

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ZHAOYIN WANG,  
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,  
AND ZHEJIANG BETA PHARMA  
CO., LTD.,  
Defendants.

No. 3:14CV1790 (VLB)

MAY 26, 2015

BETA PHARMA, INC. AND DON ZHANG'S REPLY MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO DISQUALIFY OPPOSING COUNSEL

STATEMENT OF THE CASE

This is a straightforward, egregious conflict. Liu<sup>1</sup> previously counseled Defendants on the issues in this lawsuit, then teamed up with Katz, Plaintiff's lawyer. Liu infected Katz and this litigation with the conflict, so Katz must be disqualified. In his opposition brief ("Opp") [D.E. #76], Katz opposes Defendants' Motion to Disqualify largely on the grounds that (I) Liu did not counsel Defendants on the same matter; and (II) he did not receive confidential information. These arguments misapply controlling law and miscast the facts.

First, Liu advised Defendants on the 2010 Agreement that is the basis of this lawsuit. He worked on a draft revision, dissolving the Agreement, and related tax issues. Defendants have proven these facts. If the Court grants the Motion for Protective Order, Defendants will provide additional evidence showing the

<sup>1</sup> Shorthand words have the same meaning as in Defendants' moving papers.

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conflict. In either case, the evidence proves that Liu advised Defendants on the same matter as this action.

Second, through many associations with Liu, Katz has had ample chances to obtain Defendants' confidential information. Katz asks the Court to accept his (and Liu's) assurances that Liu did not disclose any confidences. Putting aside credibility issues, controlling law expressly holds that, where a conflicted lawyer teams up with another lawyer in the same or substantially the same matter, the moving party need not show actual disclosure of confidences; such disclosure is irrebuttably presumed as a matter of law.

In accordance with controlling law, to protect Defendants' confidences, and to avoid the appearance of impropriety, the Court must disqualify Katz.

#### LEGAL ARGUMENT

##### I. Liu Advised Defendants on the Matters at Issue in this Action

The parties agree that the test for Katz's disqualification asks whether Liu, while representing Defendants, worked on the same matter as this case or a substantially related matter. If so, then this Court must disqualify Katz from representing Plaintiff in this action because Katz's associations with Liu created opportunities for disclosure of Defendants' information.

##### A. Liu's Representation of Defendants and this Case Both Concern the 2010 Agreement

The evidence proves that Liu counseled Defendants on the exact issues in this lawsuit. As set forth in Defendants' moving papers on pages 5 to 7 and 19, Liu counseled Defendants on the 2010 Agreement, a revision of that Agreement,

dissolving the Agreement, and related tax issues. He then associated with Katz who is suing Defendants on the 2010 Agreement in this lawsuit.

Because Liu has switched sides, RPC 1.9 (and controlling law) requires Katz's disqualification. The Official Commentary to RPC 1.9 states that, "[w]hen a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited." That is exactly what happened here. Liu counseled Defendants directly on the 2010 Agreement and subsequently formed relationships adverse to Defendants' interests.

Even if these were not the same matter – and they are – Liu's advice to Defendants is "substantially related" to this case. The Official Commentary to RPC 1.9 explains that "[m]atters are 'substantially related' for purposes of this Rule [1] if they involve the same transaction or legal dispute or [2] if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Here, Liu counseled Defendants on the purported Agreement between BP and Plaintiff and, in doing so, gained knowledge of the Agreement and its legal ramifications. His representation of Defendants concerned a substantially related matter because his services "involve[d] the same transaction," and since there "is a substantial risk" that information normally obtained "would materially advance" Plaintiff's positions.

In sum, Liu has switched sides on the same (or substantially the same) issues and has infected Katz with a conflict of interest.

**B. Katz's Arguments to the Contrary are Without Merit**

Katz struggles to distinguish this action from Liu's prior representation of Defendants. His arguments are easily refuted.

**i. Katz Cannot Escape the Fact that Liu Drafted a Revision to the 2010 Agreement**

As explained above, Liu previously worked on the issues in this case when he drafted a revision to the 2010 Agreement. It is difficult to conceive a more direct conflict than drafting an agreement on behalf of a client and then assisting another lawyer in suing that former client on the same agreement.

