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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 108536/2010

LEGEND MERCHANT GROUP LLC

vs.

EARLYBIRD CAPITAL LLC.

SEQUENCE NUMBER : 001

DISQUALIFY COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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~~ Petition is denied for all reasons stated on the record.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/7/10

EMILY JANE GOODMAN 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

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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LEGEND MERCHANT GROUP, INC.,

Petitioner,

-against-

EARLYBIRDCAPITAL, INC.,

Respondent.

----------X

Index No. 108536/10

Emily Jane Goodman, J.S.C.:

Petitioner Legend Merchant Group, Inc. (Legend) brings this petition to disqualify Graubard Miller (Graubard), the attorneys representing respondent EarlyBirdCapital, Inc. (EarlyBird), in an arbitration between the two parties, which Legend commenced against EarlyBird before the Financial Industry Regulatory Authority (FINRA). The petition is brought pursuant to Rules 3.7 and 1.9 of the New York Rules of Professional Conduct (22 NYCRR 1200).

I. Background

The parties are broker-dealers, and members of FINRA. The parties agreed to co-manage the initial public offerings (IPOs) of four "special purpose acquisition companies" (SPACs), identified as Hyde Park Acquisition Corp., Pantheon China Acquisition Corp., China Opportunity Acquisition Corp. and China Discovery Acquisition Corp. (the SPACs).

SPACs, publically traded companies, are designed, as stated

by Jeffrey M. Gallant (Gallant), one of the Graubard attorneys responsible for the negotiation of the SPACS, to "facilitate a business combination, typically a merger, acquisition or asset purchase, of a target business within a specified industry or geographic location." Gallant Aff., at 3. Capital to fund a SPAC is raised through the IPO, with which the SPAC proceeds to locate a target company acceptable to its shareholders. However, according to Gallant, SPAC management teams also provide their own capital contributions. *Id.* at 7. SPAC shareholders rely on the expertise of SPAC management teams to effectuate the business "combinations."

Broker-dealers, such as the parties herein, act as underwriters of the IPO. "Managing" underwriters may be involved in managing the underwriting process and assisting the SPAC management teams to locate a target company and close the transaction, for which they earn a fee. "Syndicate" underwriters do not assist in the procurement of the combination, but merely underwrite a portion of the IPO, collecting a commission.

According to Legend, both parties held a management role in the underwriting of the IPOs. EarlyBird acted as lead underwriter of the IPOs, doing the lion's share of the management, negotiations and closings of the SPACs. Legend allegedly acted as co-manger, "solicit[ing] institutional investors and help[ing], as needed, on issues relating to Merger

and Acquisition Events." Petition, ¶ 8.

The parties fell out over the payment of commissions due for their respective roles. Legend claims that, while "[t]o date, SPAC IPOs have been consummated" for the SPACs (*id.*, ¶ 10), it has not been paid "Deferred Compensation" allegedly owed it by EarlyBird for its efforts as a co-manager in the underwriting of the IPOs. As a result, Legend commenced the FINRA arbitration.

In the present petition, Legend seeks to disqualify Graubard from representing EarlyBird in the arbitration because, according to Legend, (1) Graubard's attorneys, as representatives of the SPACs, are likely to be witnesses in the arbitration, in violation of Rule 3.7 of the New York Rules of Professional Conduct (Rule 3.7); (2) Graubard, as "de facto counsel and/or vicariously counsel" (*id.*, ¶ 16) to Legend in the closing of the IPOs, is barred from representing EarlyBird in a proceeding which is "the same or a substantially related matter," and in which EarlyBird's interests "are materially adverse to the interest of" Legend (*id.*, ¶ 15, citing Rule 1.9 [a] of the New York Rules of Professional Conduct [Rule 1.9 (a)]); and (3) Graubard represented Legend with regard to a separate, unrelated, SPAC, as a result of which, "[d]ue to its unique position as former counsel to [Legend], Graubard is in possession of confidential information which is relevant to this action," so as to "unfairly disadvantage[]" Legend, in violation of Rule 1.9 (c) of the New

York Rules of Professional Conduct (Rule 1.9 [c]). Petition, ¶ 23.

