Lukoil Pan Ams., LLC v Phoeninca Invs. LLC
2025 NY Slip Op 30884(U)
March 17, 2025
Supreme Court, New York County
Docket Number: Index No. 653336/2024
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LUKOIL PAN AMERICAS, LLC, Plaintiff,	INDEX NO.	653336/2024
- v -	MOTION DATE	--
PHOENINCA INVESTMENTS LLC, Defendant.	MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

--X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for ATTORNEY - DISQUALIFY/RELIEVE/SUBSTITUTE/WITHDRAW.

Defendant Phoeninca Investments LLC (PIL) moves for an order disqualifying Baker & McKenzie LLP (Baker) from acting as litigation counsel for plaintiff Lukoil Pan Americas, LLC (LPA) in this action because it allegedly has an ethical conflict of interest due to its alleged former representation of PIL.[1]

Background

In 2016, nonparty Silverpeak Strategic Partners LP (Silverpeak) retained Baker's Peruvian office Estudio Luis Echecopar García S.R.L. (ELEG) to advise it on an investment in a Peruvian fuel distribution business with LPA. (NYSCEF Doc. No. [NYSCEF] 14, Jonathan L. Socolow[2] aff ¶¶4, 5.) On March 31, 2016, Silverpeak executed an Engagement Letter with ELEG. (NYSCEF 37 in 653130/2024,

[1] PIL made the identical motion in its action entitled *Phoeninca Investments LLC v Lukoil Pan Americas, LLC*, Index. No. 653130/2024. All NYSCEF references are to the 653336/2024 action unless noted otherwise.

[2] Socolow is General Counsel of Silverpeak. (NYSCEF 14, Socolow aff ¶¶1, 14.)

Engagement Letter.) The Engagement Letter defines “Firm” as Baker & McKenzie International. (*Id.* at 2/5.[3]) Baker’s letterhead lists all Baker’s offices, including ELEG. (*Id.*) Attached to the Engagement Letter are “Standard Terms of Engagement for Legal Services” (Standard Terms) (*id.* at 3/5) which provide that the “engagement is with [ELEG], a member of Baker & McKenzie International.” (NYSCEF 38 in 653130/2024, Standard Terms at 2/3.) As to conflicts, the Standard Terms state:

> “**Conflicts With Affiliates**. For purposes of our engagement, our client is only the entity designated in our Assignment Letter, and not its affiliates (the stockholders, parent, subsidiaries, directors, officers, or related companies of any entity, or the individual members of a trade association, or the partners of a partnership or joint venture). Accordingly, for conflict of interest purposes, we and other firm offices may represent another client with interests adverse to your affiliates without obtaining your or their consent. We will expect you to inform us immediately if the designated client does business under any other name.
>
> **Third Parties**. Our engagement for you does not create any rights in or liabilities to any third party.” (*Id.* [emphasis added].)
>
> “**Conflicts**. We will always honor our duty of confidentiality to you and protect your information. Without detracting from our duty of confidentiality to you, this letter confirms our mutual agreement that, so long as we act in accordance with ethical requirements, we and other Firm offices may without your consent act for other persons or entities whose interests are adverse to you or your affiliates in matters not substantially related to our engagement by you. The adversity may be in litigation, legislative or regulatory matters, or in transactions or otherwise, all regardless of type, importance or severity of the matter.
>
> We agree, however, that we will not act adversely to you in any instance where, as the result of our representation of you, we have obtained sensitive, proprietary or other confidential information of a nonpublic nature that, if known to any such other client of ours, could be used in a matter in which we are retained by our other client to your or your affiliates’ material disadvantage, unless we screen our lawyers and paralegals who have such information from any involvement in the adverse representation.” (*Id.* [emphasis added].)

[3] NYSCEF pagination.

In 2016, ELEG's Oscar Trelles de Belaunde, Esq. led the Silverpeak team of 59 timekeepers. (NYSCEF 36 in 653130/2024, Kerry Miller, Esq.[4] aff ¶¶20, 23, 26.)

> "In July 2019, Mr. Trelles de Belaunde resigned from [ELEG], and no further work appears to have been performed for Silverpeak by anyone at [ELEG] after his departure. The last invoice, dated September 18, 2019, included time worked through the end of June 2019 by Mr. Trelles de Belaunde and his team." (*Id.* ¶22.)

However, there is no evidence before the court of the scope of the work done for Silverpeak after the deal closed until September 2019 and whether it was related to the 2017 deal. At Silverpeak's instruction to ELEG, Silverpeak's files were transferred to Trelles de Belaunde at his new firm. (NYSCEF 39 in 653130/2024, email.) Forty-two of the original timekeepers left EIEG with Trelles de Belaunde. (NYSCEF 36 in 653130/2024, Kerry Miller, Esq. aff ¶23.)

PIL and two other special purpose vehicles (SPVs) were created the day before the closing on the Joint Organization Financing and Operating Agreement (JOFOA) which structured the joint venture between Silverpeak and LPA. (NYSCEF 14, Socolow aff ¶¶13-15.) PIL has no employees, is owned by certain Silverpeak partners, not Silverpeak, though Silverpeak manages PIL. (*Id.* ¶¶2, 14.) ELEG did not issue a new engagement letter when PIL came into being. (*Id.* ¶18.)

