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PRISTEC REFINING TECHNOLOGIES USA, LLC, EARLE REFINING LLC, EARLE OIL INVESTMENTS, LLC, and EARLE INVESTMENTS, LLC, Plaintiffs, v. PRISTEC AG, PRISTEC AMERICA, INC. (NEVADA), PRISTEC AMERICA, INC. (NEW JERSEY), INNOVATIVE CRUDE TECHNOLOGIES, INC., ANTHONY SICHENZIO, and JOSEPH LAURA, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART MONMOUTH COUNTY Docket No.: MON-C-98-19 CIVIL ACTION

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISQUALIFY THE LAW FIRM SILLS CUMMIS FROM REPRESENTING PLAINTIFFS IN THIS ACTION

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PRELIMINARY STATEMENT

This litigation is in its initial stages, having waited to mature while certain of the parties arbitrated the core of the dispute, which was recently concluded decisively in favor of Defendants Pristec America, Inc. (Nevada), Pristec America, Inc. (New Jersey), Innovative Crude Technologies, Inc. ("ICT"), Joseph Laura ("Laura") and Anthony Sichenzio ("Sichenzio" and, with the other defendants, collectively referred to herein as "Defendants).

Since it is abundantly clear that Sills, Cummis & Gross, P.C. ("SCG"), counsel for Plaintiffs Pristec Refining Technologies USA, LLC ("PRT"), Earle Refining LLC ("Earle Refining"), Earle Oil Investments, LLC ("Earl Oil"), and Earle Investments, LLC ("Earle Investments") has a concurrent and unwaivable conflict of interest, it should be disqualified and a protective order entered staying discovery while replacement counsel is sought. If the motion is denied, it is respectfully requested that discovery be stayed for fourteen days so that Defendants make seek leave to appeal any such adverse order.

The first lawsuit between these parties was filed by SCG in October 2017, wherein it purported to sue both on behalf of PRT and its minority member, Earle Refining, asserting causes of action related to certain business transactions between the parties. At the heart of the dispute is who controls PRT and whether there was a proper disassociation event stripping PAI of its member interest in PRT.

The case made its way to the Monmouth County Chancery Division, where Defendants implored the Court to look at the very complaint filed by SCG to see that it had a crippling conflict of interest under the Rules of Professional Conduct ("RPCs") which prohibited it from acting as counsel for Plaintiffs in the prior filed matter. The Appellate Division in 2014 put to rest the question of whether a law firm can simultaneously represent the interests of a closely-

held LLC as well as the managing member of that LLC where there are claims, like here, of misappropriation and fraud and there is a clear, continuing obligation of the LLC's counsel to the majority member (PAI).

SCG and its client, minority member Earle Refining, were clever, though. They pled around the problem by claiming that Earle Refining had "disassociated" PAI from PRT before SCG took on representation of PRT, and further argued that a certain February 2017 Share Acquisition Agreement between Pristec AG ("PAG") and Defendants had stripped Laura and Sichenzio of any ability to raise the conflict issue. Judge Quinn denied the motion to disqualify, accepting these arguments at face value, understanding, of course, that testimony would be taken soon in the arbitration that would test these theories. The Final Award in the arbitration destroyed these standing arguments, as did the testimony taken therein.

As shown below and in the enclosed Certifications, there can be no colorable argument that SCG can continue in this action as counsel for any party. It has a crippling, concurrent conflict of interest. And it must be disqualified.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Distilled to its essence, this case concerns an unconscionable scheme by Earle Refining, a minority member of PRT who served as Manager of PRT (and claims to still be doing so) who schemed with PAG to force Laura and Sichenzio from PAI-NV, PAI-NJ; ICT, and PRT, through fraud and deception. Their scheme was designed to take unlawful control of valuable petroleum refining technology developed by Laura and Sichenzio and to loot PAI-NV, PAI-NJ, ICT and PRT of their assets. (See Answer and Counterclaims, Ex. 4 to the Certification of Joseph Laura ("Laura Cert.")).

Laura is a shareholder of Pristec AG ("PAG") through his stock ownership of ICT, and PAG is named in this action as a defendant but has never been properly served. (Id., ¶ 2 & n.1). Laura is a founding shareholder of Defendant Innovative Crude Technologies, Inc. ("ICT") and owns fifty (50%) percent of the stock of that company, along with Defendant Anthony Sichenzio ("Sichenzio") who owns the balance of ICT stock. (Id., ¶ 3). ICT owns fifty (50%) of the outstanding stock of Pristec America, Inc. (Nevada) and Pristec America, Inc. (New Jersey) (hereinafter collectively referred to as PAI), with PAG owning the balance of stock in PAI. (Id., ¶ 4).

PAG is an Austrian stock company with its headquarters in Vienna, Austria. (Id., ¶ 5).

The claims by Plaintiffs in this case concern PAI's interests in PRT, which is a Delaware limited liability company formed by SCG, and the substantial deadlock which has ensued over fraud committed by Plaintiff Earle Refining LLC ("Earle Refining") and its affiliated companies, with the active assistance of their attorneys, SCG.

The schematic below shows who owns the member interests in PRT, and how PAI owns a majority interest in PRT:

At its core, this case is a fight over PRT; where PAI's capital contributions to PRT went; and why it failed.[1] (Id., ¶ 8).

Previously, there were two actions before this Court involving Laura, Mr. Sichenzio and their companies, but the claims were ordered to arbitration on motion to Judge Quinn. The arbitral matter was one before a Mayer Brown partner, B. Theodore Howes, in the International Centre for Dispute Resolution ("ICDR") arbitration styled Joseph Laura et al. v. Pristec AG, ICDR Case No. 01-18-0001-9729 (the "ICDR Arbitration"). (Id., ¶ 10).

After a lengthy period of discovery and motion practice, all of which is described in the ICDR Final Award, the Arbitrator conclusively ruled in favor of Defendants. (Laura Cert., Ex. 1).

Judge Quinn had denied applications for injunctive relief as against Messrs. Laura and Sichenzio, and correctly saw that they were being railroaded, with PAG having basically hijacked both PAI and ICT without any legal authority whatsoever. PAG did so with the active

[1] While PAG was listed in the caption of this action, Earle Refining, purporting to act as manager on behalf of PRT, has never served PAG with a complaint in this case, nor kept PAG informed of the submissions to the Court being made by any of the Plaintiffs, nor any Court deadlines or hearing dates. Defendants have made no claims against PAG in this matter as Messrs. Laura and Sichenzio, both individually and derivatively on behalf of ICT and PAI, prevailed on all of their claims against PAG in a prior arbitration, which was reduced to a final award and judgment.

assistance of Earle Refining and SCG. The Final Award reached factual conclusions that bind the Plaintiffs under collateral estoppel principles, given their participation in the hearings and the fact that they were closely aligned with (and in fact, found to be in collusion with), PAG. (Id., ¶ 13).

In pertinent part, the Arbitrator found that:

a. A Share Acquisition Agreement between Laura, Sichenzio, ICT and PAG dated February 8, 2017 ("SAA"), was void and unenforceable and declared rescinded. In making this finding, the Arbitrator found that Laura and Sichenzio had shown clear and convincing evidence that they were fraudulently induced to enter into the SAA and that PAG and Earle Refining [(with the active participation of SCG)] were "clearly conspiring to freeze Claimants out of the U.S. Pristec Companies and to transfer rights to the Pristec Technology to companies controlled by Earle in the weeks leading up to the execution of the SAA."

b. With the rescission of the SAA, the Parties were returned to the *status quo ante* with Laura and Sichenzio owning 50% of ICT and together owning all issued and outstanding shares of ICT; PAG having no ownership or equity interest of any kind in ICT; and ICT being the lawful owner of 35,000 shares of PAG. All other obligations under the SAA are excused inasmuch as the SAA is null and void, such as a bogus "License Performance Guaranty" that the Arbitrator specifically noted had been illegally entered into by Earle and PAG during their period of collusion. It is this same "License Performance Guaranty" which forms the basis for claims still made by Earle Refining in this action, notwithstanding these findings by the Arbitrator.

c. The officers, Board of Directors members and Supervisory Board members of each of PAG, ICT, and PAI are to be the same as they existed on February 7, 2017, including, but not limited to, (a) Laura, Sichenzio, Swaminathan Ramachandran, Ruediger Nuerk, and Jose Miguel Delgado Castillo are now the members of the Board of Directors of PAI-NV and PAI-NJ, (b) Laura is the Chairman, President and CEO of PAI-NV, PAI-NJ, and ICT, (c) Sichenzio is the Vice Chairman of PAI-NV, PAI-NJ, and ICT, (d) Laura the Chairman of the Supervisory Board of PAG, and (e) Sichenzio shall be a member of the Supervisory Board of PAG.

d. The October 1, 2013 "Patent, Technology and Know-How License Agreement" entered into by and between PAG and PAI-NV (the "PAG-PAI License") remains in full force and effect notwithstanding the rescission of the SAA, and PAG (whether directly or through its officers, employees or agents) was permanently enjoined from terminating the PAG-PAI License without the internal approvals required by Austrian law, including the approval of PAG's Supervisory Board.

e. PAG, whether directly or through its officers, employees or agents, is permanently restrained and enjoined from: (a) taking any actions to implement or consummate the terms of the purported settlement agreement in the litigation pending in the Chancery Division in Monmouth County, captioned *Pristec Refining Technologies et al. v. Pristec AG,* et al. (No. MON-C-175-17), including causing or permitting ICT, PAI-NV or PAI-NJ to implement or consummate the terms of that settlement agreement; (b) compromising the claims or potential claims of ICT, PAI-NV or PAI-NJ in the Monmouth Action or otherwise; and (c) taking any other actions (including causing ICT, PAI-NV or PAI-NJ to take any actions) to enter into, implement or consummate the terms of any other settlement agreements or transactions of any kind that would impact the operations, ownership or rights of ICT, PAI-NV and PAI-NJ, including rights in the cold cracking Pristec Technology or any other technology.

f. Within 14 days, PAG was ordered to pay attorney's fees related to Laura's and Sichenzio's defense of the action *Pristec America, Inc. (Nevada), Pristec America, Inc. (New Jersey) and Innovative Crude Technologies v. Joseph Laura and Anthony Sichenzio,* Docket No. MON-C-24-18 in the amount of $26,586, along with interest incurring at the simple rate of 9%, as measured from February 26, 2018. PAG was also ordered to reimburse Laura's and Sichenzio's payment of arbitration fees in the total of $154,835.98 plus 9% interest from the date of the Award and legal fees in the amount of $331,614.99 plus 9% interest from the date of the Award.

This is not the first case brought by Earle Refining against Laura or Sichenzio, or PAG. Earle Refining filed an action styled *Pristec Refining Technologies et al. v. Pristec AG,* et al. (No. MON-C-175-17) (Action 1)(*See* Laura Cert., Ex. 2). As the Court can see from the Complaint in Action 1, the claim there by Earle Refining—which owns a minority interest in PRT—was that it had taken complete control of PRT and somehow assumed PAI's entire ownership interest in PRT by dint of a "disassociation event." (See Ex. 2).

The Court should understand that SCG is a law firm that formed PRT; drafted the operating agreement and associated agreements for PRT; and purported to operate on PRT's behalf prior to the filing of that suit. (Id., ¶ 17). At no time did the Managing Member of PRT—Earle Refining—ever receive authority from the members of PRT to bring that action. In fact, at a member meeting called in 2017 for purposes of discussing the lack of such authority, it was expressly voted that no authority existed for the actions by Earle Refining. Earle Refining

simply ignored the results, and continued with its frivolous claims, including the frivolous claim that PAI had been somehow "disassociated" from PRT. (Id., ¶ 18).

The heart of this alleged "disassociation" was a license termination notice that SCG itself drafted—in total derogation of its legal obligations to act on behalf of its client (PRT), in collusion with PAG. The Court does not have to believe Defendants on this, because the ICDR Arbitrator has concluded ***as fact*** that both PAG and Earle Refining committed fraud (Ex. 1, at ¶ 225, p. xxix):

> **As set out in the factual recitals above, Respondent and the Earle Parties were clearly conspiring to freeze Claimants out of the U.S. Pristec Companies and transfer rights to the Pristec Technology to companies controlled by Earle in the weeks leading up to the execution of the SAA. The quick-fire series of events underlying this conspiracy – *from* the January 1, 2017 License Performance Guaranty *to* the January 19, 2017 letter accusing PAI-NV of committing material breaches of the PRT Operating Agreement and the PRT License *to* Earle's January 20, 2017 ghost-writing of the draft Cease and Desist Letter *to* Nuerk sending the Cease and Desist Letter to Laura on January 21, 2017 *to* the February 7, 2017 letter from Earle to Laura claiming that PAI-NV had been "*disassociate[ed] from PRT*" because of the Cease and Desist letter – is clear and convincing evidence in my opinion. Moreover, this was all done at a time when Laura was Chairman of Respondent's Supervisory Board, yet Laura was left out of the dealings between Respondent and the Earle Companies.**

Previously, Laura and Sichenzio sought to disqualify SCG from representing PRT in Action 1. (Id., ¶ 20). The motion to disqualify was denied[2] by Judge Quinn, in Action 1, for several reasons, all of which have been disproven at this point:

a. SCG claimed that Laura and Sichenzio lacked standing to object to its representation of PRT because neither Mr. Sichenzio nor Laura were current shareholders of either ICT or PAI because they had somehow lost that status through the SAA. This

[2] Defendants do not contend that Judge Quinn erred, in light of the claims by PAG and PRT that Laura and Sichenzio's interest in PAI were contested, and because there was a claim by PRT (albeit frivolous) that Earle Refining had someone "disassociated" PAI from PRT. See Reddy v. Patel, 2019 WL 5677779 (D.N.J. 2019). But with it being quite clear that PAI is controlled by ICT's shareholders, something that PRT now concedes in its Amended Complaint, the motion to disqualify is now ripe for disposition.

argument was debunked and decided in Laura's and Sichenzio's favor by the Final Award, as noted above;

b. SCG claimed that PAI had been "disassociated" from PRT, another argument totally debunked by the Final Award, which actually concludes that this disassociation and the associated termination of PAI's license with a letter penned by SCG, was part of a fraud; and

c. SCG denied that it did substantive work for PRT while PAI was a member of PRT. This, too, was disproven at the ICDR arbitration, precisely because PAI has never lost its ownership in PRT and remains a member to this day!

The Complaint in this new action totally backs off the theory that PAI is not a member of PRT. (See Laura Cert., Ex. 3). The significance of this is that SCG purports to represent PRT and to be suing on its behalf, and it is suing the majority member of PRT, PAI. As the Court can see from Defendants' Answer and Counterclaims (id., Ex. 4), Defendants seek a variety of relief as against, among others, Earle Refining, in connection with its illegal and tortious activities with PAG. These claims include one for tortious interference with PAI's license rights through the very documents drafted by SCG in direct violation of the Rules of Professional Conduct, and the common law and statutory law of both New Jersey and Delaware. (Id., ¶24).

Earle Refining never obtained, nor sought, board of members' approval to bring this action (much less the prior action). Moreover, the claims made in this action by Earle Refining (through SCG) are not in the best interests of the members of PRT. The deadlock of PRT is therefore caused directly by the litigation strategy made by Earle Refining, Manager of PRT, through SCG, which strategy is not in the interests of anyone and is only intended to drive up the fees of PAI and PAG. (Id., ¶ 26).

As the Court can see from the accompanying Certification of Ruediger Neurk, he recites a conversation that he shared just days ago with Defendants, relating to something said by PRT's Managing Member, Earle Refining. He certifies that he spoke to Thomas J. Earle, Jr. ("TJ Earle"), a member of Earle Refining who supposedly is the acting Managing Member of PRT, and that Mr. Earle said to him, in substance, that he believes this litigation will prevent PAI from raising any funds. Mr. Nuerk reached the ineluctable conclusion from this discussion that the strategy that Earle Refining ***and PRT's own lawyers*** (SCG) are taking is to use PRT's lawsuit to drive up Defendants' fees, and thereby tie up the companies in litigation and bankrupt them so that ONE of SCG's clients (Earle Refining) can simply pick up the assets later at a fraction of what it would cost to buy the company, but only after the OTHER SCG client, PRT, is bankrupt. (Id., ¶ 27; see also Certification of Ruediger Nuerk).

At no time did PAI, PAG or ICT ever consent to have PRT's lawyers (SCG) also represent the Manager of PRT, Earle Refining. The attorneys at SCG have a direct conflict of interest both because they have represented (and continue to represent PRT) and because they are participants in many of the transactions that remain in dispute between Plaintiffs and Defendants. (Id., ¶ 28).

The involvement of SCG is even more nefarious than drafting what the Arbitrator called a phony and illegal license termination notice. SCG didn't end there, and its tortious actions continued until this past summer when it engaged in blatant violations of the permanent injunction entered by the ICDR arbitrator. (Id., ¶ 29).

The lawyers supposedly representing the interests of PRT helped minority member Earle Refining, in July 2019 (just a few weeks after learning of the permanent injunction) in entering

into a transaction with PAG in an effort to purchase the U.S. patent rights to the Pristec Technology for $500,000, which is a fraction of what the rights are worth. (Id., ¶ 30).

During a visit to Vienna Defendants made in September 2019, Defendants obtained documentation showing that Earle Refining further breached its fiduciary duties to PAI and PRT by obtaining a valuation of the Pristec Technology, claiming to own it all through the very company that the Arbitrator had already restrained. (Id., ¶ 31).

The stated value of the Pristec Technology in that valuation shows that the technology in question has a value of approximately $540,000,000. (Laura Cert., Ex. 5). SCG is known to have handled this transaction because its name appears on documents filed with the U.S. Patent and Trademark Office. Again, it actually helped one client (Earle Refining) securing licensing rights in direct violation of a permanent injunction, knowing full well that this was detrimental to its other client, PRT! (Id., ¶ 33).

The outrageous, scorched earth strategy by SCG is also evident in how they are dealing with a related civil action that is pending in the Eastern District of New York, which involves civil claims brought by the Securities & Exchange Commission ("SEC") against certain of the Defendants. (Id., Ex. 6).

The mere juxtaposition of the SEC's allegations which frame Earle Refining as a supposed "victim" who "lost everything" with the clear findings of the arbitrator who properly saw Earle Refining as a fraudster guilty of having masterminded an effort to hijack the companies and steal the technology, demonstrates that the SEC has been instigated into bringing these civil claims by bad actors. The mere juxtaposition of the SEC's allegations that Earle Refining has seen no return on its investment because the Pristec Technology has not been

commercially developed, with the valuation (Ex. 5) shows the games that SCG and Earle Refining are playing with the SEC.

The SEC's complaint relies on alleged "misappropriation of funds" that are the very funds in dispute here, concerning PRT. In significant part, monies in question about which the SEC complains, were infused by Earle. (*See* SEC Complaint, ¶¶ 3, 5, 21, 42, 46, 49 ("He also misappropriated proceeds from a joint venture partner of PAI (the "JV Partner")"); ¶ 51(b)(complaining of money from an Earle joint venture being used to pay back Gil de Rubio); ¶ 94 (describing alleged dealings with Earle).

Laura and Sichenzio served multiple subpoenas on SCG and Earle Refining in the SEC action and SCG caused Earle Refining to completely default on them and refuse to answer them. There is currently a motion pending in which SCG, ostensibly speaking on behalf of PRT's "Manager," Earle Refining, refuses to give Messrs. Laura and Sichenzio any access to PRT's own records! (Id., ¶ 39). Magistrate Vera Scanlon was totally exasperated yesterday when Earle Refining failed to show up for a conference where the subpoenas were to be discussed, and issued an Order yesterday rebuking SCG for failing to attend. (Id., Ex. 7).

At the ICDR arbitration, Laura and Sichenzio demonstrated the involvement of SCG at every level of the fraud committed by Earle Refining, in blatant violation of its obligations to PRT and its members under the RPCs. They also disproved SCG's statements to Judge Quinn about its role in representing PRT, forming the company, and the like. (Id., Ex. 8).

For instance, the following facts were established:

Page/Line	**Content**
p.1386	SCG, while Action 1 was pending, ***and while purporting to represent PRT,*** formed a new entity for Earle Refining whereby Earle

	Refining sought to transfer all of the license rights in the Pristec Technology to this new entity (Pristec USA, LLC)(hereinafter "PUSA"). See also O'Connor Cert., Ex. 1, showing that SCG formed this entity in blatant violation of the RPCs). The arbitrator blocked this transaction with his preliminary injunction and permanent injunction, as noted above.
P1423-24	Robert Schiappacasse of SCG prepared the PRT operating agreement, formation of PRT, and supporting agreements with consultants.
P1427-1429	Earle admitted that the sum of $250,000 was contributed to PRT as a capital contribution in September 2016, and claims that "expenses" consumed it and that its "gone". He would not disclose how it was "consumed" and what "expenses" were drawn against this fund (likely because they are legal fees paid to SCG).
P1464-65	Mr. Earle admitted that he cannot say that SCG was not paid with PAI's funds from the PRT capital account to write the phony "license termination notice" which the arbitrator found to be part of a fraud between PAG and Earle Refining.
P1467	Earle claims that when SCG wrote the phony license termination notice, it had switched to representing Earle Refining and not PRT, even though SCG alleged in Action 1 that it had been acting on behalf of PRT when it sent the letter of disassociation.
P1558:14-1566	The architect of the fraudulent "letter of termination" was none other than Robert Schiappacasse of SCG, who admits that he wrote the letter on behalf of PRT's Managing Member, to cause the life-line of PRT (the license flowing from PAG to PAI, and down to PRT) to be cut. This, because Schiappacasse negotiated a "new deal" for Earle Refining giving it a greater increase of ownership in the U.S. as well as rights in

	Canada, to the Pristec Technology. It was this secret deal described by the Arbitrator as being the fraud committed by Earle Refining and PAG, which "deal" was permanently enjoined.
P1568-69	SCG's lawyer admitted he has no idea what happened to the $250,000 capital account created with PAI's money.
P1574	SCG admits that even though it helped write the letter found to be part of a fraud, terminating PAI's license, to the potential detriment of PRT, it still represented PRT in Action 1, as well as the Manager of PRT (Earle Refining).

PAI, as admitted by SCG and Earle Refining, has a $250,000 capital account that has gone missing. SCG is supposed to be representing the interests of PRT, and is hiding the documents relating to this account by refusing to produce even a single piece of paper in any of the various litigations we have been involved in. This is but one example of the gamesmanship that is being played by the so called lawyers for PAI's company, PRT. (Id., ¶ 46).

If this case goes to trial, a central theme of this case will be the actions of SCG and its client, Earle Refining, in committing fraud and tortious interference against PAI and its license with PAG. PAI would be severely prejudiced if SCG is not disqualified because it is highly improbable any prudent client would go to trial with a compromised attorney like that, and it is highly probable that Earle Refining will use this conflict as a basis, later, to stall this case even further. (Id., ¶ 47).

LEGAL ARGUMENT

POINT I

THE COURT SHOULD DISQUALIFY THE SILLS CUMMIS FIRM

As the New Jersey Supreme Court has observed, "[o]ne of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients. From that duty issues the prohibition against representing clients with conflicting interests." In re Opinion No. 653, 132 N.J. 124, 129 (1993); see also Kevin H. Michels, N.J. Attorney Ethics, 11 17:1 (Gann 2018). SCG's concurrent representation of both PRT and Earle Refining in the same suit is flatly prohibited by the RPCs and the case law.

As shown by the enclosed certifications, SCG has a long history of representing PRT—a closely held LLC which was and is owned 75% by Defendant PAI. As shown by the underlying documents and testimony given at the recent arbitration, SCG's central role in the underlying fraud alleged against PRT Manager Earle Refining is clear and unmistakable.

Moreover, to the degree that it is relevant that this representation of PRT goes back all the way to when it was formed, in September 2016, it is clear beyond peradventure that SCG was the law firm who did all of the legal work, and formed the entity.[3]

Of course, we all know that SCG has represented PRT since May 2017 when its client, Earle Refining, unilaterally filed a lawsuit on PRT's behalf against PAG and PAI.

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[3] While simultaneously hiding documents (the exact tactic taken by Norris McLaughlin the Comando case), SCG also disputes that it did the various things it obviously did when PRT was formed and began operations. But where there are conflicting facts and allegations concerning the existence of an attorney-client relationship, it is error to reach a determination on that issue as a matter of law. Froom v. Perel, 377 N.J. Super. 298, 310-11 (App. Div. 2005). The existence of an attorney-client relationship can be express or inferred from the facts by implication. Michels, § 13:4-1, at 256. All this Court needs do is look at the various documents and testimony of witnesses, including TJ Earle, to see that SCG was PRT's counsel in the formation of the entity and drafting of consulting agreements.

In Action 1, SCG tried to "plead around" these conflicts by arguing that the other members of PRT (Earle Refining, Hays and Gil de Rubio) somehow managed to take action to ***involuntarily disassociate PAI*** from its valuable member interest in PRT. (See Complaint, Action 1, Laura Cert. Ex. 8, ¶¶ 132-33). Plaintiffs claimed that this occurred by way of a *January 27*, 2017 letter from SCG sent on behalf of its client and *minority* PRT member Earle Refining, to its other client and majority member of PRT, PAI, through Laura. (Id.). The absurdity of these allegations in the Complaint were plain to see, as was the idea that lawyers for PRT (SCG) could ever (permissibly) send a letter to a controlling member ***of its own client*** to effect a "disassociation" of PAI from PRT.

It is therefore undeniable that SCG held itself out as counsel to PRT at a time when it was indisputably owned and controlled by 75% member, PAI, ***and that it continues to represent PRT in this action which is brought against the majority member of that LLC.*** It is also undeniable that PRT alleged in Action 1 that SCG acted on its behalf in disassociating PAI.[4] The conflict here is "unmistakable." In re Palmieri, 76 N.J. 51, 62 (1978) (holding that an attorney who represented both sides in a sale of a business could not later sue one of those parties in litigation).

In a 2014 groundbreaking, published decision, the New Jersey Appellate Division spoke to the impermissible nature of what SCG is doing in this case. Comando v. Nugiel,

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[4] It has long been held that attorneys will be precluded from later arguing that they were not a party's attorney when they have held themselves out to others as a party's attorney. In re Silvia, 152 N.J. 243, 249 (1998)(given correspondence with bank identifying attorney as lawyer for grievant, Court rejected notion that no attorney-client relationship existed); In re Schwartz, 99 N.J. 510, 517 (1985)(attorney who filed notice of appeal for party could not argue that no attorney client relationship was formed). SCG can be expected to argue that it erred in its complaint when it alleged that it represented PRT in sending the disassociation letter. This Court should not allow such gamesmanship but, in any event, given that PAI owns a controlling interest in PRT, SCG simply cannot continue to represent PRT.

436 N.J. Super. 203 (App. Div. 2014).[5] In Comando, a law firm had represented an LLC in connection with its formation and negotiation of a lease document (like here, with SCG's history of forming PRT and representing PRT, as shown in the Guaranty). The LLC was owned 50% by a management company named RCP, and the other 50% by Elizabeth Comando. There was an inter-member dispute that erupted into litigation (like here) where the lease was part of the claims in the case (like here, with the "Guaranty", which is the subject of Count II of the complaint drafted by SCG).

Just like in Comando, the law firm (Norris McLaughlin) refused to give access to the LLC's records and hid evidence, resulting in numerous motions even while the appeal was pending. Ultimately it turned out, as predicted by appellant, that Norris McLaughlin was hiding evidence that would further show the scope and extent of its conflicts, and Norris McLaughlin tried to withdraw, only to see the Appellate Division refuse to allow it to do so, and requiring it to participate in the appeal.[6]

The Appellate Division reversed the trial court's order refusing to disqualify Norris McLaughlin from the case as counsel for RCP. The Court held that this presented a ***concurrent conflict of interest***, in light of Ms. Comando's individual and derivative suit against the individual owner and management company. The Court recognized that the Norris firm had represented the LLC at a time when it was owned by the two members, and, essentially, later sought to choose sides in the inter-company dispute, something that was clearly prohibited under the RPCs. Id. at 215.

Of particular importance here was the Court's warning to the bar when a lawyer chooses

[5] The undersigned was counsel to Ms. Comando in the cited case.

[6] SCG would be well advised to take note, that when this happens, and where a final decision is made by an appeals court that a law firm had a conflict, and where the law firm was in the case when the opinion is rendered, this is res judicata in a later suit against the firm. The decision cannot be reversed.

to pick one or more members to represent in an inter-member dispute:

> "Also, allegations such as minority shareholder oppression, wrongful disposition of excess funds received by 10 Centre in the SBA loan closing, and diversion of profits based on Nugiel's refusal to release the details of 10 Centre's financial affairs, are problematic to NMM which purports to currently represent 10 Centre, as well as RCP and Nugiel. 'R***.P.C. 1.7 reflects 'the fundamental understanding that an attorney will give complete and undivided loyalty to the client [and] should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost.***' " Id. (emphasis added).

This is Comando all over again.

In essence, when a law firm represents a closely-held legal entity like PRT, it also has duties to its constituent members, particularly to PAI which holds a majority interest in the LLC and owns the license rights!

The temerity of SCG to undertake representation of PRT under these circumstances knows no bounds. Like RCP's lawyers (Norris firm) in Comando where the Norris firm represented both the LLC and the Managing Member, so too here we have a law firm (SCG) who is acting on behalf of a minority member to take actions that are unquestionably harmful to the majority member (PAI) and harmful to SCG's other client, PRT. There can be no question but that refusing to comply with lawful subpoenas as SCG has done, and in forming new companies on behalf of a minority member to steal the license away from PRT, or to ghost write termination notices on behalf of third-parties that can be used to terminate PRT's lifeline (the license), are all examples of a law firm that has totally jettisoned its legal duties to its client, PRT.

As Justice Hoens wrote in Twenty-First Century Rail, "[i]n determining how to strike that balance fairly [on motions to disqualify] courts are required to recognize and to consider that `a person's right to retain counsel of his or her choice is limited in that there is no right

to demand to be represented by an attorney disqualified because of an ethical requirement." Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 274 (2012); see also City of Atlantic City v. Trupos, 201 N.J. 447 (2010).

RPC 1.7 provides, in pertinent part, as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (3) the representation is not prohibited by law; and
> (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." [RPC 1.7(emphasis added).]

RPC 1.9(a) provides:

> "A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." [(RPC 1.9(a)].

RPC 3.7, "Lawyer as Witness," provides as follows:

"(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9." [RPC 3.7(emphasis added)].

As recognized by the Supreme Court in In re Kamp, 40 N.J. 588 (1963), "conflict of interest is inherent in the relationship of buyer and seller," id. at 595, and the transactions at issue here are quite analogous to a real estate transaction. Where a lawyer seeks to be on both sides of a transaction like this, he must make timely, up front disclosure of "the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer should be made aware of the significance of the differing interests before giving his or her consent to the conflicting representations." Id. at 595-96; see also Michels, N.J. Attorney Ethics, 19:2-2; In re DiMartini, 158 N.J. 439, 442 (1999) (suspending an attorney who acted in similar fashion to represent several sides to a complex real estate transaction); In re Palmieri, 76 N.J. at 63 (holding an unmistakable conflict where law firm handled the sale of a business for buyer and seller and later sued buyer on behalf of seller).

Here, since the crippling conflict for SCG is unmistakable, it should be disqualified. There could not be a clearer case than this where RPCs 1.7, 1.9 and 3.7 operate to disqualify counsel. See RPCs 1.7, 1.9 and 3.7; see also Petit-Clair v. Nelson, 344 N.J. Super. 538, 543-44 (App. Div. 2001)(recognizing that in the context of a small corporation, lawyer can and should be held to have represented individual shareholders); Clark v. Corliss, 98 N.J. Super. 323, 326 (App. Div. 1967)(observing that an attorney should not accept employment in a case where he knows or has reason to know his testimony will be needed); Barbetta Agency v. Sciaraffa, 135 N.J. Super. 488, 495 (App. Div. 1975)(observing that only the attorneys who had negotiated a transaction were capable of giving testimony with respect to the issue of contract formation;

further observing that testifying against a client's interest may subject the attorney to disciplinary action); see also Messing v. FDI, Inc., 439 F. Supp. 776, 782 (D.N.J. 1977); Natomas Gardens Investment Group, LLC v. Sinadinos, 2009 WL 3055213 (E.D. Cal. Sept. 14, 2009).

Finally, if this Court should find any doubts about SCG's crippling conflict, the courts have repeatedly said that "doubts are to be resolved in favor of disqualification." Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 114 (D.N.J. 1993); see also Herbert v. Hafln, 292 N.J. Super. 426, 438-39 (App. Div. 1996).[7]

[7] SCG can be expected to argue that the conflict was waived because the motion was untimely. Issue was just joined in this case as between PAI and PRT, and no discovery has been exchanged. Moreover, Plaintiffs have yet to even serve co-defendant PAG. The motion is timely.

CONCLUSION

As Justice Rivera-Soto observed in the opening paragraph of the Trupos case, "(i)n the shifting of allegiances that arises when lawyers 'change sides' in their representation of new clients, the confidences of prior clients must be preserved. The propriety of a lawyer representing a current client adverse to the interests of a former client generates a tension-between fealty to a former client and zealousness in favor of a current client * * * ." Id., 201 N.J. at 450-51. It is this "tension" which underlies the current matter and commends it to this Court to disqualify SCG so that the substantial business claims underlying this litigation can proceed untainted by lingering issues of conflict of interest and violation of attorney-client privilege.

In recognition of these considerations, and for all the reasons discussed, this Court should disqualify SCG from representing Plaintiffs in this action, and stay discovery by use of a protective order until such time as replacement counsel is secured. If the motion is denied, it is respectfully requested that the Court continue the stay of discovery for fourteen (14) days so that Defendants can seek leave to appeal to the Appellate Division.

Dated: January 23, 2020

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