IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

M. ROBERT COOK,	:	
Plaintiff,	:	Case No. C-15-CV-22-4740
v.	:	
BRUCE S. COOK, et al.,	:	
Defendants.	:	

Attorneys and Law Firms:

Andrew Jay Graham, Esq. and Louis P. Malick, Kramon & Graham, P.A.,
Attorneys for Plaintiff M. Robert Cook

Glenn C. Etelson, Esq. and John Troost, Esq., Shulman Rogers, P.A.
Attorneys for Defendants Bruce S. Cook and Site Residential Management, Inc.

Memorandum and Order

This case has been specially assigned to the Business & Technology Case Management Program by the Administrative Judge. This is a business dispute among two brothers and the companies they formed. Currently before the court is a procedural, yet vitally important matter, one that the court does not undertake lightly.

The plaintiff has moved to disqualify defense counsel from representing either the individual defendant or the corporate defendant. The defendants oppose the plaintiff's request. The court held a hearing on January 12, 2024, and took the matter under advisement. The Court's decision, and the reasons for it, are set out below.

Background

The plaintiff, M. Robert Cook ("Bob Cook") filed this lawsuit on December 21, 2022. He sued Bruce S. Cook ("Bruce Cook") and Site Residential Management, Inc. ("SRM"),

asserting both direct claims against Bruce Cook and derivative claims on behalf of SRM. Bruce Cook and SRM are represented by Shulman Rogers, P.A. ("Shulman"). Shulman filed a motion to dismiss claiming that Bob Cook is not, and has never been, a stockholder of SRM.

The circuit court held a hearing on September 6, 2023, and, the next day, issued an order largely denying the motion to dismiss but granting leave to amend as to the counts for which the motions judge saw pleading deficiencies. A second amended complaint was filed on September 22, 2023.

In a letter dated October 5, 2023, counsel for Bob Cook averred that Md. R. Attorneys, Rule 19-301.7 prohibited Shulman from representing SRM and Bruce Cook in this lawsuit without the informed consent of both 50% co-owners of the company. Bob Cook did not assent to this joint representation. This letter also alleged that Bruce Cook's son, Josh Cook, had sued SRM is a separate case and that a default had been entered against SRM. According to Bob Cook, Bruce Cook had interfered with insurance counsel's representation of SRM in that case, resulting in the default. No response to that letter was received.

In an answer to the amended pleading, filed on October 10, 2023, both defendants again denied that Bob Cook was a stockholder of SRM and for that reason, among others, was not entitled to any relief, either directly or derivatively.[1] Counsel for Bob Cook wrote again on October 16, 2023, advising that a motion to disqualify would be filed if Shulman did not withdraw. No response to that letter was received.

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[1] Bob Cook also has sued Site Management Inc. ("SMI"). Bob Cook and Bruce Cook each own 50% of SMI. SMI is a separate company from SRM and has never filed an answer or appeared through counsel. It is through SMI that Bob Cook alleges that he owns 50% of SRM. In an amended answer to the second amended complaint, filed on December 20, 2023, the defendants (Bruce Cook and SRM) admitted that Bob Cook was a 50% owner of Site Management, Inc., but continued to deny that he was a stockholder of SRM.

On October 20, 2023, Bob Cook moved to disqualify Shulman, under Rule 19-301.7, from continuing to represent either Bruce Cook or SRM in this lawsuit.[2] Shuman opposed the motion contending, first, that it was untimely, and second, that there was no basis for disqualification in this case.

The Plaintiff's Claims[3]

Bob and Bruce Cook are brothers. Bob Cook alleges that they each own 50% of the stock in SRM through their equal 50% ownership of the stock in SMI. The brothers are deadlocked, and disagree about how SRM should be run, whether it should be wound up, and how its assets should be distributed.

According to the second amended complaint, SRM ceased day-to-day operations in 2021, currently has no day-to-day business operations, and is not expected to conduct business in the future. Bob Cook alleges that SRM currently holds more than $930,000 in cash and is owed $500,000 by Seagate Investors, LLC ("Seagate"), a real estate holding company owned by Bob and Bruce Cook and three other family members.

Bob Cook alleges that SRM has taken no action to collect the $500,000 from Seagate, without any business reason for failing to do so, and that SRM, under the control of Bruce Cook, has refused to make any distributions to stockholders despite Bob Cook's repeated requests. Bob Cook further alleges that Bruce Cook has precluded him from exercising his right to co-manage SRM, despite their agreement that they would manage the corporation together.

[2] On October 5, 2023, and October 16, 2023, counsel for Bob Cook wrote to Shulman asserting the basis for their request for disqualification and asking that Shulman step aside as counsel for both Bruce Cook and SRM. Shulman did not respond to either letter.

[3] The facts are taken largely from the Second Amended Complaint, as supplemented by information presented at and after oral argument.

SRM came into being through the parties' purchase of the stock in David O. Feldman, Inc. in 1997. Bob Cook alleges that after the purchase, no officers were appointed, and no stockholder or directors' meetings were held. Bob Cook also alleges that Bruce Cook's sons, Josh Cook and Byron Cook, prepared and filed Articles of Amendment with the Maryland Department of Assessments and Taxation changing the name of David O. Feldman, Inc. to SRM telling the state that the name change had been approved by the stockholders. Josh Cook signed the Articles as Secretary and Byron Cook signed as President even though, according to Bob Cook, the filing never had been approved by the stockholders and neither of Bruce Cook's sons had been validly appointed as officers of the corporation.

Bob Cook further avers that there is no written stockholder's agreement and that his agreement with Bruce Cook to share control, decision-making and the profits of SRM is oral. He claims that Bruce Cook has frozen him out of decision-making and allowed his sons, Josh and Byron Cook to run SRM, against Bob Cook's wishes. In short, Bob Cook alleges that Bruce Cook has appointed himself the *de facto* president of SRM and has acted as its sole manager, without Bob Cook's approval, and has acted as the sole or majority owner of the corporation.

The second amended complaint alleges that Josh Cook, who has signatory authority over SRM's bank accounts, has sued SRM and, with the acquiescence of Bruce Cook (who, it is alleged, interfered with obtaining counsel to represent the corporation and timely enter an appearance in that case) obtained a default against SRM. Josh Cook is seeking what he characterizes as unpaid wages from SRM of $225,000, which he wants to be trebled to $675,000 under the Maryland Wage Payment Act.

<u>Discussion</u>

The defendants contend that the merits of the disqualification motion should not even be considered because, in their view, it is untimely and, therefore, waived.

As timeliness has been raised, the court must consider this question before consideration of any potential disqualification of defense counsel. This is because the disqualification of counsel is a drastic action, and the court must consider whether the issue has been waived or brought for tactical reasons. *See, e.g., Gross v. SES Americom, Inc.*, 307 F. Supp. 2d 719, 723-24 (D. Md. 2004); *In re Modanlo*, 342 B.R. 230, 236-37 (D. Md. 2006);

Judge Watts, writing for the intermediate appellate court in *Baltimore County v. Barnhart*, 201 Md. App. 682, 712-13 (2011), citing *Buckley v. Airshield Corp.*, 908 F. Supp. 299, 307 (D. Md. 1995), summarized the "timeliness" factors the court must consider before addressing the merits of a disqualification motion. These include: (1) when the movant learned of the conflict; (2) whether the movant was represented by counsel during the period of alleged delay; (3) why any delay occurred; (4) whether the motion is brought for tactical reasons; and (5) whether disqualification would result in prejudice to the nonmoving party. These factors subsequently were adopted by the Supreme Court of Maryland in *Ademiluyi v. State Board of Elections*, 458 Md. 1, 24 (2018), and will be applied here.

The factual basis for the actual adversity certainly first surfaced in this case on March 1, 2023, when, on behalf of both Bruce Cook and SRM, Shulman entered its appearance and moved to dismiss all counts in the original complaint on the ground that Bob Cook is not, and never has been, a stockholder of SRM. The adversity crystallized, however, on October 10, 2023, when, in an answer to an amended complaint, Shulman "denied" that Bob Cook and Bruce Cook each

were 50% stockholders in SRM. The disqualification motion was filed on October 20, 2023, ten days thereafter.

