During approximately the next seven weeks, the Estate's counsel neither appointed an appraiser to determine the value of the Estate's share of the Companies, nor did the Estate's counsel respond in any way to the Companies' appraisal.

On November 29, 2005, the Companies emailed to the Estate's counsel an offer to purchase the Estate's share in the Companies. After receiving no responses either to this email, to a letter dated December 9, 2005, or to its other attempts to contact the Estate's counsel, the Companies sent the Estate's counsel a letter dated December 19, 2005 informing him that the Estate had until the end of business on December 20, 2005 to accept the offer to purchase the Estate's share in the Companies.

On December 21, 2005, the Estate terminated its retained counsel and hired new counsel. When the Estate's new counsel requested from the Companies more time to conduct an appraisal, the Companies refused the request but extended the offer to purchase until December 22, 2005.

Thereafter, on January 6, 2006, the Estate's new counsel informed the Companies that she had retained a firm to conduct an appraisal of the Estate's share in the Companies, and requested that the Companies provide the Estate with various "financials and tax returns" that would assist the firm's appraisal process. Then, five days before the contractual deadline for the closing, on February 1, 2006, the Estate's new counsel filed a petition in the Surrogate's Court seeking an order compelling the Companies to provide the Estate with the requested "financials and tax returns" and extending the time in which the Estate could conduct its appraisal. However, the Surrogate's Court denied this petition, and declared that "[a]ll controversies and disputes relating to the terms of the operating agreement are required to be settled by binding arbitration...."

Consequently, on February 9, 2006, the Estate filed a Demand for Arbitration against the petitioners with the American Arbitration Association ("AAA"), alleging that petitioners

breached the Operating Agreements, and seeking an order directing the parties to proceed with a buy-out of the Estate's interest or declaring that the Estate shall continue as a member of the Companies. In turn, the petitioners commenced the instant proceeding to nullify the demand and stay arbitration.

Contentions of the Parties

The Petition

The petitioners contend that the CPLR § 7503(b) permits a party to apply for a stay of arbitration on the ground that a valid agreement has not been complied with. Therefore, since the Estate failed to comply with "the self-contained timetable, and detailed, exclusive valuation" requirements of Section 10.02 of the Operating Agreements, the Estate's demand for arbitration must be stayed. Petitioners assert that upon Mr. Beiter's death, the Valuation Procedure of Section 10.02 was triggered, thereby requiring that the Estate appoint an appraiser within twenty days thereof. According to petitioner, Section 10.02 also requires that, within thirty days after the appointment of the second appraiser, the appraisers meet to determine the fair market value of the Estate's share in the Companies. Finally, if the Estate had appointed an appraiser, and if the Companies' appraisal and the Estate's appraisal differed by more than five percent, a third appraiser could have been appointed within five days of the meeting between the first two appraisers. However, the petitioners assert, the Estate failed to comply with any of these conditions precedent to arbitration in a timely fashion.

Petitioners further argue that since the Estate "was well aware of the timelines and procedures contained within Section 10.02 of the Operating Agreements, and acknowledged, if not admitted, that it had not complied [with] this Section," the Estate cannot now ask an

arbitrator "to create new timetables or an alternative remedy that was never agreed upon by the parties or expressly denied in the Operating Agreements." The Estate's "lack of diligence and delay" is "obstructing" the Companies from both soliciting an outsider to "continue the business of the enterprise" and "preventing the surviving member from continuing the work of the Companies." Thus, since the Estate has not complied with the Operating Agreements, it has waived any rights that it might have to contest the Companies' appraisal.

Opposition to the Petition

In opposition, the respondent notes that, of the different grounds under which an arbitration may be stayed pursuant to the CPLR, the only issue herein is whether the Estate has complied with the parties' arbitration agreement. The respondent submits that in order to determine whether an arbitration agreement has been complied with, a court must determine if the arbitration agreement imposes a condition precedent to arbitration, and if so, whether the parties have complied with that condition. According to the respondent, the arbitration clause at issue contains no such condition precedent, and therefore, there are no grounds upon which to stay the arbitration, which has already been ordered by the Surrogate's Court. The respondent therefore argues that the court's inquiry into whether arbitration should be stayed should end, and the court ordered arbitration should proceed.

Further, there is no authority to support petitioners' contention that respondents' breach of Section 10.02 of the Operating Agreements warrants a stay of arbitration. Otherwise, argues respondent, any contractual dispute would nullify any arbitration clause contained in the disputed contract. The respondent also notes that Section 10.02 "has nothing to do with arbitration." The respondent does not deny that there is a dispute regarding the valuation procedures. However,

argues respondent, that dispute "does not somehow defeat the parties' arbitration agreement." The respondent asserts that "this dispute is the very reason the parties require arbitration."

Reply Memorandum in Further Support of the Petition

The petitioners argue that the plain language of CPLR 7503 provides that a stay of arbitration may be sought on the grounds "that a valid agreement was not made or has not been complied with," and that the Estate concedes that it failed to comply with the Operating Agreements.

The petitioners also contend that the Surrogates Court's order is not controlling, since the issue before the Surrogate Court concerned a procedural motion on whether that court should hear the Estate's case, and not whether the Estate complied with the Operating Agreements. And, petitioners did not have a reasonable opportunity to respond to the Estate's motion.

Further, the petitioners contend that the Operating Agreements must be read as a whole to determine the "parties' intent for resolving disputes over the valuation of a deceased Member's interest. The petitioners assert that several factors provide evidence of the parties true intent concerning the resolution of valuation disputes: (1) under Section 10.03, the Estate is no longer a Member of the Companies due to the death of Mr. Beiter; (2) Section 10.02 is a "self-contained, self-executing, and self-remedying provision, which includes its own arbitration proceeding"; and (3) in order to challenge the petitioners' valuation, the Estate was obligated to obtain a valuation in a timely manner and to follow the procedures detailed in Section 10.02.

Estate's Motion to Disqualify

Respondent argues that Willkie, Farr, & Gallagher LLP ("Willkie") cannot represent the Companies and Lamotte in the underlying arbitration action, adverse to the interests of its former

client, Mr. Beiter.

In support, the Estate asserts that in 2002, Mr. Beiter and petitioner Lamotte created the Companies, and that Willkie has represented and continues to represent the Companies. The Estate contends that by representing a small company with two members, Willkie also effectively represented both members of the Companies. And, New York law presumes that a lawyer for a small company also represents the shareholders of that company. Therefore, the Estate argues, since Mr. Beiter's interests are now held by the Estate, Willkie cannot represent the adversaries of the Estate, Lamotte or the Companies, in the underlying arbitration.

The Estate also argues that under New York law, it is inferred that a law firm that has represented a small company is privy to and has obtained confidential information concerning the members or shareholders. Therefore, Willkie cannot use such confidential information against the Estate in the underlying adversarial arbitration proceeding. Therefore, Willkie should be disqualified for this reason as well.

The Estate further contends that Willkie should be disqualified as counsel since its representation of Lamotte presents an appearance of professional impropriety. The Estate asserts that since Willkie previously represented the Companies, its current representation of one of the Companies' members, Lamotte, in an adversarial action against the interests of the other member of the Companies creates an obvious appearance of impropriety.

Moreover, the Estate contends that Willkie's representation of Lamotte runs afoul of the advocate-witness rule, which prohibits an attorney from taking a case against a former client that is in any way related to the prior representation. The Estate, as the embodiment of the former client, is entitled to certainty that its interests will not be prejudiced as a result of Willkie's

representation of petitioners. The Estate further asserts that Willkie's representation of Lamotte is prohibited because the standards of the legal profession are demanding, and, as such, they require that an attorney avoid not only the fact, but even the appearance of representing conflicting interests.

The Estate also contends that should there be any doubt that Willkie represented Mr. Beiter in the past, that it obtained his confidential information, that its representation of the petitioners appears improper, or that its representation runs afoul of the advocate-witness rule, all such doubts must be resolved in favor of disqualification.

Finally, the Estate asserts that since the interests of petitioners Lamotte and the Companies are not the same in this matter, they cannot be fairly represented by the same counsel. When considering that the Estate still maintains a 50% interest in the petitioning Companies, and Lamotte's interests are opposed to the Estate's, Willkie's representation of both Lamotte and the Companies warrant disqualification, and engagement of separate counsel for Lamotte and the Companies.

