2009 WL 3252986 (Cal.App. 1 Dist.) (Appellate Brief)
Court of Appeal, First District, Division 3, California.

Eric OBERLE, Shery Scott, Matthew Fremont, and Natan Benyonatan, Plaintiffs and Respondents,

v.

David A. TARAN, Defendant and Appellant.

No. A124575.
September 17, 2009.

San Mateo County Superior Court No. Civ 478796, Hon. Steven J. Dylina
(In Support of an Appeal from an Order Denying Appellant's Motion to Disqualify Opposing Counsel)

Appellant's Opening Brief

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1** ***INTRODUCTION

Defendant David A. Taran appeals the San Mateo Superior Court's February 2, 2009 order denying his motion to disqualify Plaintiffs' attorneys, Robert B. Hawk and Ryan D. Marsh of Hogan & Hartson, LLP. (AR 14, 385) At issue here is the sanctity of the attorney-client relationship, and the lawyer's duties of loyalty and confidentiality. Mr. Taran seeks to disqualify Plaintiffs' attorneys because they possess confidential information, or are presumed to possess confidential information, about his business structures at issue in this case because their former law firm provided substantial advice to him about how to set up and protect similar business structures. Now, they are representing Plaintiffs in an attack on his business structures and their own law firm's work product. (AR 23-39) Plaintiffs' counsel must be disqualified to protect Mr. Taran's confidential information. Failure to disqualify them in this case sends the simple and wrong message that it is appropriate for attorneys to sue their former clients and attack the very advice they gave.

STATEMENT OF FACTS

From 1998 to 2000, Mr. Taran retained the law firm of Heller Ehrman LLP to provide significant legal advice to him and ***2** companies he had formed for real estate investment purposes. (AR 73-86) Using the confidential information, Heller Ehrman provided Mr. Taran comprehensive review of his existing business structures and provided advice on creating complex investment structures for him, which he would not have been able to create without their advice. (AR 73-81) The new structures were designed to provide insulation from personal liability, asset protection, and tax advantages to him and investors. (AR 74-77)

Heller Ehrman had more than 35 lawyers and other time keepers working on the prior matters for Mr. Taran and charged him $650,000 for legal advice regarding the structure of a complex real estate investment portfolio, which also included the creation of separate LLCs to hold separate real properties within a portfolio so as to avoid any claim that they were a sham. (AR

76-77, 154) In particular, that work included advice about whether his existing business structure was vulnerable to alter ego or piercing-the-corporate-veil claims and how to structure his new real estate businesses to protect against such claims. (AR 73-74, 76-80, 84) Heller Ehrman's advice to Mr. Taran also included how to structure future real estate investment portfolios as well as making sure that the individual entities would not be consolidated. (AR 74-80) Heller Ehrman also provided advice about the risks and benefits of the ***3** business structures (including issues relevant to piercing the corporate veil) and it prepared a "non-consolidation" opinion for a lender. (AR 80, 108) As explained by Mr. Taran's expert, a non-consolidation opinion examines the question of whether the entities will be consolidated and treated as a single entity for bankruptcy purposes, which raises the same kind of questions as an alter ego claim. (AR 103-105)

In doing that work, Heller Ehrman necessarily obtained extensive confidential information relevant to structuring Mr. Taran's real estate businesses. (AR 106-109) Mr. Taran later used similar structures for subsequent real estate investments, including a • real estate investment structure to hold rental properties in the city of East Palo Alto. (AR 81-84) Mr. Taran's new real estate business, at issue here, uses a structure that is similar to structures about which Heller Ehrman previously advised him. (AR 81-83) His decisions both about the over-arching structure and the details of the arrangements between the various entities at issues in his case were based - in part - on the advice that was given to him by Heller Ehrman. (AR 81-83)

Furthermore, Mr. Taran understood that the work was being done on his behalf and shared his confidential information with the attorneys at Heller Ehrman. (AR 74-75) That confidential ***4** information included information about his personal financial circumstances and interests, as well as the way he structured and operated a real estate business. (AR 75-76) As Mr. Taran explained in the Superior Court:

In the course of handling those matters, I provided to our Heller Ehrman attorneys confidential documents and information regarding the structures of our existing real estate investment portfolio and the reasons for those structures. Heller Ehrman learned extensive information about the way that I operated those real estate investments, and my involvement in the structures. A major focus of my conversations with Heller Ehrman lawyers included my personal financial interests, my personal views about how best to operate a real estate investment business, and how to approach the organizational and structural aspects of that business. We discussed how to set up a business structure that was designed to advance my business interests. We discussed how to operate that business structure so as to protect my assets and minimize my liabilities, including the dangers of a third-party seeking to pierce the corporate veil. (AR 76)

I was shocked to see that Heller Ehrman was representing plaintiffs suing both the business entities that I am currently working with, and me personally. I was shocked to read allegations that the business structure that I presently use is a "sham," when Heller Ehrman had advised me as to the advantages and disadvantages of using a substantively identical structure. Because Heller Ehrman has access to the files and information from ***5** its prior representation of me, I believe that it will have a significant and unfair strategic advantage over attorneys who did not have such access. Because Heller Ehrman also has access to the individual attorneys who worked on my prior matters, it has an even greater advantage; they are aware of the confidential business strategies that I believe are appropriate for real estate investments, as well as other confidential information, and are the keepers of privileged work product. They are aware of what steps were taken in the past to put my interests into a structure that would legally protect me while advancing my legitimate business interests. Worse still, they are suing me personally on a business structure about which they had previously given me advice. Based on this confidential information that it has obtained from the firm's prior representation of me, if Heller Ehrman were allowed to continue to represent the plaintiffs in this lawsuit, I would be greatly disadvantaged in seeking to protect my interests. (AR 77)

As Plaintiffs admit, under East Palo Alto's rent control ordinance, an owner of less than five residential units is exempt from the rent control provisions that limit rent increases. (AR 24) The ordinance specifically provides that "Rental units which are owned by landlords who own a maximum of four rental units" are not subject to the maximum legal rent restrictions and it defines landlord for this purpose as "the owner of record". (AR 24) However, four tenants in buildings subject to the rent control exemption and owned by separate entities in the portfolio Mr. Taran assembled (using a ***6** structure similar to the Heller Ehrman structures) sued him alleging that the LLCs were actually his alter ego and should be ignored, otherwise it would

"permit an abuse of the limited liability company privilege...." (AR 27-31) Attorneys Hawk and Marsh, who worked for Heller Ehrman when this litigation began, are representing those Plaintiffs. (AR 27-31) The complaint in the underlying suit alleges that Mr. Taran created Page Mill Properties LLC and the other LLC Defendants as alter egos. (AR 27-31) Plaintiffs allege that they are residential tenants in East Palo Alto who live in properties owned by Defendants. (AR 25) They claim that the LLCs are a sham that they were set up by Mr. Taran as part of a conspiracy to evade the rent control ordinance:

Defendants have created numerous LLCs and a corresponding corporate structure, where each "address" LLC is set up as the putative "owner" of no more than four rental units in East Palo Alto. [] Defendants rely on the asserted separate corporate existence of these "address" LLCs to evade the RSO. (AR 175-176)

In fact, Plaintiffs' attorneys are advancing the same arguments regarding alter ego/piercing the corporate veil that their prior firm was hired by Mr. Taran to avoid. (AR 27-31) Plaintiffs claim that these LLCs "are in reality the alter egos of Page Mill Properties and Mr. Taran himself...." (AR 176) As a result, ***7** Plaintiffs argue that all of the LLCs should be treated as a single owner, i.e., multiple alter egos of Mr. Taran, and therefore own more than four units. (AR 30-31) Indeed, the complaint appears to allege the elements of a plain vanilla alter ego claim and asserts that Mr. Taran should be held personally liable for all of Plaintiffs' damages. (AR 30-31, 38) In short, Plaintiffs seek to consolidate the entities. If indeed, the structure is subject to attack, Heller Ehrman would know, and would know exactly how and why. (AR 76-77)

Mr. Taran denies the allegations of the complaint and asserts that he structured the real estate business (with multiple properties and multiple LLCs) for the same reasons that he structured his prior real estate investments -- reasons that he discussed with Heller Ehrman and about which that firm provided him legal advice based on his confidential information. (AR 76-83) Some of that advice was designed to protect him from precisely the kind of alter ego claims asserted in this action. (AR 73-80) Whether Plaintiffs' allegations are true or not, attorneys Hawk and Marsh have a special (and tremendously unfair) advantage in pursuing these claims because of Heller Ehrman's prior representation of Mr. Taran and their possession of his privileged and confidential information directly relevant to the issues in this case.