Apparently, there is no factual basis for this "denial," and counsel for both defendants conceded at oral argument on the disqualification motion, that Bob Cook was, in fact, a 50% beneficial owner of SRM.

As noted, the defendants contend that the disqualification motion is untimely and, therefore, any conflict has been waived. In support, they rely on a Texas decision, *In re Murrin Bros. 1885, Ltd*, 603 S.W.3d 53 (Tex. 2019), which, in a mandamus proceeding, concluded that the trial judge did not abuse his discretion in declining to disqualify counsel, when the motion was first made some three months before a scheduled trial. *In Re Murrin Bros.* is not particularly instructive as to timeliness because, among other reasons, no trial date has been set in this case. More apt, perhaps, is a Texas case cited by the defendants in their sur-reply, *In re Kyle Financial Group LLC*, 562 S.W.3d 795 (Tex. App. 2018), in which an unexplained thirteen-month delay was held to be a waiver, particularly given that the trial date was only two months off. However, no such circumstances are present in this case.

As noted, the possibility of a conflict first surfaced on March 1, 2023, when the defendants moved to dismiss, contending that Bob Cook was not a stockholder of SRM. That motion was mooted when the plaintiff filed a first amended complaint on March 30, 2023. A pre-answer motion was filed as to that pleading, and the circuit court, after a hearing, largely denied the motion with leave to amend those aspects as to which the motions judge had concerns.

The second amended complaint was filed on September 22, 2023. An answer filed on October 10, 2023, by Shulman on behalf of both the corporate defendant and the individual

defendant, stated, for the first time in a pleading, that Bob Cook was not a stockholder of SRM. By that assertion, the defendants told the court that Bob Cook lacked standing to bring a claim for dissolution, a claim for breach of fiduciary duty or any derivative claims. By this answer, the case was at issue and Bruce Cook and SRM became unquestionably "adverse" to all of the relief sought by Bob Cook.

It is true that the discovery deadline of September 5, 2023, had passed by the time the disqualification motion was filed. Yet, it also is true that both sides, in their September 18, 2023, pretrial statements told the court that the case was not yet ready for trial and that no depositions had been taken. Both sides asked for a several-month extension of the discovery period. This posture was reiterated on September 29, 2023, when, in a joint motion to postpone the pretrial hearing, counsel jointly told the court that discovery was not yet completed and that an extension of the discovery deadline was requested. While it is true that the court has the discretion to decline to extend the discovery period, the court concomitantly has the discretion to allow depositions to be taken particularly when, as here, no trial date has been set.

Although the plaintiff certainly could have moved with greater alacrity, the filing of a disqualification motion is a serious matter, not to be undertaken lightly. Here, the court easily concludes, that the motion was not filed for tactical or strategic reasons. It was filed only after plaintiff's counsel were, in their minds, certain, that there was a conflict and, what they concluded, was a violation of the Maryland ethical rules. This view was cemented when the defendants filed their answer denying that Bob Cook owned 50% of SRM. *Cf. Buckley v. Airshield Corp.*, 908 F. Supp at 307 ("[T] mere length of delay is not dispositive and the Court should not deny a motion to disqualify based on delay alone."). Critically, the only prejudice that has been alluded to is slight delay and the expense of new counsel getting up to speed.

In short, the granting of the plaintiff's motion certainly would occasion some delay and some additional expense for the defendants. The court finds that the only actual prejudice that will redound to the individual and the corporate defendant by the granting of this motion "relates to further delay of the case and additional costs to be incurred, but costs and delay, although unfortunate, are not unusual in complicated commercial litigation." *Prudential v. E-Net*, 140 Md. App. 194, 234 (2001). No other prejudice is extant, and the court concludes that the plaintiff has not waived his right to seek disqualification.

As to the merits of the motion, the court is guided by the standard outlined in *Klupt v. Krongard*, 126 Md. App. 179, 203 (1999). In that case, the intermediate appellate court outlined a three-step process for a trial court to follow. First, the movant must identify a specific violation of the Rules. Second, the court must determine whether, in the case before it, there has been an actual violation of the Rule. Finally, the court must, in the exercise of discretion, determine whether or not to impose the sanction of disqualification. *Klupt v. Krongard*, 126 Md. App. at 203.

In this case, Bob Cook contends that Rule 19-301.7(a) precludes an attorney from representing a client in a matter involving a conflict of interest if "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client." In this case, Bob Cook contends that both aspects of the Rule are violated by Shulman's continued representation of both Bruce Cook and SRM. First, it is contended that the representation of Bruce Cook, the individual defendant, is directly adverse to the interests of SRM, the corporate defendant. Second, it is contended that there is a significant risk that the representation of SRM, the corporation, will be materially limited by the concurrent

representation of Bruce Cook, the individual stockholder and, it is alleged, the controller of the corporation.

This case involves, among other claims, stockholder derivative claims brought by Bob Cook, on behalf of the corporation, against Bruce Cook. Bruce Cook sees it differently, contending that there is no legitimate basis for stockholder derivative claims, and that this case is really just a garden variety dispute between two brothers over which the corporation has no interest.

The court disagrees. First, the parties elected to conduct their affairs through the corporate form, an organizational form created by the Legislature. The corporate charter is a grant of authority by the State of Maryland, which permits stockholders to conduct a business for profit while benefitting from the corporate shield from personal liability. A corporate charter is a creature of legislative grace. J. Hanks, MARYLAND CORPORATE LAW § 1.5 (2019 Supp.). It certainly comes with important rights, particularly for the stockholders. It also comes with responsibilities, not just to those in control but also "[to] many others who may be associated with or depend on the company – other shareholders, its management, employees, and customers." *Bontempo v. Lare*, 444 Md. 344, 370 (2015). Consequently, the court rejects the notion, advocated by Bruce Cook, that this is just a sibling dispute.

Second, the corporation and Bruce Cook filed an answer to the second amended complaint. Neither defendant moved to dismiss. The court's review of the operative pleading shows that it states facts sufficient to constitute causes of action for both direct and derivative claims. It may be that some or all of Bob Cook's claims cannot survive summary judgment or be

proven at trial. But this case is now at issue, and the court cannot, at this juncture, say he cannot prevail.[4]

Third, the second amended complaint alleges serious violations of corporate governance. It is alleged that Bruce Cook improperly facilitated his son Josh Cook's (a purported officer of the corporation, one who has filed documents with the State of Maryland purporting to be an officer of the corporation and a person alleged to have signatory authority over corporate bank accounts) obtaining a default judgment against SRM. That, if true, is a breach of fiduciary duty resulting in harm to the corporation, and this claim may be asserted derivatively as any recovery or benefit would go to the corporation, not individual stockholders. *Shenker v. Lauteate Educ., Inc.*, 411 Md. 317, 343-44 (2009); *Tooley v. Donaldson, Lufkin & Jenerette, Inc.*, 845 A.2d 1031-33 (Del. 2004).

The leading treatise on Maryland corporate law states that, because of the inherent conflicts of interest in stockholder derivative actions between the entity and the directors and officers who typically are named as the defendants : "[I]t is commonly accepted today that the corporation and the individual defendants should be represented by separate counsel." J. Hanks, MARYLAND CORPORATE LAW § 7.22G at p. 7-116 (2020 Update).

This conclusion is underscored by the case of *Tydings v. Berk Enterprises*, 80 Md. App. 634, 637 (1989). In that case, a derivative suit was filed by the minority stockholders of Montgomery Golf Corporation. A single lawyer answered the complaint on behalf of both the corporation and the majority stockholders. The trial court ruled that the lawyer was disqualified from representing the corporation. A ruling was deferred on whether he could continue to

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[4] It may be that Bob Cook cannot pursue (or recover) on both direct and derivative claims in the same lawsuit and that, at some point, he may have to make an election. But that is for another day. *See Horowitz v. Pownall*, 582 F. Supp. 665, 666 (D. Md. 1984).

represent the majority stockholders. That question was never decided in that case because new counsel entered their appearance in the case for the majority stockholders. 80 Md. App. at 637-38. On appeal, the trial court's decision to disqualify counsel from representing the corporation was affirmed. 80 Md. App. at 639-41.

Tydings v. Berk Enterprises is controlling authority. It is buttressed by the treatise cited above. The wound here was entirely foreseeable and self-inflicted; Shulman never should have sought to represent both the corporation and Bruce Cook in this case. Their disqualification from continuing to represent the corporation is warranted.

In this case, there cannot be a majority of the board of directors who can select corporate counsel. In fact, based on counsel's representations at oral argument, it does not appear that there even is a duly constituted board of directors. There are only two stockholders, each controlling 50% of the vote, and they are deadlocked. In this circumstance, it is left to the court to appoint a director who can select counsel to represent the corporation. *See Renbaum v. Custom Holding, Inc.*, 386 Md. 28, 61 (2005) (trial court had the authority to appoint counsel for the corporation where there was no board majority to make the decision); *Forrester Construction Co v. Forrester*, 2021 WL 5764503 at *4-5 (Md. Cir. Ct., Nov. 2, 2021) (trial court had the authority to appoint provisional director where board was deadlocked).

Bob Cook contends that Shulman cannot continue to represent Bruce Cook if it is disqualified from representing the corporation. He bases this contention on Md. R. Attorneys, Rule 19-301.9(a). SRM, he asserts, cannot give informed consent because of the 50-50 deadlock between the stockholders (there is no board of directors), their interests are materially adverse, and that the representation is "in the same or substantially related matter." Bruce Cook counters that Shulman should be permitted to represent him even if it is disqualified from representing the

corporation, with new counsel being retained only to represent SRM. He reasons that Shulman could not have obtained any confidential information from SRM that it could not have obtained from Bruce Cook.

Bruce Cook cites no case authority to support his argument.[5] The court's own research indicates that courts have taken differing views over whether the disqualification of an attorney from representing the entity in the lawsuit also disqualifies him from representing a majority stockholder in that same lawsuit.

In the stockholder derivative context, the appellate courts of New York generally have said yes. *E.g., Morris v. Morris,* 763 N.Y.S.2d, 622, 625 (NY App. Div. 2003); *accord Taneja v. FamilyMeds Group, Inc.,* 2010 WL 2573762 (Conn. Super. May 18, 2010). The principle behind this conclusion was stated by the Court of Appeals of New York, as follows: "One who has served as attorney for a corporation may not represent an individual shareholder in a case in which his interests are adverse to other shareholders." *Matter of Greenberg*, 614 N.Y.S.2d 825, 827 (N.Y. 1994).

The court's research discloses that Florida and California courts have permitted, under some circumstances, an attorney who was disqualified from representing the corporation to represent an individual, stockholder defendant. *Campellone v. Cragan*, 910 So.2d 363, 365 (FL DCA 2005); *Forrest v. Baeza*, 58 Cal. App. 4th 65, 80-82 (1997). In those cases, not cited by Bruce Cook, the appellate courts concluded that since the controlling stockholder was the source of any confidential information held by the corporation, there was no real ethical constraint to preclude the attorney, who was disqualified from representing the corporation in a lawsuit, from

[5] The court has considered the arguments advanced in Shulman's post-hearing memorandum, filed on January 31, 2024.

continuing to represent the controlling stockholder in that same lawsuit. *Beachcomber Mgt. Cove, LLC v. Superior Court*, 13 Cal App. 5th 1105, 1123 (Cal. App. 2017).

The leading case that permits the attorney, who has been disqualified from representing both the corporation and an individual stockholder, to continue to represent the individual stockholder in a derivative action is *Forrest v. Baeza, 58 Cal. App. 4th at 80-82.* There, the intermediate appellate court focused largely on practical considerations rather than the ethical rules. 58 Cal. App. 4th at 80-82. It concluded that since the lawyer could receive the same information from the stockholder that he could obtain from the corporation, there was no ethical conundrum, in its view. 58 Cal. App. 4th at 82.

