

STATE OF MAINE  
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No.: BCD-CV-12-28

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JAMES C. EBBERT, Court-appointed  
Receiver for Associated Grocers of Maine,  
Inc.,  
  
Plaintiff,  
  
v.  
  
JOSEPH SLEEPER & SONS, INC.,  
d/b/a TRADER JOE'S OUTPOST, and  
NELSON SLEEPER  
  
Defendants

**DECISION AND ORDER**  
**(Motion to Disqualify)**

Plaintiff James C. Ebbert, the court-appointed Receiver for the Associated Grocers of Maine, Inc. (AGME),<sup>1</sup> moves to disqualify the law firm of Marcus, Clegg, & Mistretta, P.A. (MCM) from serving as counsel to Defendants Joseph Sleeper & Sons, Inc., Nelson Sleeper, and any other similarly situated former AGME member.<sup>2</sup>

Before the Court may grant a motion to disqualify an entire law firm, the moving party must satisfy three criteria. First, the moving party “has the burden of demonstrating more than mere speculation that an ethics violation has occurred”; “she must establish in the record that continued representation of the nonmoving party by that party’s chosen attorney [or firm] results in an affirmative violation of a particular ethical rule.” *Morin v. Me. Educ. Ass’n*, 2010 ME 36,

<sup>1</sup> Ebbert was appointed receiver of AGME by consent, see *Savings Bank of Me. v. Assoc. Grocers of Me., Inc.*, KENSC-CV-11-92 (Me. Super. Ct., Ken. Cty., Apr. 27, 2011), prior to that case’s transfer to the Business and Consumer Court on October 5, 2011, see *Savings Bank of Me. v. Assoc. Grocers of Me., Inc.*, BCD-CV-11-36 (Me. Super. Ct., Cum. Cty., Oct. 5, 2011).

<sup>2</sup> On August 10, 2012, the Court consolidated this case with 29 other cases brought by the Receiver. See *Ebbert v. Joseph Sleeper & Sons, Inc.*, BCD-CV-12-28 (Me. Super. Ct., Cum. Cty., Aug. 10, 2012). Many of the defendants in these matters have entered into a joint defense agreement.

¶ 9, 993 A.2d 1097. Second, the ethical violation must be one that would disqualify the entire firm. *See id;* accord M.R. Prof. Conduct 1.10(a) (articulating the imputation of conflicts among lawyers currently associated in a firm). Finally, the moving party must show “that continued representation by [the firm] would result in actual prejudice to the party seeking that [firm]’s disqualification” by pointing to “specific, identifiable harm she will suffer in the litigation by opposing counsel’s continued representation.” *Morin*, 2010 ME 36, ¶ 10, 993 A.2d 1097 (citing *Adam v. Macdonald Page & Co.*, 644 A.2d 461 (Me. 1994)).

The Receiver asserts that MCM’s continued representation of Defendants and other similarly situated defendants represents a conflict as contemplated by M.R. Prof. Conduct 1.9(a).<sup>3</sup> A conflict for one member of a firm may be imputed to lawyers associated in a firm if the representation of a client by “any one of them practicing alone would be prohibited . . . by Rules 1.7 or 1.9.” M.R. Prof. Conduct 1.10(a).<sup>4</sup> M.R. Prof. Conduct 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

For purposes of the rule, matters are “substantially related . . . if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information as

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<sup>3</sup> The Court recognizes that when assessing a motion to disqualify, the Court must be “mindful that motions for disqualification are ‘capable of being abused for tactical purposes, and . . . [must be] justifiably wary of this type of strategic maneuvering.’ Disqualification could provide the moving party with ‘a brief, tactical advantage, a result that would debase the professional conduct and subvert, not advance, the public interest they serve.’” *Morin*, 2010 ME 36, ¶ 8, 993 A.2d 1093 (citing, *Casco Bank v. JBI Assocs.*, 667 A.2d 856 (Me. 1995)). In this case, the Court is convinced that the Receiver filed the motion due to a genuine concern about the potential conflict resulting from MCM’s prior representation of AGME. The Court also believes that all parties have approached the issue professionally and appropriately. The parties have a legitimate dispute as to whether MCM’s prior representation of AGME presents a conflict that prohibits MCM from representing parties adverse to the court-appointed Receiver for AGME in this action. Before the filing of the motion, counsel for the parties discussed the issue among themselves, raised the issue with the Court, and agreed that the issue should be presented to the Court for resolution. The Court commends counsel for all parties for addressing the issue in a professional and respectful manner.

<sup>4</sup> No party asserts that the exception in M.R. Prof. Conduct 1.10(a) regarding a personal interest of the lawyer applies in this case.

would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." M.R. Prof. Cond. 1.9(d).

Several facts are not contested. First, MCM now represents Defendants and other similarly situated defendants that are being sued by the Receiver. Second, neither the Receiver nor any officer of AGME has given informed consent in writing to MCM's representation of the Defendants and other similarly situated defendants. Finally, the parties do not dispute that MCM, primarily Attorney George Marcus, served as corporate counsel to AGME between 1999 and 2006. (Marcus Aff. ¶ 4.)

The parties disagree as to the significance of MCM's prior representation of AGME. More specifically, Defendants maintain that MCM is not currently adverse to a former client because the Receiver, and not AGME, is the plaintiff in the pending litigation. Because the Receiver is not MCM's former client, Defendants contend that MCM's representation of the Defendants in this matter cannot constitute a violation of Rule 1.9, which prohibits a lawyer from representing, without written consent, a person whose interests are adverse to the former client in a substantially related matter. The parties also dispute whether the two representations are substantially related and whether the interests of the respective clients are materially adverse.

As noted above, MCM represented AGME from 1999 until 2006. (Marcus Aff. ¶ 4.) During this period, Attorney Marcus advised AGME on "the collection of shareholder capital deposits from incoming new shareholders of AGME[;] the repayment of capital deposits to withdrawing shareholders[;] and the use of such capital deposits as security for unpaid invoices when an existing shareholder failed to pay invoices owed to AGME." (Marcus Aff. ¶ 5.) In 2005, the Securities and Exchange Commission contacted AGME regarding compliance related to federal securities law with respect to excess capital deposits by AGME members. (M.

Disqualify 4.) At a directors' meeting on April 15, 2005, Attorney Marcus advised the Board members that "as long as [AGME] accepts 'excess deposits,' it must comply with the SEC reporting requirements" and presented several options to the Board members. (Pl.'s Exh. A at 3.) Based on the record before the Court, MCM did not advise AGME with respect to the loan from the Bank of Maine, or on the intricacies of the Bank of Maine as a secured lender. (Marcus Aff. ¶¶ 6-7.)

In this case, the Court has previously stated that the "primary issues in this case, and in all of the similar cases filed by the Receiver against former AGME members, are the nature of the relationship between AGME and its members, and whether the amount owed can be reduced by the value of the members' capital accounts." The Receiver characterizes the capital accounts as equity, i.e. capital contributions to AGME; Defendants and other former AGME members characterize the capital accounts as security for amounts due on a member's account. Insofar as MCM's prior representation of AGME included advice regarding the nature of the capital accounts and the relationship of the capital accounts to the balance of the members' accounts for goods purchased, MCM's legal representation of AGME involved matters that are substantially similar to the issues presented in this litigation. Given the relationship of the prior representation to the issues in this litigation, "there 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." M.R. Prof. Cond. 1.9(d). Thus, the two matters are substantially related.

With respect to whether MCM's clients are now materially adverse to AGME, the Receiver, on behalf of AGME, is suing the Defendants and other similarly situated former AGME members, i.e., MCM's clients, for amounts owed for groceries received by those

members. Provided the Receiver qualifies as a former client, the interests of the former client are plainly materially adverse to the interests of the Defendants.<sup>5</sup>