II. Discussion

"A party is entitled to be represented by the attorney of his or her choice. This is a valued right which should not be abridged absent a clear showing that disqualification is warranted." *Eisenstadt v Eisenstadt*, 282 AD2d 570, 570 (2d Dept 2001). However, a party's right to chose its own counsel "is not absolute" and may give way to "protect a compelling public interest." *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 (1987). "[A]ny restrictions must be carefully scrutinized." *Id.*

A. Rule 1.9 (a)

Rule 1.9 is concerned with "Duties to former clients." Rule 1.9 (a) states that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client unless the former client gives informed consent, confirmed in writing.

The party requesting disqualification bears the burden of proving "(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); *see also Medical Capital Corp. v MRI Global Imaging, Inc.*, 27 AD3d 427 (2d Dept 2006); *Sgromo v St. Joseph's Hospital Health Center*, 245 AD2d 1096 (4th Dept 1997).

A court must "look to the actions of the parties" to determine if an attorney-client relationship has been created. *Bloom v Hensel*, 59 AD3d 1026, 1027 (4th Dept 2009). An attorney-client relationship is established "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). Finally, there must be "'an explicit undertaking to perform a specific task [citation omitted]'" before an attorney-client relationship will be recognized. *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 (1st Dept 2008); *see also Wei Cheng Chang v Pi*, 288 AD2d 378 (2d Dept 2001). However, a party's "unilateral beliefs and actions do not confer upon it the status of client." *Jane Street Co. v Rosenberg & Estis, P.C.*, 192 AD2d 451, 451 (1st Dept 1993); *see also Solondz v Barash*, 225 AD2d 996 (3d Dept 1996).

Legend fancies itself as a client of Graubard's in regard to the four SPACs. However, it is beyond discussion that Graubard represented the SPACs themselves, and not the underwriters. Legend had its own attorneys in the SPAC transactions at issue. There is no basis to claim that it was a de facto client of

Graubard's. There is simply no indicia of an attorney-client relationship. Therefore, Rule 1.9 (a) is inapplicable.

Legend tries to invoke an attorney-client relationship between it and Graubard, based on letters which Graubard provided in its opposition papers, which Legend calls the "Disqualification Letters" (Letters)(Gallant Aff., Ex. 1), which Legend admittedly did not know existed until they were produced herein. In the Letters, written to EarlyBird and the SPACs, Graubard attests that it represents EarlyBird as outside counsel, but that it will also be representing the four SPACs. In the letters, EarlyBird is asked, and does, consent to Graubard's representation of the SPACs "in connection with [their] IPO and waives any actual or potential conflicts arising therefrom." *Id.*

The Letters go on to say that "[t]his will also confirm [Graubard's] agreement that, notwithstanding the foregoing, it shall not represent any of the parties to the IPO[s], including the recipients of this letter, in any legal proceeding initiated by any other of the parties to the IPO[s] arising out of a dispute between them thereunder." *Id.*

Legend would read the Letters to disqualify Graubard from representing EarlyBird against Legend, based on the words "including the recipients of this letter," which, Legend claims, indicates that other parties (such as Legend) who are not recipients of the Letters are included in the general

disqualification, making Legend an intended third-party beneficiary of the Letters.

The difficulty with Legend's reliance on the Letters is that it has admitted that it was unaware of their existence until Graubard produced them in opposition to the petition. As such, Legend could not possibly have had any expectation that Graubard was its de facto attorney, or that Graubard was allegedly disqualifying itself from representing EarlyBird against Legend in a dispute between the IPOs' co-underwriters. If an attorney-client relationship requires "'an explicit undertaking to perform a specific task [citation omitted]'" (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d at 99), and a party cannot "create [an attorney-client] relationship based on his or her own beliefs or actions" (*id.*), it certainly cannot create an attorney-client relationship out of acts of the proposed attorney of which it was not even aware.

Further, Legend does not deny that Graubard wrote the Letters before it knew that Legend would be an underwriter. *See* Gallant Aff., at 6, n 3. Under these circumstances, Legend could not be an intended third-party beneficiary to the Letters. *See State of California Public Employees' Retirement System v Shearman & Sterling*, 95 NY2d 427, 434 (2000)(party seeking to be found a third-party beneficiary must show that "the contract was intended for his benefit ... [internal quotation marks and

citation omitted]"). Nor is it reasonable to conclude that the Letters are applicable to Legend, in light of to whom the Letters were addressed (EarlyBird and the SPACs) and the evident purpose of the Letters as indicated by their content.

As a result of the foregoing, Legend cannot disqualify Graubard under Rule 1.9 (a), based on Graubard's representation of the SPACs.

B. Rule 1,9 (c)

Rule 1.9 (c) states that "[a] lawyer who has formerly represented a client in a matter ... shall not thereafter (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client ... ; (2) reveal confidential information of the former client protected by Rule 1.6 ... ."

"Confidential information" under Rule 1.6 (a) is:

> information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Legend claims that Graubard's prior representation of Legend in a prior, unrelated, SPAC creates a conflict, because Graubard "had a wealth of information" about Legend from the prior

representation which it can use against Legend. Petition, ¶ 26. Specifically, Legend claims that Graubard "is intimately familiar with confidential information relating to [Legend] as an underwriter for SPACs, and in connection with the specific SPAC IPOs at issue here, and as such cannot be permitted to continue as opposing counsel against [Legend]." Legend Memorandum of Law, at 19.

The duty to not disclose the confidences of a former client "is broader than the attorney-client privilege." *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d at 98. "[I]t is not necessary for a party seeking disqualification to show that "confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice.'" *Jamaica Public Service Co. Ltd. v AIU Insurance Co.*, 92 NY2d 631, 637 (1998), quoting *Greene v Greene*, 47 NY2d 447, 453 (1979); *see also Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, *supra*. The burden of identifying the "'specific confidential information imparted to the attorney [citation omitted]'" is on the party seeking disqualification. *Muriel Siebert & Co., Inc. v Intuit Inc.*, 32 AD3d 284, 286 (1st Dept 2006). Further, "a movant must do more than make bald conclusory allegations. Facts must be demonstrated which would make it reasonable to infer that the attorney gained some information in the prior representation that would be of some value to the

present client." *Hunkins v Lake Placid Vacation Corp., Inc.*, 120 AD2d 199, 202 (3d Dept 1986).

Legend's claims that Graubard knows how Legend operates as an underwriter of SPACs, based on its representation of Legend in an earlier, unrelated, SPAC, does not reach the level of confidential information which would be "likely to be embarrassing or detrimental" to Legend (Rule 1.6 [b]) in the arbitration involving Legend's co-management of the SPACs in issue. The claim that this alleged knowledge gives Graubard some sort of edge over Legend in an arbitration involving Legend's role as co-managing underwriter of other, unrelated, SPACS is too conclusory to merit disqualifying Graubard from representing EarlyBird.

C. Rule 3.7

Rule 3.7 (a) states that, with several irrelevant exceptions, "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact ... ." Legend insists that, because Graubard "represented the SPACs in connection with the transactions and agreements which are directly at issue in this case, and Graubard was intimately involved with the negotiations, agreements, facts and circumstances underlying [Legend's] claims" (Legend Memorandum of Law, at 11), Graubard will be a necessary witness in the arbitration. Specifically,

Legend claims that "Graubard ... has intimate knowledge of the parties' actions as underwriters, and the events triggering compensation." *Id.* at 12.

Disqualification is required under the "advocate-witness" rule when it is "*likely* that [the attorney] will be called as a witness [emphasis supplied]." *Broadwhite Associates v Truong*, 237 AD2d 162, 162 (1st Dept 1997). Disqualification is called for "only where the testimony by the attorney is considered *necessary* [emphasis in original]." *Id.* at 162-163. The party seeking to disqualify its opponent's attorney bears the "heavy burden" of proving that necessity. *See ODS Optical Disc Service G M B H v Toshiba Corporation*, 41 AD3d 166, 166 (1st Dept 2007); *see also Eisenstadt v Eisenstadt*, 282 AD2d 570, *supra*.

"'Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence.'" *Broadwhite Associates v Truong*, 237 AD2d at 163, quoting *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d at 446; *see also Eisenstadt v Eisenstadt*, 282 AD2d 570, *supra*.

Graubard has claimed, and Legend does not deny, that Graubard was not involved in the negotiation of the oral co-management agreement between Legend and EarlyBird, or that it was not aware of the financial arrangements contained therein. These

are the issues which underlie the arbitration, and Graubard's representation of the SPACs does not impinge on this area of testimony. Therefore, Legend has not delineated evidence necessary to the arbitration which Graubard, and only Graubard, is in the position to testify thereto. Even if Graubard had information concerning the agreement between the co-managing underwriters, Legend has not shown that Graubard would be the only source of such information. *See Campbell v McKeon*, 75 AD3d 479 (1st Dept 2010)(movant unable to show the "unavailability of other sources of such evidence").

Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding is dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: September 7, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN