

1 GIBSON, DUNN & CRUTCHER LLP
JAMES P. FOGELMAN, SBN 161584
2 jfogelman@gibsondunn.com
WILLIAM F. COLE, SBN 308624
3 bcole@gibsondunn.com
333 South Grand Avenue
4 Los Angeles, CA 90071-3197
Telephone: 213.229.7000
5 Facsimile: 213.229.7520

6 GIBSON, DUNN & CRUTCHER LLP
RANDY M. MASTRO
7 rmastro@gibsondunn.com
(member of the New York bar;
8 *pro hac vice* forthcoming)
JENNIFER H. REARDEN
9 jrearden@gibsondunn.com
(member of the New York bar;
10 *pro hac vice* forthcoming)
200 Park Avenue
11 New York, NY 10166-0193
Telephone: 212.351.4000
12 Facsimile: 212.351.4035

13 Attorneys for Plaintiffs
ALEXANDRIA REAL ESTATE EQUITIES, INC.
14 and JOEL S. MARCUS

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF LOS ANGELES

17 ALEXANDRIA REAL ESTATE EQUITIES,
18 INC. and JOEL S. MARCUS,

19 Plaintiffs,

20 v.

21 STEVEN MARCUS and BUGSBY
PROPERTY LLC,

22 Defendants.

CASE NO. 19STCV05246

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' *EX PARTE* APPLICATION
TO ADVANCE THE HEARING DATE
THEIR MOTION TO DISQUALIFY GIBSON
DUNN & CRUTCHER LLP AS COUNSEL
FOR PLAINTIFFS**

ASSIGNED FOR ALL PURPOSES TO:
HON. RICHARD J. BURDGE
DEPARTMENT 37

HEARING:

Date: December 12, 2019
Time: 8:30 a.m.
Dept: 37

Action Filed: February 13, 2019
Trial Date: Not set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

I. INTRODUCTION

Both the *ex parte* Application, which ***has never even been served*** on Plaintiffs¹ in violation of this Court’s rules, and the motion to disqualify to which it relates, have been brought in bad faith, are without merit, and should be denied.² ***This case has been pending since February 13, 2019***, and substantial discovery and motion practice has taken place over the year, including multiple hearings, which have resulted in court-authorized jurisdictional discovery that is now the subject of eight motions to compel against Defendants related to Defendants’ refusal to appear for duly-noticed depositions, failure to produce documents, and failure to respond substantively to other written discovery. Yet it was only yesterday, December 10, 2019, that Defendant Steven Marcus (“Steven”) chose to file a transparently frivolous motion to disqualify Plaintiffs’ counsel, Gibson, Dunn & Crutcher LLP (“Gibson Dunn”)—***a motion that is nearly identical to one Steven filed over six months ago in the New York case he wrongfully brought, only to voluntarily withdraw it after the New York court made it clear that it was frivolous and would be denied.*** To say that it constitutes bad faith to file such a motion again now, in this action, in a transparent attempt to avoid his discovery obligations, is a dramatic understatement. It is sanctionable.

There is, in any event, no urgency to have the matter heard. Having waited this entire year to raise the issue, and having already presented and withdrawn the same motion in New York long ago, Steven has made it clear that even he does not believe it has merit. Steven should not be permitted to force a hearing on his frivolous motion to take place before, or even at the same time, as the hearing on the discovery motions already pending, or the hearing on Defendants’ motion to quash. Steven has waited this long, he can wait until June for the hearing should he choose not to withdraw the motion.

¹ The California Rules of Court require that “[p]arties appearing at the *ex parte* hearing must serve the *ex parte* application . . . on all other appearing parties at the first reasonable opportunity.” (Cal. Rules of Court, Rule 3.1206.) And a moving party must give notice of an *ex parte* application—including “[s]tating with **specificity** the nature of the relief to be requested”—at 10 a.m. the court day before the *ex parte* appearance. (Cal. Rules of Court, Rule 3.1204.) Yet Plaintiffs *never* received Defendants’ moving papers, much less any specific reasons why an expedited hearing on their motion to disqualify is necessary. (Cole Decl., ¶ 13, Ex. D.) For this reason alone, Defendants’ application should be denied.

² Plaintiffs intend to timely file a substantive opposition to the motion to disqualify at the appropriate time.

1 Steven has never been a client of Gibson Dunn and has never sought the firm’s counsel about
2 any issues even remotely related to this lawsuit. The merits need not be decided now, but the *ex parte*
3 relief to have the motion heard earlier should be denied.

4 II. BACKGROUND

5 A. Steven and Bugsby Resist Jurisdictional Discovery in this Action and then Move to 6 Disqualify Gibson Dunn after Plaintiffs file Motions to Compel that Discovery.

7 In this case, Defendants, Steven and Steven’s alter ego, Bugsby Property, LLC (“Bugsby”), a
8 shell company that he controls, have outlandishly demanded that Steven’s father, Joel Marcus (“Joel”),
9 and Joel’s California-based company, Alexandria Real Equities, Inc. (“Alexandria”), pay them *more*
10 *than \$12 million* in connection with limited advice that Steven allegedly provided to Alexandria nearly
11 six years ago, in late 2013. But because Steven unambiguously agreed in a valid Confidential
12 Information and Non-Disclosure Agreement (“CNDA”) with Alexandria that “no compensation would
13 be paid by Alexandria” in connection with that supposed advice, Plaintiffs filed this declaratory relief
14 action to confirm what the CNDA makes inescapably plain. Despite the fact that Defendants also
15 “consent[ed] to personal jurisdiction and venue” in “state courts and the Federal courts located in Los
16 Angeles County, California” through the CNDA (Compl., Ex. A, ¶ 12), Defendants responded to the
17 Complaint by filing a meritless Motion to Quash Service of Summons for Lack of Personal Jurisdiction,
18 or, in the Alternative, to Dismiss on the Grounds of Inconvenient Forum.

19 In connection with their efforts to oppose Defendants’ motion to quash, on May 28, 2019
20 Plaintiffs sought jurisdictional discovery through Requests for Production (“RFP”), Requests for
21 Admission (“RFA”), Special Interrogatories, and Form Interrogatories, but Defendants’ responses were
22 evasive and incomplete, as Steven and Bugsby refused to respond *at all* to many RFPs, RFAs, and
23 Interrogatories. (Cole Decl., ¶¶ 2–3.) During the course of the summer the parties met and conferred
24 regarding Defendants’ deficient responses, but Defendants ultimately refused to amend their responses,
25 and then waited until the day that Plaintiffs’ motions to compel (and opposition to Defendants’ motion
26 to quash) would be due to agree to extend the due date on Plaintiffs motions to compel (knowing full
27 well that Plaintiffs would have already borne the time and expense of preparing those motions). (Cole
28 Decl., ¶ 4.)

1 On September 23, the Court held a hearing on Defendants’ motion to quash service of
2 summons. Prior to the hearing, the Court issued a *tentative* opinion denying Defendants’ motion with
3 respect to Steven, but granting it with respect to Bugsby. (Cole Decl., ¶ 5.) At the hearing, however,
4 the Court recognized that an alter ego relationship may be found “if there’s a close enough relationship”
5 between the two parties and, accordingly, ordered a continuance of the hearing to January 10, 2020 in
6 order to allow Plaintiffs “to do some discovery into the alter ego allegations.” (Cole Decl., ¶ 6.)

7 Since the September 23 hearing, Plaintiffs have attempted to obtain the jurisdictional discovery
8 that this Court expressly authorized, but have been met with continued resistance. Indeed, although
9 Plaintiffs again attempted to obtain full and complete responses to the RFPs, RFAs, and Special
10 Interrogatories that were served this past *May*, Steven and Bugsby have each continued to refuse to
11 respond to at least five RFPs, one RFA, and one Special Interrogatory. (Cole Decl., ¶ 7.) Similarly,
12 despite serving Steven and Bugsby with deposition notices, both defendants simply refused to show up
13 for those properly-noticed depositions or to produce documents in response to the RFPs accompanying
14 those deposition notices. (Cole Decl., ¶ 7.) At the same time, Defendants have filed a new lawsuit
15 against Plaintiffs in a New York federal court that advances the same claims that had been previously
16 dismissed by a New York state court and that are at issue in this lawsuit. But in an effort to fraudulently
17 invoke federal jurisdiction, Steven represented to the New York federal court that Bugsby was a “single
18 member” LLC whose “sole member is a citizen of France”—i.e., not Steven. (Cole Decl., ¶ 8.) This
19 representation, however, was contrary to Steven’s sworn declaration to this Court that Bugsby is a
20 “multi-member LLC” of which Steven serves as Managing Member. (See S. Marcus Decl., ¶¶ 1, 6.)

21 Due to Defendants’ months-long effort to avoid responding to jurisdictional discovery, and the
22 fast-approaching date on Defendants’ motion to quash hearing, Plaintiffs were forced file motions to
23 compel the depositions and written discovery. (Cole Decl, ¶ 9.) But because the earliest dates available
24 for hearings on those motions to compel were in March and July of 2020, Plaintiffs applied *ex parte* to
25 this Court on December 3, 2019 for an order advancing the hearing date on Plaintiffs’ motions to
26 compel and briefly continuing the hearing on Defendants’ motion to quash. This Court granted
27 Plaintiffs’ *ex parte* application and advanced the hearing on Plaintiffs’ motions to compel to January
28

1 17, 2020 and then subsequently continued the hearing on Defendants’ motion to quash to February 28,
2 2020.

3 Shortly after Plaintiffs *ex parte* motion was granted, on December 10, 2019, Steven filed a
4 motion to disqualify Gibson Dunn as counsel for Alexandria and Joel based on purported conflicts of
5 interest.

6 **B. Steven and Bugsby’s Failed Efforts to Disqualify Gibson Dunn in the New York State**
7 **Court Action.**

8 Defendants’ latest disqualification motion is not the first time that they have tried to disqualify
9 Gibson Dunn from representing Joel and Alexandria in this dispute. On February 7, 2019—the same
10 day that Alexandria and Joel filed their Complaint for declaratory relief in this Court—Steven and
11 Bugsby filed a lawsuit in New York asserting claims for quantum meruit and fraud and seeking
12 compensation for the more-than \$12 million supposedly owed to them as a result of the “advice” they
13 allegedly furnished to Alexandria in December 2013.

14 On June 3, 2016, counsel for Steven and Bugsby filed a letter with the New York Court
15 requesting a “pre-motion conference,” seeking “leave to file a disqualification motion” against Gibson
16 Dunn. (Cole Decl., ¶ 10, Ex. A.) That letter vaguely and conclusory raised many of the same
17 arguments presented by Defendants in the disqualification motion recently filed in this Court, including
18 the patently false allegations that “Steven Marcus” has “a long and extensive relationship” with “Randy
19 Mastro of Gibson, Dunn & Crutcher LLP” and that Gibson Dunn supposedly “obtained extensive
20 confidential information from Bugsby and Steven Marcus about their track records, deal sourcing
21 strategies, business acumen, investor networks, and know-how.” (Cole Decl., ¶ 10, Ex. A.)

22 Two days later, Randy Mastro, counsel for Alexandria and Joel, filed a letter with the New
23 York Court explaining in detail why Steven and Bugsby’s disqualification argument had no basis in
24 law or fact. (Cole Decl., ¶ 11, Ex. B.) Specifically, Mr. Mastro explained that neither Steven nor
25 Bugsy “has ever been a client of Gibson Dunn or sought our counsel about any issues even remotely
26 related to this lawsuit, and I have no recollection of communicating with Plaintiff Steven Marcus since
27 2010.” (Cole Decl., ¶ 11, Ex. B.) Mr. Mastro also explained that the one brief interaction he had with
28 Steven in 2010—for which even Steven admits that Gibson Dunn was never formally engaged and

1 apparently concerned a company that Steven was a principal of (not Steven in his individual capacity)
2 (Mot. to Disqualify at p. 8)—had nothing to do with the issues in this dispute. (Cole Decl., ¶ 11, Ex. B.)
3 Further, Mr. Mastro explained that he was “not aware of any further contact with Steven thereafter—
4 not a single email in nearly nine years.” (Cole Decl., ¶ 11, Ex. B.) Finally, and most importantly, Mr.
5 Mastro pointed out that Steven and Bugsby had only provided vague and generalized allegations about
6 what confidential information was supposedly obtained, much less how any such confidential
7 information would be relevant to Steven and Bugsby’s claim for compensation. (Cole Decl., ¶ 11,
8 Ex. B.)

9 On July 30, 2019 the New York Court held a hearing on Alexandria and Joel’s motion to dismiss
10 Steven and Bugsby’s complaint. At that hearing, the judge briefly inquired about the disqualification
11 question, and asked Steven and Bugsby’s counsel if it was “no longer an issue,” but Steven and
12 Bugsby’s counsel responded that “it is still an issue” and that he “would request a motion on that.”
13 (Cole Decl., ¶ 12, Ex. C at p.3:23-25.) The Judge refused, stating that the parties should “just deal with
14 it now,” and after entertaining a brief discussion of the merits of the issue, informed Steven and
15 Bugsby’s counsel that “unless you have a real basis, a strong basis, for showing a conflict of interest,
16 then I think I’m obligated to let people make their own decisions” regarding counsel. (Cole Decl., ¶ 12,
17 Ex. C at p. 6:6-9.) Instead of providing any such “real basis” for disqualification, however, Steven and
18 Bugsby’s counsel opted to abandon the argument, stating: “Thank you, your Honor, for the
19 consideration of the issue. We won’t belabor the point.” (Cole Decl., ¶ 12, Ex. C at 6:10-12.)

20 III. ARGUMENT

21 Defendants cannot demonstrate any good cause—such as “irreparable harm, immediate danger,
22 or any other statutory basis for granting *ex parte* relief.” (Cal Rules of Court, Rule 3.1202, subd. (c).)
23 As an initial matter, Defendants have known that Gibson Dunn represented Plaintiffs in this lawsuit
24 since at least February 13, 2019 when the Complaint was filed, and they have known of the alleged
25 bases for their disqualification motion since no later than June 3, 2019 when they attempted to
26 disqualify Gibson Dunn on substantially similar grounds in the New York state action. (Cole Decl.,
27 ¶ 10, Ex. A.) Defendants sat on these arguments this entire year and chose to spring them on Plaintiffs
28 at the last moment, when they perceived that they might be able to obtain some strategic advantage.

1 Defendants’ **ten-month delay** in bringing this disqualification motion, by itself, demonstrates that no
2 such “irreparable harm or immediate danger” (Cal Rules of Court, Rule 3.1202, subd. (c)), is likely to
3 befall them if their motion is heard in June 2020, as opposed to six months earlier in January 2020, and
4 their gamesmanship is reason enough to deny their *ex parte* application.

5 More than that, however, Plaintiffs’ disqualification arguments are utterly meritless—designed
6 solely for delay, obstruction, and to run up costs—as even a passing inspection of their motion
7 demonstrates. Rule 1.9 of the California Rules of Professional Conduct precludes a lawyer who
8 formerly represented a client from “represent[ing] another person in the same or a substantially related
9 matter in which that person’s interests are materially adverse to the interests of the former client unless
10 the former client gives informed written consent.” (Cal. R. Prof’l Conduct, Rule 1.9, subd. (a).) But
11 even assuming that Steven Marcus was a former client of Gibson Dunn—and he was not, as many of
12 his own allegations make crystal clear³—nothing in Defendants’ disqualification motion even suggests
13 that the alleged “prior multiple representations” of Steven were “substantially related” to this dispute,
14 which concerns Steven’s and Bugsby’s supposed entitlement to compensation for their purported
15 “advice” to Alexandria and Joel in late 2013 regarding Alexandria’s capital markets strategy. (Compl.,
16 ¶¶ 36, 37.) In applying the “substantial factor” test, California courts take a “pragmatic approach” that
17 “focus[es] on the nature of the former representation.” (*H.F. Ahmanson & Co v. Salomon Bros., Inc.*,
18 (1991) 229 Cal.App.3d 1445, 1455). In particular, courts “focus on the similarities between the two
19 factual situations, the legal questions posed, and the nature and extent of the attorney’s involvement
20 with the cases.” (*Ibid.*, internal quotation marks omitted). There are no such substantial similarities in
21 this case.

22 Here Defendants point to four alleged prior “representations” of “Steven”: (1) assisting
23 Northmoore Capital Management “a company of which Steven Marcus was the principal” in obtaining
24 the approval of New York’s Metropolitan Transit Authority (“MTA”) for the acquisition of another
25

26 ³ At most, even assuming the truth of Defendants’ allegations (and the Court should not do so),
27 Gibson Dunn is only alleged to have represented “Northmoore Capital Management” and
28 “Silvercup Studios”—not Steven Marcus in his individual capacity. (Mot. to Disqualify at pp. 8–
10.) Indeed, the most that Steven can say is that Gibson Dunn represented him in his individual
capacity in connection with his acquisition of an apartment in New York that functioned as his
primary residence. (Mot. to Disqualify at pp. 9–11.)

1 DATED: December 11, 2019

GIBSON, DUNN & CRUTCHER LLP

2
3 By: _____



James P. Fogelman

4
5 Attorneys for Plaintiffs
6 ALEXANDRIA REAL ESTATE EQUITIES, INC.
7 and JOEL S. MARCUS
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28