

Herrick, Feinstein LLP v Windsor Sec., LLC
2020 NY Slip Op 33746(U)
November 10, 2020
Supreme Court, New York County
Docket Number: 652124/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

HERRICK, FEINSTEIN LLP,

Plaintiff,

- v -

WINDSOR SECURITIES, LLC, ARENT FOX LLP, JULIUS
ROUSSEAU

Defendant.

-----X

INDEX NO. 652124/2020

MOTION DATE 12/01/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 32, 35, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 113, 114, 115

were read on this motion to/for DISQUALIFY COUNSEL.

Upon the foregoing documents, it is

ORDERED that the application by Petitioner Herrick Feinstein LLP (“Herrick”) pursuant to CPLR 7502 (motion sequence no. 001) is granted to the extent that the Alan Frank Firm is disqualified as counsel for Nominal Respondents Arent Fox LLP and Julius A. Rousseau III, Esq, both individually and as a corporate designee of Arent Fox LLP, in the JAMS Arbitration *Windsor Securities, LLC v. Herrick, Feinstein LLP, REF# 1425022228* (“the Arbitration”), and severed, and it is further

ORDERED that the remainder this action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the application by Herrick to disqualify the Alan Frank Firm as counsel for Respondent Windsor Securities, LLC (“Windsor”) in the Arbitration is denied without prejudice at this juncture, and the Court is ordering further discovery on this matter; and it further

ORDERED that Herrick shall conduct the depositions of Julius A. Rousseau III, Esq. and Alan Frank, Esq. on or before thirty (30) days from the service of notice of entry, and it is further

ORDERED that Herrick, within thirty (30) days of the completion of the depositions, shall either renew its motion to disqualify Alan Frank as counsel to Windsor in the Arbitration or file a stipulation advising that this matter has been settled and withdrawn, and it is further

ORDERED that should Herrick renew its motion, Windsor shall produce the Arent Fox/Rousseau Settlement Agreement to the Court for an *in camera* review as part of its submissions in response to the renewed motion, and it is further

ORDERED that the Arbitration is stayed pending this Court’s further determination with respect to the disqualification of the Alan Frank Firm as counsel for Windsor in the Arbitration; and it is further

ORDERED that the application by Herrick for attorney’s fees is denied and the application by Windsor for costs is denied; and it is further

ORDERED that counsel for Herrick shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

Petitioner Herrick, Feinstein LLP (“Herrick”) brings an application pursuant to CPLR 7502 to disqualify counsel for Respondent Windsor Securities, LLC and Nominal Respondents Arent Fox LLP (“Arent Fox”) and Julius A. Rousseau III, Esq. (“Rousseau”) in an underlying JAMS arbitration proceeding entitled *Windsor Securities, LLC v. Herrick, Feinstein LLP*, REF# 1425022228 (“the Arbitration”) (motion seq. 001). Herrick seeks an order (i) disqualifying The Alan Frank Firm (“Alan Frank”) as counsel for Rousseau individually and as a corporate designee of Arent Fox; (ii) disqualifying Alan Frank as counsel for Windsor; (iii) compelling Windsor to produce its settlement agreement with Arent Fox and Rousseau; (iv) compelling Windsor and Alan Frank to provide Herrick with any and all confidential information concerning Herrick which they have obtained, either orally or in writing, from Arent Fox or Rousseau; and (v) staying the arbitration until Windsor retains new counsel.

Windsor opposes the petition in its entirety on the grounds that Alan Frank is not representing Rousseau or Arent Fox in the Arbitration but only Windsor, and its representation of Windsor is proper. Windsor also seeks an award of attorney’s fees and costs involved in answering the Petition.

BACKGROUND

Underlying Facts

This motion arises out of an underlying legal malpractice action connected to Herrick’s former representation of Windsor. Windsor provides life insurance premium financing so that individuals can obtain life insurance policies. The life insurance policies of the borrower then become the collateral for the loan issued by Windsor (NYSCEF doc No. 1, ¶ 12). In either late

2007 or early 2008, Windsor made loans for five insurance policies that are currently at issue in the underlying malpractice action (*id.*, ¶ 17). The policies are as follows:

- *Bitter Policy* – Policy issued on February 8, 2008, in the amount of \$2,000,000, with a loan maturity date of July 10, 2010;
- *Acker Policy* – Policy issued on March 6, 2008, in the amount of \$1,000,000, with a loan maturity date of July 29, 2010;
- *Collins Policy* - Policy issued March 4, 2008, in the amount of \$2,000,000, with a loan maturity date of July 29, 2010;
- *Stamatov Policy* – Policy issued on January 28, 2008, in the amount of \$2,000,000, with a loan maturity date of June 29, 2010
- *Coppock Policy* – Policy issued on December 2, 2007, in the amount of \$2,000,000, with a loan maturity date of July 8, 2010.