The pertinent question is, therefore, whether the Receiver, acting on behalf of AGME, can assert the rights of AGME as a former client of MCM. Resolution of this issue is principally dependent upon the scope of the Receiver's authority, as defined in the Receivership order. Defendants argue that AGME is a separate entity and that the Receiver has no authority to assert a position on behalf of AGME with respect to disqualification because the Receiver does not have the authority to exercise the full corporate rights of AGME. Both parties rely in part on *Jo Ann Howard & Associates, P.C. v. Cassity*, 2012 U.S. Dist. LEXIS 52178 (E.D. Mo. April 13, 2012), which the Court finds instructive, but not controlling. In *Jo Ann Howard*, the court, upon motion of the receiver of three companies appointed pursuant to the Texas insurance code, disqualified the attorneys for parties against whom the receiver had asserted claims for breach of fiduciary duty and legal malpractice based on those attorneys' prior representation of the three receivership companies. *Id.* at \*12-\*20. The court analogized the receiver's position to that of a bankruptcy trustee, but also specifically relied upon the broad authority granted the receiver by the Texas Insurer Receivership Act to "manage the . . . business operations[] and legal claims of entities placed under receivership." *Id.* at \*16. The import of the court's reasoning to the present matter is limited given that the receivership order in this case is not nearly as broad as the powers of the receiver in *Jo Ann Howard*.

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<sup>5</sup> Defendants argue in part that even if the Receiver qualifies as a former client the interests of the Defendants are not adverse to AGME because AGME will not realize any financial benefit in the event that the Receiver recovers a judgment against Defendants. In support of this argument, Defendants note that any funds that the Receiver recovers will likely be paid to the Bank. The likelihood that a party will prevail is not, however, material to the Court's consideration of whether a conflict exists. In other words, the Law Court has not identified a party's likelihood of success on the merits as an element for the Court's consideration when assessing whether a conflict of interest exists.

Nevertheless, the order appointing the Receiver confers broad powers upon the Receiver and could empower the Receiver to move to disqualify MCM on AGME's behalf in certain instances. Among other things, the Receivership order authorizes and empowers the Receiver:

a) To manage, protect and preserve the Collateral[,], . . . to wind up the business of AGME, and to collect all proceeds of the Collateral, and to collect all rents, income, revenue and profits of or relating to the shutdown, wind up, and/or liquidation of the business and assets of AGME, and to apply the same to the payment of all expenses and other charges of such receivership . . .

....

d) To collect the rents, income, revenue, profits, accounts receivable, proceeds, and all other obligations owing to AGME, to bring legal action, if necessary, in order to collect the same . . .

e) To . . . do all things AGME could or would do in the course of shutting down, winding up, and/or liquidating the business and assets of AGME;

....

s) To do anything the Receiver reasonably deems necessary to perform the duties set forth above.

*Savings Bank of Me. v. Assoc. Grocers of Me., Inc.*, KENSC-CV-11-92, at 2-4, 8 (Me. Super. Ct., Ken. Cty., June 15, 2011) (hereinafter "Rcvr. Order"). In addition, the Receiver may negotiate short-term contracts, renegotiate or terminate contracts, hire and fire employees, and exercise the rights of AGME under permits and licenses in furtherance of shutting down and winding up the business. (Rcvr. Order 4-5.)

The Receiver, pursuant to his court-ordered authority and his efforts to wind up the business of AGME, initiated the present litigation to collect money due from the Defendants for groceries accepted but for which the Defendants have not paid. Pursuant to the order, the Receiver may "do all things AGME could or would do in the course of shutting down, winding up, and or liquidating the business and assets of AGME" and to do "anything the Receiver

reasonably deems necessary to perform the duties set forth above.” (Revr. Order 4, 8.) Consequently, the Receiver has the authority to act in all of the ways in which AGME could act legally to collect the moneys owed. This conclusion is logical given that the Receiver can only assert AGME’s claims, and, as evidenced by this case, is subject to challenges to his collection efforts based on AGME’s conduct and practices.<sup>6</sup> Because the disqualification issue arose in the context of litigation to collect moneys owed in furtherance of winding down the business, the Receiver may move to disqualify an attorney or firm consistent with the Receiver’s authority to wind down AGME and collect outstanding moneys owed. To rule otherwise could potentially materially limit the Receiver’s ability to satisfy his responsibility to wind down and conclude the business of AGME. Assuring that parties against whom AGME has a claim do not unfairly benefit from an attorney’s prior representation of AGME is among the legal rights that the Receiver can and should assert. Accordingly, the Court concludes that MCM’s continued representation of Defendants and other similarly situated former AGME members presents a conflict in accordance with M.R. Prof. Conduct 1.9(a), which conflict would be imputed to all members of MCM.

The final inquiry is whether the conflict of interest prejudices the Receiver, as supported by “specific, identifiable harm” that the Receiver “will suffer in the litigation by [MCM]’s continued representation.” *Morin*, 2010 ME 36, ¶ 10, 993 A.2d 1097. The Receiver asserts that MCM is violating M.R. Civ. P 1.9(c) because it

appears to be using confidences gained from its former representation of AGME to disadvantage AGME. Specifically, it was not until Defendants engaged MCM that the internal 2005 deliberations of AGME’s board of directors began to be featured prominently in Court filings by Defendants and other members of the AGME Customer Group. . . . [T]he Receiver believes that MCM is using its

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<sup>6</sup> As evidence of this fact, by order of even date, the Court denied the Receiver’s motion for summary judgment in part based upon disputed factual issues related to AGME’s practices and communications with its members.

confidential knowledge, gained through the former representation, to work against AGME's interests in collecting its accounts receivable.

(M. Disqualify 13.) Defendants respond that 1) the 2005 Board documents are not confidential, but were produced by the Receiver in discovery; and 2) the Receiver has not pointed to any other specific identifiable harm suffered by the Receiver on behalf of AGME. The Receiver counters that while the board meeting minutes were produced in discovery, Attorney Marcus as corporate counsel, would have also been privy to discussions in executive sessions with his own recollection of those events. *See In re N. Am. Deed Co.*, 334 B.R. 443, 448-49 (D. Nev. 2005) ("The scope of all these communications, however, was such that in any normal attorney-client relationship, there would have been significant confidential communications exchanged before the communications were released publicly."). Because Defendants challenge the Receiver's ability to collect the accounts receivable based partly on the acts, communications and practices of AGME, some of which acts, communications and practices occurred during MCM's prior representation of AGME, the Board's discussions regarding the members' accounts, some of which discussions involved MCM, are and will likely continue to be a significant factor in the case. While the substance of some of the discussions is available through other means (i.e., the minutes of Board meetings), one can reasonably conclude that the minutes do not reflect the full substance of the communications between MCM and AGME on all relevant topics.

The Court concludes, therefore, that because the nature of the AGME member accounts is a central issue in the case, and because MCM, as part of its prior representation of AGME, advised AGME about the nature of the member accounts, and because without MCM's prior representation of AGME, Defendants would not be privy to all of the pertinent communications between MCM and AGME, Plaintiff has demonstrated the requisite actual prejudice.

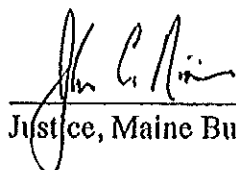


In summary, MCM's prior representation of AGME is substantially related to the present litigation; the interests of AGME are materially adverse to the interests of the Defendants; and the Receiver has the authority to assert AGME's rights as a former client of MCM in litigation in furtherance of the Receiver's obligation to wind down AGME;<sup>7</sup> and that the Receiver has demonstrated the necessary prejudice resulting from the prior representation. The Court, therefore, determines that MCM's continued representation of Defendants and other similarly situated former AGME members represents a conflict as described in M.R. Prof. Conduct 1.9(a), which conflict is imputed to all of MCM. *See* M.R. Prof. Conduct 1.10.

Based on the foregoing analysis, therefore, the Court GRANTS the Receiver's Motion to Disqualify. The law firm of Marcus, Clegg, & Mistretta shall not continue to represent Defendants and any other similarly situated defendants without written consent of the Receiver acting on behalf of AGME.

Pursuant to M.R. Civ. P. 79(a), the clerk shall incorporate this Decision and Order into the docket by reference.

Dated: 2/15/13

  
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Justice, Maine Business & Consumer Court

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<sup>7</sup> Alternatively, the Court concludes that the Receiver's attorneys may move to disqualify MCM pursuant to M.R. Prof. Conduct 1.9(c) and 8.3. *Cf. Kevlik v. Goldstein*, 724 F.2d 844, 847-48 (1st Cir. 1984); *In re Compact Disc Minimum Advertised Price Antitrust Litg.*, 2001 U.S. Dist. LEXIS 25818, \*6-\*7 (D. Me. Mar. 12, 2001) (Hornby, J.).