UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARICULTURA DEL NORTE, S. DE R.L. DE C.V., et al.,

Plaintiffs,

-against-

WORLDBUSINESS CAPITAL, INC., et al.,

Defendants.

No. 14 Civ. 10143 (CM)

MEMORANDUM DECISION AND ORDER DENYING MOTION TO DISQUALIFY

McMahon, J.:

Plaintiffs Maricultura Del Norte, S. de R.L. de C.V. ("Maricultura") and Servax Bleu, S. de R.L. de C.V. ("Servax," and together with Maricultura "Plaintiffs"), bring this action asserting violations of federal antitrust law and a variety of common law claims against Defendants Worldbusiness Capital, Inc. ("WBC"), Umami Sustainable Seafood, Inc. ("Umami"), Craig A. Tashjian ("Tashjian"), and Amerra Capital Management, LLC ("Amerra," and together with Tashjian "Sidley Defendants").[1] Defendants Tashjian and Amerra are currently represented by the law firm Sidley Austin, LLP ("Sidley"). Before the Court is Docket #23, Plaintiffs' motion to disqualify Sidley from representing the Sidley Defendants. For the reasons stated below, Plaintiffs' motion is **DENIED**.

[1] The Complaint also names the Overseas Private Investment Corporation ("OPIC") as a defendant. Plaintiffs have since stipulated to a voluntary dismissal of all claims as against OPIC. (*See* Docket ##31, 40.)

BACKGROUND

I. The Underlying Dispute[2]

Maricultura is a Mexican firm engaged in the aquaculture business. It captures wild Bluefin Tuna and transports them while they are still alive to an aquatic "farm" where it raises them for export. Maricultura operates its fishing and farming sites off the coast of Baja California, Mexico. From its inception in the 1990s, Maricultura exported primarily to Japan.

In 2005, Maricultura borrowed up to $9.9 million from defendant WBC. The loan is governed by a credit agreement dated December 16, 2005, and is secured by a First Preferred Mexican Fleet Mortgage and a Second Preferred Mexican Ship Mortgage, both in favor of WBC. Plaintiffs have attached to the complaint copies of the credit agreement and mortgages, all dated December 16, 2005.

The complaint alleges that Maricultura had the right under both the credit agreement and mortgages to cure any event of default, in which case WBC would restore Maricultura to its former position. In particular, the complaint alleges that WBC was obligated to accept any offer by Maricultura to pay a balance due under the credit agreement.

Although Maricultura continued to pay interest on the loan through 2012, it acknowledges that it was in default by March, 2010, owing $5.2 million in principal. Before the latter half of 2012, WBC did not exercise against Maricultura any remedies it had under the credit agreement or the mortgages.

In spring and early summer 2012 Maricultura began negotiations with non-party Grupo Altex to expand its fishing operations through plaintiff Servax, an Altex affiliate. Altex had decades of experience exporting food products to the United States and Europe, which experience

[2] Unless otherwise noted, facts in this section are drawn from the complaint.

Maricultura hoped to exploit in order to increase its production capacity and to export Bluefin Tuna to the United States.

Servax and Maricultura signed several agreements establishing a joint venture. Initially, they would work together catching and farming Bluefin Tuna. Once Maricultura was able to free its assets of all liens and encumbrances, Servax would acquire substantially all those assets. Servax contributed $4 million up front for the transaction.

In May, 2012, individual defendant Tashjian worked for defendant Amerra, a Delaware investment firm. (As noted above, both defendants are now represented by Sidley.) Tashjian was familiar with Servax from a previous job. While working at Amerra, Tashjian learned of the joint venture between Servax and Maricultura and asked that Amerra be allowed to compete to finance the venture. Servax executives visited Amerra on September 5, 2005 in person and provided confidential information about the venture and Plaintiffs' financial position, including the fact that Maricultura was under water on the WBC loan, which was secured by mortgages on Maricultura's fleet. Amerra allegedly signed a confidentiality agreement governing its use of the information Servax provided. Amerra thereafter provided Servax with a proposed term sheet, but Servax declined the terms and sought richer waters from which to finance the deal. Plaintiffs now claim that the financing discussions were merely bait by Amerra designed to procure confidential information.

In August, 2012, while Servax and Maricultura were finalizing their venture, Maricultura executives contacted WBC to discuss both their proposed joint venture with Servax and the status of WBC's loan to Maricultura. Plaintiffs specifically wanted to propose terms for repaying the loan in full.

On August 28, 2012, WBC served Maricultura with notice of a maritime foreclosure action filed in Mexico. Maricultura's fleet was then arrested pursuant to a Mexican court order.

Maricultura claims that its counsel attempted to contact WBC with an offer to deposit $5.2 million cash in escrow as security for the loan if WBC would release the vessels (in effect providing double security, since the mortgages would remain in place even if the vessels were released). WBC rebuffed the request. Through the final three months of 2012 and January 2013 Maricultura claims that it repeatedly attempted to obtain the release of its vessels. The complaint describes in detail the efforts by Maricultura and its counsel to contact WBC or WBC's counsel, all of which were refused or simply unanswered. Maricultura and its counsel, of course, found this refusal to deal rather fishy. Finally, in early February 2013 WBC demanded $7.9 million to extinguish the debt.

At the time of that offer, unbeknownst to Plaintiffs, WBC had met with Umami – Maricultura's principal competitor in the Bluefin Tuna export market and had assigned all of its rights, obligations, and causes of action under the credit agreement and the mortgages to Umami. That assignment was filed with the Mexican court on February 8, 2013.

The assignment occurred at the behest of Amerra, which had a preexisting credit agreement with Umami. The complaint alleges on information and belief that by summer 2010 Umami had reeled in the full line of credit, so to speak, under its agreement with Amerra. Amerra then allegedly offered to extend additional credit to Umami so that Umami could acquire Maricultura's credit agreement and mortgages from WBC. That acquisition would enable Amerra to obtain a dominant position in the Bluefin Tuna market by locking up its competitor's assets.

In February, 2013, after learning that its competitor Umami had acquired its debt and mortgages, Maricultura contracted Umami to try and pay off the debt. Umami instructed its

counsel to demand $9 million to satisfy the debt and release Maricultura's fleet. Maricultura, desperate to recover its fleet before the Bluefin Tuna season began in May, offered to pay the money. In early April, 2013, one week before a scheduled meeting, Umami contacted Maricultura to inform it that Umami would not accept payment and would instead retain Maricultura's vessels.

Since that time, Maricultura's business has been dead in the water, as the firm has caught and farmed far fewer Bluefin Tuna than in prior years. (Because it has no fleet of its own, it has had to hire vessels on contract, but has not been able to hire nearly the number it needs.) It has ceased to compete meaningfully in the U.S. market. The complaint alleges that Umami has come to dominate the Bluefin Tuna import market in the United States. Further, Maricultura asserts that Umami has allowed Maricultura's fleet to fall into disrepair (except one vessel, which Umami has appropriated, repainted, and upgraded for its own use) while the fleet has been in Umami's possession.

The gravamen of the complaint with respect to the Sidley Defendants is that they conspired with Maricultura's competitor (Umami) to use the confidential information they obtained from Maricultura in order to destroy Maricultura's business and help Umami dominate the market for Bluefin Tuna. As against the Sidley Defendants, the complaint asserts claims for (1) breach of contract; (2) tortious interference with contractual relations; (3) conversion; (4) fraud; and (5) violations of the Sherman Act.

II. Steven Selsberg's Relationship with Plaintiffs

The origin of Sidley's allegedly disqualifying conflict is a series of conversations between Altex's Mexican counsel, Fernando Elias-Calles, and Steven R. Selsberg, a partner in Sidley's Houston office. Elias-Calles and Selsberg previously worked as colleagues at an American law firm other than Sidley. The two lawyers remained in contact after Elias-Calles left that firm to take a position as general counsel of a Mexican industrial group. Elias-Calles would sometimes refer

potential clients to Selsberg. In declarations submitted in conjunction with this motion, Elias-Calles and Selsberg dispute the typical fashion in which these referrals proceeded. (*See* Elias-Calles Decl. ¶¶ 9-11; Selsberg Decl. ¶¶ 3-6; Elias-Calles Reply Decl. ¶ 25.)[3] I do not need to resolve that dispute to decide this motion. Therefore, I do not discuss it further.

The parties' initial briefing on this motion addressed only one week's worth of communications between Elias-Calles and Selsberg: their email exchanges and phone conversations from February 22 to February 27, 2013. In his reply declaration, Elias-Calles states that – after being prompted by erroneous assertions in Selsberg's declaration – he "search[ed] . . . [his] firm's computer system to locate all of [his] email correspondence with Mr. Selsberg between October 2012 and March 2013." (Elias-Calles Reply Decl. ¶ 4.) Elias-Calles's search uncovered additional exchanges with Selsberg in October 2012 and November 2012. (*Id.* ¶ 5.) Although the additional correspondence from late 2012 (which I discuss below) further supports Plaintiffs' motion to disqualify, it is not necessary to the decision on this motion. As I will explain in further detail, Selsberg's email exchanges with Elias-Calles in February 2013 are sufficient to establish that Selsberg formed an attorney-client relationship with Plaintiffs before Sidley began to represent the Sidley Defendants in January 2015.

Recall that by October 2012, Maricultura's fleet had been foreclosed on and arrested in Mexico. Maricultura and Servax were seeking to discuss payment terms with WBC, which was rebuffing or simply declining to respond to those requests. Elias-Calles states that he reached out to Selsberg on October 11 seeking to engage Sidley – a "top-tier 'white shoe' firm," – to force WBC to accept payment. (*Id.* ¶ 9.)

[3] Citations to "Selsberg Decl." refer to the revised declaration of Steven Selsberg filed partially under seal on February 24, 2015.

Elias-Calles emailed Selsberg on October 11, 2012, seeking "advice to see if [Selsberg] can send a letter in the US toi [sic] a US Banck [sic], [regarding] possible interference in a contract." (*Id.* Ex. A at 2.) Selsberg responded about an hour later, agreeing to help Elias-Calles: "Sure. No problem at all. I probably can do for you for free." (*Id.*)

Over the next few days, Elias-Calles and Selsberg exchanged additional emails. (*Id.* Ex. A at 1-2, Ex. B, Ex. C.) Elias-Calles states that between October 12 and October 16, he and Selsberg met in person and had a phone conversation, which "certainly included a detailed discussion of the issues now involved in this case." (*Id.* ¶ 13.) Elias-Calles does not describe those issues in further detail or state whether he requested legal advice or Selsberg provided any advice.

On October 18, 2012, Elias-Calles informed Selsberg that the "Bank [WBC] does not want to settle," after which he and Selsberg agreed to discuss the issue the next day. (*Id.* Ex. D.)

Elias-Calles and Selsberg actually renewed their dialogue on November 7, when Ellias-Calles emailed Selsberg about a "possible tortious interference" by WBC, and stated that he would "prepare a brief email as to the facts" so that Selsberg could be "more informed" for an upcoming phone call. (*Id.* ¶ 15, Ex. E.) Throughout the days of November 8 and 9, 2012, Elias-Calles claims that he and Selsberg "exchanged correspondence with detailed information on the dispute and certain strategic considerations." (*Id.* ¶ 16.) Elias-Calles has not provided any such correspondence to the Court, but because the existing record sufficiently establishes that Selsberg and Plaintiffs formed an attorney-client relationship, I have not pressed the matter.

Elias-Calles has provided an email chain beginning late in the day on November 9, 2012, with the subject line "IMPORTANT." (*Id.* Ex. F at 2.) That chain begins with Elias-Calles asking Selsberg to "recommend me [sic] with one of your litigation partners." (*Id.*) The email states, "WBC took possession of [Maricultura's] boats," and as a result, "over 1000 tons of blue tuna

[with] market value 25 million . . . will die." (*Id.*) The email concludes that Elias-Calles's "client wants to do something in the states if possible." If so, "we need to hire Sidley asap." (*Id.*) Selsberg responded that he needed "more information" and the two arranged a follow-up call. (*Id.* Ex. F at 1-2.)

The following Monday, November 13, 2012, Elias-Calles and Selsberg once again exchanged emails.[4] Elias-Calles wrote, "The client might proceed with payment, but they [sic] want to go directkly [sic] to the offices of the Bank WBC, accompanied by a Sidley lawyer . . .." (*Id.* Ex. G at 3.) Selsberg agreed that "Someone from Sidley could likely go if we are hired on it and all agreed that it was beneficial." (*Id.* Ex. G at 2.)

Nothing further happened at that time because, on November 13, 2012, WBC sent a letter "giving Mar[icultura], Servax and Altex the impression that WBC was ready to accept payment and put an end to the dispute." (*Id.* ¶ 20, Ex. H.) Nonetheless, "to ensure that there would be no impediment to Sidley's continuing and potentially expanding its representation of [Elias-Calles's] clients," (*Id.* ¶ 21), Elias-Calles asked Selsberg to "star[t] running a conflict check[,]" identifying the "client [a]s Servax Bleu . . . [which] eventually turns out to be Grupo Altex." (*Id.* Ex. G at 1-2.) Selsberg agreed: "Ok Will do thanks." (*Id.* ¶¶ 19-21, Ex. G at 1.)

Whether Selsberg ran a conflicts check or not is unclear; Selsberg say nothing about it one way or the other, and while Elias-Calles asserts that no conflicts check was run, (*id.* ¶ 21), that assertion would have to be hearsay. Elias-Calles never had a Sidley attorney accompany anyone from Plaintiffs' firms to WBC. Instead, email exchanges between November 13 and November 15, 2012 reveal that Elias-Calles and Selsberg played phone tag. (*Id.* Exs. I-L.) Elias-Calles states

[4] Elias-Calles actually sent the first email in this chain in the afternoon of November 12, 2012.

they also discussed the developments with WBC and the possibility of "reaching an amicable resolution . . .." (*Id.* ¶ 22.) Elias-Calles has not disclosed the details of those conversations.

As far as the Court is aware, contact between Elias-Calles and Selsberg about Plaintiffs' dispute with WBC did not resume until February 22, 2013.

[redacted] It appears that Elias-Calles was unable to contact Selsberg on February 22. Elias-Calles claims that he called Selsberg and "identified the parties, described the relationship between Altex, Servax, and Marnor, the nature of their dispute with WBC and Umami, and told Mr. Selsberg that they needed his legal advice." (Elias-Calles Decl. ¶ 30.) Selsberg disputes that assertion; based on his phone records, which Selsberg has provided to the Court, (Selsberg Decl. Exs. A-B), Selsberg concludes that only one call on that day could have been from Elias-Calles, a 24-second incoming call at 2:27pm. (*Id.* ¶ 10.) Plaintiffs do not dispute that assertion in their reply papers.[5]

Both sides agree that the next contact between Elias-Calles and Selsberg occurred on February 25, 2013. That day the parties exchanged emails arranging a call late in the morning. (*Id.* Ex. F.) That call lasted, according to Selsberg's records, 16 minutes 54 seconds. (*Id.* ¶¶ 10, 12.) There is no transcript of the phone call. Selsberg concedes that during this "brief call . . . Elias-Calles identified at least some of the parties involved in the potential matter and generally described the issues about which he would like my preliminary views." (*Id.* ¶ 12.) Elias-Calles describes the phone call – together with emails exchanged the same day – as follows:

> Mr. Selsberg and I discussed details of Mar[icultura] and Servax's joint venture and confidential business plans, the history of negotiations with WBC, strategic

5 [redacted]

considerations concerning litigation in the United States and the foreclosure proceedings in Mexico (the substance of which, in the United States, would constitute work product), the identity of the parties to be named in a potential complaint, damages, and the bases for potential causes of action. (Elias-Calles Decl. ¶ 36.)

[redacted]

The dialogue between Selsberg and Elias-Calles resumed the following afternoon, February 26, 2013, and continued through the evening of February 27, 2013. This is, perhaps, the most important email exchange between the two for purposes of determining whether an attorney-client relationship was formed. [redacted]

[redacted]

There were – at least based on the record before the Court – no further exchanges between Elias-Calles and Selsberg, or between Plaintiffs or any attorney representing them and anyone from Sidley between February 27, 2013, and the filing of this action.

III. Sidley's Current Representation of Amerra and Tashjian

Plaintiffs filed the present action on December 29, 2014. (Docket #1.)

On January 15, 2015, Sidley attorney Joel Mitnick, a partner in Sidley's New York office who has appeared in this action, contacted Plaintiffs' attorneys – from the firm Gordon & Rees LLP – to request an extension of time to answer Plaintiffs' complaint. (Pl. Mem. at 7.) Plaintiffs' attorneys contacted Elias-Calles, at which point they learned about his previous dealings with Selsberg.

On the afternoon and evening of January 15, Elias-Calles sent two emails to Selsberg. The first email requested information about Mitnick and Steve Bierman, another partner in Sidley's New York office who has entered an appearance in this matter. (Selsberg Decl. Ex. C.) The second email informed Selsberg that Plaintiffs had "an issue . . .." (*Id.*) Elias-Calles explained that Plaintiffs' attorneys were "ask[ing] Sidley to withdrawl [sic] from the case because [of] the bulk of emails" between Elias-Calles and Selsberg. (*Id.*)

The following day, Selsberg attempted to contact Bierman, who was unavailable; he was then transferred to Mitnick. (*Id.* ¶ 18.) Selsberg told Mitnick about his relationship with Elias-Calles and their communications two years earlier, but stated that he "had no idea or knowledge about what Mr. Elias-Calles was referring to with respect to his lawsuit." (*Id.*) Since that telephone call, Selsberg has had no further contact with any attorneys representing Amerra or Tashjian. (Selsberg Decl. ¶ 19; *see also* Mitnick Decl. ¶ 8; Bierman Decl. ¶ 4.)

That same day, February 16, Plaintiffs contacted Mitnick, advised him of the putative conflict of interest, and asked Sidley to withdraw from representing Amerra and Tashjian. (Pl.

Mem. at 7.) Later that day, Sidley's Committee on Professional Responsibility sent an email to Selsberg, Mitnick, and Bierman among others informing them of an "ethical screen between [Selsberg] and everyone else at the firm who was assigned to work on this action." (Selsberg Decl. ¶ 19, Ex. D.) Selsberg, Mitnick, and Bierman each state they have abided by, and will continue to abide by, the screen. (Selsberg Decl. ¶ 19; Mitnick Decl. ¶ 7; Bierman Decl. ¶ 5.)

Several days later, on January 21, 2015, Alan Unger, a member of Sidley's Office of General Counsel, sent a letter to Plaintiffs' attorneys declining to withdraw from representing Amerra and Tashjian. (Unger Decl. ¶ 1, Ex. A.) In the letter, Unger reiterated Selsberg's statement that he had not shared any information he may have obtained from Elias-Calles with Sidley attorneys working on the matter, and stated that Sidley had implemented an ethical screen to prevent the flow of information between Selsberg and Sidley lawyers assigned to the Amerra matters. (*Id.*) Further, Unger argued that Sidley was permitted to represent Amerra and Tashjian under New York Rule of Professional Conduct ("NYRPC") 1.18, which governs lawyers' duties to prospective clients.

Nothing in the record suggests that Selsberg was ever contacted by Amerra or Tashjian or that he had any conversation about the case with anyone at Sidley or at Amerra about the case, aside from the one conversation in which he revealed his earlier involvement to Mitnick and any conversations he may have had with Sidley's Committee on Professional Responsibility.

Plaintiffs moved to disqualify Sidley from representing Amerra and Tashjian on February February 18, 2015. (Docket #23.)

DISCUSSION

I. Applicable Law

A. Standards Governing Motions to Disqualify

The Second Circuit has summarized the District Court's authority to disqualify attorneys as follows:

> The authority of federal courts to disqualify attorneys derives from their inherent power to preserve the integrity of the adversary process. In exercising this power, we have attempted to balance a client's right freely to choose his counsel against the need to maintain the highest standards of the profession. Although our decisions on disqualification motions often benefit from guidance offered by the American Bar Association (ABA) and state disciplinary rules, such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification. *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (internal citations and quotation marks omitted).

Motions to disqualify are "disfavor[ed]." *Bennett Silvershein Assocs v. Furman*, 776 F. Supp. 800, 802 (S.D.N.Y. 1991). "This reluctance probably derives from the fact that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons. And even when made in the best of faith, such motions inevitably cause delay." *Bd. of Ed. of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (internal citations deleted). Despite its reluctance to grant such motions, the Court must resolve any doubts in favor of disqualification. *Arifi v. de Transp. du Cocher, Inc.*, 290 F. Supp. 2d 344, 349 (E.D.N.Y. 2003).

Plaintiffs' motion to disqualify is based on successive representation. Plaintiffs argue that they are former clients of Selsberg, that Selsberg's conflict should be imputed to Sidley, and that Sidley's current representation of the Sidley Defendants therefore creates a conflict of interest. In a case of successive representation, the Second Circuit has held that an attorney may be disqualified if "(1) the moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the

moving party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client." *Hempstead Video*, 409 F.3d at 133 (citing *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983)); *see also Madison 92nd St. Assocs, LLC v. Marriott Int'l, Inc.*, No. 13 CIV. 291, 2013 WL 5913382, at *11 (S.D.N.Y. Oct. 31, 2013), *appeal withdrawn* (Feb. 27, 2014). Successive representation on substantially related matters is the "paradigmatic" case for disqualification, because "the attorney is in a position to use the confidences gained through prior conferences with a former client." *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1083-84 (S.D.N.Y. 1989); *see Madison 92nd St. Assocs*, 2013 WL 5913382, at *11.

Where the first two elements are satisfied and a moving party has shown both that it was a former client of the adverse party's counsel and that there is a substantial relationship between the subject matter of the prior representation and the present suit, there is an "irrebuttable presumption" that the third element – that the attorney had or likely had access to relevant privileged information – is also satisfied. *See Scantek Med., Inc. v. Sabella*, 693 F. Supp. 2d 235, 239 (S.D.N.Y. 2008). That presumption is based both on the "difficulty of obtaining proof of breaches" and on the need to prevent a lawyer from making "[a]dverse use of confidential information" by means other than disclosure to the adverse party. *Chinese Auto. Distributors of Am. LLC v. Bricklin*, No. 07 CIV. 4113, 2009 WL 47337, at *2-3 (S.D.N.Y. Jan. 8, 2009) (quoting *Ullrich v. Hearst Corp.*, 809 F. Supp. 229, 235-36 (S.D.N.Y. 1992)); *see also T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953) (Weinfeld, J.) ("The Court will assume that during the course of the former representation confidences were disclosed to the

attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent.").

B. Formation of An Attorney-Client Relationship

1. Texas Law Applies

Plaintiffs argue that the specific question whether Selsberg formed an attorney-client relationship with Plaintiffs is governed by Texas law. Sidley argues that New York law applies to that issue because the action was filed in New York.

I agree with Plaintiffs – not that it makes the slightest difference to the outcome.

In late 2012 and early 2013, when Elias-Calles and Selsberg were exchanging emails and phone calls, Selsberg was working in Texas out of Sidley's Houston office. Selsberg is licensed to practice law in Texas but not in New York. It appears from the email exchanges between Selsberg and Elias-Calles that Selsberg may have been outside the state of Texas when some of his communications with Elias-Calles occurred. But no party has claimed that Selsberg advised or communicated with Elias-Calles in any way while in New York.

Sidley argues that New York law governs because this action was filed in New York and Plaintiff is trying to disqualify New York lawyers. First of all, that mischaracterizes what Plaintiffs are trying to do – they are trying to disqualify the entire Sidley firm and all of its lawyers, wherever located (Sidley has offices in 18 cities around the world). Second, it makes absolutely no sense to apply New York law to the question whether a Texas lawyer formed an attorney client relationship with plaintiffs arising out of matters that appear to have occurred mainly in Mexico some two years before any lawsuit was filed in this district. To hold otherwise would mean that the character of Selsberg's relationship with Plaintiffs would change depending on the forum in which Plaintiffs eventually chose to file suit.

But in the end, it makes no difference. Having reviewed New York and Texas law governing the formation of attorney-client relationships I have not been able to identify any material difference. Thus, while I will cite Texas case law, and apply Texas law to the discussion of Selsberg's relationship with Plaintiffs, I would not reach a different result were I applying New York law.

2. Requirements for Forming an Attorney-Client Relationship

"An attorney-client relationship arises when an attorney agrees to render professional services to a client." *Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*, 178 S.W.3d 40, 43 (Tex. App. 2005). Under Texas law, "In order for an attorney-client relationship to exist, it is necessary that the parties either explicitly or implicitly manifest an intention to create an attorney-client relationship." 7 Tex. Jur. 3d Attorneys at Law § 120; *see also Hill v. Bartlette*, 181 S.W.3d 541, 547 (Tex. App. 2005). Whether the parties have manifested that intent is determined objectively, "viewed from the perspective of a reasonable client under the circumstances." 1 McDonald & Carlson Tex. Civ. Prac. § 2:7 (2d. ed.); *see also Moore v. Yarbrough, Jameson & Gray*, 993 S.W.2d 760, 763 (Tex. App. 1999). Thus, an attorney-client relationship does not exist merely because one party subjectively believes such a relationship has been formed. *Sutton v. Estate of McCormick*, 47 S.W.3d 179, 182 (Tex. App. 2001); *Kiger v. Balestri*, 376 S.W.3d 287, 290-91 (Tex. App. 2012). Further, there must be "a clear and express agreement of the parties about the nature of the work to be done and the compensation to be paid." *Hill*, 181 S.W.3d at 547.

Formalities, however, are not required. Thus an attorney-client relationship may be "impliedly created through the parties' actions." *Greene's Pressure Treating & Rentals*, 178 S.W.3d at 43 (citing *Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App. 2000)). For example, there need not be a written contract or retainer agreement in place. 48 Tex.

Prac., Tex. Lawyer & Jud. Ethics § 1:2 (2015 ed.). "Nor does the attorney-client relationship depend on payment of a fee. It may arise from services rendered gratuitously." 1 McDonald & Carlson Tex. Civ. Prac. § 2:7 (2d. ed.); *see also Sotelo v. Stewart*, 281 S.W.3d 76, 80-81 (Tex. App. 2008); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App. 1991), *writ denied* (July 1, 1992).

Courts applying Texas law have thus found the existence of implied attorney-client relationships where a lawyer provided legal services or advice. *See, e.g., E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 387 (S.D. Tex. 1969) (denying summary judgment); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 402-05 (Tex. App. 1997), *writ dismissed by agreement* (Mar. 26, 1998); *Perez*, 822 S.W.2d at 265. More recently, a few Texas courts have held that "an attorney-client relationship may arise by implication if the lawyer knows a person reasonably expects him to provide legal services but does nothing to correct that misapprehension." *Valls v. Johanson & Fairless*, 314 S.W.3d 624, 633-34 (Tex. App. 2010); *see also TQP Dev., LLC v. Adobe Sys. Inc.*, No. 2:12-CV-570, 2013 WL 3731492, at *2 (E.D. Tex. July 13, 2013) (citing but not discussing *Valls*); *MacFarlane v. Nelson*, No. 03-04-00488-CV, 2005 WL 2240949, at *4 (Tex. App. Sept. 15, 2005); *Moore*, 993 S.W.2d at 763.

II. Plaintiffs' Motion to Disqualify is Denied

A. Selsberg Formed an Attorney-Client Relationship With Plaintiffs and is Disqualified from Representing Them

The thrust of Sidley's opposition to Plaintiffs' motion is that Selsberg never formed an attorney-client relationship with Plaintiffs. Accordingly, Plaintiffs are not former clients: not of Selsberg's and therefore not of Sidley's. Rather, Sidley claims that Plaintiffs were no more than "prospective clients" – a category subject to less exacting conflict-of-interest requirements

recognized by New York's Rules of Professional Conduct, but not mentioned in Texas's corresponding code.

Sidley is wrong. Although it did not happen in his first contact with Elias-Calles, Selsberg formed an attorney-client relationship with Plaintiffs under Texas law.

From the beginning, Elias-Calles, acting on Plaintiffs' behalf, sought legal advice and services from Selsberg. In the very first email exchange, on October 11, 2012, Elias-Calles requested "advice" regarding whether Selsberg could "send a letter" to WBC about "possible interference in a contract." (Elias-Calles Reply Decl. Ex. A at 2.) Selsberg responded that the request was "No problem at all[,]" and that he could "do [it] for free." (*Id.*)

Sending a letter to a party with whom a client has a dispute is a quintessential legal service. Not only did Selsberg manifest his intent to provide this legal service, he suggested the price (free). Thus, even in that simple exchange, the two lawyers agreed to "the nature of the work to be done and the compensation to be paid," *Hill*, 181 S.W.3d at 547. Had any work been done, this conversation would have sufficed to form an attorney-client relationship.

In its surreply, Sidley emphasizes that Elias-Calles asked for help with a "small issue," which he did not describe. But an attorney-client relationship does not depend on the size of the services performed by the attorney.

However, the work that Selsberg proposed to perform for free was never done – there is no evidence in the record that Selsberg actually sent any letter on Maricultura's behalf. The most that can be said is that Selsberg told Elias-Calles that he would send the letter ("no problem at all") and could "probably" do so for free. If this email exchange were all that had passed between Selberg and Elias-Calles, I would conclude that no attorney-client relationship was formed.

But of course there is considerably more.

Elias-Calles claims that he requested "legal advice" when he spoke to Selsberg by phone on February 22. (Elias-Calles Decl. ¶ 30.) There is no recording or transcript of the conversation, and Selsberg's phone records show that any conversation – if the two lawyers in fact spoke on that day – lasted only 24 seconds. It was not possible for an attorney-client relationship to form in so brief a conversation.

[redacted][6]

[6] As noted above, several Texas courts have held that "an attorney-client relationship may arise by implication if the lawyer knows a person reasonably expects him to provide legal services but does nothing to correct that misapprehension." *Valls*, 314 S.W.3d at 633-34; *see also MacFarlane*, 2005 WL 2240949, at *4; Restatement (Third) of Law Governing Lawyers § 14(1)(b) (2000). [redacted]

Fortunately, it is not necessary to grapple with that question, because in the days that followed, Selsberg actually provided legal services to Plaintiffs – thereby erasing any about the formation of an attorney-client relationship.

[redacted][7]

[redacted] Elias-Calles "implicitly manifest[ed] an intent," *Hill*, 181 S.W.3d at 547, that Selsberg "render professional services to [his] client" in the form of legal advice, *Greene's Pressure Treating & Rentals*, 178 S.W.3d at 43.

Selsberg manifested his intent to become a party to that attorney-client relationship by actually providing the requested legal advice. [redacted]

[redacted]

[7] Selsberg also spoke to Elias-Calles for 17 minutes by telephone on February 26. Neither man has testified about what was said during that conversation, but the conversation was plenty long enough to have allowed a great deal of information about the legal matter between Plaintiffs and WBC to be exchanged.

[redacted]

[redacted] Legal research is, of course, a legal service provided by lawyers. [redacted]

Sidley argues that no attorney-client relationship was formed between Plaintiffs and Selsberg because none of the typical formalities associated with an attorney-client relationship were present: no fee was paid, no conflict check was run, no retainer was established, and no engagement letter was signed. These facts are evidence against the formation of an attorney-client relationship, but they are not dispositive. An attorney-client relationship may arise even when no fee is paid, *Perez*, 822 S.W.2d at 265, and no engagement letter is signed, *Prigmore v. Hardware Mut. Ins. Co. of Minn.*, 225 S.W.2d 897, 899 (Tex. Civ. App. 1949). The fact that Selsberg actually performed legal services for Plaintiffs is more important than any of these factors, because the provision of legal services and advice are the very essence of what an attorney-client relationship is.

Sidley emphasizes that *both* parties must manifest an intent to form an attorney-client relationship under Texas law. *See Valls*, 314 S.W.3d at 634. That did not happen, according to Sidley, because Selsberg never manifested an intent to act as attorney for Plaintiffs. Sidley is right about the law, but it is wrong about the facts. Selsberg may not have believed that he formed an attorney-client relationship with Plaintiffs. (*See, e.g.*, Selsberg Decl. ¶¶ 13, 14, 15.) But Selsberg's subjective view of the situation is just as irrelevant as Elias-Calles's claim that Plaintiffs subjectively viewed Sidley as representing them. *Sutton*, 47 S.W.3d at 182. Viewed objectively, the provision of legal services manifested Selsberg's intent to form that relationship.