(*id.*, ¶ 18).

In 2009, Windsor retained Rousseau, then a partner at Herrick, to represent Windsor in connection with the policies (*id.*, ¶ 19). Rousseau represented Windsor throughout his time at Herrick until 2010, and then continued to represent Windsor as a partner at Arent Fox until 2014 (*id.*, ¶¶ 20-21).

The five insurance policies at issue led to various disputes and litigation proceedings. In one lawsuit that became an arbitration related to the Bitter Policy, the panel found that Windsor failed to comply with strict foreclosure procedures under California law (*id.* at ¶ 32). Windsor claimed that the decision was “directly based on Rousseau and Arent Fox’s failures and incorrect advice” (*id.*, ¶ 33).

The SDNY Action against Arent Fox and Rousseau

In February 2016, Windsor filed a lawsuit against Arent Fox in the United States District Court for the Southern District of New York (“the SDNY Action”). Windsor was represented by Alan Frank. In the complaint, Windsor asserted claims against Rousseau and Arent Fox for legal malpractice, breach of fiduciary duty, and breach of contract in connection with their

“representation of Windsor relating to certain premium financing Windsor provided for several different life insurance policies, and litigation arising therefrom” (*id.*, ¶ 39). In connection with the action, Windsor, through Alan Frank, took the deposition of Rousseau individually and as a corporate representative of Arent Fox (*id.*, ¶ 43). Throughout the lifespan of the SDNY Action, Windsor, through Alan Frank, continually asserted that Rousseau and Arent Fox committed malpractice in connection with their representation of Windsor connected to each of the five life insurance policies (*id.*, ¶ 44).

In the spring of 2019, Rousseau and Arent Fox entered into a settlement agreement with Windsor that resolved the SDNY Action (“the Settlement Agreement”). Windsor has not produced the Settlement Agreement to Herrick, but Herrick believes that as part of the agreement, Alan Frank agreed to represent Arent Fox and Rousseau in connection with Windsor’s pending arbitration against Herrick (*id.*, ¶ 47).

The Current Pending Arbitration against Herrick

In October 2016, Windsor filed a demand for the JAMS Arbitration at issue in this motion, asserting virtually identical claims against Herrick as against Arent Fox and Rousseau in the SDNY Action (*id.*, ¶ 48). Alan Frank is representing Windsor in this Arbitration. The Arbitration was stayed pending resolution of the SDNY Action, and Windsor accordingly contacted JAMS to lift the stay after the Settlement Agreement was finalized. In July 2019, the arbitration panel (“the Panel”) directed Windsor to file an Amended Demand. Windsor’s Amended Demand, filed by Alan Frank, includes malpractice claims not just against Herrick but also as against Rousseau and Arent Fox (*id.*, ¶ 55).

On July 29, 2019, Herrick filed its Response to the Amended Demand, wherein Herrick denied all allegations of wrongdoing, and asserted affirmative defenses, that, inter alia: (i)

Herrick was not the cause of any claimed damages; (ii) Windsor's injuries, to the extent any exist, were "the result of superseding events and/or actions or inactions by other parties, including, but not limited to . . . Arent Fox . . ."; *id.* at p. 43; and (iii) Windsor's claims fail in view of the doctrine of judicial estoppel and judicial admissions because Windsor, through Alan Frank, made representations in the SDNY Action concerning the conduct of Rousseau and Arent Fox that would absolve Herrick of liability in the Arbitration (*id.*, ¶ 56).

