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

PRESENT: HON. RICHARD D. LOWE, III PART 54

Justice

Volo Logistics LLC

INDEX NO. 602536/07

MOTION DATE 10/12/07

MOTION SEQ. NO. 002

-v-

Varig Logistica S.A.

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	

FILED
DEC 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12/18/07

HON. RICHARD D. LOWE, III

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

----------X

VOLO LOGISTICS LLC and
CAT AEREA LLC,

Plaintiffs,

-against-

Index No. 602536/07

VARIG LOGISTICA, S.A. and
VOLO DO BRASIL S.A.,

Defendants.

----------X

Hon. Richard B. Lowe, III:

In this action, plaintiffs Volo Logistics LLC (Volo) and CAT Aerea LLC (CAT) seek, as lenders, over $88 million pursuant to certain loan transactions in which Bracewell & Giuliani LLP (B&G), plaintiffs' counsel, allegedly formerly represented the interests of defendant Varig Logistica, S.A. (VarigLog) and VRG Linhas Aereas, S.A. (VRG) its former subsidiary, as borrowers.

VarigLog now moves for an order (1) disqualifying B&G as plaintiffs' counsel pursuant to Disciplinary Rules 5-105 (22 NYCRR 1200.24) and 5-108 (22 NYCRR 1200.27) of the New York Code of Professional Responsibility; and (2) requiring B&G to give VarigLog access to and copies of its files regarding the loan transactions at issue in which it allegedly represented VarigLog, or VarigLog's then 99% owned subsidiary Aero Transports Aeros S.A. (subsequently renamed VRG).

FACTS

Plaintiffs and defendant VarigLog present completely conflicting portraits of the underlying loan transactions at issue. Defendant contends that, in late 2006, VarigLog, then

represented by B&G, entered into two Loan Agreements with plaintiff Volo. During this same time, VRG, VarigLog's former subsidiary, which was then under VarigLog's management and control, and represented by B&G, entered into three Loan Agreements with Volo, and two additional Loan Agreements with plaintiff CAT. Defendant alleges that VarigLog later assumed the obligations of VRG under those Loan Agreements. Thus, defendant contends, B&G, the law firm for plaintiffs in this action, represented VarigLog and its subsidiary, as borrowers, in connection with the negotiation and documentation of each of these seven transactions on which VarigLog has been sued in this case.

Conversely, plaintiffs contend that, in connection with the loan transactions at issue in this suit, B&G represented only MatlinPatterson Global Advisers LLC and various of its related and advised entities (collectively, MatlinPatterson), including Volo, MatlinPatterson's wholly-owned investment subsidiary, the plaintiff lender on six of the seven loans at issue.

In support of its version of events, defendant submits the affidavit of Marcos Michael Haftel, a member of VarigLog's Board of Directors, and a shareholder of defendant Volo do Brasil S.A. Plaintiffs submit the affidavit of Mark E. Palmer, Esq., a member of B&G who has continuously represented MatlinPatterson continuously, on at least 30 separate matters, since October 2001. The following factual recitation is comprised of allegations taken from both of these affidavits.

MatlinPatterson is a distressed-debt investor that endeavors to obtain controlling interests in companies facing uncertain financial circumstances (Palmer Aff., ¶ 5). During 2005, MatlinPatterson became interested in the bankruptcy of Varig, the Brazilian passenger airline (id.). MatlinPatterson's interest in Varig included initially acquiring VarigLog, a subsidiary of

Varig, which was (and is) in the airline cargo business (id., ¶ 6).

Brazilian regulations require Brazilian citizens to control 80% of the voting stock of companies operating in the airline sector. MatlinPatterson therefore agreed with three Brazilian citizens to create an entity, structured in accordance with Brazilian regulations, to acquire VarigLog. Thus, together with Haftel, Luiz Eduardo Audi and Marco Antonio Gallo, defendant Volo do Brasil S.A. (VDB) was created (id., ¶ 7; Haftel Aff., ¶ 4). Volo, MatlinPatterson's wholly-owned investment subsidiary, owns 60% of VDB's capital stock, but to satisfy the Brazilian regulations, Haftel, Audi and Gallo control 80% of VDB's voting power. Volo controls only 20% of the voting power (id.). In January 2006, VDB closed on the transaction to purchase VarigLog (Haftel Aff., ¶ 8).

After Palmer joined B&G in May 2006, MatlinPatterson retained B&G to develop the structure through which it could invest in Varig's businesses. On May 2, 2006, Palmer sent an engagement letter to MatlinPatterson, setting forth the terms of the engagement. MatlinPatterson countersigned the engagement letter. That letter contained, among other things, details of the B&G-MatlinPatterson fee arrangement. That letter does not mention representation of VRG, VarigLog or VDB (id., ¶¶ 9-10).

In July 2006, MatlinPatterson participated in an auction for the purchase of Varig's passenger business unit. It was successful and through VarigLog, MatlinPatterson entered into agreements to acquire Varig's passenger airline business unit (id., ¶ 12).

To accomplish this acquisition, a special purpose vehicle owned by VarigLog and named Aereo Transportes Aereos S.A. (ATA) was created. ATA later became known as VRG. B&G was not involved in the formation of that special purpose vehicle (id., ¶ 13).

From June 2006 until March 2007, VarigLog was a 99% owner of its subsidiary VRG (Haftel Aff., ¶ 9). In March 2007, VarigLog sold its interest in VRG to a third party (id.). During the period of VarigLog's ownership of VRG, the companies, while separately incorporated in Brazil, were closely integrated. The day-to-day operations of VRG were controlled by VarigLog. Two members of VarigLog's board of directors were directly involved in VRG's operations (id.). VRG had no board of directors of its own. Instead, VRG had only statutory "directores" (executives) under Brazilian law, who were identical to the statutory directores of VarigLog, and who had the same responsibilities in both companies (id.). VRG and VarigLog also shared additional personnel, as well as a database system, ancillary systems, and certain computer networks (id.).

In connection with the acquisition of Varig's passenger airline business unit, VRG required additional funding. B&G represented MatlinPatterson in its negotiations with three entities, Cerberus, ACE and Tricap, i.e., CAT, to raise additional necessary capital, and to obtain additional business "know how" to run the passenger business. By then, MatlinPatterson had advanced approximately $96 million for the benefit of the Varig passenger business and VRG. VRG, however, needed additional funds to consummate the acquisition of the Varig passenger business and thus, MatlinPatterson desired additional financial partners (Palmer Aff., ¶ 14).

B&G therefore negotiated exclusively on MatlinPatterson's behalf with CAT's lawyers, primarily the law firm of Schulte Roth & Zabel LLP (Schulte), to develop the overall structure by which CAT would become MatlinPatterson's investment partner in VRG. CAT was unwilling to structure its VRG investment as an investment through VarigLog. The structure therefore had to avoid any risk associated with VarigLog's operations. Thus, B&G, on behalf of

MatlinPatterson, negotiated with Schulte on behalf of CAT to develop a structure to avoid exposure to VarigLog (id., ¶ 15).

Ultimately, MatlinPatterson and CAT agreed to a structure through which, among other things, CAT would provide loans to VRG. Thereafter, B&G drafted a Memorandum of Understanding (the MOU) memorializing the terms. VarigLog and VDB were not parties to the MOU. The MOU contemplated, among other things, that CAT would assume the funding obligations with respect to half – or $48 million – of MatlinPatterson's original $96 million funding, and would continue to fund one-half of the next $75 million in funding necessary to close the acquisition of the Varig passenger airline business (id., ¶ 16).

Once the MOU was executed, because MatlinPatterson had already funded its $96 million, it was necessary for CAT to "true up" so that its funding of VRG would be equal to that of MatlinPatterson. As required by the MOU, CAT began to do so by lending money to VRG through two loan transactions (Loan 1 and Loan 2), more fully described below (id., ¶ 17).

In this action, plaintiffs assert claims against VarigLog and VDB, arising out of defendants' non-payment of eight loans in the amount of approximately $88 million. The loans at issue were made by CAT or Volo to defendants and to VRG. The obligations to repay the loans made to VRG have since been assumed by VarigLog (id., ¶ 21).

Over a period of several months in late 2006, VRG entered into five separate Loan Agreements. In the first two Loan Agreements (dated September 12, 2006 and referred to as Loans 1 and 2), VRG was the borrower from plaintiff CAT (see Complaint, Exhs 1 and 2). After entering into the MOU, CAT became obligated to MatlinPatterson to fund its one-half of the $96 million already advanced by MatlinPatterson – i.e., $48 million. Thus, pursuant to Loan 1, CAT

loaned VRG $18,300,000, and in Loan 2, CAT bought from Volo, and amended and restated, a prior loan to VRG in the amount of $29.7 million. Those loans satisfied CAT's obligations to MatlinPatterson, pursuant to the MOU, to initially advance $48 million of the $96 million that had been advanced to or for the benefit of VRG (Palmer Aff., ¶ 22).

Plaintiffs allege that B&G negotiated the terms of those loans in connection with its negotiation of the MOU – to which neither VRG or VarigLog was a party – and did so solely as counsel to MatlinPatterson and Volo. Plaintiffs further allege that the loan agreements necessarily reflect critical terms of the MOU, and that because they reflect certain negotiated governance and investment rights as between CAT and MatlinPatterson, B&G negotiated for the sole purpose of ensuring that MatlinPatterson's interests were protected (id., ¶ 23).

Volo is the lender on the six remaining loans. In the next three loan agreements (dated October 25, November 17 and December 5, 2006 and referred to as Loans 3, 4 and 5) VRG was the borrower from lender Volo, in the amounts of $10,650,000, $10,765,823.06 and $3,307,093.60, respectively (see Complaint, Exhs 3-5). Pursuant to certain Debt Assumption Agreements, VarigLog has assumed the obligations of VRG for each of these loans (id., ¶ 25).

On December 13, 2006, VarigLog directly entered into two Loan Agreements with plaintiff Volo (Loans 6 and 7), in which it was the borrower, in the amounts of $8,852,376.74 and $5,860,232.26, respectively (see Complaint, Exhs 6-7).

In Loan 8, Volo lent money directly to VDB (Palmer Aff., ¶ 25).

Plaintiffs allege that these loans were "cookie-cutter" versions of the prior loans. When VRG needed money, the parties conformed and executed loan agreements based on the prior documents. There were no negotiations regarding these loans or their terms, and B&G did

not negotiate any terms on behalf of VRG or VarigLog with respect to these loans. The only material actions taken with respect to these subsequent loans was recording with the Brazilian financial authorities and updating disclosure schedules, both of which activities were performed in Brazil by VRG and VarigLog (id., ¶ 26).

Plaintiffs further allege that B&G has never entered into an engagement agreement with VarigLog or VRG; has never said that it would represent either of those entities with respect to the loans at issue; and never provided legal advice to VRG or VarigLog concerning the loans at issue. Plaintiffs contend that B&G has not entered into a fee arrangement (either for the payment of fees or for the provision of services without fee) with either of these entities, has not sent a bill to either of those entities and has not been paid by any of those entities. According to plaintiffs, fees and expenses, and the sharing thereof, was the subject of the MOU and negotiations with CAT (id., ¶ 28).

Conversely, defendant alleges that, in the negotiation and documentation of each of the Loan Agreements for Loans 6 and 7, B&G represented the borrower VarigLog and is named as a notice representative for borrower VarigLog in the applicable notice clauses of each of the Loan Agreements, and that B&G also represented Volo Logistics, as lender, on these loan transactions (see Haftel Aff., ¶¶ 12-13).

Defendant further alleges that high-level officials of VarigLog were responsible for the negotiation and execution of each of Loans 1 through 5 on behalf of borrower VRG (see id., ¶¶ 9, 12). In the negotiation of the initial Loans 1 and 2, plaintiff CAT, the lender, was represented by counsel from Schulte (see id., ¶12; see also Complaint, Exhs 1 and 2). Defendant contends that VRG was represented by B&G in connection with all of Loans 1 through 5, and

B&G is named as a notice representative for borrower VRG in the applicable notice clauses of each of the Loan Agreements, and that, on Loans 3, 4 and 5, B&G represented the interests of the lender as well (see id., ¶¶ 12-13; see also Complaint, Exhs 1-5).

On December 8, 2006, by way of a Debt Assumption Agreement (the December 2006 Assumption Agreement), VRG's debt obligations under Loans 1, 3, 4 and 5 were assumed by VarigLog, VRG's parent (see Complaint, Exh 9).

In June 2007, by way of another Debt Assumption Agreement (the June 2007 Assumption Agreement), VRG's debt obligations under Loan 2 were assumed by VarigLog (see id., Exhs 10-11).

On July 26, 2006, plaintiff lenders commenced this action, seeking over $88 million in damages against VarigLog and co-defendant VDB.[1] Plaintiffs' claims against VarigLog allege breaches of Loans 1 through 7, and seek contractual damages against VarigLog pursuant to the terms of the Assumption Agreements (Loans 1-5) and the Loan Agreements (as to Loans 6 and 7).

DISCUSSION

As the party seeking disqualification, defendant bears the burden on this motion (see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437 [1987]; NYK Line (N. Am.) Inc. v Mitsubishi Bank, Ltd., 171 AD2d 486 [1st Dept 1991]). In support of its motion for disqualification, defendant contends that disqualification is required because B&G represented VarigLog and VRG, its subsidiary, in connection with the loans that are the subject

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[1] VarigLog asserts that VDB, which has not been served, has not yet appeared in this action, and is not a party to this motion.

of this action. Specifically, defendant contends that B&G, which is now litigation counsel for plaintiff lenders, served directly as counsel for VarigLog in connection with Loans 6 and 7 on which plaintiffs' claims against VarigLog are based. Defendant asserts that, moreover, B&G served as counsel for VarigLog's then 99% owned subsidiary VRG in connection with Loans 1-5, subsequently assumed by VarigLog, on which plaintiffs' claims against VarigLog are based. Defendant asserts that, given the fact that the management and operations of VarigLog and VRG were intertwined, B&G's representation of VRG with respect to Loans 1 through 5 is tantamount to representation of VarigLog. Defendant contends that thus, B&G's disqualification is necessary for several reasons: (1) B&G's representation of plaintiffs clearly violates DR 5-108 of the New York Code of Professional Responsibility; (2) to enforce the duty of loyalty, which B&G assumed when it agreed to represent VarigLog; and (3) to avoid the unfairness which would infect this case if B&G were allowed to persist in suing its former client over the very subject matter of its prior representation.

Plaintiffs sharply contest the assertion that B&G represented VarigLog and VRG in connection with the loan transactions at issue in this action. Plaintiffs assert that, to the contrary, B&G represented only MatlinPatterson and Volo, its wholly-owned investment subsidiary, in connection with the loan transactions. Plaintiffs contend that B&G entered into an engagement agreement with MatlinPatterson, and not with defendant; it took instruction from MatlinPatterson, and not from defendant; it has been paid by MatlinPatterson, and not by defendant; and it has received no confidential information from defendant. Moreover, plaintiffs contend, Haftel and his colleagues were aware from the outset of Palmer's long-standing representation of MatlinPatterson, and aware of his representation of MatlinPatterson and Volo

in connection with this transaction.

It is well-settled that a lawyer "may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter" (Kassis v Teacher's Ins. and Annuity Assn., 93 NY2d 611, 615-616 [1999]; see also Disciplinary Rule 5-108 of the New York Code of Professional Responsibility, 22 NYCRR 122.27 [a]). Moreover, the personal conflicts of individual lawyers within a firm are generally imputed to their firm. Accordingly, "if one attorney in a firm is disqualified from representing a client, then all attorneys in the firm are disqualified" (Solow v W.R. Grace & Co., 83 NY2d 303, 306 [1994]; see also Kassis v Teacher's Ins. and Annuity Assn., 93 NY2d 611, supra; DR 5-105D, 22 NYCRR 1200.24 [D]).

A party seeking to disqualify an attorney or law firm must establish: (1) the existence of a prior attorney-client relationship, and (2) that the former and current representations are adverse and substantially related (see Solow v W.R. Grace & Co., 83 NY2d 303, supra). "Any doubts as to the existence of a conflict should be resolved in favor of disqualification" (Chang v Chang 190 AD2d 311, 319 [1st Dept 1993]). If the moving party satisfies these standards, an "irrebuttable presumption of disqualification" of the client's former lawyer or law firm arises (Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 131 [1996]).

The dispositive issue on this motion is whether or not B&G represented VarigLog in connection with the loan transactions in dispute, and thus, whether an attorney-client relationship was created between them. An attorney-client relationship "arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services" (Matter of Priest v Hennessy, 51 NY2d 62, 68-69 [1980]). While no single factor determines

whether an attorney-client relationship exists, "[i]t is fundamental that an explicit undertaking to perform a specific task is required to establish an attorney-client relationship" (Sucese v Kirsch, 199 AD2d 718, 719 [3d Dept 1993]; see also Tropp v Lumer, 23 AD3d 550, 551 [2d Dept 2005] ["'(a) plaintiff's unilateral belief does not confer upon him [or her] the status of client. ... Rather, to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task"'], quoting Volpe v Canfield, 237 AD2d 282, 283 [2d Dept 1997]). Formality is not essential to create a legal services contract. Therefore, "'it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed'" (Talansky v Schulman, 2 AD3d 355, 358 [1st Dept 2003] [citation omitted]; see also Wei Cheng Chang v Pi, 288 AD2d 378 [2d Dept 2001], lv denied 99 NY2d 501 [2002]; McLenithan v McLenithan, 273 AD2d 757 [3d Dept 2000]).

Other important factors include: (1) whether a fee arrangement was entered into or a fee paid; (2) whether a written contract or retainer agreement exists, indicating that the attorney accepted representation; (3) whether there was an informal relationship whereby the attorney performed legal services gratuitously; (4) whether the attorney actually represented the individual in one aspect of the matter; and (5) whether the individual reasonably believed that the attorney was representing him or her (see Reyes v Leuzzi, 10 Misc 3d 1064[A], 2005 NY Slip Op 52112[u] [Sup Ct, NY County 2005], citing First Hawaiian Bank v Russell & Volkening, Inc., 861 F Supp 233 [SD NY 1994]). Courts also consider (6) whether the attorney took direction from the "client" (First Hawaiian Bank v Russell & Volkening Inc., 861 F Supp 233, supra); and (7) whether the "client" shared confidences with the attorney (Tom L. Lamere & Assoc., Inc. v City of Syracuse Bd. of Educ., 8 Misc 3d 913 [Sup Ct, Onondaga County 2005]).

"[M]ore than mere 'generalized assertions' are required to justify disqualification" (Waehner v Northwest Bay Partners, Ltd., 30 AD3d 799, 800 [3d Dept 2006] [citation omitted]). Thus, a party seeking to disqualify counsel on the basis of a supposed prior attorney-client relationship must show a reasonable basis for the party's belief that such relationship existed (see First Hawaiian Bank v Russell & Volkening Inc., 861 F Supp at 238 [identifying as a relevant factor "whether the purported client believes that the attorney was representing him and whether this belief is reasonable"]).

As an initial matter, contrary to plaintiffs' contentions, the facts that VarigLog and VRG had no written retainer agreement with B&G and did not pay B&G's fees are wholly inconclusive on the relevant issue. It is well-settled that "an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee" (Moran v Hurst, 32 AD3d 909, 911 [2d Dept 2006]; see also Tropp v Lumer, 23 AD3d at 551 ["'An attorney client relationship may exist in the absence of a retainer or fee'"] [citation omitted]). Nor does MatlinPatterson's payment of B&G's bills for the loan transactions answer the question of whether B&G represented VRG and VarigLog in these transactions (see Ithaca Partners, L.P. v Kramer Levin Naftalis & Frankel LLP, 4 Misc 3d 139[A], 2004 NY Slip Op 50949[u] [App Term, 1st Dept 2004] ["The fact that an invoice was billed to another company is not dispositive as to whether defendant represented solely that entity or both that company and plaintiff"]).

Moreover, although plaintiffs state that B&G had a long-standing relationship with MatlinPatterson and conclude that thus, B&G cannot have represented VRG and VarigLog, the fact that an attorney may represent one party involved in a transaction is irrelevant to the question of whether he also represents another party, even where the parties sit on opposite sides

of the transaction (see Talansky v Schulman, 2 AD3d at 359 [claim that attorney represented other side in transaction "does not preclude the possibility that (attorney) was also representing the (putative client), and, if (attorney was) indeed representing both sides, that he owed a fiduciary duty to both"]; see also K&S of New York Corp. v Suchi of Nao Intl., Inc., 8 Misc 3d 41 [App Term, 1st Dept 2005] [putative clients raised triable question as to whether attorney representing other side in transaction also represented them]; Tabner v Drake, 9 AD3d 606 [3d Dept 2004] [same]). Rather, the relevant issue is whether the parties' "words and actions" were sufficient to create an attorney-client relationship (see Talansky v Schulman, 2 AD3d at 358).

An examination of the "words and actions" of the parties, as set forth in the Haftel and Palmer affidavits, reveals sharply conflicting factual assertions on the issue of whether B&G, in addition to representing Volo, also represented VarigLog and VRG in connection with the loan transactions at issue in this action. There is thus a triable issue of fact as to whether the parties' "words and actions" were sufficient to create an attorney-client relationship.

Defendant asserts that, based on communications from and actions taken by B&G, VRG and VarigLog reasonably understood that B&G was acting as counsel for them in the negotiation and documentation of these loan transactions. In his moving affidavit, Haftel alleges that he "was involved in the negotiations of the initial Loan Agreements which are at issue in this litigation" (Haftel Aff., ¶ 9), and that he "was under the understanding and impression" that B&G was "representing and protecting the interests of VRG and Varig Logistica," and that B&G was "our attorney[] acting for the interests of VRG and Varig Logistica" (Haftel Aff., ¶¶ 13, 14).

In his reply affidavit, Haftel elaborates that, as a member of both the VarigLog and VDB Boards, and as one of the ultimate controlling shareholders in VRG, he was a member

of the Volo/Varig team represented by B&G in the negotiation of both the MOU, and the loans from CAT to VRG, which were contemplated by the MOU. Haftel alleges that, as a representative of clients of B&G, he communicated directly with B&G lawyers as to the terms of the MOU and the CAT loans; he was asked for comments on drafts by B&G; he gave instructions which were followed by B&G; and he expected that confidences of VDB, VarigLog and VRG that he transmitted to B&G would be kept confidential and not revealed to third parties (see generally Haftel Reply Aff.).

Specifically, Haftel alleges that he understood that B&G was acting as the lawyers for VRG, VarigLog and ultimately VDB in negotiating and documenting the loans to VRG and VarigLog (id., ¶¶ 3, 6-14; Exhs B through H). Haftel further alleges that he had direct private attorney-client conversations with B&G lawyers on the issues related to the drafting of the MOU and the loans (id., ¶15; Exh 1). Moreover, according to Haftel, B&G directly requested Haftel to provide comments on drafts of the Amended and Restated Loan Agreement (Loan No. 2) prepared by Schulte, CAT's lawyers (id., ¶¶ 11-14), and that he gave instructions to B&G attorneys which were carried out by B&G in the drafting of the MOU and loan agreements, including the elimination of specific provisions from the CAT loans to VRG (id., ¶ 8; Exh C).

Haftel also alleges that he provided B&G, at their request, with up-to-date and accurate information concerning VRG for inclusion in a disclosure schedule for the CAT Amended and Restated Loan to VRG (id., ¶ 13; Exh H). Haftel further alleges that, in connection with the Amended and Restated Loan Agreement of September 2006, whereby CAT replaced Volo as lender to VRG, and also changed the choice of law from Brazilian law to New York law, VRG looked to B&G, a New York law firm, to advise it as to New York law,

especially in circumstances where the new lender CAT was represented by Schulte, a New York firm (id., ¶ 10; Exh E). Haftel also alleges that, in each of the loans at issue in this action, other than those in which CAT was the lender, the Amended and Restated Loan Agreement served as a model, which was adapted to the circumstances of the particular loan, and in each such loan B&G represented both the borrower and the lender, since they had a common interest in ensuring funding for VRG or VarigLog. In each case, New York law governed the contract, and the borrower, which was not otherwise represented by New York counsel, relied on B&G, as New York counsel (id., ¶¶ 10, 17). Finally, Haftel alleges that he had an expectation that confidences he communicated to B&G, as attorney for VRG, VarigLog and VDB, would not be revealed to third parties (id., ¶ 18).

In his opposing affidavit, Palmer completely disputes defendant's assertions, and unequivocally states that B&G did not represent defendant. Thus, Palmer alleges that, although B&G has had communications with Haftel and others at VarigLog and VRG, it has done so only as counsel to MatlinPatterson, at MatlinPatterson's request and in connection with MatlinPatterson's interests (Palmer Aff., ¶ 29).

Palmer further alleges that B&G has not separately received any confidential information from VRG or VarigLog, and is not aware of any information that it received from VRG or VarigLog that was not also copied to third parties (id., ¶ 30). According to Palmer, Haftel reviewed the drafts of the MOU only to provide input for what would be appropriate for corporate governance and other local issues with respect to VRG. The ultimate objective was to craft the deal that MatlinPatterson wanted. Therefore, Palmer alleges, such communications concerning the negotiation of a contract to which VarigLog or VRG were not even parties do not

amount to legal representation of VarigLog or VRG (id., ¶ 35).

Palmer also asserts that there is no evidence that B&G explicitly undertook to perform specific tasks for defendant, or that VarigLog gave direction to B&G. In contrast, Palmer alleges, B&G explicitly undertook to perform many specific tasks for MatlinPatterson and Volo; it entered into an engagement agreement, including a fee arrangement, with MatlinPatterson; it has sent bills to and has been paid by MatlinPatterson; and MatlinPatterson and Volo gave direction to B&G (Palmer Aff., ¶¶ 9, 10, 36, 37).

In his affidavit, Palmer also addresses some of defendant's contentions. Although defendant alleges that B&G is one of the entities designated to receive notice of VRG and VarigLog's default under any of the loans, Palmer alleges that Volo, as the party with the real financial risk in the transaction underlying this action, wished to learn promptly of any default or other notices sent to the borrowers, and that such notice was intended to serve Volo's interests, and not those of defendant (id., ¶ 27).

With respect to defendant's contention that "we have revealed to [B&G] information concerning the operations of Varig Logistica's business that [B&G] would not otherwise know if they had not been the lawyers for Varig Logistica with respect to the loans at issue" (Haftel Aff., ¶ 14), Palmer alleges that, due to MatlinPatterson's significant financial stake in the transaction, MatlinPatterson and Volo had access to certain books, records and operations of VDB and VarigLog, and that thus, B&G, by virtue of its representation of MatlinPatterson and Volo, would have been entitled to receive "information concerning the operation of VarigLogistica's business" directly from Volo (Palmer Aff., ¶ 31).

Finally, although Palmer identifies approximately 12 e-mails and a telephone call

in which a B&G attorney communicated with VarigLog outside the presence of a representative of MatlinPatterson and/or Volo, he contends that this does not alter the conclusion that B&G did not represent VarigLog (Palmer Suppl Aff., ¶ 3).

Accordingly, the conflicting affidavits submitted by the parties raise a triable issue of fact as to whether the "words and deeds" of B&G and VarigLog, its putative client, suggest the existence of an attorney client relationship (see Tropp v Lumer, 23 AD3d 550, supra [putative client presented a triable issue as to the existence of an attorney-client relationship where the attorney participated in regular discussions of case status with the putative client, and agreed to "keep an eye" on the case]; Talansky v Schulman, 2 AD3d 355, supra [genuine issue of material fact existed as to whether attorney-client relationship existed between maker of $300,000 loan and attorney/financial investment advisor who prepared loan documents]; Tabner v Drake, 9 AD3d 606, supra [allegation that plaintiff agreed to represent defendant in connection with loans and that plaintiffs negotiated the terms thereof on his behalf were sufficient to raise a triable issue of fact on the question of whether plaintiffs represented defendants]). Thus, an evidentiary hearing must be held to determine "whether the parties' 'words and actions' were sufficient to create an attorney-client relationship ... prior to a final determination on the motion for disqualification" (K&S of New York Corp. v Suchi of Nao Intl. Inc., 8 Misc 3d at 45 [internal citation omitted]; see e.g. Poli v Gara, 117 AD2d 786 [2d Dept 1986] [evidentiary hearing held on disqualification motion where parties sharply disagreed over existence of attorney-client relationship]).

In light of the above determination, defendant's motion for disqualification, as well as the motion seeking an order requiring B&G to give VarigLog access to and copies of its

files regarding the loan transactions at issue in which it allegedly represented VarigLog or VRG, are held in abeyance, pending determination of the issue of whether B&G represented VarigLog and VRG in connection with the loan transactions at issue.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the issue of whether an attorney client relationship existed between Bracewell & Giuliani LLP, and Varig Logistica, S.A. and VRG Linhas Aereas, S.A. in connection with the loan transactions at issue in this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that both the motion for disqualification and the motion for an order requiring Bracewell & Giuliani LLP to give Varig Logistica, S.A. access to and copies of its files regarding the loan transactions at issue in this motion are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4402 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to

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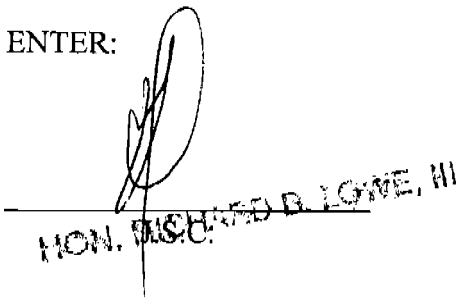
[2] Copies are available in Rm. 119 at 60 Centre Street, and on the court's website.

place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: December 18, 2007

ENTER:



HON. J.S.C.