Opposition to the Motion to Disqualify

Petitioners argue that the Estate has failed to meet the "high burden of proof" warranting disqualification. First, the petitioners argue that the Estate has failed to establish that any attorney-client relationship currently exists between the Estate and Willkie or that any such relationship previously existed between Mr. Beiter, in his individual capacity, and Willkie. Second, the petitioners assert that, even assuming that the Estate can establish a prior representation, the Estate cannot establish that the prior relationship is substantially related to the current dispute. Third, the petitioners argue that, even assuming that Willkie represented Mr.

Beiter in the past, the Estate has failed to show that during that representation, Willkie had access to any confidential information related to the current controversy. Nor are there any facts from which it may be inferred that Willkie obtained confidential information of Mr. Beiter. Indeed, no confidential information of Mr. Beiter could be obtained concerning this matter, since the events underlying the instant matter occurred after his death.

The petitioners also deny that Willkie currently represents the Estate.[2] Petitioners point out that under Sections 10.01 and 10.03 of the Operating Agreements, a deceased Member is automatically disenfranchised and disassociated from the Companies, and thus, is deemed to have withdrawn from the Companies. Thus, the Estate's claim that it is a 50% partner in the Companies is improper. Also, under New York caselaw, the fact that a law firm represented a small company does not render the members thereof clients of the law firm, unless the law firm undertook an affirmative duty to represent them. According to James C. Dugan, member of Willkie and counsel to the petitioners, Willkie never provided legal services to Mr. Beiter in his individual capacity, and prior to the present action, never represented Lamotte in his individual capacity. Instead, Willkie was retained by the Companies on July 15, 2002 to revise the Operating Agreements. Following that particular assignment, Willkie performed additional administrative tasks for the Companies concerning various hedge funds managed by the companies. It is argued that Willkie's limited representation of the Companies prior to the present action did not give rise to an affirmative duty to represent Mr. Beiter in his individual capacity.

Additionally, the petitioners contend that since the advocate-witness rule only applies "if

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[2] *See* footnote 4, *infra*.

the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client," and since no attorney from Willkie will be called as a witness in the present matter, this rule is irrelevant to the court's determination.

Finally, the petitioners refute the assertion that Willkie should be disqualified to avoid the appearance of impropriety. The petitioners argue that courts have expressly held that the alleged appearance of impropriety created when a law firm represents a closely held corporation in litigation against a former shareholder is an insufficient ground upon which to base a disqualification motion.

Analysis

Stay of Arbitration

On a motion to stay arbitration, there are three threshold questions to be resolved by a court before determining whether a stay will be granted or denied: (1) whether the parties made a valid agreement to arbitrate, (2) whether if such an agreement was made it has been complied with, and (3) whether the claim sought to be arbitrated would be barred by a statute of limitations had it been asserted in State court (*see* CPLR 7503(b); *see also The Matter of the Arbitration between the County of Rockland and Primiano Construction Co., Inc.*, 51 NY2d 1, 431 NYS2d 478 [1980]).[3]

The first threshold question requires the court to consider two issues: whether (a) the parties make an agreement to arbitrate, and (b) the particular claim sought to be arbitrated come within the scope of that agreement (*id.*). As to the determination of whether the parties agreed to arbitrate, the court must rely on basic principles of contract interpretation. Courts must construe

[3] Petitioners do not contend that the Estate's claim is barred by the statute of limitations.

a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 743 NYS2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3rd Dept. 1989]), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358 [2002], *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721 [1968], *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable

expectations" (*see Sutton v. East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

In the present case, Section 12.12 of the Operating Agreements, entitled "Arbitration," states that "... any controversy, dispute or claim arising out of or in connection with this Agreement, or the breach, termination or validity hereof, shall be settled by final and binding arbitration...." This general arbitration clause in the Operating Agreements is complete, clear, and unambiguous on its face and must be enforced according to the plain meaning of its terms (*see R/S Assoc.*, 98 NY2d 29, *supra*). Accordingly, the court finds that the parties made an agreement to arbitrate.

As to the determination of whether the claim sought to be arbitrated falls within the scope of the arbitration agreement, it is for the court to determine whether a dispute generally comes within the scope of an arbitration agreement among the parties (*see Sisters of Saint John the Baptist v. Phillips R. Geraghty Constructor*, 67 NY2d 997, 502 NYS2d 997 [1986]). The court's inquiry ends where the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate (*id.*). Once the court determines that a dispute is subject to arbitration under the parties' arbitration agreement, disputes concerning the interpretation of particular contract terms must be left for an arbitrator (*id.*).

In *Sisters of Saint John*, *supra*, a dispute arose when Phillips R. Geraghty Constructor, Inc., a company hired to renovate a building owned by Sisters of St. John the Baptist, wanted extra compensation for unforeseen construction projects during the course of the renovation. When Sisters of St. John refused payment according to Phillips' demands, Phillips filed a notice of arbitration to determine the amount owed for the additional labor and materials. Sisters of St.

John moved to stay the demanded arbitration. The arbitration agreement under examination "provided broadly for arbitration of all disputes arising out of, or relating to, the Contract Documents," which included the original contract and all subsequent modifications (*id.*). The Court of Appeals, in denying the motion to stay arbitration, found that the dispute at issue between the parties arose out of the "Contract Documents," and thus the dispute was covered by the arbitration clause (*id.*).

Similarly, in *The Matter of Morgan Guaranty Trust Company of New York v. Wasserman*, 10 AD2d 278, 199 NYS2d 293 (1st Dept. 1960), Lillian Wasserman and Otto Knopf owned all of the stock in a corporation. An agreement between the two provided for Wasserman to purchase Knopf's shares in the event of Knopf's death. The price of such shares would be at the "book value" as determined by the corporation's accountant using usual accounting practices. The agreement specifically provided that upon the accountant's preparation and certification of her "book value" statement, any dispute among the parties as to the value of Knopf's shares shall be submitted to arbitration. The agreement further provided that the accountant's statement of value shall be "binding and conclusive upon both parties," unless one of the parties objected to the statement in writing within twenty days of its submission. The agreement also contained a general arbitration clause that provided for the determination of "[a]ny controversy or claim arising out of or relating to this agreement or its interpretation, or the breach thereof by arbitration before the American Arbitration Association." When Knopf died, the accountant computed the "book value" of his shares, and the parties closed on the transfer of shares from Knopf's estate to Wasserman without objection. However, subsequent to the closing, Wasserman alleged that the accountant's computed "book value" was incorrect and made a

demand for arbitration to recalculate the value of the shares. Knopf's estate moved to stay arbitration.

When determining whether the dispute at issue was covered by the arbitration agreement, the First Department operated under the assumptions that Wasserman failed to object to the statement within twenty days of the submission of the statement, and that the "book value" computed by the accountant was not left open by any references in the statement that the value was "tentative," thereby becoming "binding and conclusive" on the parties. Even in the face of such assumptions, the First Department nonetheless denied Knopf's estate's motion to stay arbitration, finding that the parties' dispute over the "book value" of the shares "raises an issue that the arbitrators must decide both under the specific arbitration clause and under the broader general arbitration clause – if not under the specific then certainly under the general clause" (*id.*). Essentially, the court decided that since the dispute at issue arose from or was related to a valuation process created by their agreement, regardless of the purported "binding and conclusive nature" of the accountant's valuation statement, staying arbitration would not be proper in light of the parties' agreement to arbitrate "any" dispute arising from or related to their agreement (*id.*).

In the present case, the dispute between the petitioners and the Estate is straightforward. As outlined in its Demand for Arbitration, the Estate asserts that it would have complied with the Valuation Procedure of Section 10.02 of the Operating Agreements if it could have completed its appraisal within the 180 day period following John Beiter's death, and any alleged failure to comply with Section 10.02 was due to actions of the petitioners and circumstances associated

with the unexpected nature of the decedent's death.[4] The petitioners, on the other hand, contend that the Estate failed to comply with the specific and complete timetable and procedures for the valuation and purchase of a deceased Member's interest in the Companies. Thus, the resolution of the dispute over the valuation of Mr. Beiter's interest requires an interpretation of the Valuation Procedures of Section 10.02 of the Operating Agreements, and a determination as to the parties' compliance therewith. Similarly to the findings made in *Sisters of Saint John*, *supra*, and *Morgan Guaranty Trust*, *supra*, this court finds that the requisite relationship has been established between the subject matter of the dispute (interpretation of Section 10.02) and the subject matter of the underlying agreement to arbitrate ("any dispute in connection with the Agreement") (*see Sisters of Saint John*, 67 NY2d 997, *supra*).

One of the petitioners' primary contentions in support of their motion to stay arbitration is that the dispute among the parties is not a dispute covered by the arbitration clause of Section 12.12, but is instead a dispute covered by Section 10.02, since that section of the Operating Agreements "is a self-contained, self-executing and self-remedying provision, which includes its own *arbitration proceeding*" (emphasis in original). However, the petitioners' reliance upon *The Matter of the Arbitration between American Silk Mills Corporation and Meinhard-Commercial Corporation* (35 AD2d 197, 315 NYS2d 144 [1st Dept. 1970]), *inter alia*, for this position is misplaced. In *American Silk*, the contract among the parties in that case for the sale of real property and various inventory and raw materials contained a general arbitration clause similar to the arbitration clause in the present case. However, the contract also contained a clause that

[4] The Estate made its Demand for Arbitration in response to the Surrogate Court's order directing this case to proceed to arbitration. However, while this court has used content from the Estate's Demand to frame the Estate's position, this court has not relied on the Surrogate Court's order when making its present determination.

provided for an accounting firm to make a "final and binding" determination of the value of the inventory in the event of any dispute as to the value of the inventory. When a dispute over the value of the inventory arose, the seller in the transaction served a demand for arbitration, and consequently, the buyer sought a stay of arbitration. The First Department found that

> although parties have broadly agreed to the arbitration of any dispute arising under a contract, they may limit such agreement by also providing that, independent of the arbitration agreement, the value of the property involved in a particular contracted for transaction shall be fixed by appraisers. In such case, the courts are empowered to enforce such an appraisal agreement as if it were an arbitration agreement and to treat the proceeding brought to effect its enforcement as one brought under article 75 of the CPLR relating to arbitration (*see Dimson*, 19 NY2d 316, 324, *supra*).... Under such circumstances, the contract between the parties is considered in effect as providing for "two instances of arbitration," and the existence of both appraisal and arbitration clauses gives rise to an issue of arbitrability, an issue which it is for the courts rather than the arbitrators to resolve (*see Dimson*, 19 NY2d 316, 324, *supra*).

Moreover, the First Department held that since the "inventory valuation fixed by the ... accounting firm was to be 'final and binding ...,' ... the parties intended to remove that particular matter from consideration by an arbitrator" (*American Silk*, 35 AD2d 197, *supra*).

In the present case, however, the Valuation Procedure of Section 10.02 is wholly distinguishable from the inventory appraisal/valuation provision in *American Silk*. Section 10.02 contains no clause or provision that bestows a "final and binding" effect onto any appraisal rendered by any appraiser appointed pursuant to the section. Thus, Section 10.02 is absent of any intent among the parties to remove that particular matter from consideration by an arbitrator. Therefore, the parties' dispute concerning the valuation procedure for the Estate's share in the Companies, like any dispute or controversy arising from or connected to the Operating Agreements, is covered by the arbitration provisions of Section 12.12.

If it is concluded, as in this case, that the parties executed an agreement to arbitrate and the claim sought to be arbitrated falls within the scope of that agreement, the court must then answer the second threshold question, that is, whether the arbitration agreement been complied with (*see Primiano*, 51 NY2d 1, *supra*). Resolution of this question calls for a judicial determination as to (a) whether there are any conditions precedent to arbitration to be complied with, and if so, (b) whether there has been compliance with those conditions precedent (*id.*). If it is concluded that there exists a valid arbitration agreement, the dispute sought to be arbitrated falls within its scope, and there are either no conditions precedent or such conditions have been complied with, absent any issue as to the statute of limitations, the court's inquiry is at an end, the motion to stay will be denied, and the parties shall proceed to arbitration (*id.*).

Contrary to petitioners' contention, an examination of the arbitration clause contained in Section 12.12 quoted above reveals that there exists no conditions precedent to arbitration. A contractual obligation ordinarily will not be construed as a condition precedent absent clear language that it was so intended *(Roan/Meyers Associates, L.P. v. CT Holdings, Inc.*, 26 AD3d 295, 810 NYS2d 67 [1st Dept. 2006]). Here, Section 10.02 and Section 12.12 contain no language from which it may be concluded that the procedures of Section 10.02 were intended to be treated as conditions precedent to arbitration of disputes under the Operating Agreements.

Accordingly, the petitioners' motion to stay arbitration is denied, and the parties shall proceed to arbitration.

Disqualification of Counsel

It is well settled that on a motion to disqualify opposing counsel,

> the burden is upon the one seeking disqualification of the adversary attorney because of the strong public policy to allow persons to retain counsel of their choice and because in many cases ..., disqualification of counsel would cause severe prejudice to the client, who would have to secure new counsel to deal with somewhat complex litigation with the accompanying increased expense and loss of time (*see Macro Cash and Carry Corp. v. Berkman*, 81 AD2d 783, 439 NYS2d 22 [1st Dept. 1991]).

In addition, the disqualification rules provide guidance rather than binding authority for courts in determining whether disqualification is required (*see S & S Hotel Ventures Ltd. Partnership v. S.H. Corp.*, 69 NY2d 437 [1987]).

The respondent moves to disqualify Willkie as the petitioners' counsel pursuant to 22 NYCRR §§ 1200.24(d) & 1200.27(a). 22 NYCRR § 1200.24(d) states, in pertinent part, that "[w]hile lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under section ... 1200.27(a) ... of this Part, except as otherwise provided therein."[5] 22 NYCRR § 1200.27(a) states, in pertinent part, that

> ... a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) [t]hereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client; (2) [u]se any confidences or secrets of the former client except as permitted ... when the confidence or secret has become generally known.

Accordingly, the Court of Appeals has ruled that a party seeking disqualification of its

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[5] Determining whether disqualification is warranted under 22 NYCRR 1200.24(d) is directly dependent upon whether 22 NYCRR 1200.27(a) has been violated. Thus, the court's determination on the motion to disqualify will focus on the respondent's claim under 22 NYCRR 1200.27(a).

adversary's lawyer pursuant to 22 NYCRR 1200.27(a) bears the burden of showing (1) that there was an attorney-client relationship between the moving party and the opposing counsel, (2) a "substantial relationship" between the issues in the present litigation and the subject matter of the prior representation, and (3) that the interests of the present client and the former client are materially adverse (*see Jamaica Pub. Serv. Co. Ltd. v. AIU Ins. Co.*, 92 NY2d 631, 636 [1998]). In the absence of a showing of adverse interests or a substantial relationship between the proceedings, the proponent for disqualification may prevail "only upon a showing that in the prior action [the attorney] had received specific confidential information substantially related to the present litigation" (*Lightning Park, Inc. v. Wise Lerman & Katz,* 197 AD2d 52, 55, 609 NYS2d 904 [1st Dept 1994]), *citing Saftler v. Government Employees Ins. Co.*, 95 A.D.2d 54, 57, 465 N.Y.S.2d 20).

In the present case, it is uncontested that the interests of Willkie's current client, Lamotte, and the respondent Estate are materially adverse. Essentially, however, the court must determine whether the respondent, as the movant for disqualification, has shown that a former attorney-client relationship existed between the Mr. Beiter's and Willkie, and if such a relationship existed, whether the matters involved in Willkie's former representation of Mr. Beiter are substantially related to Willkie's present representation of the petitioners.

Contrary to respondent's contention, caselaw under the First Department holds that an attorney-client relationship between a law firm and a corporation does not create an attorney-client relationship between the law firm and a shareholder of the corporation unless the law firm assumed an affirmative duty to represent the shareholder (*see Omansky v. 64 N. Moore Assoc.*,

269 AD2d 336, 703 NYS2d 471 [1st Dept. 2000] [denying plaintiff partner's disqualification motion, holding that law firm's representation of the partnership in a prior action did not render the law firm counsel for the plaintiff partner], *citing with approval, Kushner v. Herman*, 215 AD2d 633, 628 NYS2d 123 [2nd Dept. 1995]; *see also Walker v. Saftler, Saftler, and Kirschner*, 239 AD2d 252, 657 NYS2d 187 [1st Dept. 1997] [cause of action alleging a conflict of interest is without merit since defendants did not represent plaintiff's co-shareholder simply by reason of their representation of the subject corporation, and there is no evidence that they affirmatively assumed the duty of representing her] *citing with approval, Kushner v. Herman*, 215 AD2d 633, 628 NYS2d 123 [2nd Dept. 1995]; *The Stratton Group, Ltd. v. Sprayregen*, 466 FSupp 1180 [SDNY 1979]).