Herrick began to suspect Alan Frank was representing Arent Fox and Rousseau along with Windsor in the Arbitration after it served an Arbitration Subpoena upon Arent Fox and received a response from Arent Fox through Alan Frank in December 2019 (*id.*, ¶¶ 57-58). Additionally, in February 2020, Alan Frank agreed to accept service of a deposition subpoena on behalf of Rousseau (*id.*, ¶ 61). On February 17, 2020, Alan Frank sent an email to the Panel on behalf of Windsor objecting to Herrick's request for a deposition subpoena to Arent Fox, in which it referred to itself "as counsel to Mr. Rousseau for the purposes of said subpoena and deposition in this arbitration proceeding" (NYSCEF doc No. 115, ¶ 3). Herrick then contacted the Panel, asking the Panel to so-order a subpoena to be served on Arent Fox and reserving its right to challenge Alan Frank's participation in the Arbitration. The Panel responded via Pre-Hearing Order No. 7 on February 20, 2020, wherein it stated that it would not consider the subpoena issue until the conflict issues raised by Herrick were resolved and directed the parties to submit memoranda addressing whether the conflict issues were arbitrable (*id.*, ¶ 63). Windsor and Herrick thereafter submitted memoranda agreeing that the conflict issue should be resolved by a court, not the Panel.

In its memorandum, Windsor averred that it attempted to resolve Herrick's concerns by offering to share the specific terms of the Settlement Agreement, provided that Herrick would

agree to keep it confidential (*id.*, ¶ 65). Herrick did not agree, on the grounds that the Settlement Agreement may need to be eventually introduced into evidence in court. On March 6, 2020, Alan Frank submitted a letter to the Panel affirming that it would no longer be representing Rousseau in his deposition connected to the Arbitration, which it claimed rendered Herrick's concerns moot (*id.*, ¶ 67). Herrick was not persuaded, however, given that it still believed Alan Frank to be representing Arent Fox for all purposes, and Alan Frank only confirmed it would withdraw from representing Rousseau for the purposes of the deposition, not the arbitration generally. On March 10, 2020, Herrick responded to Alan Frank's letter and requested a stay of the Arbitration:

“[The Alan Frank Firm] apparently agreed to represent both Arent Fox and Herrick's former partner, Rousseau, when [Windsor] executed the Rousseau / Arent Fox Settlement Agreement – a fact never disclosed until now. Incredibly, [The Alan Frank Firm] apparently prepared the Amended Demand against Herrick **after** [The Alan Frank Firm] had agreed to undertake the legal representation of the very Herrick partner whom [The Alan Frank Firm] claims committed malpractice. In that Amended Demand, [The Alan Frank Firm] went ahead and accused both Arent Fox and Rousseau of having committed malpractice.

“The Alan Frank Firm has already appeared for Arent Fox in responding to written discovery, and has not even offered to withdraw as counsel for Arent Fox, even for the purposes of discovery. Frankly, the Alan Frank Firm's self-serving, unsworn letter, claiming its office never actually conferred with Mr. Rousseau raises significant questions since Frank prepared and signed Arent Fox's written discovery responses to Herrick. Frank offers absolutely no indication of any steps it has taken to avoid obtaining Herrick's confidences from Rousseau. Indeed, if Frank is planning on continuing to represent Arent Fox, Frank would essentially be continuing to represent Rousseau as well. As Frank has conceded, Frank's ability under the professional responsibility code to represent Windsor, Arent Fox, and/or Rousseau, in any capacity, will be for a court to decide.”

(*id.*, ¶ 69) (emphasis original).

The Panel thereafter granted Herrick's application, subject to the resolution of the Petition now before this Court, which was filed by Herrick on May 29, 2020.

Windsor's Answer

On July 1, 2020, Windsor filed its answer to the petition, as well as an affirmation from Alan Frank, managing partner of Alan Frank, in support of the answer. Windsor's papers characterize this Petition as a meritless attempt to delay the Arbitration. As a preliminary matter, Windsor argues that Herrick lacks standing to pursue the disqualification, as it is not a current or former client of Alan Frank (NYSCEF doc No. 41, ¶ 56). Windsor further argues the Petition should be dismissed as Alan Frank has represented Windsor for four years in the underlying legal malpractice actions, and it will not represent Rousseau or Arent Fox in any capacity in the Arbitration, as both parties will be represented by their counsel in the SDNY Action, Foley & Lardner, LLP ("Foley & Lardner") (NYSCEF doc No. 40 at 3). Windsor also contends that neither Rousseau nor Arent Fox ever communicated any confidential information to Alan Frank and that Alan Frank's response to Herrick's non-party subpoena for documents on behalf of Arent Fox does not create any conflict as it involved only re-producing the same documents that Arent Fox produced to Windsor in the settled SDNY Action (*id.*).

Windsor also argues that Herrick's request of this Court to compel Windsor to disclose the Settlement Agreement must be denied as the Panel already properly denied Herrick's request to compel production of the Settlement Agreement and Herrick has not introduced any basis by which this Court could overturn the Panel's decision.