8** ***STATEMENT OF THE CASE

A. *Santa Clara County Proceedings*

Plaintiffs filed their complaint in Santa Clara County Superior Court on July 15, 2008. (AR 23) On August 1, 2008, certain Defendants filed a motion to change venue to San Mateo County on the grounds that the complaint was a local action and could only be heard where the land was situated. (AR 169-170) That motion was set for October 10, 2009. (AR 169) On September 26, 2008, Mr. Taran first moved to disqualify Heller Ehrman, and attorneys Hawk and Marsh. (AR 47) That motion was set to be heard on October 31, 2008. (AR 47-51) Certain Defendants also filed an anti-SLAPP motion pursuant to Code of Civil Procedure § 425.16 and Plaintiffs filed a motion for preliminary injunction. (AR 4, 8, 9, 17-18) On October 10, 2009, the Santa Clara County Superior Court granted the motion to change venue for the reasons Defendants advocated. (AR 169) As a result, it did not hear the SLAPP or preliminary injunction motions.

B. *San Mateo County Proceedings*

Plaintiffs did not quickly take action to move the case to San Mateo County and it was not actually transferred until December 1, 2008. (AR 22B) Before Plaintiffs took the necessary steps to ***9** actually transfer the case, Heller Ehrman dissolved and Plaintiffs' attorneys joined Hogan & Hartson LLP. (AR 205) Attorneys Hawk and Marsh, now at Hogan & Hartson, continued to represent Plaintiffs. (AR 320) Once the San Mateo Superior Court assumed jurisdiction, Mr. Taran renewed his motion and again sought to disqualify Plaintiffs' attorneys. (AR 205) He also updated it to seek disqualification of Hogan & Hartson as well. (AR 205-206) On December 8, 2008, Mr. Taran requested a scheduling order and the Court set his motion to disqualify for a hearing on February 2, 2009. (AR 18)

In support of the disqualification motion, Mr. Taran relied on his declaration providing the information stated above regarding the work done by Heller Ehrman, as well as the declaration from his expert, Joshua Stein, a partner at Latham & Watkins, who specializes in real estate transactions and financing. (AR 72-151) Mr. Stein's declaration established that in structuring a real estate investment, the attorney must obtain and consider many issues and cannot properly advise the client without obtaining significant amounts of confidential information related to the client's business interests, tax position, exit strategy, etc. (AR 106-109) As he explained:

***10** Ownership structuring can inject the attorney deep into the client's financial and tax affairs and business strategy, providing access to all kinds of confidential information. . . . Therefore, any attorney who assists in creating an ownership structure for any substantial investor will almost by definition learn a great deal of confidential information about that investor and its affairs." (AR 108-109)

In opposition to the motion, former Heller Ehrman partner Brian Smith submitted a declaration stating that he recalled Heller Ehrman's representation of Mr. Taran's various entities. (AR 360) Mr. Smith stated that he did not recall Heller Ehrman representing the entities or their principals in any residential projects or in relation to any rent control ordinances. (AR 360) Mr. Smith's declaration does not deny telling Mr. Taran that Heller Ehrman would represent him. (AR 360) His declaration does not deny having, or receiving, Mr. Taran's personal confidential information, nor did Plaintiffs submit declarations from the 34 other lawyers and time keepers who worked on Mr. Taran's matters. (AR 360) Plaintiffs did not deny Mr. Taran's description of Heller Ehrman's work, including giving advice about how to structure his existing and future real estate investments to protect against alter ego claims - their only denial concerned whether he was a client of Heller Ehrman. (AR 334-335) ***11** denying the motion. (AR 385) Mr. Taran filed a petition for writ of mandate on February 27, 2009 (*Taran v. Superior Court*, #A124156) from the Court's oral statement on the record at the hearing. This Court issued an order to show cause and stayed trial proceedings. It then denied the petition without explanation on April 16, 2009.

