STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

HAJRUILA "ARI" SHEKO, derivatively on behalf of ELLER SERVICES, LLC,

Plaintiff,

v

Case No. 21-189781-CB
Hon. Michael Warren

THICK ENTERPRISES and LYLE THICK,

Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFF'S FIRST MOTION TO DISQUALIFY GIARMARCO MULLINS & HORTON, P.C.

At a session of said Court, held in the County of Oakland, State of Michigan
February 22, 2022

PRESENT: HON. MICHAEL WARREN
_____/

OPINION

I
Overview

Before the Court is the Plaintiff's First Motion to Disqualify Giarmarco, Mullins & Horton, P.C. The Court having reviewed the Motion and Response, and otherwise being fully informed in the premises, dispenses with oral argument as it would not assist the Court in rendering a decision. MCR 2.119(E)(3).

The gravamen of this Motion is whether the minority shareholder of a limited liability company is entitled to disqualify the company's legal counsel when the minority shareholder brings a derivative action? Because the company is only a nominal plaintiff, there is no conflict of interest and the answer is "no."

II
The Law

MRPC 1.7(a) provides that a law firm may be disqualified if it such representation presents a conflict of interest:

> (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.

III
Facts & Arguments

This is a derivative action brought by Hajruila "Ari" Sheko derivatively on behalf of Elder Services, LLC, a Michigan limited liability company. Sheko owns 49% of the membership interest of Eller. The Defendants in this case are (1) Thick Enterprises, LLC, a Michigan liability company that Sheko argues has improperly stolen a business opportunity from Eller, (2) Lyle Thick, the 51% owner of Eller and the sole owner of Thick

Enterprises, and (3) Giamarco, Mullins & Horton, P.C., a Michigan professional corporation ("GMH") which allegedly acted in concert with Thick and Thick Enterprises to steal the business opportunity while it served as counsel to Eller. Sheko argues that GMH should be disqualified because its client, Eller, is on the other side of the "versus" of this lawsuit, presenting an unsurmountable conflict of interest. The Defendants argue that Eller is only a nominal plaintiff which should be disregarded for purposes of determining conflicts of interest, and such status should not be used to disqualify GMH as they represent Thick and Thick Enterprises in unity against Sheko.

IV
Eller's Nominal Plaintiff Status Does Not Warrant Disqualification of GMH

Although this Court is not one to search across the country to discern the law, one Arizona appellate case is particularly illuminating in similar circumstances. This decision is persuasive and best speaks for itself:

> ¶8 This Court reviews a trial court's ruling on a motion to disqualify counsel for an abuse of discretion. *Smart Indus Corp, Mfg. v Bradshaw,* 179 Ariz 141, 145, 876 P2d 1176, 1180 (App 1994). When the trial court's decision is not based on the resolution of disputed factual issues but the application of legal principles, however, we review the decision de novo as an issue of law. *See Tritschler v Allstate Ins. Co.,* 213 Ariz 505, 518 ¶ 41, 144 P3d 519, 532 (App 2006) ("court abuses its discretion if it commits legal error in reaching a discretionary conclusion."); *Chih Teh Shen v Miller,* 212 Cal App 4th 48, 150 Ca Rptr3d 783, 788 (2012) ("[W]here there are no material disputed factual issues, the appellate court reviews the trial court's determination [on disqualification] as a question of law."). The nature of disqualification motions requires a "careful review" of the trial court's ruling. *Chih Teh Shen,* 150 Cal Rptr 3d at 788 *(quoting People ex rel Dep't of Corps, v SpeeDee Oil*

Change Sys., Inc, 20 Cal 4th 1135, 86 Cal Rptr 2d 816, 980 P2d 371, 377 (1999)). Because disqualification interferes with a party's attorney-client relationship, disqualification motions are subject to "tactical abuse," *id.,* and are "view[ed] with suspicion," *Gomez v Superior Court (Dawson),* 149 Ariz 223, 226, 717 P2d 902, 905 (1986). They should be granted "[o]nly in extreme circumstances," and the party seeking disqualification has the burden of proof. *Alexander v D'Angelo,* 141 Ariz 157, 161, 685 P2d 1309, 1313 (1984).

¶ 9 The issue in this case is whether GT has a conflict of interest in representing Ron on his derivative claims on behalf of TP Racing because GT also represents Ron in his defense against claims by TP Racing. Ron argues that no conflict exists because GT's only attorney-client relationship is with him, and not with TP Racing. TP Racing argues that although GT has no attorney-client relationship with it, GT still owes a fiduciary duty to it because the derivative claims are pursued *on behalf of TP* Racing, which impermissibly places GT as counsel on both sides of the litigation.

¶ 10 Conflict of interest disputes are resolved under Arizona Rules of Professional Conduct Ethical Rule ("ER") 1.7(a). That rule prohibits a lawyer from representing a client if (1) that representation will be directly adverse to another client or (2) a significant risk exists that the lawyer's responsibilities to another client, a former client, a third person, or to the lawyer's personal interest will materially limit the client's representation. The "threshold question" is whether an attorney-client relationship exists between the lawyer and an adverse party. *Gonzalez ex rel Colonial Bank v Chillura,* 892 So2d 1075, 1077 (Fla Dist Ct App 2004).

¶ 11 As TP Racing concedes, no attorney-client relationship exists between GT and TP Racing. An attorney-client relationship exists when a person has manifested to a lawyer his intent that the lawyer provide him with legal services and the lawyer has manifested consent to do so. *Paradigm Ins Co v Langerman,* 200 Ariz 146, 149 ¶ 10, 24 P.3d 593, 596 (2001) *(quoting* Restatement (Third) of the Law Governing Lawyers § 14). Nothing in the record shows that TP Racing manifested to GT its intent that GT provide legal services to it or that GT manifested any consent to do so. GT's only attorney-client relationship is with Ron.

¶ 12 The fact that GT's client Ron — in his capacity as a minority partner of TP Racing — has filed derivative claims on behalf of TP Racing changes nothing. Although no Arizona appellate court has considered the issue, courts that have considered the issue have held that lawyers are not disqualified from representing clients who are simultaneously pursuing direct claims against a corporation and derivative claims on behalf of that

corporation. *See Chih Teh Shen,* 150 Cal Rptr.3d at 789-91; *Gonzalez,* 892 So 2d at 1077-78 (applying Florida Rule of Professional Conduct 4-1.7, identically worded to ER 1.7); *see also In re Dayco Derivative Sec. Litig,* 102 FRD 624, 630 (SD Ohio 1984) ("the case law is virtually unanimous in holding that one counsel can represent a stockholder bringing both an individual and a derivative action") (footnote omitted). This is so because of the nature of derivative actions.

¶ 13 Derivative actions allow a minority shareholder to pursue a claim on behalf of a corporation when the management of the corporation has refused to pursue the claim itself. *Kamen v Kemper Fin Serv, Inc.,* 500 US 90, 95, 111 S Ct 1711, 114 L Ed 2d 152 (1991). The corporation is merely a nominal party in a dispute between a minority shareholder and the management that controls the corporation. *See Chih Teh Shen,* 150 Cal Rptr3d at 790-91; *Gonzalez,* 892 So 2d at 1078; *see also Cohen v Beneficial Indus. Loan Corp,* 337 US 541, 548, 69 S Ct 1221, 93 L Ed 1528 (1949) (noting that in a derivative action, the corporation is a nominal party). The corporation thus is not a "client" of the lawyer for the minority shareholder and the lawyer has no attorney-client relationship with it. If the filing of a derivative claim created an attorney-client relationship between the corporation and the lawyer for the minority shareholder, "there would be no way for the derivative plaintiff to ever have conflict-free counsel." *Gonzalez,* 892 So 2d at 1078. The corporation would then control who could represent the minority shareholder, "letting the fox guard the chicken coop." *Id.*

¶ 14 Because the lawyer in a derivative action has an attorney-client relationship only with the minority shareholder, nothing prevents the lawyer from also representing the minority shareholder on any direct claims against the corporation or its management that arise from the same set of facts. The shareholder may sue directly for harms the mismanagement of the corporation has caused him personally, and derivatively for harms the mismanagement has caused the corporation. *See Chih Teh Shen,* 150 Cal Rptr.3d at 795 ("Shen's individual and derivative claims revolve around the same nucleus of facts alleging misconduct by corporate mismanagement.") (internal quotation marks and citation omitted); *Dayco,* 102 FRD at 631 ("The legal theory underlying the derivative suit and Lovorn's complaint in state court is parallel and entirely compatible."). The lawyer is not representing adverse interests in this situation.

¶ 15 The same analysis applies to Ron's claims involving TP Racing. Just as a shareholder has the right to pursue a derivative action on behalf of a corporation, a minority partner in a limited partnership has the right to

> pursue a derivative action on behalf of a partnership. ARS § 29-356. Ron's direct claims are aligned with the derivative claims filed on behalf of and for the benefit of TP Racing. The direct claims are against TP Racing and Jerry for harm Jerry has caused Ron in his alleged mismanagement of TP Racing. These claims include breach of the partnership agreement, breach of the covenant of good faith and fair dealing, and breach of the duty of loyalty. The derivative claims similarly allege mismanagement of TP Racing by its manager, Jerry. These claims include breach of the fiduciary duties of loyalty and due care. Because Ron's interests in his direct claims and the interests of TP Racing in the derivative claims are aligned, GT is not representing adverse interests and has no conflict of interest cognizable under ER 1.7(a).
>
> [*Simms v Rayes,* 234 Ariz. 47, 49-51, 316 P3d 1235, 1237-1239 (2014) (footnote omitted).]

This reasoning applies here. The language of MRPC 1.7(a) and the Arizona and California decisions is in all material respects identical, as is the law involving derivative actions. Simply put, the derivative status of the instant case is not grounds for disqualifying GHM. See also also *Gonzalez v Colonial Bank,* 892 So 2d 1075 (Fla Dist Ct App, 2004).

The Court also incorporates by reference the other authorities and arguments set forth in the Response.

ORDER

In light of the foregoing, the Plaintiff's First Motion to Disqualify Giarmarco, Mullins & Horton, P.C., the Motion is DENIED.