Katz attempts to avoid this conflict by mischaracterizing the facts. He states that Liu did not revise the 2010 Agreement; instead, he characterizes the revision as "an effort by plaintiff Wang to obtain defendant Zhang's signature on a tax document." Opp. at 18. For support, Katz focuses on a July 27, 2012 email in which Plaintiff mentions tax issues and an Aug. 1 email in which Zhang references a "new agreement." But between those emails, on July 28, Plaintiff sent Jirong Peng an email attaching a draft "Shareholder's Agreement," which reflected Zhang's and Plaintiff's purported obligations and ownership interests in BPC. Zhang Aff., Exh. 4. Beta Pharma ("BP") then forwarded Plaintiff's July 28, 2012 email and the attached agreement to Liu. Kolpen Decl., Exh. 1, ref. # 1. On July 30, 2012, Liu counseled BP on the 2010 Agreement, BPC, and a possible revision to the 2010 Agreement. Zhang Aff., at ¶ 13; Kolpen Decl., Exh. 1, ref. # 2.

BP has testimonial and documentary evidence proving Liu drafted a revision to the Agreement. Specifically, Zhang stated, in his affidavit, that "Liu counseled [BP] on the purported agreement . . . including issues related to . . . a

possible revision to the 2010 Agreement.” Zhang Aff., at ¶ 13. As Zhang was the client receiving Liu’s legal services, this sworn statement proves Liu worked on a possible revision to the Agreement. While Katz characterizes the subject of the July 2012 email exchange between Plaintiff and Zhang as merely a “tax document,” in fact, revision of the purported Agreement was directly at issue.

Further, Defendants have a copy of the draft revision, which Liu wrote, but cannot submit it to the Court because doing so would require revelation of attorney-client privileged and work product information. Controlling law dictates that, on a motion to disqualify, the movant need not reveal confidences to establish the conflict (see section II.B below), so Defendants moved for entry of a Protective Order that will allow for submission of such materials while protecting their privileges. While the Court has ample evidence before it to disqualify Katz, to the extent the Court has any question about Liu’s services on the 2010 Agreement, upon the granting of the proposed Protective Order, Defendants will submit further evidence under seal.<sup>2</sup>

- ii. Katz’s Insistent Focus on Legal Services that Did Not Involve Liu is a Smoke Screen and Distraction from Liu’s Substantial Work on the 2010 Agreement

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<sup>2</sup> Granting the Motion for Protective Order would alleviate Katz’s concern that he and Plaintiff have not received a copy of Liu’s draft revision to the Agreement. In any case, this concern is misguided. Whether Plaintiff ever received the draft revision is irrelevant; all that matters on this Motion is that Liu counseled *Defendants* on the 2010 Agreement.

Katz argues Liu did not counsel Defendants on the same matter, stating that Plaintiff and BP entered the purported Agreement before Liu's representation of BP began in 2011, and another lawyer counseled BP on the Agreement in Sept. 2013, after Liu had ended the attorney-client relationship. But it is irrelevant whether another lawyer counseled BP on the Agreement after Liu, or whether Liu created the Agreement. Another lawyer's work on the 2010 Agreement does not erase Liu's legal work. The Court must determine whether *Liu* counseled Defendants on the issues in this case. And the evidence proves he did.

iii. As Liu Counseled Defendants on the Same Matter as this Action, Katz's Argument that Liu Had No Access to Relevant, Privileged Information is Without Merit

When advising Defendants on the Agreement, Liu had access to relevant, privileged information. He "received broad access to [BP's] corporate information, including highly confidential and proprietary business information such as research projects, business contracts, investor information, financial information, tax filings and related information, employee information and settlements, and proposed stock valuations." Zhang Aff., at ¶ 12. Liu had confidential communications with Defendants regarding the Agreement and thereby obtained relevant, confidential information.

iv. Norris, Rodriguez, and Vincent Provide No Support for Katz's Contention that the Matters are Different

The case law that Katz cites is easily distinguished. He cites *Norris v. City of New Haven*, 2006 WL 2567866, at \*2 (D.Conn. Sept. 5, 2006), in which a former municipal counsel represented the City and its police department on excessive force claims, officer claims involving alleged unfair treatment, and claims that the

City's promotional practices violated the Constitution. After leaving for private practice, the attorney brought an unrelated action against the City alleging unconstitutional employment practices. *Id.* at \*1. The Court determined that the lawyer's prior work for the City and the issues in the case at bar were not sufficiently related. *Id.* at \*2. *Norris* is inapplicable here. While representing the City, the lawyer provided no legal services directly associated with *Norris's* claims. In contrast, Liu counseled Defendants on the exact Agreement and issues that are being litigated in this action.