In *Kushner*, the respondents, Ira Orshan and Joel Katz, moved to disqualify the appellants' counsel, claiming that appellants' counsel created an attorney-client relationship with the respondents when appellants' counsel represented a limited partnership of which the respondents' were both limited partners and officers of the corporate general partner. The Second Department reversed the motion court's disqualification of the appellants' counsel, finding that appellants' counsel created no such attorney-client relationship with the respondents during its representation of the limited partnership because no evidence existed that the law firm affirmatively assumed the duty of representing the respondents (*see Kushner*, 215 AD2d 633, supra).

In the present case, the record indicates that the Companies retained Willkie on July 15, 2002 for the purpose of revising the Operating Agreements. There is no indication that Willkie negotiated or drafted the Operating Agreement, or more importantly, the Sections of the

Operating at issue, for the exclusive benefit of either Lamotte or Mr. Beiter. Thereafter, Willkie purportedly performed discrete additional tasks concerning the Companies' hedge funds and other administrative matters. Thus, since the record is void of any indication that Willkie assumed an affirmative duty to represent Mr. Beiter,[6] the respondent has failed to meet its burden of showing that an attorney-client relationship existed between Willkie and Mr. Beiter.

In any event, there is no showing that Willkie's revision of the Operating Agreements, work performed on the Companies' hedge funds, and any of the administrative tasks performed by Willkie on behalf of the Companies are "substantially related" to the underlying issues regarding the parties' compliance with the valuation procedures. In order to meet the "substantial relationship" test, the issues in the present litigation must be "'identical to'" or "'essentially the same' as" those in the prior matter before disqualification will be granted (*Lightning Park, Inc. v. Wise Lerman & Katz,* 197 AD2d 52, *supra citing Dinger v Gulino,* 661 F Supp 438, 444 [EDNY]). Nor is there any showing that Willkie had received specific confidential information concerning Mr. Beiter which is substantially related to the parties' dispute over the Valuation Procedure.

The respondent's reliance on *Fleet v. Pulsar Construction Corp.*, 143 AD2d 187, 531 NYS2d 635 (2nd Dept. 1988) and *In re Matter of Greenberg*, 206 AD2d 963, 614 NYS2d 825 (4th

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[6] It should be noted that the petitioners' denial of respondent's purported claim that Willkie Farr currently represents "the Estate" is unfounded, since respondent never made any such assertion. Notwithstanding the

footnote 6 cont'd.

petitioners' mistaken contention, the respondent's burden of satisfying the attorney-client prong of the attorney disqualification rule is not dependent on whether Willkie *currently* represents John Beiter's Estate, but is instead dependent on whether Willkie *formerly* represented John Beiter, which would have created the requisite attorney-client relationship.

Dept. 1994) are misplace.[7]

In *Fleet*, a dissolution action, Paul Weinberg (the "movant"), a 50% shareholder of the subject corporation, moved to disqualify Harold Elovich, the attorney representing Thomas Fleet, the other 50% shareholder of the corporation. It was undisputed that prior to the parties' execution of the shareholder's agreement, the movant consulted Mr. Elovich concerning its terms, and Mr. Elovich later made revisions to the agreement on the movant's behalf. Further, Mr. Elovich previously represented the corporation in various breach of contract actions against third parties. When difficulties arose between the movant and Mr. Fleet, the movant sought out Mr. Elovich. The Court found it "clear" that Elovich acted "as the movant's attorney in negotiating and drafting the shareholders' agreement governing [Weinberg's and Fleet's] rights and obligations" (*see Fleet*, 143 AD2d 187, *supra*) (emphasis added). The court also found that Elovich's representation of the corporation in the course of litigation on the corporation's behalf rendered him the representative of the corporation's "only two shareholders" (*id.*), and that from these professional relationships, it could be inferred that Mr. Elovich obtained confidential information of value to Mr. Fleet.

In *Greenberg*, Alan Plotnik, a shareholder of Madison Cabinet & Interiors, Inc. ("Madison"), brought a derivative action against his co-shareholder, Meyer Greenberg, and Mr. Greenberg's "new" corporation, Meyer's Cabinet & Interiors, Inc., ("Meyer's Cabinet"), alleging that Mr. Greenberg breached his fiduciary duty to Madison by misappropriating Madison's assets and good will for use by his new corporation, Meyer's Cabinet. Plotnik moved to disqualify Marshall Kaplan, the attorney for Meyer's Cabinet and Mr. Greenberg. Relying on *Fleet*, the

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[7] *See* footnote 6, *infra*.

Fourth Department held that an attorney that has represented a corporation may not represent an individual shareholder of that corporation in a case in which the shareholder's interests are adverse to other shareholders of the corporation (*see Greenberg*, 206 AD2d 963, *supra*). Since Kaplan formerly represented Madison Cabinet, incorporated Meyer's Cabinet at Mr. Greenberg's behest, and was representing Mr. Greenberg both the dissolution of Madison Cabinet and defending Mr. Greenberg against another shareholder of Madison, the court disqualified Mr. Kaplan as Mr. Greenberg's attorney.

The Court notes that such decisions are not in line with the First Department caselaw, which requires that there be evidence that counsel for the corporation undertook an affirmative duty to represent the shareholder. Nonetheless, there is no indication in the record that Willkie acted as Mr. Beiter's attorney in revising the Operating Agreement, or that Willkie represented the corporation in the course of any litigation such that it can be said that it represented Mr. Beiter individually. The court in *Fleet* also favored disqualification "to preserve the confidences and secrets of a [shareholder] acquired during the course of the attorney-client relationship..." (*see Fleet*, 143 AD2d 187, *supra*). Here, there is no evidence from which it may be inferred that Willkie obtained confidential information of Mr. Beiter, or any of Mr. Beiter's confidential information of any value to Lamotte.

Furthermore, the respondent's claim that Willkie should be disqualified as counsel for Lamotte under the advocate-witness rule, fails. The advocate-witness rule requires an attorney to withdraw from a case "if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" (*Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 747 N.Y.S.2d 441 [1st Dept. 2002] *citing New York Code of*

Professional Responsibility DR 5-102 [A] [22 NYCRR 1200.21(a)]). In seeking to disqualify opposing counsel based on the advocate-witness rule, the test is whether an attorney "ought to be called" (*J.P. Foley & Co., Inc. v. Vanderbilt,* 523 F.2d 1357, 1359).

Respondent, as the moving party, failed to establish that the continued representation by Willkie of petitioners would constitute a violation of the advocate-witness rule (*see Davin v. JMAM, LLC*, 27 AD3d 371, 812 NYS2d 494 [1st Dept. 2006] [disqualification of plaintiff's law firm for violation of the advocate-witness rule was properly denied in the absence of a showing that the testimony of plaintiff's attorneys would be necessary]; *cf. Crump*, 172 Misc2d 968 [Supreme Court New York County 1997 [dispute of the parties, centering on money allegedly owed between them, may require that counsel testify as to the distributions she made, mandating disqualification under the advocate-witness rule]). There is no indication that Willkie possesses information material and strictly necessary to the parties' dispute over the interpretation of the Valuation Procedures, or compliance thereof.

Lastly, respondent's contention that Willkie, as counsel for the Companies, cannot fairly represent the Estate's 50% interest in the Companies, given the opposing interests of Lamotte and the Estate, is insufficient to support disqualification. The Court notes that Section 10.04 of the Operating Agreements provides that a shareholder's estate shall nonetheless "be an *interest holder*..." (emphasis added). In addition, pursuant to LLCL § 608, if a member of an LLC, who is a natural person, dies, the member's executor may exercise all of the member's rights for the purpose of settling his estate or administering his property. However, conceptually, the Companies, as party respondents in the underlying arbitration, will benefit from the prosecution of the arbitration, in that the value of the Companies' assets will ultimately be fairly determined,

and the litigation itself fairly represents the "interests" of the Companies as a whole. Therefore, that the Estate is a 50% shareholder of the Companies, which is a party to the underlying arbitration, does not warrant disqualification.

Based on the foregoing, it is hereby

ORDERED that the respondent's motion to disqualify Willkie Farr & Gallagher LLP as counsel for the petitioners, Niklas Lamotte, Resolution Partner, LLC, and Resolution GP, LLC, is denied. It is further

ORDERED that the petition, pursuant to CPLR 7503(b), to nullify and stay arbitration is denied and the petition is dismissed. It is further

ORDERED that the respondent's request for attorneys' fees and costs incurred in connection with responding to the petition is denied. It is further

ORDERED that counsel for the respondent shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

The foregoing constitutes the decision and order of the court.

Dated: May 30, 2006

Hon. Carol Robinson Edmead, J.S.C.