Windsor finally contends that it is entitled to an award of costs incurred in answering the Petition (NYSCEF doc No. 41 at 73). Herrick opposes and contends that the Court should instead award attorney's fees in its favor, given that this Petition could have been avoided had Alan Frank withdrawn as counsel for both Rousseau and Arent Fox from the outset (NYSCEF doc No. 115, ¶ 28).

Rousseau's Affirmation

Rousseau separately submitted an affirmation stating that he and Arent Fox have not communicated with Alan Frank following the conclusion of the SDNY Action and that he takes no position regarding the Petition (NYSCEF doc No. 110 at 2). Rousseau states that Foley Lardner will represent him and Arent Fox in the Arbitration, and that the only action taken by Alan Frank was to assist Foley Lardner in responding to a document subpoena issued by Herrick to Arent Fox in the Arbitration and to interpose written responses and objections to that subpoena on behalf of Arent Fox (*id.*)

DISCUSSION

Standing

As a preliminary matter, the Court addresses Windsor's argument that Herrick lacks standing to bring this Petition.

The Appellate Division, First Department, has held that "a party seeking to disqualify another party's attorney on conflict of interest grounds must have standing to do so based on either being a present or former client of the subject attorney and must prove, among other things, the existence of a prior attorney-client relationship between itself and opposing counsel. (*Campbell v McKeon*, 75 AD3d 479, [1st Dept 2010]). Windsor concludes that as it is undisputed that Herrick is neither a former nor present client of Alan Frank, it does not have standing to seek disqualification and the Petition must be denied as a matter of law.

However, as pointed out by Herrick, Windsor's argument is misplaced. While Herrick is not a former client of Alan Frank, Rousseau, Herrick's former partner and the Herrick partner in charge of Windsor's former representation, is the subject of Windsor's malpractice claims against Herrick in the Arbitration, as well as Windsor's malpractice claims against Arent Fox in the

SDNY Action. Therefore, Alan Frank's potential representation of Rousseau in the Arbitration presents a possible conflict of interest, notwithstanding the fact that Herrick itself is not a former client of Alan Frank. The Court of Appeals has also recognized that "attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests. This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large" (*Green v Green*, 47 NY2d 447,451 [1979]). Guidelines for disqualification of counsel are thus not limited to scenarios involving former clients, but rather must "adequately address the need to ensure to both clients and the general public that lawyers will act within the bounds of ethical conduct" (*Planning & Control Inc. v MTS Group, Inc.*, 1992 WL 51569, at *2 [SDNY Mar. 11, 1992], quoting *SMI Indus. Canada Ltd. v Caelter Indus., Inc.*, 586 F Supp. 808, 815 (ND NY 1984)).

Furthermore, it should be noted that the Panel in the underlying Arbitration specifically referred the potential conflict to this Court to make a determination with respect to disqualification. The issue of whether Alan Frank's representation of any party in the Arbitration presents a conflict is now before this Court, which has the authority and jurisdiction to rule on the issue of disqualification. *See Kuris v Kuris*, 2009 WL 1194548, at *2 (NY Sup. Ct. NY Cty. Apr. 28, 2009) ("It has been held that disqualification can be raised by the trial court, sua sponte, and that the authority to require the Bar to adhere to their ethical obligations may be exercised whenever it has been brought to the attention of the court").

Accordingly, Windsor's argument that Herrick lacked standing to bring this Petition is unpersuasive, and the Court turns to the merits of the Petition.

The Petition to Disqualify

“Resolution of an issue respecting disqualification requires a delicate balance between the interests of the client who desires to retain an attorney of his or her choice against the interests of the opposing party to be free from any risk of opposition by an attorney who had been privy to that litigant's confidence” (*Saftler v Gov't Employees Ins. Co.*, 95 AD2d 54, 57 [1st Dept 1983]). 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" (*Macro Cash and Carry Corp. v Berkman* , 81 AD2d 783 [1st Dept 1981], quoting *Young v Oak Crest Park, Inc.*, 75 AD2d 956, 957 [3d Dept 1980]). The right to be represented by counsel of one's choice is "a valued right [and] any restrictions must be carefully scrutinized" (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 [1st Dept 2013] [quoting *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]).