Sidley's most powerful argument, though one that ultimately fails, is that the language in many of the emails exchanged between Elias-Calles and Selsberg implies that no attorney-client relationship yet existed. This is particularly true of the 2012 emails. For example, on November 9, Elias-Calles stated that Plaintiffs "want[] to do something in the states if possible[,]" and that if that was possible "we need to hire Sidley asap." (Elias-Calles Reply Decl. Ex. F at 2.) After Elias-

Calles provided additional information and told Selsberg that he wanted a Sidley attorney to accompany Plaintiffs to WBC's offices, Selsberg wrote back that "Someone from Sidley could likely go if we are hired on it and all agreed that it was beneficial." (*Id.* Ex. G at 2.) Elias-Calles then asked Selsberg to "star[t] running a conflict check" which Selsberg agreed to run. (*Id.* Ex. G at 1.) [redacted] Sidley also notes that at no point in February 2013 did Selsberg ever refer to Plaintiffs previously retaining Sidley.

First, assuming that Sidley is correct about the 2012 emails, they have no bearing on whether an attorney-client relationship was formed later, in February 2013, [redacted]

Had the parties moved forward with a lawsuit, Sidley almost certainly would have required Plaintiffs to comply with the formalities of its typical attorney-client relationships such as a retainer, an engagement letter, and a conflict check. But the fact that nothing ended up happening doesn't change the nature of the already-existing relationship between Selsberg and Plaintiffs.

Having shown that Selsberg formed an attorney-client relationship with Plaintiffs, two additional factors must be considered before Selsberg himself can be disqualified from this matter: there must be a "substantial relationship" between the subject matter of the prior representation and the present lawsuit, and Selsberg must have had access to, or likely had access to, relevant privileged information while representing Plaintiffs. *Hempstead Video*, 409 F.3d at 133. Where the "substantial relationship" element is satisfied there is an "irrebuttable presumption" that the conflicted attorney had access to privileged information. *Scantek Med.*, 693 F. Supp. 2d at 239; *see Chinese Auto. Distributors of Am.*, 2009 WL 47337, at *2-3.

Here, there can be no doubt that a substantial relationship exists between Selsberg's prior representation of Plaintiffs and the present litigation. In fact, Sidley does not contest this point. The subject matter is identical: Maricultura's loan to WBC, the arrest of Maricultura's ships, and the transfer of the debt to Umami. The only difference is that two years have passed, and according to Maricultura, the reason it did not file a lawsuit in 2013 was because of Selsberg's advice.[8]

Because the second element of the Second Circuit's disqualification test is satisfied as to Selsberg, an irrebuttable presumption arises that the third element is also satisfied.

Selsberg is personally disqualified from representing Plaintiffs.

B. Selsberg's Confict is Not Imputed to Sidley

1. The Law Governing Imputation

The remaining question is whether Selsberg's conflict should be imputed to Sidley, the law firm in which he both is a partner and was a partner at the time he dealt with Elias-Calles on this matter.

[8] [redacted]

This question, unlike the question whether Selsberg formed an attorney-client relationship with Plaintiffs, is governed by Second Circuit law, not by Texas law.

In their moving papers, Plaintiffs equivocate about the governing law for imputation of a conflict. On the one hand, Plaintiffs argue that "Under Applicable Texas Law[] . . . *Selsberg* Entered Into an Attorney-Client Relationship with [Plaintiffs.]" (Pl. Mem. at 10 (emphasis added).) Yet in their reply brief, Plaintiffs cite Texas law when discussing imputation of Selsberg's conflict to Sidley. (Pl. Reply Mem. at 12-13.)

Whatever their view on the matter, Plaintiffs have offered no persuasive argument why Texas law should apply to imputation of Selsberg's conflict to Sidley, as distinct from the formation of an attorney-client relationship between Plaintiffs and Selsberg. Texas law governs the latter issue because Selsberg worked in Sidley's Texas office, communicated with Plaintiffs from Texas, and practiced in Texas. That relationship either formed or did not form in 2012 and 2013. Plaintiffs' choice where to file a lawsuit today cannot alter the character of that past relationship.

By contrast, the propriety of imputing Selsberg's conflict to Sidley as a whole concerns ongoing events directly related to this lawsuit. The Court must determine whether lawyers representing the Sidley Defendants before this Court – both of whom practice in New York out of Sidley's New York office (Bierman Decl. ¶ 1; Mitnick Decl. ¶ 1) – are conflicted, as well as whether an ethical screen established to seal off Sidley's lawyers in New York from communicating with Selsberg will be effective in keeping client confidences. The relationship between the Sidley Defendants and Sidley – specifically the Sidley attorneys representing them in this matter – is a New York-based relationship, and Sidley is representing Amerra and Tashjian in a New York court. Whether they can do so is determined by the law of this circuit.

It remains the law in this Circuit that, "An attorney's conflicts are ordinarily imputed to his firm based on the presumption that 'associated' attorneys share client confidences." *Hempstead Video*, 409 F.3d at 133. The Second Circuit, however, has "join[ed]" the "strong trend . . . toward allowing the presumption of confidence sharing within a firm to be rebutted." *Id.* at 133 (internal citations and quotation marks omitted). Thus, it is now established that "in appropriate cases and on convincing facts, isolation – whether it results from the intentional construction of a 'Chinese Wall,' or from de facto separation that effectively protects against any sharing of confidential information – can[] adequately protect against taint." *Id.* at 138.

Courts follow a two-step process to "analyz[e] conflict imputation from an attorney to his firm." *Id.* at 134. First, the Court must "determine whether an attorney is 'associated' with the firm. If he is, a rebuttable presumption arises that the attorney and the firm share client confidences, and the court then proceeds to the second step . . .." *Id.* We need not pause long at the first step; at all times relevant to this matter, Selsberg has been a partner of Sidley. There is, therefore, a rebuttable presumption that the entire firm is conflicted.

The second step requires the Court to "determin[e] whether the presumption has been rebutted." *Id.* It is at this stage that the existence of an ethical screen becomes relevant. The Second Circuit "has adopted no categorical rule against considering practices and structures that protect client confidences within a firm in determining whether an attorney or firm should be disqualified." *Id.* at 137. Rather, the focus is on preventing "trial taint." Where there is no risk that a conflict will taint an underlying trial – for example, by allowing an attorney to use a former client's confidential information against the former client – disqualification is inappropriate. *Id.* at 132-33; *see also Nyquist*, 590 F.2d at 1246.

Two courts in this district have recently relied on *Hempstead* to find that conflicts involving one attorney should not be imputed to that attorney's firm, even when the ethical screens established by the firms were less than perfect and when the lawyers whose presence at the firm created the conflict performed much more substantive work for their former clients than Selberg did for his.

In *Arista Records LLC v. Lime Group LLC*, No. 06 CV 5936, 2011 WL 672254 (S.D.N.Y. Feb. 22, 2011), my colleague Judge Wood rejected a motion by Arista Records to disqualify Lime Group's retained counsel because an admitted conflict of interest involving one attorney from the Lime Group's firm "d[id] not pose a significant risk of trial taint." *Id.* at *1. In that case, an attorney at Lime Group's firm had previously worked at a law firm representing Arista on the same matter, where he billed hundreds of hours and was intimately involved in managing and litigating the case. *Id.* at *1 n.2. That attorney worked at Lime Group's law firm for three years before the firm started representing Lime Group. During that time, however, the law firm failed to enter the attorney's prior representation of Arista into its conflict database; when it learned of the conflict, the law firm delayed establishing an ethical screen. *Id.* at *1-3.

Judge Wood acknowledged that the law firm's "screening procedures were imperfect." *Id.* at *5. Despite those imperfections, Judge Wood held that the individual attorney's conflict should not be imputed to the law firm. In doing so, Judge Wood relied on affidavits from the conflicted attorney stating that he never disclosed Arista's confidential information to anyone at his new firm and from other lawyers who billed hours on the Lime Group matter swearing that they had not received any confidential information; Judge Wood also relied on electronic audits showing that the conflicted attorney never accessed documents relating to the Lime Group matter. *Id.* at *5-6. Judge Wood further noted that the law firm at issue was a "large law firm," which "makes the risk

of inadvertent disclosures of confidences less likely," and said that three-year gap between the attorney's work on behalf of Arista and his new firm's work for Lime Group "naturally diminished" the attorney's recollection of confidential information. *Id.* at *7.

Similarly, in *American International Group, Inc. v. Bank of America Corp.*, 827 F. Supp. 2d 341 (S.D.N.Y. 2011), my colleague Judge Jones also held that an individual attorney's conflict should not be imputed so as to disqualify his firm from representing the plaintiffs.[9] In *American International Group*, an attorney at the plaintiffs' firm had previously represented the defendants on related matters, billing over 120 hours during which he interviewed clients, researched legal strategies and reviewed forensic analyses. *Id.* at 343-344. After joining the plaintiffs' law firm the attorney actually billed 5.8 hours on the plaintiffs' matter; his law firm was then unaware of the conflict. *Id.* at 344. Once plaintiffs' firm learned of the conflict (through a letter from defendants' counsel) it erected an ethical screen. *Id.*

Judge Jones held that the particular attorney was clearly conflicted, but that "flawed screens—including late screens—are not fatal" on a motion for disqualification. *Id.* at 346. Judge Jones' opinion emphasized several facts in denying the motion to disqualify: [1] Once the plaintiffs' firm learned of the conflict it erected an ethical screen within 24 hours; [2] Plaintiffs submitted affidavits from all attorneys who billed more than 50 hours on the case swearing they received no information from the conflicted attorney; [3] That attorney swore he shared no confidences and could not recall the details of his work on defendants' behalf (which assertion was supported by the passage of three years); [4] That attorney – who worked in the firm's London

[9] In *American International Group*, the conflicted attorney resigned from the plaintiffs' law firm after the motion to disqualify was filed. That fact played no role in Judge Jones' decision.

office – was physically separated from his colleagues in New York working on plaintiffs' matter; and [5] The law firm itself was large, making inadvertent disclosures unlikely. *Id.* at 346-47.

CQS ABS Master Fund Ltd. v. MBIA Inc., No. 12 Civ. 6840, 2013 WL 3270322 (S.D.N.Y. June 24, 2013) is a post-*Hempstead* case that did rule a firm disqualified against an argument that an ethical screen had been set up. In *CQS*, the plaintiffs' retained law firm had previously represented the defendant's Mexican branch on closely related matters. Plaintiffs argued that this conflict should not preclude their firm from continuing representation, because documents from the prior representation "are kept under lock and key . . . and could be reviewed only after obtaining written approval from [the firm's] general counsel's office." *Id.* at *13. However, as my colleague Judge Sullivan noted in his opinion, these assertions were not supported by "evidence of specific screening procedures" – i.e., declarations and exhibits – to prevent access to confidential information. *Id. Hempstead* set up a rebuttable presumption; in *CQS*, the presumption was not rebutted.

In every other post-*Hempstead* case I have located within this circuit, the district court, after considering whether an ethical screen was sufficient, has found the presumption rebutted and denied a motion to disqualify. *See Plumbing Supply, LLC v. ExxonMobil Oil Corp.*, No. 14 CV 3674, 2014 WL 6644221, at *7-8 (S.D.N.Y. Oct. 23, 2014); *Wrubel v. John Hancock Life Ins. Co.*, No. 11 CV 1873 WFK LB, 2012 WL 2251116, at *3 (E.D.N.Y. June 15, 2012); *Intelli-Check, Inc. v. Tricom Card Technologies, Inc.*, No. 03 CV 3706, 2008 WL 4682433, at *4-5 (E.D.N.Y. Oct. 21, 2008).

2. Sidley Has Rebutted the Presumption of Shared Confidences Within its Firm.

Sidley has adequately rebutted the presumption of shared confidences within the firm.

First, although Selsberg plainly fell down on the job when it came to complying with the procedures for opening new client matters back in 2013, Sidley did not fall down on the job once it learned of the possibility that Selsberg might have had a prior attorney-client relationship with Plaintiffs. Sidley set up an ethical screen between Selsberg and the lawyers working on the matter within 24 hours after Selsberg received a letter from Elias-Calles, just as the plaintiffs' law firm did in *American International Group*. 827 F. Supp. 2d at 346.

Admittedly, during that 24-hour period Selsberg spoke to Mitnick about the email he had simultaneously received from Elias-Calles; but there is no evidence that Selsberg shared any confidential information about Plaintiffs with Mitnick. The subject of their conversation was whether there had been a prior relationship. Selsberg avers that he could not recall any particular information about the case when he talked to Mitnick; that rings true, given the brevity of the representation and the fact that no lawsuit ultimately came of it. (Selsberg Decl. ¶ 18; Mitnick Decl. ¶ 4.) Moreover, the three partners involved – Selsberg, Mitnick, and Bierman – all state that they will abide by the ethical screen and have had no communications about this matter since the screen was put in place. (Mitnick Decl. ¶ 8; Selsberg Decl. ¶ 19; Bierman Decl. ¶¶ 4-5.) The fact that Selsberg works in the Houston office, not in the New York office, lends credibility to their assertions, since the geographic separation reduces the likelihood of sharing confidential information. *Am. Int'l Grp.*, 827 F. Supp. 2d at 346-47; *Arista Records*, 2011 WL 672254, at *6.

Second, the delay between Selsberg's attorney-client conversations with Elias-Calles and the ultimate filing of this action diminishes the likelihood of inadvertent disclosure. The last communication noted by either party occurred on February 27, 2013, almost two years before December 29, 2014, when this matter was filed. On similar facts, both Judge Wood and Judge Jones concluded that the passage of time between the prior relationship and the representation from

which disqualification was sought diminished the likelihood of inadvertent disclosure within a law firm. *See Am. Int'l Grp.*, 827 F. Supp. 2d at 346 ("over three years"); *Arista Records*, 2011 WL 672254, at *7 ("32 months").

Third, while Selsberg did enter into an attorney-client relationship with Plaintiffs, the limited nature of his involvement in a matter that never went anywhere argues against imputation. Selsberg provided some legal advice but he was not intimately involved in strategizing, much less litigating, on Plaintiffs' behalf. He presumably had access to confidential information, but he did not assemble a team, interview the clients directly, supervise or take any discovery or – from the Court's review of the email record – learn any facts that are not disclosed in the complaint or otherwise discoverable. In this sense, the case for disqualification here is even weaker than in *American International Group* and *Arista Records*, where the conflicted attorneys were deeply involved in a prior representation, billing hundreds of hours in the course of ongoing litigation.

Plaintiffs do not discuss any post-*Hempstead* cases from this circuit, but make two arguments for imputing Selsberg's conflict to Sidley.

First, citing Texas case law, Plaintiffs argue that once a substantial relationship exists between prior representation and current litigation, there is an *irrebuttable* presumption that confidential information was shared. *See E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969); *Centerline Indus., Inc. v. Knize*, 894 S.W.2d 874, 876 (Tex. App. 1995).

As explained above, Second Circuit law, not Texas law, controls the issue of imputation. But Plaintiffs are wrong about the law. The cited cases actually hold that, when an individual attorney represents an adverse client on a matter substantially related to a matter on which that attorney represented a former client, that attorney is irrebuttably presumed to have learned confidential information during the prior representation. I have no quarrel with that principle;

indeed, I relied on it in holding that Selsberg himself was disqualified from representing Plaintiffs. *See supra* at 25. But that presumption is distinct from the presumption that the confidential information learned by one attorney has been shared within a firm. As to the presumption of sharing within a firm, *Hempstead* could not be clearer; that presumption is rebuttable. 409 F.3d at 133-34, 137.[10]

Second, Plaintiffs argue that *Hempstead* is distinguishable on its facts. And so it is. In *Hempstead*, the court concluded that the matter before it was not substantially related to the prior matter on which the conflicted attorney had worked. But the court held in the alternative that any conflict should not be imputed to the firm – both because "of counsel" attorneys are not necessarily "associated" with the firm for imputation purposes, *id.* at 134-36, *and* because the firm established an ethical screen, *id.* at 137-139. The *Hempstead* court's discussion of ethical screens was no afterthought; it spans two full pages of the Federal Reporter. The Second Circuit squarely considered and approved the use of ethical screens in appropriate cases.

In one key respect, I do agree with Plaintiffs that *Hempstead*, *American International Group*, and *Arista Records* are distinguishable. In each of those cases, a conflicted attorney established a prior relationship with the party moving for disqualification before he came to the firm sought to be disqualified. Here, by contrast, Selsberg was at Sidley when he formed an attorney-client relationship with Plaintiffs, and he remains a partner there now.

[10] Although not relevant to the Court's decision, it appears that the Fifth Circuit has also declined to adopt an irrebuttable presumption that attorneys share confidential information within law firms. *See In re ProEducation Int'l, Inc.*, 587 F.3d 296, 304 (5th Cir. 2009). Indeed, the Fifth Circuit may have even gone further than this circuit, by rejecting any presumption (rebuttable or irrebuttable) of shared confidences. *Id.* at 304 n.7. Thus, were this case filed in federal court in Texas (where venue does not appear to lie), Plaintiffs' motion would still be denied.

I cannot rule out the possibility that this might be a difference that makes a difference. An ethical screen does not change the fact that Selsberg's notes and communications are on Sidley's server or in Sidley's files, available to any unscrupulous attorney who might decide to access them. In the other cases cited, the client communications and files relating to the prior representation were on some other firm's server or in its files. Furthermore, given the relationship that partnership implies – even in today's legal environment – the likelihood of inadvertent disclosure is greater in the situation facing this Court than was true in *Hempstead* and its progeny.

But while the law used to impute one lawyer's conflict to his partners in every case, that is no longer true. I do not believe that the conflict can be imputed in this case. In the cited cases, the lawyer whose prior work created the conflict had performed substantial services for the client over a long period of time; that is not true here. In the cases cited, the prior work resulted in or was performed in the context of a live litigation, *Am. Int'l Grp.*, 827 F. Supp. 2d at 344; *Arista Records*, 2011 WL 672254, at *1 & n.2; that is not the case here, where Selsberg's advice apparently caused Plaintiffs not to go forward with any lawsuit. Selsberg, working out of a far-away office on a limited engagement, functioned very much like an attorney at a different firm.

Furthermore, the opinions in *Hempstead*, *American International Group*, and *Arista Records* adopt a functional approach to disqualification – what matters is the risk of trial taint. Nothing in any opinion the Court has found suggests that the distinction between a migrating attorney and an attorney who has worked at the potentially conflicted firm is a distinction that makes a difference, except to the extent that it affects the risk of trial taint in a practical way. No one has yet pointed to any such risk.[11]

[11] The only risk that occurs to the Court is that the Sidley Defendants might want to assert some sort of waiver or laches defense, based on the failure of Plaintiffs to sue earlier. I have no idea

CONCLUSION

For the forgoing reasons, Plaintiffs' motion to disqualify Sidley Austin, LLP from representing defendants Tashjian and Amerra is **DENIED** The Clerk of the Court is directed to remove Docket #23 from the Court's list of pending motions and to **LIFT THE STAY**. The initial conference previously scheduled for February 27, 2015 is rescheduled for March 27, 2015 at 10:30am. Defendants' answers to the complaint and any motions to dismiss are due March 27, 2015.

Dated: March 6, 2015

U.S.D.J.

BY ECF TO ALL COUNSEL

whether such a defense might be available to the Sidley Defendants, but were that scenario to transpire, Sidley might well have to be disqualified, because Plaintiffs would wish to introduce evidence of Selsberg's advice in order to justify any delay. No one has suggested this possibility, but Sidley needs to assess that issue promptly and should advise the Court if it might arise.