This court declines to follow *Forrest v. Baeza*, and those cases that permit a disqualified law firm to continue to represent individual defendants, after the joint representation was severed by disqualification. Although allowing having the corporation obtain new counsel and the conflicted attorney to continue to represent the individual stockholder is convenient, such a result basically ignores the conflict and ethical violation that gave rise in the first place to disqualification from the dual representation of the corporation and the individual defendant, minimizes the problem that gave rise to the ethical breach in the first instance, and runs afoul of Rules 13-3017(a)(1) and 19-301.9(a). The size of the corporation and the number of stockholders does not (and should not) change the ethical rules or modify an attorney's ethical obligations.

Here, the interests of SRM and Bruce Cook are adverse. Shulman undertook to represent both in the same case. SRM cannot give informed consent and Bob Cook declined to do so. In the exercise of its discretion in this case and after considerable thought, *Klupt v. Krongard*, 126 Md. App. at 203, the court has decided to grant the motion.

1. The motion to disqualify counsel is granted.

2. Neil A. Greenberg[6] is appointed Custodian and Provisional Director for Site Residential Management, Inc.

3. Mr. Greenberg shall have all the powers and title of a receiver appointed under §3-414 of the Corporations and Associations Article.

4. Mr. Greenberg shall have all the rights and powers of a duly elected director of the corporation, including but not limited to the right to notice of and to vote at meetings of directors, until such time as removed by the court.

5. Mr. Greenberg shall be compensated at his customary rate, with Site Residential Management, Inc. advancing 100% of the cost, subject to a final allocation or re-allocation of fees, expenses, and other costs by the court.

It is So Ordered this 6th day of February, 2024.

Ronald B. Rubin, Judge

[6] A copy of Mr. Greenberg's *curriculum vita* is attached.

NEIL A. GREENBERG

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QUALIFICATIONS

Chief Operating Officer. Somerset Companies, LLC, a developer of large mixed-use communities (www.somersetconstruction.com) 1994 - Present
Broker. Maryland Real Estate 1994 - Present
Member. MD Bar, DC Bar, DC Federal Bar & U.S. Supreme Court Bar 1991 – Present
Director & Chairman of Community Engagement Committee. University of Maryland Baltimore Washington Medical Center 2020 – Present
Director. Garden of Remembrance Memorial Park 2022 - Present
Court Appointed Receiver. Forrester Construction Company *(Mont County Cir Ct)* 2021
Director. Colombo Savings Bank 1998 - 1999
Associate. Tucker, Flyer & Lewis *(predecessor to Venable)* 1991 - 1993

EDUCATION

Juris Doctor. Georgetown Law Center 1991
BBA in Finance. Emory University, *Summa Cum Laude, Valedictorian* 1988

PROJECTS

Manager of Master Developer 1994 - Present
1,100-acre Arundel Mills Mall
A mixed-use community in Western Anne Arundel County, MD. This community contains Arundel Mills Mall (3,000,000 square feet of retail and office space (www.simon.com/mall/arundel-mills), The Villages of Dorchester (800 townhomes and single family homes), Arundel Overlook (www.sjpi.com/property/detail/arundel_overlook) (313,000 square feet of flex/office space) and Arundel Preserve (www.arundelpreserve.com) (1,750 residential units, 2,300,000 square feet of office space, 400,000 square feet of retail space and 2 hotels).

Manager of Master Developer 2005 - Present
1,000-acre Greenleigh (formerly Baltimore Crossroads @95) (www.Greenleigh.com), a mixed-use community in Eastern Baltimore County, MD. This community, at completion, will contain 9,500,000 sq ft of office, flex, R&D, warehouse, manufacturing, retail, hotel and residential space.

Manager of Master Developer 2012 - Present
Annapolis Junction Town Center (www.annapolisjunctiontowncenter.com) a mixed-use community in Howard County, MD. This community is being developed for 716 apartments, 101,000 square feet of office, 108-room hotel and 13,240 square feet of retail space.

Co-Developer (Residential & Retail) 2017 - Present
400-acre Melford Town Center (www.MelfordTownCenter.com) a mixed-use community in Bowie, MD which will contain 1,260 apartment homes, 247 townhomes, 140 senior living homes and a retail center.