STATEMENT OF APPEALABILITY

"The denial of a motion to disqualify counsel can be challenged by a writ of mandamus or by filing an appeal." (*Sharp v. Next Entertainment. Inc.* (2008) 163 Cal.App.4th 410, 424, fn. 7, citing *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216-217) Furthermore, "pretrial denial of a writ petition does not establish law of the case unless the denial is accompanied by a written opinion following the issuance of an alternative writ. (*Citizens for Open Access to Sand and Tide. Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1064, citing *Kowis v. Howard* (1992) 3 Cal.4th 888, 891) "Thus, [a] prior summary denial of [Appellants'] writ petition has no preclusive effect upon consideration of the issue on appeal from the ruling...." (*Citizens for Open Access*, supra, 60 Cal.App.4th at 1064) Mr. Taran filed his notice of appeal on February 27, 2009 (AR xx) and designation of the record on March 9, 2009. (AR xx) Thus, this appeal is timely. (Rule of Court 8.104(a))

***12** *CONTENTION ON APPEAL*

The Superior Court committed reversible error by failing to disqualify attorneys Hawk and Marsh, and the Hogan & Hartson law firm.

STANDARD OF REVIEW

The general standard of review of an order denying a motion to disqualify opposing counsel is abuse of discretion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159) However, in this appeal, the relevant facts are undisputed because there is no dispute about the scope of the work done by Heller Ehrman in the first matter and there is no dispute about the relevant issues in this case. (*See Harris v. Superior Court* (1979) 97 Cal.App.3d 488, 493 - in disqualification writ, finding abuse of discretion for granting motion where uncontroverted declaration by petitioners established that "great hardship" would ensue if attorney disqualified); *Beck v. Reinholtz* (1956) 138 Cal.App.2d 719,724 - on summary judgment motion, uncontroverted facts alleged in the party's

affidavits must be accepted as true in trial court and on appeal) Thus, the only issue presented by this writ is whether the two matters are sufficiently related to satisfy the substantial relationship test.

In that situation:

***13** "Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied." As the historical facts are undisputed, the question is whether, given those historical facts, McKesson has waived the attorney-client privilege and attorney work product protection. That inquiry "requires a critical consideration, in a factual context, of legal principles and their underlying values." Therefore, the question is predominately legal, and we independently review the trial court's decision. (*McKesson HBOC. Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1235-1236, citations omitted)

Thus, this Court reviews the Superior Court's order de novo, even though the review is done under the rubric of abuse of discretion: "we are concerned with the legal significance of the undisputed facts in the record. We therefore review the trial court's exercise of its discretion as a question of law in light of the pertinent legal principles." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems. Inc.* (1999) 20 Cal.4th 1135, 1144 - applying de novo standard on review of disqualification order because facts were not in dispute)

14** ***ARGUMENT

I. *DISQUALIFICATION OF OPPOSING COUNSEL PRESENTS SIGNIFICANT COMPETING INTERESTS. BUT DOUBTS ARE RESOLVED IN FAVOR OF THE MOVING PARTY ONCE THE ATTORNEY-CLIENT RELATIONSHIP IS ESTABLISHED*

The lawyer-client relationship expects that, with narrow exceptions not applicable here, the lawyer will keep the clients' secrets inviolate. (*Fox Searchlight Pictures. Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 309) A client cannot trust his lawyer with confidential information if he knows that the lawyer can turn around and sue about that advice later. That is not allowed under California law; thus, the Supreme Court has held that:

[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship. (*Wutchumma Water Co. v. Baily* (1932) 216 Cal. 564, 573-574; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156 - quoting same and emphasizing that the "prohibition is in the disjunctive")

One highly respected treatise recognizes that this is the majority rule in the United States. (Hazard, Hodes & Jarvis, The Law of ***15** Lawyering § 13.6 at 13-18 (2005-1 Supp.) - "Most authorities agree, however, that two matters are also substantially related if a lawyer performs work for a client and later attacks that work on behalf of a new client, *even in the absence of risk of a breach of confidentiality*.")

Having received that confidential information, lawyers cannot take actions inconsistent with that confidential information. The lawyer must not sue the former client and the client must choose a conflict-free lawyer. The California Supreme Court explained why:

A trial court's authority to disqualify an attorney derives from the power to control the judicial proceedings before it. The right to ones' chosen counsel must yield to ethical considerations, and one of those paramount considerations is the attorney's duty to maintain the confidentiality of its present and past clients. (*Speedee Oil*, supra, 20 Cal.4th at 1146)

The duty to maintain client confidentiality does not diminish with the passage of time. (*See Speedee Oil*, supra, 20 Cal.4th at 1147 - duty continues after the termination of the relationship) Thus, once a substantial relationship is shown between the current matter and the prior representation, "the length of time since the former representation is irrelevant." (Vapnek, Tuft, Peck & Wiener, Professional Responsibility (The Rutter Group) § 4:189.2 at ***16** 4-60.9 - citing *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 607 - granting motion to disqualify even though prior work was completed 12 years before current matter began)

Ignoring these authorities, Plaintiffs argue that the alter ego reasons for Heller Ehrman's former advice are different than the alter ego reasons for this case; therefore, the Courts should ignore the near identity of the issues. (AR 335) In fact, the complaint appears to allege the elements of a plain vanilla alter ego claim and asserts that Mr. Taran should be held personally liable for all of Plaintiffs' damages. (AR 30-31, 38) However, even if Plaintiffs could re-write (and limit) their complaint, their claim rests on the same legal and factual issues as any other alter ego claim: does this real estate investment structure protect against alter ego claims so that the separateness of the legal entities will be respected? Whether that claim results in an owner's liability for claims against the entities or is the basis for creating liability is irrelevant for conflict purposes. In deciding whether there is a conflict, the critical question is whether the matters are substantially related, i.e., whether the issues in the two matters are similar - not whether they are identical.

The Superior Court found that it was clear that Mr. ***17** Taran had either been a client or that the Heller Ehrman lawyers obtained his personal confidential information and that the legal standard to evaluate disqualification (the substantial relationship test) was not relaxed simply because Plaintiffs' attorneys had left Heller Ehrman and joined Hogan & Hartson months after this suit was filed. (RT 6:14-17) Nevertheless, the Superior Court found that it was not clear that the past representation and the current matter were substantially related. (RT 35-36) The Court candidly admitted that it was "an incredibly close issue". (RT 35:2)

The Court erred in that determination because the relationship between the past and present representations need not be identical, but only related in a substantive way. (*Meza v. H. Muehlstein & Co.* (2009) 176 Cal.App.4th 969) In the first instance, the Heller Ehrman lawyers advised Mr. Taran regarding establishing a certain structure, one specific purpose of which was to resist any piercing of the corporate veil, and in the second instance, the Heller Ehrman lawyers filed this action alleging that the structure (based on Heller Ehrman's advice) is a sham and the corporate veil should be pierced. (AR 27-31, 73-86) The same kind of structure that the Heller Ehrman lawyers built in the first instance, they seek to tear down in the second -- claiming it is a sham and unlawful. (AR 27-31)

***18** In response, Plaintiffs' attorneys argued that an attorney may first advise a party to take legal steps -- like creating LLCs or forming a corporation - to protect against personal liability and then sue that former client alleging that the protection did not attach to a subsequent entity based in part on the original advice. (AR 335-337) That argument flies in the face of every attorney's duties of loyalty and confidentiality, and contradicts the rules protecting clients from conflicts of interest. A client should be able to rely on the fact that his attorney will not turn around and sue him based on the advice previously given to the client. To determine here that the matters are not substantially related would place too great a burden on the lay person to protect against providing confidential information that may later be challenged by the same attorney to whom it is provided -- a burden that should fall on the legal profession.

The lawyer-client relationship demands more from a lawyer. Clients cannot trust their lawyers with confidential information if they know that the lawyer can turn around and sue about advice based on that confidential information later. This is an unjust result. Lawyers are in the business of helping their clients. They cannot help their clients unless they can obtain confidential information. Having received that confidential information, the ***19** attorney cannot take action adverse to the client especially if the action involves similar confidential information. Disqualification in this case would not impinge on a lawyer's ability to earn a living nor would it impair the Plaintiffs' right to quality counsel. Thus, lawyers should not be able to sue their former clients for actions that were based in part on advice from those lawyers.

II. *BASED ON THE UNDISPUTED EVIDENCE AS FOUND BY THE SUPERIOR COURT. IT COMMITTED REVERSIBLE ERROR AS A MATTER OF LAW IN DENYING THE MOTION*

A. *The Test Is Whether the Two Matters are Sufficiently Similar to give Plaintiffs an Advantage in Litigating Against Mr. Taran*

The Superior Court determined that the substantial relationship test is the applicable standard. (RT 34) The Court was correct because this case presents the issue of successive representation. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283) The Court also found that Mr. Taran was either a former client or had provided confidential information to Heller Ehrman, but in what the Court described as a "an incredibly close issue" (RT 36:4), found that the two matters were not substantially related.[1] (RT 35-36)

***20** "Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related,... the attorney [must] be disqualified from the second representation. [Citation omitted.]" (*SpeeDee Oil*, supra, 20 Cal.4th at 1146)

A "substantial relationship" exists whenever the subject matter of the prior representation and the current representations are linked in some rational manner. (*Flatt*, supra, 9 Cal.4th at 283; *City & County of S.F. v. Cobra Solutions. Inc.* (2003) 38 Cal.4th 839, 847) The "substantial relationship" test considers fact similarity; similarity of issues; nature and extent of attorney involvement in the case; time spent; and "possible exposure" to the former client's policy and strategy. (*Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1455) The substantial relationship inquiry focuses "upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation." (

***21** *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 681)

The substantial relationship test does require some rational connection between the two matters, but it does not require identical issues or the same entities. (Vapnek, Tuft, Peck & Wiener, supra, § 4:189a at 4-60.8 - courts consider similarities between the factual situations, similarity between legal issues, and the nature and extent of attorneys' involvement) There is a substantial relationship when the two matters involve factual similarities, and legal similarities, and when the amount of time spent on the first matter, and the "possible exposure" to the client's strategy show such a relationship. (*Ahmanson*, supra, 229 Cal.App.4th at 1455) The principal focus is on the practical consequences of the attorney's relationship -- if it may give the attorney a practical advantage, then the attorney should be disqualified. (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 253) Thus, attorneys who had formerly given coverage opinions or defended insurance companies in bad faith cases were disqualified from representing Plaintiffs suing their former clients in bad faith cases that were unrelated (except by their general subject matter). (*Brand*, supra, 124 Cal.App.4th at 605-607; *Farris*, supra, 119 Cal.App.4th 671; *Jessen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698, 712-714)

***22** It does not matter that the attorney represented a different entity than the one involved in the current litigation. For example, in *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, attorney Wideman met with client Knight to negotiate setting up a business between Knight and third party Sponder. The deal fell through, and Knight never set up a business with Sponder. Later, Knight and another third party, the Fergusons, set up a business without being represented by Wideman or any other attorney. Knight and the Fergusons had a falling out, litigation ensued, and Wideman became attorney for the Fergusons. Even though Wideman did not represent Knight regarding the formation of the business with the Fergusons, the Court found that the litigation was substantially related to the work that Wideman had done for Knight's aborted deal with Sponder the first would-be partner, and ordered Wideman's disqualification. The Court held that the substantial relationship test is "broad and not limited to the 'strict facts, claims, and issues involved in a particular action' [and exists] whenever the 'subjects' of the prior and current representations are linked in some rational manner." (*Knight,* supra, 149 Cal.App.4th at 1213)

Similarly, in *Tri-Growth Center City, Ltd. v. Sildorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, the ***23** Court held that a lawyer who had represented a number of entities created by real estate developers breached his fiduciary duty by representing a party adverse to a different entity later created by the principals of the lawyers' former clients. The Court stated:

an attorney's fiduciary duty can extend to former clients, to conduct not strictly pertaining to representation of a client, and to conduct with a nonclient which affects the relationship with a client. For example, a breach can arise when an attorney gains an unfair advantage over a former client by using confidential information acquired from the relationship.... (*Id*. at 1151)

These cases confirm that identical subject matter need not be involved in the prior and current representations to require disqualification. Instead, as here, it is sufficient if the former representation provided the attorneys with confidential information that is relevant to the current representation.

B. *Mr. Taran Satisfied The Test Because The Two Matters Are Rationally Linked: The Same Issues Were Considered In Creating A Business Structure And In Attacking A Similar Structure. Which Gives Plaintiffs An Advantage*

In this case, Heller Ehrman advised Mr. Taran on the business structure for his real estate businesses and actually prepared the documents to set up additional entities for his future real estate ***24** businesses. (AR 73-81) Heller Ehrman's representation of Mr. Taran and the representation of Plaintiffs both involve Mr. Taran's use of a similar business structure for owning and managing real property. (AR 27-31, 73-81) There was heavy attorney involvement in the past relationship. (AR 73-81, 154) At least 35 attorneys and other hourly time keepers from Heller Ehrman advised Mr. Taran in the past. (AR 154) That work required the attorneys to delve deeply into Mr. Taran's confidential information concerning his businesses, finances, taxes, etc. (AR 106-109) The very nature of the relationship exposed Heller Ehrman to Mr. Taran's policies and strategies with specific attention to setting up complex business structures. (AR 73-81) Those very policies and strategies are being challenged in this lawsuit. (AR 27-31)

As shown in the discussion at pages 1-7 above, the facts are similar (i.e., separate LLCs used as part of business structure to own real estate investments); the legal issues are similar (previously, the attorneys were creating separate entities, which includes protecting against alter ego claims, and now the attorneys are making alter ego claims); the nature and extent of the attorney involvement was enormous (delving into the details of Mr. Taran's business operations and costing more than $650,000); and there was ***25** significant potential for exposure to the opposing party's policy and strategy (Heller Ehrman learned all about Mr. Taran's business structure, the way that he operates a real estate business, the way he acquires and sells real estate, etc). The two representations are rationally related, in that both pertain to the business structure that Mr. Taran uses to own and manage real property. Under the substantial relationship test, Plaintiffs' attorneys must be disqualified.

Plaintiffs also argue that this case is not about the alter ego doctrine because they seek to pierce the corporate veil to establish liability under a rent control ordinance, rather than to obtain relief for creditors. (AR 335-336) However, the substantial relationship test does not require identical issues, it only requires similar issues. (*Ahmanson*, supra, 229 Cal.App.3d at 1455) Here, the similar issue is whether the corporate form should be disregarded. That determination hinges on the same set of facts whether it is used to establish a rent control violation or to recover money for a creditor.

C. Farris. Brand. And Jessen *Are Particularly Relevant*

1. Farris

In *Farris*, the attorney advised and assisted an insurance ***26** company in making coverage decisions. In doing that kind of legal work, the attorney is required to advise the client about the issues relevant to the insurance company's decision: "whether the insurer gave sufficient consideration to the interests and expectations of the insured, whether the insurer reasonably construed and applied the relevant policy language, and whether the insurer's construction and application of the relevant policy language was consistent with its treatment of other similarly situated insureds." (*Farris*, supra, 119 Cal.App.4th at 684) Having been coverage counsel for the insurance company, the lawyer was disqualified from representing Plaintiffs suing that insurance company for bad faith in cases unrelated to the ones he had previously worked on -- except by a common subject matter. (*Farris*, supra, 119 Cal.App. 4th at 684-684) As the Court explained, "[c]overage disputes are substantially related to bad faith actions

for the purpose of attorney disqualification because they both turn on the same issue -- whether or not there is coverage under the terms of the policy." (*Farris*, supra, 119 Cal.App.4th at 684)

This case presents the same paradigm: Heller Ehrman provided advice about the efficacy of the existing business structures and it established new business structures -- all similar to the structure under attack in this case. One of the key parts of their work ***27** was to advise Mr. Taran about whether the structures were vulnerable to an alter ego challenge and how to structure future real estate investments to provide protection from alter ego claims. (AR 78) Just as a coverage attorney must consider the same issues that will subsequently be relevant to a bad faith action, a corporate attorney must consider the same issues that will subsequently be relevant to an alter ego case. (AR 106-109)

2. Brand

In *Brand*, the attorney had represented the insurance company in 14 cases where he had either defended bad faith cases or given coverage opinions -- and all of those matters had been completed 12 years before he began the new matter against his former client. (*Brand*, supra, 124 Cal.App.4th at 381-382) The Superior Court denied the disqualification motion. (*Id.*) The Court of Appeal reversed and held that the Superior Court had abused its discretion because of the common subject matter of the cases; the Court rejected the argument that "the passage of time ... was sufficient to overcome the presumption" that the attorney had acquired confidential information in the prior representation. (*Id.* at 605-607 and n. 5)

***28 3. Jessen**

Similarly, in *Jessen*, the Court of Appeal reversed a Superior Court order denying a motion to disqualify. The attorney had worked for an insurance company on coverage opinions and bad faith actions concerning different insureds. Nevertheless, the Court of Appeal reversed the Superior Court's determination that the matters were not substantially related because the Superior Court mistakenly required the former client to show too close a connection between the two matters: "Our concern is that limiting the comparison of the two representations to their precise legal and factual issues might operate unrealistically to the detriment of the first client." (*Jessen*, supra, 111 Cal.App.4th at 712) The Court concluded that the test required a "broader definition than the discrete legal and factual issues involved in the compared representations." (*Id.* at 712)

The California Supreme Court has emphasized in *Flatt* and *Cobra Solutions* that there only needs to be a rational link between the two representations to warrant disqualification. Here the link is stronger than "rational" - the issues are the same. The structure attacked as a sham by Heller Ehrman in this case is organized in a similar manner as the structures involved in Heller's ***29** prior representation and was designed in part based on Heller Ehrman's advice to Mr. Taran about how to structure real estate investments in on-going businesses. (AR 73-81) The issues considered when giving advice to a client creating an LLC to avoid future piercing of the corporate veil are similar to the issues that must be considered when litigating a claim that seeks to pierce the corporate veil. (AR 27-31, 73-86) Following corporate formalities, not commingling funds, etc. -- all those issues must be considered in both contexts. In fact, the Superior Court's recent decision allowing Plaintiffs to take discovery regarding the alter ego issues makes it clear that the factual issues relevant to this case have little or nothing to do with rent control and everything to do with the factual issues raised whenever a plaintiff seeks to pierce the corporate veil. (AR 192-198, 379-380) Of course, those are precisely the same issues that must be considered when an attorney provides advice regarding the legal structure for a business.

CONCLUSION

After Heller Ehrman provided advice about the structure of Mr. Taran's prior real estate businesses and created a similar business structure as part of its work in advising him about future purchases of additional real estate, Mr. Taran used the same ***30** kind of structure to set up the new LLCs that are involved in this case. If left in this case, attorneys Hawk and Marsh would be arguing that the business structure about which their law firm had previously advised Mr. Taran and that structures similar to

the ones that Heller Ehrman actually created for Mr. Taran, are illegal. Thus, Heller Ehrman accepted employment adverse to its former client, Mr. Taran, in violation of Rule of Professional Conduct 3-310. After leaving Heller Ehrman, attorneys Hawk and Marsh continued to work on the matter and must be disqualified if their present employment is adverse to their former client, if the former employment is the sort in which confidential information is typically passed between attorney and client, and if the two matters are substantially related. All of these factors exist here. Therefore, this Court should reverse the Superior Court's denial of Mr. Taran's motion to disqualify Plaintiffs' counsel.

Footnotes

1 The Superior Court was inclined to allow discovery which would have been relevant to the modified substantial relationship test. Mr. Taran did not pursue discovery after the court made clear that it was applying the substantial relationship test because discovery would not have been relevant.

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