The joint venture is governed by the JOFOA, effective December 21, 2017, which PIL, LPA, and three others executed, pursuant to which the signatories own Phoeninca Perú S.R.L. [PPeru], a Peruvian company. (NYSCEF 2, JOFOA at 2/41; NYSCEF 1, Complaint ¶¶1, 19.) PIL's and LPA's interests in PPeru are held through their equal

[4] Miller is Director of Professional Responsibility for Baker & McKenzie International. (NYSCEF 36 in 653130/2024, Miller aff ¶1.)

ownership of another new SPV – Phoeninca Holdings LLC (PHoldings), a Delaware company.[5] (NYSCEF 1, Complaint ¶¶20-23.)

On November 13, 2023, PIL, LPA, and PPeru entered a term sheet with PPeru's management team to acquire PHoldings. (*Id.* ¶53.) Meanwhile, PIL was negotiating with a third party to sell PHoldings' assets. (*Id.* ¶58.)

Analysis

The New York Rules of Professional Conduct provide that a lawyer is prohibited from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.9[a].)

> "The Code of Professional Responsibility establishes ethical standards that guide attorneys in their professional conduct, and its importance is not to be diminished or denigrated by indifference. When raised in litigation, however--which in addition to matters of professional conduct directly involves the interests of clients and others--the Code provisions cannot be applied as if they were controlling statutory or decisional law." (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987] [internal quotation marks and citations omitted].)

A party seeking disqualification of an adversary's attorney must show: (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. (*See Solow v W.R. Grace & Co.*, 83 NY2d 303, 308 [1994].) "Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification."

[5] The difference in PIL's membership interests in PHoldings and LPA's profit interests in PHoldings is not relevant to this decision. (*See* NYSCEF 1, Complaint ¶¶23-24.)

(*Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123, 131 [1996] [citation omitted], *rearg denied* 89 NY2d 917 [1996].) However,

> "while the so-called 'per se rule of disqualification' may very well be appropriate to disqualify individual attorneys substantially involved in the prior representation, it does not apply in situations involving imputed disqualification to other attorneys in the same law firm having insignificant involvement. Further, where the attorney who was principally involved in the prior representation has left the firm, the presumption of disqualification may be rebutted by the non-movant by providing facts establishing that the law firm's remaining attorneys do not possess confidences or secrets of the former client." (*Dudhia v Agarwal*, 66 Misc 3d 206, 211 [Sup Ct, NY County 2019] [citations omitted], *affd* 183 AD3d 537 [1st Dept 2020].)

Finally, PIL carries a heavy burden on this motion. "Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation." (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 440.) "[I]n the context of an ongoing lawsuit, disqualification of a plaintiff's law firm can stall and derail the proceedings, redounding to the strategic advantage of one party over another." (*Id.* at 443 [citations omitted].)

(1) <u>No Prior Attorney-Client Relationship between PIL and Baker</u>

There is no prior, or even a subsequent, attorney-client relationship between Baker and PIL. (*See 71 Park Ave. S. LLC v Fox Rothschild LLP*, 2018 NY Slip Op 32451[U], *7-8 [Sup Ct, NY County 2018] ["NP is the sole client identified in the Engagement Letter, and that letter clearly and unambiguously states that Fox does not represent any of NP's affiliates, subsidiaries or agents. The Engagement Letter, and the attached Standard Terms, specifically disclaim the creation of an attorney-client relationship between Fox and NP's affiliates arising out of Fox's representation"].) PIL's belief that it was a client is not dispositive. (*See Wei Cheng Cahng v Pi*, 288 AD2d 378,

380 [2d Dept 2001], *lv denied* 99 NY2d 501 [2002].) That PIL came into being as a result of ELEG's advice to Silverpeak does not give rise to an attorney-client relationship between PIL and ELEG. (*See Federal Inc. Co v North Am Specialty Inc. Co.*, 47 AD3d 52, 60 [1st Dept 2007].) The court rejects Socolow's assertion that PIL was advised by ELEG "throughout the negotiation" as impossible since PIL did not exist throughout the negotiation. (NYSCEF 14, Socolow aff ¶17.) Finally, the Engagement Letter here required any changes to be in writing. (NYSCEF 38 in 653130/2024, Standard Terms at 2/3.) Sokolow admits that the mechanism to extend ELEG's representation to PIL was never triggered by anyone including Silverpeak which is fatal to this factor. (NYSCEF 14, Socolow aff ¶18; *see 71 Park Ave. S LLC*, 2018 NY Slip Op 32451[U], *8.) Therefore, the Engagement Letter here precluded ELEG from forming such a relationship with PIL.

(2) <u>Matters Involved in Both Representations Are Not Substantially Related</u>

The complaints demonstrate that the current actions concern events that took place after the 2017 transaction. In the 653130/2024 action, initiated on June 20, 2024 by a Summons with Notice, PIL alleges that (1) in 2023, LPA ceased supplying fuel to the joint venture in violation of section 2(c)(iii)(A) of the JOFOA and (2) LPA allowed PHoldings to enter the lubricants business without following the protocol in the JOFOA with LPA supplying the lubricants from its Mexican operation which allegedly constitutes self-dealing without PIL's approval in violation of section 11(a)(vi) of the JOFOA. (*See* NYSCEF 3 in 653130/2024, Complaint ¶¶53-56.) PIL asserts a claim for breach of contract and damages of $5 million. (*Id.* ¶60.)

In its July 1, 2024 complaint in the 653336/2024 action, LPA asserts damages of $18 million for breach of contract and unjust enrichment and alleges that PIL breached the JOFOA by "failing to pay 50% of [PHoldings'] Cash Shortfall and withholding material information regarding potential transactions with third parties from LPA." (NYSCEF 2, Complaint ¶4; *see id.* ¶¶6, 67-86.) Instead, LPA "and its subsidiary, [PPeru] … paid the [PHoldings'] Cash Shortfalls owed by [PIL]" or "twice the amount required of LPA under the JOFOA." (*Id.* ¶5.) LPA also alleges that PIL negotiated a sale of PHoldings' assets while excluding LPA from the negotiations in violation of section 7 of the JOFOA. (*Id.* ¶¶57-58, 63.)

It has been seven years since the deal closed during which time the parties have been operating under the JOFOA. Indeed, the parties are engaged in exiting the deal either by selling PHoldings to the management team or by an asset sale to an anonymous nonparty. The court finds the matters are not related but consecutive and there is no evidence that ELEG's representation on this matter continued after the transaction closed.[6]

Since the matters are not related, the advance conflict waiver precludes disqualification. The court rejects PIL's argument that the advance conflict waiver swallows the conflict provision. The two provisions address two different scenarios. If the matters are not substantially related, the law firm may take the new matter without question. (NYSCEF 38 in 653130/2024, Standard Terms at 2/3.) If the matters are related, the law firm may take the new matter as long as a screen is created. (*Id.*) In

[6] PIL's argument that ELEG's representation continued is not supported by any evidence in the record.

the absence of any real objection to the screen, the court is satisfied that Baker's screen is satisfactory. (NYSCEF 20, Miller aff ¶¶18, 25, 27, at 5-7; NYSCEF 24, L Andrew S. Riccio[7] aff ¶14.) Here, even if the court had found the matters to be related, the outcome would be the same because the first factor is not satisfied. Likewise, PIL cites no authority either in the Engagement Letter or in law that such a provision cannot possibly apply to an as yet not formed entity such as PIL.

(3) <u>Interests of the Present Client and Former Client are Materially Adverse</u>

There is no dispute that LPA's interest and PIL's interests are adverse.

Even if PIL satisfied the three criteria to establish a presumption of disqualification, the presumption is rebuttable because Trelles de Belaunde and 42 of the timekeepers on the 2017 transaction left the firm in 2019. (NYSCEF 36 in 653130/2024, Miller aff ¶¶22-23; *see Kaikov v Yadgarov*, 216 AD3d 926, 929 [2d Dept 2023.) Baker has rebutted the presumption because none of the attorneys on the Silverpeak deal are on the litigation team. (NYSCEF 20, Miller aff ¶¶ 20, 23-24, at 5-6.) "[W]here the attorney who was principally involved in the prior representation has left the firm, the presumption of disqualification may be rebutted by the non-movant by providing facts establishing that the law firm's remaining attorneys do not possess confidences or secrets of the former client" that are likely to be significant or material in the litigation and that the firm has erected adequate screening measures "to eliminate any access or involvement of [any] potentially conflicted attorney." (*Dudhia*, 66 Misc 3d at 211, 215.)

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[7] Riccio of Baker is LPA's counsel. (NYSCEF 24, Riccio aff ¶1.)

Accordingly, it is

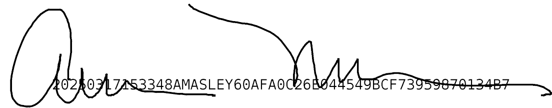
ORDERED that Phoeninca Investments LLC's motion is denied; and it is further

ORDERED that initial disclosure shall be completed by April 17, 2025 (*see* Part 48 Procedures ¶16); and it is further

ORDERD that the parties shall appear for a preliminary conference at 3:45 p.m. on April 24, 2025; and it is further

ORDEERED that by April 22, 2025, the parties shall submit a proposed preliminary conference order or, if no agreement can be reached, competing proposed orders; and it is further

ORDERED that the motions to dismiss shall be argued together on April 30, 2025 at 10 am.



3/17/2025			**ANDREA MASLEY, J.S.C.**		
DATE					
CHECK ONE:	☐ **CASE DISPOSED**		☒ **NON-FINAL DISPOSITION**		
	☐ **GRANTED**	☒ **DENIED**	☐ **GRANTED IN PART**		☐ **OTHER**
APPLICATION:	☐ **SETTLE ORDER**		☐ **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**		☐ **FIDUCIARY APPOINTMENT**		☐ **REFERENCE**