

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MGM RESORTS INTERNATIONAL,
MGM GRAND RESORT DETROIT, LLC, and
MGM DETROIT HOLDINGS, LLC,

Case No. 23-008196-CB
Hon. Brian R. Sullivan

Plaintiffs,

v.

TAFT STETTINIUS & HOLLISTER LLP,

Defendant,

and

PARTNERS DETROIT, LLC,

Intervener-Defendant.

/

**ORDER DENYING MGM RESORTS INTERNATIONAL
MGM GRAND RESORT DETROIT, LLC AND MGM
DETROIT HOLDINGS, LLC MOTION FOR DISQUALIFICATION**

At a session of the Court held in the
County of Wayne, State of Michigan
On 6/7/2024
HONORABLE BRIAN R. SULLIVAN
Wayne County Circuit Court

MGM Resorts International (MGMRI), MGM Grand Resort Detroit, LLC and MGM Detroit Holdings, LLC (collectively “MGM”) claims Taft Stettinius and Hollister (Taft) has a conflict of interest which precludes it from representing Partners Detroit, LLC (Partners) in an arbitration against MGM Detroit, LLC, and MGM Grand Detroit, Inc.

The court concludes the arbitration was filed by Jaffe, Raitt & Heuer (Jaffe), a

year before Jaffe merged with Taft. The merger of the two firms gave rise to the complained of conflict because Taft represented several MGM entities, for about 20 years, before the merger, at the time of, and after the merger, until about July 2023. MGM further asserts Taft did not notify it of the merger or of any conflict; continued to do work for it after the merger, and did not bill MGM for work performed after to conceal the conflict. MGM claims it raised the conflict as soon as it discovered it. Taft did an internal examination of the conflict due to the merger and concluded there was no conflict between Taft and the MGM so notice was not required.¹ Discovery on the conflict issue was held and MGM moves the court disqualify Taft.

MGM essentially asserts two grounds for disqualification of Taft. First, Taft represented several MGM entities, including MGM Northfield (Northfield) and MGM Grand Detroit (MGM Detroit)² which is a conflict, leading MGM to reasonably believe Taft was its lawyer at the merger and after. Taft's representation of Partners violates Taft's duty of loyalty to MGM, which does not require MGM to show prejudice.

Second, MGM asserts Northfield and MGM Detroit are operationally the same entity because they share many commonalities, including legal counsel and employees, one of whom, Louis Theros, may, testify in the arbitration. Therefore, Northfield and Detroit Grand (an entity for which Taft performed legal work) are the same entity for purposes of conflict due to commonality of operation. This situation is an instance of

¹ Taft cites the opinion for persuasive authority and collateral estoppel. The court rejects both theories.

² Partners also sued MGMRI and BetMGM, neither of whom are parties to the operating agreement. The arbitrators held they did not have jurisdiction over MGMRI or BetMGM. Partners contested that holding and sought electronic discovery (ESI) from MGMRI and BetMGM.

concurrent representation by Taft. Louis Theros of MGM worked on the arbitration for MGM and is likely to be a witness.

The determination of whether or not a conflict of interest exists is a question for the Michigan courts. The facts present a close question on the issue of disqualification. MGM, as proponent of the disqualification, has the burden to demonstrate:

1. an actual conflict exists, with specificity, between it and Taft, and
2. the appropriate remedy for that conflict is disqualification of Taft from the arbitration.
3. the relation between Northfield and MGM Grand Detroit is sufficiently close such that the two entities are really the same entity for purposes of representation in order to demonstrate it is entitled to disqualification of counsel.

The case presents the conflict of two distinct legal rights, a client's right to choose counsel and the duty of loyalty owed by an attorney to a client.

The court concludes that MGM is correct Taft has represented MGM such that it reasonably concluded Taft was its lawyer. However, Jaffe initiated the arbitration a year prior to the merger and had not done any work for MGM at that time. The merger does not automatically disqualify the former Jaffe lawyers for that reason. MGM has not demonstrated an operational commonality of Detroit Grand and Northfield is of such a kind or nature that the entities should be treated as one entity. See *GSI, infra*.

There is concurrent representation that has not been addressed to the court's satisfaction. The court concludes the evidence presented thus far does not require a per se disqualification. The court believes there are potential dangers as alleged by MGM but they can be assuaged by keeping intact the ethical screen between Taft and the former Jaffe lawyer(s) actually engaged in the arbitration. MGM can elect to have another person examine the witness as proposed by Taft.

I. PARTIES AND CASE

This case involves tension between two fundamental ethical and legal principles: the right of a party to retain counsel of its choice and the duty of loyalty of an attorney to its client. The parties to this case are MGM, Taft and Partners, who intervened in the case.

Jaffe filed arbitration on behalf of Partners against MGM on December 9, 2021. Partners sought damages for MGM's failure to pay it proceeds of gaming revenue. Partners initially named MGMRI and BetMGM as defendants, but they did not consent be a party and the panel held they could not be compelled into arbitration. Jaffe sought discovery from MGMRI in the arbitration, as it is a real target of the suit.

On December 31, 2022, Taft and Jaffe merged. Taft did not provide MGM with direct notice of the proposed, or accomplished, merger of the two law firms. Reference to the merger was made in Taft's arbitration filings in January 2023.

MGM says Taft knew of the conflict because Taft was performing legal work for MGM Grand Detroit (and other MGM entities) before, during and after the merger. Moreover, there was internal premerger discussion of the issue within Taft. Taft did not advise MGM of the problem when it arose.

MGM learned of the merger about March 23, 2023 and objected then to Taft's conflict.³ Taft performed an internal examination of the issue, denied the existence of any conflict and advised MGM of its conclusion in writing.

³ MGM's motion to disqualify Taft was rejected by the arbitrator's in a very well-reasoned and written opinion which this court does not rely upon. Hence, rejection of Taft's estoppel and collateral estoppel arguments. MGM claims Taft misled the arbitrators on work performed for MGM Detroit Grand. See time records.

MGM admits the conflict arose from the merger based on Taft's representation of MGM entities in the past (including MGMRI) for over 20 years, and did so at the time of the merger. In addition, Taft had nine open files representing MGM; Taft did work for MGM Grand Detroit, pre-merger as well as post-merger (May and July 2023); Taft tracked its time but did not bill MGM for those services, (see Taft billing records show for MGM). Taft did not reveal that information to MGM.

Taft contends this suit is an effort to gain tactical advantage in the arbitration; notice was not required, for the reason it determined there is no conflict with MGM; Taft did an internal investigation to gather information to arrive at this conclusion; MGM's objection to a conflict was only asserted to obstruct discovery; the arbitration panel has ruled there is no conflict; MGM had notice as of September of 2022 of the impending Taft and Jaffe merger, and MGM was given actual notice in March 2023, and waited almost a year (May 2024) to file this motion to disqualify Taft in the arbitration.

Jaffe had no conflict with MGM when the arbitration was initiated by Jaffe, a year before the Taft-Jaffe merger. Jaffe did not create the conflict.

A. MGM

MGMRI, a highly sophisticated and complex business entity, is the corporate parent over about 150 different entities and subsidiaries, including MGM Detroit. MGM Detroit is comprised of subsidiaries such as MGM Grand Detroit LLC most of which is involved in the gaming industry. MGM is comprised of various subsidiaries in subdivisions, generally based on geography. MGMRI is the parent company. One of the groups or entities under it is the Midwest group of MGM Grand Detroit, (comprised of MGM Grand Detroit LLC and MGM Detroit Holdings, LLC, (a new company) and 50%

owner of BetMGM, an online gaming operation in Michigan and Illinois. MGM owns a business in Ohio called Northfield Park, comprised of MGM Lessee, LLC and Northfield Park Associates, LLC. These two entities Northfield Park and Grand Detroit comprise the Midwest Group under MGMRI. MGMRI indirectly owns 50% of BetMGM (online gaming) which operates in Michigan and Illinois.

The Detroit and Ohio MGM entities are administratively managed by the same person, Matt Buckley. Both are under the legal direction of Louis Theros. They are in separate states and are separate facilities.

Louis Theros is in house counsel for MGM Midwest (Detroit and Northfield Park). He supervises some of those cases and is involved in the arbitration. On March 7, 2023 he was served with discovery requests

B. Partners Detroit

Partners Detroit is a party to the operating agreement with MGM Detroit for gaming in Detroit. See operating agreement July 2017. That agreement calls for dispute resolution via the Federal Arbitration Act with three arbitrators, held in Detroit, MI pursuant to the rules of AAA, with the agreement construed and governed by the laws of Delaware.

C. Taft

Taft is a large, sophisticated law firm with several offices including Illinois and after the Jaffe merger, in Michigan. In about 2014 Taft merged or acquired a smaller law firm which did work for MGM. Taft has performed legal work for MGM for over 20 years. Taft has represented MGM in over 25 matters since 2001 and 9 were open at the time of the Taft merger with Jaffe. Taft's legal services extended to Illinois, Michigan, Ohio

and other states (Kentucky and Indiana). Taft performed work for MGMRI, MGM Grand Detroit, MGM Growth Northfield Park and Grand Victoria.

There were few written retention letters and those letters required termination to be in writing. MGM claims Taft never provided a writing to it. Taft billed MGMRI.

II. Arbitration

The following are essential facts of the arbitration:

1. Partners Detroit, LLC was a party to an operating agreement with MGM Grand Detroit, LLC, MGM Grand Detroit, Inc., and MGM Grand, Inc., dated July 17, 1997.

2. On December 9, 2021, Jaffe, on behalf of Partners Detroit, LLC sued the above three MGM entities (parties to the operating agreement) for breach of contract and essentially claimed Partners was entitled to additional money from its partnership with MGM. Jaffe and Taft had no relationship at this time.

3. Partners originally named MGMRI(parent company of MGM entities) and BetMGM as parties in the arbitration, although it was clear neither was a party to the operating agreement which served as the basis of the arbitration.⁴

4. The operating agreement states Delaware substantive law applies (sec. 13.10) in an arbitration pursuant to the Federal Arbitration Act, in Detroit pursuant to AAA rules.

5. The arbitration panel concluded jurisdiction could not be extended over MGMRI and BetMGM, nonparties to the operating agreement.

6. On December 31, 2022, Taft and Jaffe merged into “Taft, Stettinius & Hollister, LLP” (Taft).

⁴ Counsel for Partners offered no explanation for naming these two entities in the arbitration. See MGM exhibit 14 at p 14 lines 12-14 and page 15 lines 12-14).

7. MGMRI, and other of its entities, such as Northfield Park Racino, were represented by Taft in several matters since at least 2014.

8. MGM declared it received notice of the merger in March 2023, three months' post-merger, when an MGM representative saw discovery to "nonparty" MGMRI from Taft on Taft stationary. MGM inquired of Taft and objected to the Taft's opposition to it in the arbitration due to a conflict of interest.

9. MGM asserts the conflict of interest was premised on the fact Taft represented MGMRI and other of its subsidiaries and affiliated entities, such as Northfield Park, in nine open cases and in house MGM counsel for the arbitration defendant and Northfield Park is the same person, Louis Theros.

10. The conflict question was litigated in arbitration and then MGM then filed suit in this court.

11. Taft stated MGMRI was a former client, and its representation of MGM was limited to Northfield, a business in Ohio.

12. This court concluded the conflict question did not arise out of the arbitration contract. The question of a legal conflict is not one of Delaware law for the same reason. The courts in Michigan have a distinct and particular interest in governing the ethical conduct of lawyers who are licensed to practice in this state, which Delaware and the arbitrators lack, even though they may have the ability to do so. The reason it is not a question for the arbitration panel is that the courts have a real interest in regulating the ethical conduct of the attorneys who work in this state, a matter the Supreme Court has indicated is within the exclusive domain of a court of law.

III. STANDARD OF REVIEW

The law of disqualification involves the determination by the court of the existence of a conflict of interest, usually a factual question based on the particular circumstances of the relationship of the parties. The Michigan legal literature of disqualification cited by the parties is slight. See *Rymal v Baergen*, 262 Mich App 274, 317 (2004) and the cases cited therein.

The legal and factual question as to the existence of a conflict of interest in this case is not a question arising out of, or under, the operating agreement, which invokes the substantive law of Delaware.

The conflict issue arose from the merger of Taft and Jaffe in 2022. The conflict dispute calls into question the limits of legal representation and the conduct of lawyers and clients after a merger, an area in Michigan reserved to the Michigan courts.

Disqualification of an attorney is a drastic legal measure for the reason it deprives a party of counsel of its choice. It can also disrupt litigation and can be a tool of abuse and delay. *Freeman v Chicago Musical Instrument Co.*, 689 F2d 715, 721-22 (7th Cir 1982). Those possibilities require that a court act with caution and to not act hastily. The court does not find evidence of those facts in this case.

Choice of counsel does not automatically trump the ethical obligation that a lawyer owes to a client, the duty of loyalty. A lawyer owes a client a duty of undivided loyalty to foster trust for effective representation and allegiance, full and open communication between them, and a relationship of cooperation. Disqualification is a means, albeit a drastic one, the courts employ to protect the sanctity of the attorney-

client relationship. *Sackley v Southeast Energy Group, Ltd.*, No 83 C 4615, 1986 WL 437 (ND Ill October 24, 1986).

Relationships between lawyers and clients have been generally classified as instances of representation of a single case or a continuing relationship of matters over time.

It is incumbent on the moving party to establish there is a reasonable possibility that a “specifically identifiable improbity actually occurred.” See *Eternal Pres. Assocs., LLC v Accidental Mummies Touring Co, LLC* 759 F Supp 2d 887, 891 (ED Mich 2011). The failure to reach this threshold invokes the real danger of turning disqualification into a vehicle of interference with a party’s right to counsel of choice.

Disqualification is a legitimate and appropriate remedy to protect the attorney client relationship. However, the court has to be careful to not deprive a party of being represented by counsel of choice. While this right is not absolute, it must be closely examined to protect it because an improper disqualification can result in increased expense, delay in litigation as well as an improper restriction of counsel of choice. See *Freeman, Id.* The failure to disqualify can deprive a party of a fair hearing. Some suggested factors are offered in case law.

A. Conflict factors

Courts have identified some factors to determine the existence of a conflict:

- Whether the client is the same (in this case they are not identical, although related as a subsidiary of MGMRI);
- Whether the same witnesses are interviewed (not in this case);

- Whether the lawyer's knowledge is based on former client contact (not directly in this case as Partners has Jaffe lawyers, not Taft lawyers and there is an ethical screen to block any transmission of information);
- Whether there is a commonality of witnesses (Theros), legal theories, business practices, location (none of which has been factually asserted to support a conflict, except Northfield Park which has a common director with Detroit. Northfield Park is in Ohio, and the open case involved issues peculiar to it. MGM has some common persons between Detroit and Northfield Park);
- Whether the subject matter is common (arbitration is over internet proceeds); and
- What information is at stake. (Discovery information has been alleged).

The burden of persuasion lies with the proponent of the conflict, MGM: "The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Kubiak v. Hurr*, 143 Mich App 465, 471(1985); *Freeman v Kulicke & Soffa Industries, Inc.*, 449 F. Supp 974, 977-978 (ED Pa, 1978). See also *In re Allen R. Soble Revocable Trust*, (Unpublished opinion, Court of Appeals, Docket no 364844, May 9, 2024). Michigan law has a long tradition which holds that matters of ethics are decided by the courts. See *In Re Mills*, 1 Mich 392 (1850). The court concludes the question of the existence of a conflict of interest between Taft and MGM is a question for a Michigan court and certainly one which arose out of the merger not the arbitration agreement.

MGM asserts there are two grounds of conflict: 1. Taft represented MGM before, during and after the arbitration, and the merger, so Taft is on both sides of the

controversy. 2. Taft should not be exposed to MGM information which Taft will use against MGM in the arbitration.

MGM cites MRPC 1.7 (current client) and MRPC 1.9 (former client). MGM contends both rules apply to this case for the reason MGM had current (open) files with Taft, as well as past files which relate to MGM. Taft represented MGM for over 20 years, billed it millions of dollars for legal services performed, did corporate work for MGM gaining knowledge of its structure, worked closely with MGM attorneys, and performed these services often without a specific engagement letter (contract). There is evidence to support these assertions.

B. MRPC 1.7 Conflict of current client.

MRPC 1.7 (addresses conflicts of current clients) is a general rule involving conflicts of interest which provides:

- (a)** A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b)** A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

C. MRC 1.9 Conflict with former client.

Rule 1.9, which addresses the issue of conflicts with a former client states:

- (a)** 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 consents after consultation.

(b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client

- (1) whose interests are materially adverse to that person, and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Taft had open files at the time of the merger with Jaffe. Taft is said to have recorded time but did not bill it as of July 2023, and it “fired” MGM to clear the way for this litigation. MGM believes it is still represented by Taft. That subjective belief is important but not dispositive. Belief alone cannot make any fact so, and Taft did a lot more than create an impression. Taft treatment of MGM was not excellent client service.

MRPC 1.7 has been examined to require the court examine four questions:

1. Is Taft’s representation directly (exact or precise) adverse to MGMRI and BetMGM;
2. Is the representation materially limited by responsibilities to other MGM clients?
3. Was there consent; and
4. Is the conflict waivable. See *Denhollander v Michigan State University*, 2019 WL 5697817 (February 1, 2019). Interests of parties are directly contrary when one client sues another client. *Avink v SMG*, 282 Mich App 110, 117 (2009); *Barkley v Detroit*, 204 Mich 194, 203-204 (1994).

IV. FACTS

A. MGM’s facts in support of conflict.

MGM identifies the conflict of interest on the following facts:

- i) Taft failed to timely notify MGM of the conflict;
- ii) MGM viewed Taft as its attorneys, paid Taft for its legal services to it and there was active representation of it by Taft at the time of the merger;
- iii) Taft has performed longstanding legal work for several MGM entities for several decades in many jurisdictions (including Ohio and Michigan, including MGM Detroit);

- iv) Taft breached its duty of loyalty to MGM, an ethical violation that need not reach the level of a demonstrative breach of confidentiality;
- v) Taft had actual knowledge of the conflict and failed to (timely) disclose it to MGM, and to eliminate its ethical obligations (conflict), wrote off billings for work it performed for MGM in July 2023, and terminated the relationship with MGM without any input from MGM because it was in pursuit of a potential big payday in the arbitration.

MGM filed several affidavits in support of the disqualification of Taft, attached billing records which show Taft was performing legal services for MGM after the merger of the two firms.

B. Louis Theros affidavit.

Louis Theros is vice president and general counsel for MGM Detroit and Northfield Park in Ohio. He attested:

- these two entities share management, counsel, human resources and payroll (President, Chief financial officer, vice president, technology etc.).
- Taft represented Northfield Park and performed legal work for it after MGM acquired it in 2019.
- Taft performed legal work for MGM Detroit as recent as February 2023, with billings in the millions of dollars paid to Taft since 2014.
- Taft attorneys from Jaffe were opposed to MGM while other Taft attorneys represented MGM.
- Theros attested to a parent/subsidiary conflict is specifically demonstrated by Taft's current request for "confidential materials" of BetMGM, including licenses, service agreements, race and sports book and operational agreements.
- Theros expects to be a witness in the arbitration, expected to be called by MGM.

C. Affidavit of John McManus.

John McManus is the Chief Legal Officer, Administrative Officer and Secretary of MGMRI. He has been the head of the MGM legal department since 2009. McManus attested:

- Taft has represented MGM since before 2009 and followed other lawyers who merged with Taft in 2014.
- Taft was MGM's legal representative in Illinois.

- MGM treats any entity which is adverse to an MGM entity due to shared services, common and overlapping goals and some personnel.
- Taft represented multiple MGM entities.
- He was not notified of the merger with Jaffe but was notified of the Shefsky merger with Taft.
- McManus would have objected based on contact by Jaffe attorneys before the arbitration.
- A Jaffe attorney e-mailed McManus that he was unaware Theros was an attorney for MGM Grand Detroit.
- McManus believed Taft represented MGM entities were represented by Taft.
- McManus never received a termination letter from Taft.
- McManus was not enamored with the legal tactics employed by the Jaffe lawyers against MGM.
- Taft's letter of March 29, 2023 informing McManus MGM was a former client of Taft was the first notice of the disengagement of Taft from MGM.

D. Affidavit of Patrick Madamba.

- Patrick Madamba is the Vice President and legal counsel for MGMRI since April 2019.
- Taft was longstanding outside legal counsel for MGM, primarily in the midwest region of the United States without specific engagement letters. Taft represented MGM in January 2022 and July 2022 without any indication of MGM not being a client.
- He learned Jaffe was adverse to MGM in March 2023 and until that time thought MGM was a client of Taft.

MGM asserts Taft has represented it for over 20 years, a long term relationship which covers many MGM entities, all without a formal engagement letter or written representation agreement.

E. Kenneth Mogill affidavit.

- Mogill attested as an expert in ethics and mergers of law firms.
- One area to be addressed is conflicts between merging firms, more readily identifiable pre-merger and easier to resolve at that time. Another area is client confidentiality.
- Michigan rules of Professional Conduct do not address lawyer disclosures as to conflict determination and mergers should consider MRPC 1.6(b)(7).
- It is not unusual for a single law firm to represent multiple corporate entities. Any merger should consider "alter egos" of the entities; third party discovery implicating MRPC 1.7 (a) or (b); cross examination of employees of another client with the same MRPC implications; and the status of the client as current or former.

- The primary consideration is loyalty to the client and actual prejudice is not the standard.
- Mogill opined: the firms should have addressed conflict prior to the merger and disclosure only with client consent; the existence of an attorney client relationship is based on the belief of the client and notice of merger should be prompt.

V. DISCUSSION

Conflicts can be present and direct as to current clients, as covered in MRPC 1.7. Conflicts can also be with former clients covered by MRPC 1.9. See rules cited above.

MGM assertion it was a present client of Taft at the time of the arbitration is supported by Taft's time records for several MGM entities at the time of, and after, the merger. Taft was specifically doing work for Northfield and MGM Detroit and Taft also did work in the immediate past for MGM. Therefore, MRPC 1.7 and 1.9 are invoked by this representation.

MGM has the burden to demonstrate disqualification is the appropriate remedy and alleges two grounds: 1. MGM was represented by Taft and it was MGM's reasonable expectation Taft was its lawyer and the relationship was not terminated; and 2. Northfield and Detroit are two separate entities of MGM, but they are so close in operational commonality that they should be treated as the same entity for purposes of disqualification. See *GSI Comerce Solutions, Inc v BabyCenter, LLC*, 618 F2d 204 (2d Cir 2010).

The facts show Taft's relationship with MGM was one comprised of a continuing nature over a long time.

The major impediment to disqualification as relief is the fact that Jaffe had no conflict at the inception of the arbitration, it was "created" by the merger, and there is no

compelling evidence that the separate MGM entities should not be treated as separate entities despite some overlap.

Taft represented several MGM of these entities over two decades and had open files at the time of the merger. This assertion is supported by the exhibits submitted to the court, including time sheets, open files (9), and the fact the cases were not closed as of the date of the merger. The failure of Taft to bill MGM is not dispositive of case status nor of the relationship and presents an unflattering picture to the court. But none of these acts apply directly to Jaffe, Partners choice of counsel. The numerous emails do show the conundrum of the merger and different efforts being exerted by different persons to resolve the problem. MGM has a legitimate complaint about the way it was treated. The court rejects the contention it should have gleaned notice from the public forum.

Taft has no burden on this issue and the respective merits of its assertions, such as MGM should have inferred the merger; it was generally announced; Taft's conclusion the potential conflict was determined to not exist means Taft had no obligation to address it with Taft, etc. do not reduce MGM's burden. In short, the court concludes there is a conflict, but not one that rises to disqualification, and Taft's reasons for its performance are rejected by the court.

Operational commonality.

GS/ involved a law firm, Blank Rome, representing a party against a subsidiary of a client, J & J. Blank Rome firm had an engagement letter in 2004 with J & J, the parent company. Blank then represented and advised the parent company for years. Baby Center was a subsidiary of J & J. It relied on J & J for accounting, audit, cash

management, employee benefits, finance, human resources, IT, insurance, payroll and travel, legal services as well as management control over BabyCenter's business decisions. BabyCenter entered into an ecommerce agreement with GSI to perform daily operations. Baby Center terminated the agreement and GSI sued. J&J and BabyCenter objected to Blank's representation of GSI. The court held BabyCenter and J&J are the same client and its liabilities effect J&J.

The court relied on the ground of "concurrent representation", the simultaneous representation of an existing client adverse to the client. MGM contends Taft has a *prima facie* concurrent representation, that is, Taft cannot sue its own client. The question in *GSI* is how representation of a corporate affiliate implicates the duty of loyalty owed to the client.

The general rule is that a representation of a corporation by a lawyer does not automatically extend to an affiliate. *GSI*, at 210. A lawyer cannot accept such representation where the affiliate should be considered a client of the lawyer. The conclusion depends on the circumstances of the case. *GSI*, at 210. Factors cited by the court include degree of operational commonality of the two entities; the extent of financial dependence of one entity on the other. Some examples of shared services include shared computer network, email system, travel department, health benefits plan, integration, IT team, common personnel such as managers, officers and directors, legal department, board, directors, President, other shared responsibilities for the provision and management of legal services. The focus is to allow management to trust outside counsel without fear they will be opposed by the same counsel.

The concerns articulated by the courts is that the court must balance the right to choose counsel against the need to maintain the highest standards of the profession., GSI at 209. Disqualification is warranted only if an attorney's conduct tends to taint the underlying trial. GSI at 209. Attorney conflicts are usually imputed to the firm based on the presumption attorneys share client confidences. *Hempstead Video, Inc v Incorporated Village of Valley Stream*, 409 F3d 127, 133 (2d Cir 2005). The question is whether the representation of one client is adverse to that of another client. GSI, at 209. The attorneys must show no actual or apparent conflict in loyalties or diminution in the vigor of representation. This means the attorney must show more than the matters are unrelated.

The facts show Jaffe represented Partners more than a year before the merger. In order to meet the threshold of the extreme remedy for disqualification, MGM must show one of two propositions. First, the occurrence of a specifically identifiable impropriety and that the balance of all the relevant factors requires disqualification of counsel as vindication of the integrity of the legal profession over a Partner's retaining counsel of its choice. *El Camino Rs Ltd v Huntington Nat Bank*, 623 F Supp 2d 863, 883 (WD Mich 2007). Second, there is a concurrent representation which shifts the burden to Taft to show no actual or apparent conflict in loyalties or diminution in the vigor of representation. This showing is a heavy burden. GSI, at 210.

In the case of a direct conflict, the court favors the protection of the bar by disqualification. If the conflict is not foreseeable, and the conflict arises through no fault of the lawyer, courts elect a remedy short of disqualification. *El Camino*, at 886.

In this case there is no question that neither Jaffe nor Partners caused the conflict. Moreover, there is no evidence the conflict was foreseeable by Jaffe until before the merger when Taft learned of Jaffe's representation of Partners.

At the time of the filing of the arbitration Jaffe had no known, nor identified relationship with MGM and hence no conflict of interest and no violation is cited to the court. *Ransburg Corp v Champion Spark Plug Co.*, 648 F. Supp 1040, 1044 (ND Ill 1986).

These facts weigh against disqualification of Taft. The manner in which the conflict was addressed is of concern, but that is not a reason to disqualify the firm and infringe on the right of a party to select its counsel.

Duty of Loyalty.

Old Republic Nat Title Holding CO v First Metropolitan Title Co. (Unpublished opinion, Court of Appeals, Docket No 284767,286399) provides further guidance for this court on the issues in this case. *Old Republic* states two principles are invoked, the duty of loyalty an attorney owes to a client, and the client's ability to be represented by counsel of choice. *Old Republic* held:

'It is a well-established ethical principle that "an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute." Specifically, MRPC 1.7(a) and MRPC 1.9 prohibit the representation of a client where that representation is directly or materially adverse to another client or former client.

MGM's motion to disqualify Taft is predicated on the fact that as a client of Taft, Taft's representation of Partners is directly and materially adverse to it. Taft represented MGM at the time of the merger, and at the time of the filing of the arbitration, and post-merger. Initially, Jaffe lawyers were not seeking information from MGM as Taft lawyers, but that changed as of March 2023. Taft has presented no evidence of notice given to

MGM by it as to the merger. Taft's assertion MGM should have known based on publication, news stories or gleaned it by dint of the arbitration by inference if by no other means is repugnant to civility. In short, Taft owed MGM the common decency of telling MGM straight out it does not represent it any more. This notice likely did not happen because the premerger conflict was not acted on if done, or not done. None of this excuses Taft's failure to notify MGM of the merger. MGM is not required to guess at its status as a client of Taft.

In addition, the now former Jaffe, current Taft, attorneys sought discovery from MGM in the arbitration. That discovery consisted of production of documents and depositions of various persons of MGM. The former Jaffe attorneys aggressively pushed ahead with no regard to the conflict even though Taft represented several MGM entities in the past and continued to represent some MGM entities through March 2023. The failure to bill for the time expended on MGM legal issues has not been satisfactorily explained to the court by Taft.

MGM has identified the specific legal conflict of interest as Taft's representation of Partners Detroit, LLC in the arbitration against MGM as a direct conflict of interest in violation of MRPC 1.7a. MGM is justified in concluding Taft apparently opted to pick clients at a late date and pursue the client with a deep pocket. It appears the Jaffe and Taft attorneys were somewhat at odds in this respect.

Nevertheless, after reading the briefs, examining the exhibits and hearing oral argument the court concludes MGM has not demonstrated an actual conflict of interest between Taft and MGM unless the court treated all MGM entities as one, which is not the case. The relationship between Northfield and Detroit Grand is not of such an

operational commonality which warrants disqualification of Taft from representing Partners in the arbitration against MGM based on the record presented to this court.

Pending and former cases.

MGM predicates disqualification of Taft on the fact that Taft has former cases and some active cases against MGM. The facts show MGM is a large corporation comprised of about 150 sub-entities. MGM does not contend Taft has confidential information which it obtained from MGM which is being used in this case by Taft against it; has not identified any such confidential information Taft has, which was transmitted to Taft by MGM or which it reasonably believes Taft acquired based on any relation it had or has with MGM.

The status of an attorney client relationship is examined at the time the conflict arises, not at the time a party seeks disqualification of a lawyer. In this case the conflict is alleged to have arisen on December 31, 2022. See *Denhollander v Michigan State University*, 2019 WL 5697817.

The attorney client relationship ends at the termination of a specific retained matter; or upon notice of withdrawal in a continuing relationship. Comments to MRPC 1.3; *Madox v Burlingame*, 205 Mich App 446, 450 (1994). MGM has produced ample evidence it had a continuing relationship with Taft. That type of relationship was of the nature that it was one that required termination by adequate and written notice, which MGM asserts no notice of withdrawal was submitted to it by Taft, until well after the merger. Taft has not produced evidence to the contrary:

1. Taft knew of the impending merger but did not so alert MGM;
2. The Jaffe lawyers named MGMRI and BetMGM as parties to the arbitration.

3. Taft represented MGM in at nine open cases at the time of the merger on December 31, 2022;
4. Taft representation of MGM was of a continuing nature for over 20 years;
5. Taft did work for MGM Detroit Grand about the time of the merger;
6. As of February 2023, Taft asserted the money Partners sought in the arbitration was in the hands of MGMRI, a fact Partners' attorney specifically told this court was "irrelevant"; and argued to the arbitrators MGMRI was the real party in interest; and there was no economic existence between Detroit Holdings and MGMRI;
7. Taft pursued discovery against MGMRI in the arbitration from Theros, McManus and MGM personnel.
8. A potential conflict of Taft and MGM was identified by Taft a month before the merger, but Taft took no action to notify MGM before the merger.
9. Notice of the merger was filed in arbitration on January 9, 2023.

The court concludes Taft's notice to MGM through Partners in arbitration is less than ideal.

Ethical screen.

Taft represents it has put an ethical screen in place between the lawyers who worked at Taft for MGM and the former Jaffe lawyer(s) who are in the arbitration. The established ethical screen, if honored, should be enough to protect the rights and interests of the parties under these circumstances. The court agrees.

Taft has advised the court the ethical screen prevents any Taft attorney in the litigation from having access to any MGM information. That screen must continue and it should be enforced in arbitration, or if not, then this court retains jurisdiction to do so.

Taft has also offered to use different attorneys than the Taft attorney in examination of MGM witnesses to further insulate the possibility of conflict, the decision of which the court leaves with MGM to accept or reject.

Estoppel

Taft raised an estoppel argument against MGM based on the failure to timely raise it and on the ruling of the panel. The court rejects Taft's argument that MGM waived or is estopped from seeking disqualification. Estoppel is an equitable tool of the court to correct an injustice, whether a matter of contract or tort, and the court sees no equitable basis upon which it could grant such relief to Taft. MGM acted timely and properly contested the conflict and timely asserted the conflict. Taft's failure to notify MGM does not relieve it of its obligation nor shift that burden to MGM. Taft has not produced any direct indication, letter or email, from it to MGM, or any comparable communication, which states Taft notified MGM or that position can support estoppel.

Ploy by MGM

Taft strongly asserts MGM raised the conflict as a ploy. The court concludes this is a meritless deflection and distraction. There is evidence Taft worked for MGM after the merger and then did not bill for that work. MGM's position of conflict is well founded. Taft's explanation for its treatment of MGM is not.

Unprofessional conduct.

McManus described the action of the lawyers as aggressive and a "scorched earth" approach to litigation. There is evidence to support it. That particular tactic, however, is not a basis for disqualification.

Separate entities of MGM

There is evidence that Northfield and Detroit Grand share some administration and operation. The legal question is whether the entities are so intertwined that the prosecution of the arbitration is precluded by the representation of MGM by Taft in other

matters for the reason they cannot be separated from each other or can operationally be treated as one entity for purposes of the litigation. The court concludes the entities represented by Taft are separate and distinct enough to those it has represented in the past from those it is suing in the arbitration that disqualification is not indicated by the facts.

This conclusion is supported by the law in Michigan respects the fact of separate corporate entities. *Wells v. Firestone*, 421 Mich. 641, 650, 364 N.W.2d 670 (1984). Michigan law presumes that in the absence of some abuse of the corporate form, parent and subsidiary corporate entities are separate and distinct. *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 243, 26 N.W.2d 757 (1947); *Gledhill v. Fisher & Co.*, 272 Mich. 353, 357–358 (1935), which held:

Before the corporate entity may be properly disregarded and the parent corporation held liable for the acts of its subsidiary, I believe it must be shown not only that undue domination and control was exercised by the parent corporation over the subsidiary, but also that this control was exercised in such a manner as to defraud and wrong the complainant, and that unjust loss or injury will be suffered by the complainant as the result of such domination unless the parent corporation be held liable.

The distinct existence of separate entities is honored by the court unless it is shown an otherwise separate corporate existence has been used to “subvert justice or cause a result that [is] contrary to some other clearly overriding public policy.” *Wells, supra* at 650, 364 N.W.2d 670; *Helzer v. F. Joseph Lamb Co.*, 171 Mich. App. 6, 9 (1988).

Michigan courts have generally required that a subsidiary must “become ‘a mere instrumentality’ of the parent” before its separate corporate existence will be disregarded. *Maki v. Copper Range Co.*, 121 Mich. App. 518, 524, (1982); *Shirley v. Drackett Products Co.*, 26 Mich. App. 644 (1970). The factual and operational commonality present in this case does not rise to that level. The fact that MGM entities

shares resources and other services is not enough to declare they are not separate and distinct. Northfield Park does share many aspects with the defendant entities in the arbitration, such as ownership, management, and legal counsel provided by Louis Theros. The fact of some operational overlap in these circumstances is not enough to meet the threshold of a conflict based on identity of entity. Nothing in the evidence presented to this court requires the extreme remedy of disqualification as suggested by MGM, although it is a close question.

MGM states Taft was remiss in the treatment of the conflict of cases at the time of the merger. This position is supported in fact and law, as echoed by the renown expert, Ken Mogill. The court is examining the basis for the disqualification and the account of the circumstances of the merger do not change the conclusion of the court.

CONCLUSION

The court concludes the question of disqualification of Taft is a close question. The court concludes the entities are separate, and are required by law to be treated as such as they are not operationally the same. The court concludes there is no direct adversity in the representation of Partners by Taft against the MGM Detroit entities; that Taft's representation of Partners is materially limited to the point it cannot consider, recommend or carry out appropriate course of action for the client due to other responsibilities or interests. See *Denhollander*, at p 3.

MGM has demonstrated concurrent representation of MGM but not the entities involved in the arbitration in any meaningful manner and the court does not conclude the duty of loyalty to MGM does not warrant disqualification, *per se*.

Jaffe was not the cause of the conflict which arose when Taft merged with it on December 31, 2022. Jaffe had no demonstrated connection with Taft or MGM before the merger.

Taft's conflict with MGM was not clearly addressed, and the "timing" of the merger does not explain, nor excuse, the actions of Taft towards MGM.

Nevertheless, MGM has not identified a specific conflict which requires disqualification of Taft. There is no evidence of disclosure of confidential information, secrets or confidences actually shared with Taft which will be used in the arbitration, nor has any risk of such a circumstance been shown. The presence of the ethical screen between the Taft attorneys and the former Jaffe attorneys is legally sufficient to prevent the danger of any prejudice and the court orders that ethical screen be in place during the entire matter, as does Taft's offer as to the examination of MGM witnesses. The court retains jurisdiction, as the case is not closed, there is no just reason for delay, and

IT IS SO ORDERED



Honorable Brian R. Sullivan, Circuit Judge