Similarly, Katz's reliance on *Vincent v. Essent Healthcare of Connecticut*, 465 F.Supp.2d 142, 147 (D.Conn. 2006) is misplaced because, in that case, the allegedly conflicted lawyers never represented two of the parties moving for disqualification, and the representations were not on the same matter. While the Court in *Rodriguez v. City of New Haven*, 214 F.R.D. 66, 68-69 (D.Conn. 2003) correctly presumed that the conflicted lawyer obtained the client's confidences, that case's facts are distinguishable. There, "the facts of the previous case [were] wholly unrelated to the facts giving rise to the present case." *Id.* at 69.

II. Katz's Multiple Associations with Liu Created Ample Opportunities for Disclosure of Beta Pharma's Confidential and/or Privileged Information

A. Katz Has Teamed Up with Liu

Multiple associations between and Katz and Liu created opportunities for Liu's disclosure of BP's confidential and/or privileged information to Katz. These associations included or involved: a consulting agreement in this case, where Liu

has consulted Katz<sup>3</sup>; a consulting relationship and joint representation in the Shao and Xie Actions, where Liu is or was consulting Katz and, with Katz, is or was representing the plaintiffs; an attorney-client relationship between Katz and Liu, where Katz represents Liu; a meeting amongst Xie, Katz, and Liu in October 2013; Liu introducing potential plaintiffs to Katz; and other admitted communications between Liu and Katz. See Defendants' moving brief, at 23-24; Katz May 11, 2015 Aff., at ¶ 7-8, 10-12, 14-18, 28, and 34 [D.E. #76]; Opp. at 8 ("On May 15, 2014, Katz sent Liu an email for delivery to Wang, attaching a representation agreement..."); Opp. at 9, n.5 (discussing Katz-Liu phone calls in May 2014). In fact, Katz concedes that, after Plaintiff emailed the facts of this lawsuit to Liu, "it is likely that Liu told [Katz] the contents of Wang's email to Liu...re 'My case against Don(betaPharma).'" Katz May 11, 2015 Aff., at ¶ 16. These relationships and interactions created opportunities for disclosure of information and, therefore, mandate Katz's disqualification.

**B. On a Motion to Disqualify, the Receipt and Disclosure of Confidential Information is Irrebuttably Presumed**

Unable to refute that ample opportunities existed, Katz asks this Court to accept his and Liu's representations that Liu did not disclose their information to

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<sup>3</sup> Katz's affidavit states that, when he entered a representation agreement with Plaintiff in Sept. 2014, the N.J. Court had already restrained Liu from communicating with Katz. Katz May 11, 2015 Aff. (Opp. Exh. C), at ¶ 4. The N.J. Court did not restrain Katz from communicating with Liu *about this lawsuit* until April 15, 2015 (see Amended Consent Order, attached hereto as Exhibit A).

Katz. But controlling law precludes Katz from rebutting the presumption that Liu and Katz received Defendants' confidential information.

The starting point for this analysis is L.R. 83.2(a), which provides that the Court has adopted CT's RPC's as the relevant standard of conduct. Accordingly, CT caselaw interpreting those Rules is pertinent to resolution of this Motion. See Defs.' moving papers, at 16.

The CT Supreme Court has refused to inquire into whether a side-switching lawyer disclosed confidential and/or privileged information of the former client. Rather, once the moving party establishes that the side-switching lawyer formerly worked on the same, or substantially the same, matter, courts must irrebuttably presume disclosure of the former client's information. *Goldenberg v. Corporate Air, Inc.*, 189 Conn. 504, 512 (1983). Courts in the Second Circuit have followed this rule and imposed the irrebuttable presumption, which applies to information travelling between a conflicted lawyer and another lawyer, and to information travelling from the client to the conflicted lawyer.<sup>4</sup>

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<sup>4</sup> See, e.g., *Rodriguez*, 214 F.R.D. at 68 (citing *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 740 (2d Cir. 1978) ("*Cook*") ("[W]here the cases are substantially related, the court will assume that the former client disclosed confidences to the attorney bearing on the subject matter of the representation, and the court should not require proof that the attorney actually received privileged information."); *PGH Int'l v. Gabor Shoes AG*, 222 B.R. 401, 408 (Bankr. D. Conn. 1998) ("[A] party seeking to disqualify counsel under Rule 1.9(1) need not prove that specific information was communicated to counsel . . . . Rather, it

Courts do not analyze what information the side-switching lawyer received because doing so “would put the former client to the Hobson’s choice” of “disclos[ing] his privileged information in order to disqualify his former attorney” or “refrain[ing] from the disqualification motion altogether.” *Cook*, 569 F.2d at 740; *Goldenberg*, 189 Conn. at 512. In short, the law allows the former client to seek disqualification of a conflicted lawyer without disclosing confidences. *Id.*

Under these precedents, because Defendants have proven that Liu formerly counseled them on the same or substantially the same matter as this case, and that Liu had opportunities to disclose such information to Katz, this Court must irrebuttably presume that Liu received Defendants’ confidential and/or privileged information and that Liu disclosed such information to Katz.

*Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (“*Silver*”) and *American International Group, Inc. v. Bank of America Corp.*, 827 F.Supp.2d 341 (S.D.N.Y. 2011) (“*AIG*”) are not to the contrary. *AIG* was based on New York’s RPC’s<sup>5</sup> and, therefore, is inapplicable. See *id.* at 345 (“The

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is sufficient to show a substantial relationship between the nature of the prior and current representations.”); *Cook*, 569 F.2d at 740 (“[I]n order to grant a disqualification motion, a court should not require proof that an attorney actually had access to or received privileged information. . . .”); *Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975) (“The breach of confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code.”).

<sup>5</sup> *Leslie Dick Worldwide, Ltd. v. Soros*, 2009 WL 2190207, at \* 5, n.14 (S.D.N.Y. July 22, 2009) was likewise based on New York’s RPC’s.

New York Rules of Professional Conduct prohibit attorneys from successive representation.”). In *Silver*, the Court allowed an attorney, who had switched law firms, but did not work on the same matter at both firms, to rebut the presumption that he had received the former client’s confidential information. *Silver*, 518 F.2d at 756-757. The Court based its holding on the lawyer having worked for a large law firm, so the former client’s confidential information could not be irrebuttably imputed to the lawyer. *Id.* However, Liu was not a member of a large firm in which some other lawyer represented Defendants. He himself (a solo practitioner) advised Defendants on the Agreement at issue, and then assisted Katz in suing on the very same Agreement. In situations like this, it is irrebuttably presumed that the lawyer received the client’s information. *Goldenberg*, 189 Conn. 504 at 512; *Hull*, 513 F.2d at 570.

III. To the Extent the Court Balances the Interests Involved, They Weigh in Favor of Disqualification

While granting this Motion will protect Defendants’ confidences and avoid the appearance of impropriety, it will not prejudice Plaintiff in any way, since Defendants filed this Motion early on, and Plaintiff certainly can find another lawyer to handle this breach of contract action. Accordingly, to the extent the Court considers the interests involved, it should grant Defendants’ Motion.

CONCLUSION

For these reasons, and for the reasons in Defendants’ moving papers, Defendants respectfully move that the Court grant their Motion to Disqualify.

**DEFENDANTS BETA PHARMA, INC. AND  
DON ZHANG,**

By:   /s/  

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2015 a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

*/s/*

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Michael G. Caldwell (ct 26561)

**EXHIBIT A**

CLERK OF SUPERIOR COURT  
SUPERIOR COURT OF N.J.  
MERCER COUNTY  
RECEIVED AND FILED

APR 15 2015

*Sue Regan*  
SUE REGAN  
DEPUTY CLERK OF SUPERIOR COURT

**FOX ROTHSCHILD LLP**

Formed in the Commonwealth of Pennsylvania

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BETA PHARMA, INC., BETA PHARMA  
SCIENTIFIC, INC., AND DON ZHANG,

Plaintiffs,

v.

LANCE LIU,

Defendant.

:  
: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION – MERCER COUNTY  
:  
: DOCKET NO.: MER-L-2040-14  
:  
: CIVIL ACTION  
:  
: AMENDED CONSENT ORDER  
: ENTERING PRELIMINARY  
: INJUNCTION  
:  
:

THIS MATTER having been opened to the Court by Fox Rothschild LLP, attorneys for Plaintiffs Beta Pharma, Inc. ("Beta Pharma"), Beta Pharma Scientific, Inc. ("Scientific"), and Don Zhang ("Zhang") ("Plaintiffs"); and the court having entered a Temporary Restraining Order on September 26, 2014 (appended as Exhibit A) and having entered a Consent Order Entering Preliminary Injunction dated January 14, 2015; and it appearing that the parties have stipulated and agreed to amend the terms of the Consent Order Entering Preliminary Injunction,

as set forth in this Amended Consent Order Entering Preliminary Injunction; and good cause having been shown;

NOW, THEREFORE, IT IS on this 15<sup>th</sup> day of April 2015,

ORDERED as follows:

1. The three restraints on page three of the Court's Order dated September 26, 2014, attached hereto as Exhibit A, are hereby continued for the remainder of this action.

2. For the remainder of this action, Defendant is hereby barred from:

a. Soliciting any person or entity to bring a legal claim against Plaintiffs anywhere in the world;

b. Communicating directly or indirectly with Guojian Xie about the Xie Action (*Xie v. Beta Pharma et al.*, UWY-CV-13-6025526-S, pending in the Superior Court of Connecticut), with any Plaintiff in the Buyers' Action (*Shao, et al. v. Beta Pharma, Inc., et al.*, Civil Action No. 3:14CV01177 (CSH)) about the Buyers' Action, or with Zhaoyin Wang about the Wang Action (*Zhaoyin Wang v. Beta Pharma, Inc., et al.*, Civil Action No. 3:14CV1790 (VLB)) except as provided in paragraph five of this Order; and

c. Communicating directly or indirectly with Jonathan Katz, Esquire, or any attorney representing the plaintiffs in the Xie Action, the Buyers' Action, and/or the Wang Action regarding the Xie Action, the Buyers Action, or the Wang Action except as provided in paragraph five of this Order.

3. Furthermore, for the remainder of this action, Defendant is hereby barred from:

- a. communicating with any attorneys who are representing adverse parties (to Plaintiffs) in the Xie Action, in the Buyers' Action, and in the Wang Action;
- b. soliciting parties to sue Plaintiffs, his former clients;
- c. participating in joint representations adverse to his former clients' interests in the Xie Action, Buyers' Action, or the Wang Action;
- d. communicating with parties who are suing Plaintiffs in the Xie Action, the Buyers' Action, and the Wang Action about the Xie Action, the Buyers' Action, and the Wang Action; and
- e. disclosing Protected Information related to the representation of Beta Pharma, Scientific and/or Zhang, which shall be defined as and include:
  - i. information protected from disclosure by the attorney-client privilege;
  - ii. information protected from disclosure by NJ RPC 1.6;
  - iii. information protected from disclosure by the work product doctrine; and
  - iv. information protected from disclosure as business, proprietary, sensitive, or otherwise confidential information.

4. Within fourteen (14) days of the date of this Order, if he has not already done so, Defendant shall:

- a. terminate his attorney-client relationship with Guojian Xie in the Xie Action;

- b. terminate his attorney-client relationship with Shanshan Shao, Hongliang Chu, Qian Liu, Song Lu and Xinshan Kang in the Buyers' Action;
  - c. terminate any attorney-client relationship with Zhaoyin Wang in the Wang Action;
  - d. terminate his joint representation with Jonathan Katz, Esq., in the Xie Action and Buyers' Action;
  - e. terminate any joint representation with Jonathan Katz, Esq., in the Wang Action;
  - f. identify any and all parties he solicited to sue Plaintiffs;
  - g. identify Plaintiffs' Protected Information that Defendant disclosed to the individuals and entities identified on the list appended as Exhibit B (except that Defendant is not required to disclose any communications with his attorneys in this case); and
  - h. identify any information he disclosed regarding his representation of Beta Pharma and/or Scientific to Zhejiang Beta Pharma Co., Ltd. (including any of its employees, officers, or directors) to any lawyer (except if in connection with his claims against Plaintiffs), and/or any person or entity in connection with any claim or potential claim or complaint against Don Zhang, Beta Pharma, Inc., or Beta Pharma Scientific, Inc. (except that Defendant is not required to disclose any communications with his attorneys in this case).
5. Defendant may send the letters attached as Exhibits B and C.

6. Plaintiffs do not concede that the contents of the letters marked as Exhibits B and C are accurate. The Court has neither found nor ruled that the letters in Exhibits B and C are accurate.

7. Defendant does not concede that he has acted improperly or that he has disclosed confidential or protected information. Plaintiffs dispute this contention.

8. To the extent permitted by NJ RPC 1.6(d), Liu may disclose information otherwise protected from disclosure by this order to his attorneys in this action and/or in this action. Such disclosure shall not cause or work a waiver of the Plaintiffs' attorney client privilege, work product, or confidentiality under NJ RPC 1.6. Any such disclosure shall be governed by and subject to the Protective Order in place in this action, and shall be designated "ATTORNEY'S EYES ONLY" and subject to paragraph 18 thereunder.

SO ORDERED

  
Hon. Paul Innes, P.J.Ch.

We hereby consent to the form and entry of the within Order.

  
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Dated: April 13, 2015

Dated: April 10, 2015