Notwithstanding the fact that the right to choose one's counsel is highly protected, when a party moves to disqualify its adversary's counsel based on a conflict of interest, “in order to disqualify a party's attorney, there need not be direct evidence of breach of a confidential relationship, as the issue is not the ‘actual or probable betrayal of confidences, but the mere appearance of impropriety and conflict of interest.’” (*Nemet v Nemet*, 112 AD2d 359, 360 [2d Dept 1985])[citations omitted]; *In re Hof*, 102 AD2d 591, 594 [2d Dept 1984] [“Clearly, petitioner need not set forth specifics to substantiate a claim of breach of the confidential

attorney-client relationship as to do so would obviate the protection afforded by disqualification”]). Moreover, in some circumstances disqualification may be appropriate even where the attorneys in question may not have received confidential information, to free the party seeking disqualification “from the apprehension . . . that the prior representation would inure to their current adversaries' advantage” (*Decana Inc. v Contogouris*, 27 AD3d 207, 207 [1st Dept 2006]). On the other hand, courts must also “examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation” (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]).

The Court writes separately to address the merits of Herrick’s Petition as against Windsor and Arent Fox/Rousseau.

Windsor

Windsor argues that Herrick fails to meet his heavy burden on its Petition, as it has not demonstrated a clear showing of Alan Frank’s access to confidential information. Windsor reiterates that it is entitled under the law to choose its own counsel, and that Herrick’s “conclusory and speculative allegations” unequivocally do not amount to actual prejudice or a substantial risk thereof (NYSCEF doc No. 41 ¶ 146). Windsor contends there is no reasonable risk that Alan Frank obtained from Rousseau and/or Arent Fox confidential information of Herrick within the context of its representation of Windsor, notwithstanding its acceptance of service of the subpoena on behalf of Rousseau (*id.*) Windsor concludes that any presumption of disqualification has been adequately rebutted and this Petition is merely a meritless delay tactic on Herrick’s part to delay the Arbitration.

However, Windsor's position that confidences were not shared is insufficient to overcome the burden Alan Frank carries to avoid disqualification, given the background of this proceeding. As Herrick points out, as a former partner of Herrick, Rousseau owes fiduciary obligations to Herrick. The fact that Alan Frank may have at one point represented Rousseau even in a limited capacity while simultaneously representing Windsor, who is suing Herrick for malpractice raises a question of fact regarding whether Alan Frank may have availed itself of access to Herrick's confidential information. Herrick also has no idea what confidential materials, if any, may have been reviewed or discussed by Alan Frank in the course of settling the SDNY Action. The Court finds that Herrick has introduced enough evidence to demonstrate a possible conflict of interest due to the access Alan Frank may have already had to Herrick's confidential information. While Windsor may well be able to demonstrate that Rousseau and Arent Fox did not exchange any confidential information, and it therefore can properly continue to represent Windsor in the Arbitration, Herrick is at least entitled to question them on the issue (See *K&S of New York Corp. v Sushi of Nao Intern., Inc.*, 8 Misc. 3d 41, 45 [App Term, 1st Dept 2005] ["On this record, there exists sufficient aspects of such relationship to trigger inquiry into the potential conflict arising from [counsel's] role herein and to warrant an evidentiary hearing prior to a final determination on the motion for disqualification"]).

Therefore, discovery is warranted to determine whether Herrick's confidences were shared with Alan Frank by Rousseau or Arent Fox. "The amount of discovery permitted with respect to a motion to disqualify counsel is left to the broad discretion of the judge before whom the motion is pending," *British Int'l Ins. Co. v Seguros La Republica, S.A.*, 2002 WL 987199, *1 (SD NY 2002)], citing *Lefrak v Arabian Am. Oil Co.*, 527 F2d 1136, 1140 [2d Cir 1975] and *European Cmty. v RJR Nabisco, Inc.*, 134 F Supp.2d 297, 309 (ED NY.2001)]. The issue may

be determined with the aid of affidavits, depositions, a special master and/or oral argument (*id.*, *1-2). Here, the Court believes the best procedure would be for Herrick to depose Msrs. Rosseau and Frank with respect to the nature and extent of their communications regarding Herrick relevant the malpractice litigation. After the depositions are completed, Herrick may, if it so chooses, renew the motion to disqualify and the Court will determine the issue upon additional affidavits and brief.

Regarding production of the Settlement Agreement that resolved the SDNY Action, Windsor contends that this Court cannot order production because the Panel already denied Herrick's request for the production of the agreement. However, the Panel rendered this decision in the context of discovery in the Arbitration, prior to when the issue of Alan Frank's conflicted representation arose. Herrick is not asking this Court to compel production for discovery purposes but rather to determine if it bears on the matter of Alan Frank's conflicted representation. Therefore, upon the completion of the depositions, should Herrick choose to renew its motion, Respondents are directed to submit with their papers a copy of the Settlement Agreement for *in camera* review so that the Court may determine whether its terms bear on the question of whether Alan Frank should be disqualified as Windsor's counsel in the Arbitration.

Arent Fox and Rousseau

Windsor stipulates in its answer that Alan Frank “has not represented Rousseau, and will not be representing Rousseau and/or Arent Fox in the Herrick Arbitration” (NYSCEF doc No. 40 at 2) and contends that Foley Lardner will be representing both parties in the Arbitration (*id.*). Windsor's papers are generally silent as to representation of Arent Fox, but they do not deny that Alan Frank represented Rousseau in connection with the deposition subpoena to be issued in the Arbitration and agreed to accept service on Rousseau's behalf. Until March 6, 2020, Alan Frank

repeatedly confirmed that it represented Rousseau; for instance, it expressly referred to itself as “as counsel to Mr. Rousseau for the purposes of [the] subpoena and deposition in this arbitration proceeding” in a February 2020 email (NYSCEF doc No. 115, ¶ 3). Alan Frank now asserts that its representation was solely limited to responding to the subpoena and that it agrees to not represent Rousseau in his deposition. However, conflicts of interest must be assessed by courts at the time they arose, not after the attorney at issue has taken steps to rectify (See *City & County Paving Corp. v Titan Concrete, Inc.*, 173 AD3d 518, 518 [1st Dept 2019]). As Herrick points out, Alan Frank’s statements averring that it never represented Rousseau or Arent Fox appear to be only offered now due to the matter of conflicted representation raised by Herrick.

This Court thus is not persuaded by Alan Frank’s self-serving statements, and out of an abundance of caution, this decision orders that Alan Frank is disqualified from representing Arent Fox and Rousseau, both individually and as a corporate designee of Arent Fox, in any capacity in the Arbitration.

Finally, the parties’ requests for attorney’s fees and/or costs are denied in the Court’s discretion, as the parties have not provided support for their entitlement and it does not appear that either party’s arguments have been so frivolous as to justify sanctions (see, e.g., *Minichiello v Supper Club*, 256 AD2d 59, 59 [1st Dept 1998]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the application by Petitioner Herrick Feinstein LLP (“Herrick”) pursuant to CPLR 7502 (motion sequence no. 001) is granted to the extent that the Alan Frank Firm is disqualified as counsel for Nominal Respondents Arent Fox LLP and Julius A. Rousseau III, Esq, both individually and as a corporate designee of Arent Fox LLP, in the JAMS Arbitration *Windsor Securities, LLC v. Herrick, Feinstein LLP*, REF# 1425022228 (“the Arbitration”), and it is further

ORDERED that the remainder this action is thus severed and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the application by Herrick to disqualify the Alan Frank Firm as counsel for Respondent Windsor Securities, LLC (“Windsor”) in the Arbitration is denied without prejudice at this juncture, and the Court is ordering further discovery on this matter; and it further

ORDERED that Herrick shall conduct the depositions of Julius A. Rousseau III, Esq. and Alan Frank, Esq. on or before thirty (30) days from the service of notice of entry, and it is further

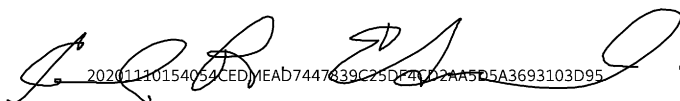
ORDERED that Herrick, within thirty (30) days of the completion of the depositions, shall either renew its motion to disqualify Alan Frank as counsel to Windsor in the Arbitration or file a stipulation advising that this matter has been settled and withdrawn, and it is further

ORDERED that should Herrick renew its motion, Windsor shall produce the Arent Fox/Rousseau Settlement Agreement to the Court for an *in camera* review as part of its submissions in response to the renewed motion, and it is further

ORDERED that the Arbitration is stayed pending this Court’s further determination with respect to the disqualification of the Alan Frank Firm as counsel for Windsor in the Arbitration; and it is further

ORDERED that the application by Herrick for attorney’s fees is denied and the application by Windsor for costs is denied; and it is further

ORDERED that counsel for Herrick shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.


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11/10/2020
DATE

CAROL R. EDMOAD, J.S.C.

CHECK ONE:

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APPLICATION:

CHECK IF APPROPRIATE: