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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF PLACENTIA,

Plaintiff,

v.

KFM ENGINEERING, INC.,

Defendant and Respondent;

RICK AUGUSTINI,

Objector and Appellant.

G046098

(Super. Ct. No. 30-2011-00450162)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Nancy Wieben Stock, Judge. Affirmed.

Law Office of Rick Augustini and Rick Augustini for Objector and Appellant.

No appearance for Plaintiff.

Bremer, Whyte, Brown & O'Meara, Keith G. Bremer, Jeremy S. Johnson and Michael H. Shen for Defendant and Respondent.

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Objector and appellant Rick Augustini appeals from an order disqualifying him from representing plaintiff City of Placentia (City) in this action against defendant and respondent KFM Engineering, Inc. (KFM), its chief executive officer, Rick Kreuzer, and several other defendants. The trial court disqualified Augustini because it found a substantial relationship existed between (1) his representation of KFM in its buyout of a former shareholder, officer, and director in 1999 and (2) the allegations Augustini made on the City's behalf seeking to hold Kreuzer liable as KFM's alter ego. Based on that relationship the trial court conclusively presumed Augustini's prior representation of KFM provided him with confidential information material to his representation of the City and therefore his disqualification was mandatory.

We conclude substantial evidence supports the trial court's finding that Augustini's successive representations of KFM and the City are substantially related and therefore required Augustini's disqualification. All of Augustini's contrary arguments ignore the conclusive presumption that arises under the controlling substantial relationship standard: When an attorney represents interests adverse to a former client and a substantial relationship exists between the two representations, it is conclusively presumed the attorney obtained confidential information during the prior representation material to the later representation. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 706 (*Jessen*)). Accordingly, we affirm the trial court's ruling disqualifying Augustini from representing the City against KFM.

We also affirm the trial court's ruling disqualifying Augustini from representing the City against all other defendants. A contrary conclusion would defeat the purpose of disqualifying Augustini from representing the City against KFM because Augustini would remain in an adversarial role that posed the risk he would inadvertently

or intentionally disclose KFM's confidential information to the attorney hired to replace Augustini. (See *Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 78 (*Pound*).

## I

### FACTS AND PROCEDURAL HISTORY

In 1999, Augustini worked as an associate with the law firm of Case, Knowlson, Burnett & Wright LLP (Case Firm). A partner assigned him to represent KFM regarding a dispute with a KFM officer, director, and shareholder, Ronald Fromknecht. The representation lasted a few months and concluded after Augustini negotiated and drafted a buyout agreement between KFM and Fromknecht. Augustini left the Case Firm in August 2001 without taking any files relating to the KFM representation.

In 2002 the City hired KFM to provide "on-call engineering services" for a project to lower or "trench" certain railroad lines running through the City. The City received federal and state funds for the project through the California Department of Transportation (CalTrans). CalTrans began an audit of the project in 2005 and later disallowed numerous charges based on alleged conflicts of interest and improper contract procurement by KFM and other consultants. In February 2010, after lengthy negotiations with CalTrans, the City agreed to repay approximately \$5.5 million it received for the trenching project.

The City hired Augustini to recover those funds from KFM and the other consultants the CalTrans audit identified. Augustini filed this action on the City's behalf in February 2011, alleging multiple claims for express and equitable indemnity. The City's complaint named KFM and Kreuzer as defendants and alleged Kreuzer was

KFM's alter ego.<sup>1</sup> The complaint also alleged claims against five other consultants the CalTrans audit identified.

After receiving the City's complaint, KFM and Kreuzer contacted Augustini to inform him that his representation of the City created a conflict of interest because he previously represented KFM and acquired confidential information relevant to the City's alter ego allegations. KFM and Kreuzer agreed Augustini could continue to represent the City if it would dismiss Kreuzer because doing so would remove the alter ego issues that gave rise to the conflict. Augustini declined to dismiss Kreuzer because he believed his prior representation of KFM did not create a conflict of interest. KFM and Kreuzer renewed their offer several times, but Augustini declined to reconsider.

In August 2011, KFM moved to disqualify Augustini based on his prior representation of KFM. To support the motion, Kreuzer filed a declaration stating he retained Augustini "to represent KFM[']s interests as it related to a dispute and buyout negotiations with former KFM officer/director/shareholder Ronald Fromknecht. [¶] As counsel for KFM . . . , Mr. Augustini directly negotiated with Mr. Fromknecht and documented the ultimate buyout agreement reached."

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<sup>1</sup> Specifically, the City's complaint alleged: "Plaintiff is informed and believes that Defendant Kreuzer is, and at all relevant times has been, the alter ego of Defendant KFM because, among other things: (a) KFM was a mere sham and shell; (b) KFM was so inadequately capitalized that compared with the business being done and the risk of loss attendant thereto, its capitalization was trifling; (c) there existed a unity of interest and ownership between Defendant Kreuzer, on the one hand, and KFM, on the other hand, that any separateness has ceased to exist in that (i) Defendant Kreuzer has used the assets of KFM for personal use, (ii) Defendant Kreuzer has caused assets of KFM to be transferred to himself without adequate consideration, (iii) Defendant Kreuzer has withdrawn funds from entity bank accounts of KFM for personal use, and (iv) Defendant Kreuzer commingled his personal funds with those belonging to KFM; (d) Defendant Kreuzer at all times has controlled, dominated, managed and operated KFM to the point that any separateness between them never existed and/or has ceased to exist; and (e) failure to deem Defendant Kreuzer to be the alter ego of KFM would work a fraud and injustice on Plaintiff."

Kreuzer further declared that Augustini “was provided with privileged, confidential information relating to KFM’s corporate structure, valuation and operations,” including (1) “KFM’s corporate documents and bylaws so that [he could] understand the mechanisms in place for buying out a shareholder and removing officers/directors from office”; (2) “documents which outline[d] KFM’s corporate structure, decision-making hierarchy/structure, and the number of and classes of outstanding shares in KFM”; (3) “information pertaining to KFM’s company capitalization and the valuation of the company”; and (4) “documents involving: KFM’s approval of authority to purchase Mr. Fromknecht’s shares, KFM’s resolutions to remove Mr. Fromknecht as a director and officer, and KFM’s documentation regarding the termination of Mr. Fromknecht’s employment at KFM.” Finally, Kreuzer declared that Augustini “met with and repeatedly spoke with the highest level of KFM’s management including its officers, directors and major shareholders . . . . By virtue of this fact, Mr. Augustini learned the names, identities, roles and responsibilities for these individuals.”

Augustini opposed the motion by submitting a declaration denying that he received any confidential information from KFM: “The engagement was a quick, simple and straightforward one, i.e., I am informed and believe that it did not involve any litigation, discovery and/or valuations and that I did not receive any confidential information regarding KFM. [¶] To the contrary, I remember that I finalized the agreement with Mr. Fromknecht fairly quickly and that my work consisted mostly of: (a) exchanging proposals with Mr. Fromknecht; and (b) drafting an agreement th[at] effectuated the exchange of shares for money. [¶] My limited representation of KFM in the Fromknecht Matter in 1999 did not involve any of the alter ego issues at bar in this Action, e.g., the nature or extent of KFM’s capitalization, whether KFM was adequately capitalized, whether Defendant Kreuzer had commingled or otherwise misused corporate assets and/or whether Defendant Kreuzer was the alter ego of KFM.” (Original italics.)

Augustini also declared, “I did not take any of the information and/or documents that I received from KFM in connection with my limited engagement in the Fromknecht Matter in 1999 with me when I left [the Case Firm] in *August 2001*, and I never represented KFM again.” (Original italics.) Finally, Augustini declared, “I do not know what [confidential] information [or documents] Defendant Kreuzer is referring to [in his declaration] since his descriptions are vague, but I do not have any recollection of receiving any ‘privileged’ or ‘confidential’ information [or documents from KFM].”

In September 2011, the trial court granted KFM’s motion and disqualified Augustini from representing the City “in any capacity in this Action.” The court explained, “It would be difficult to imagine a situation in which a more substantial relationship existed than that which existed here between the negotiation of a buyout agreement, which necessarily would involve the financial intricacies of the corporate entity, its capitalization, its valuation, etc. and an alter ego allegation, which seeks to prove the lack of any sufficient capitalization and value. If the corporation had no value and the real value was in the controlling individual, isn’t that exactly what would be the nature of any due diligence in a buyout? That confidential information[] was acquired in the past relationship between Augustini and KFM is therefore conclusively presumed.” The court further found that KFM presented sufficient evidence to establish that Augustini actually received confidential information from KFM regardless of any presumption that may arise. Finally, the court concluded, “As the former and present representations have a direct and substantial relationship, and as access to confidential information is both presumed and proven, disqualification is mandatory.”<sup>2</sup>

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<sup>2</sup> The court’s ruling also stated, “This and the related case *City of Placentia v. Woodruff, Spradlin*, Case No. 30-2010-00367949 [Malpractice Action] are both in the early pleading stages. It may be much more expedient and efficient, and appropriate to have Mr. Augustini disqualified as to both Actions. That issue is not presently before the Court. Defendant KFM to give Notice to parties in both related matters, so that the issue can be discussed and any additional order proposed, if appropriate.” In the Malpractice Action, the City is suing its former city attorney for malpractice, alleging the attorney

Augustini timely appealed the trial court's order, but the City did not. (*A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077 ["Disqualified attorneys themselves have standing to challenge orders disqualifying them"].) Instead, the City retained replacement counsel and continues to litigate this action in the trial court.<sup>3</sup>

## II

### DISCUSSION

#### A. *Standard of Review*

"We review a trial court's decision on a disqualification motion for abuse of discretion. [Citation.] "In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court has drawn reasonable inferences from the evidence, we

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failed to detect and prevent KFM and the other consultants' misconduct giving rise to CalTrans's demand that the City repay the funds the audit identified. The trial court consolidated this action and the Malpractice Action for case management and discovery purposes, but not trial. Based on the trial court's invitation, KFM and the defendants in the Malpractice Action moved to extend the disqualification order at issue on this appeal to the Malpractice Action. The trial court granted that motion and Augustini separately appealed. We affirm that ruling in a separate unpublished opinion. (See *City of Placentia v. Woodruff, Spradlin & Smart* (Aug. 2, 2012, G046322).)

<sup>3</sup> KFM moved to dismiss this appeal on mootness grounds. KFM contends the appeal is moot because (1) the City retained new counsel to represent it after the trial court disqualified Augustini and (2) the City's administrator testified in deposition that the City did not intend to rehire Augustini if we overturn the disqualification order. The City's administrator, however, submitted a declaration in opposition to the motion stating the authority to rehire Augustini lies with the City council alone; he may only make recommendations to the council. The City administrator also explained that his deposition testimony meant the City would not rehire Augustini to replace its current counsel, but it would consider rehiring him to work with its current counsel. KFM therefore failed to establish this appeal is moot and we deny the motion to dismiss.

have no power to draw different inferences, even though different inferences may also be reasonable.” [Citations.] We presume the trial court found for the prevailing party on all disputed factual issues. [Citations.]’ [Citation.]” (*Orange County Water Dist. v. The Arnold Engineering Co.* (2011) 196 Cal.App.4th 1110, 1116-1117 (*OC Water*).

““We will reverse the trial court’s ruling only where there is no reasonable basis for its action. [Citation.] However, we must also ensure that the trial court has made a reasoned judgment that complies with the applicable legal standard. [Citation.]’ [Citation.] ‘Thus, where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court’s exercise of discretion. [Citation.]’ [Citation.]” (*OC Water, supra*, 196 Cal.App.4th at p. 1117.)

#### B. *Governing Attorney Disqualification Principles*

A motion to disqualify counsel places a litigant’s right to select his or her attorney into conflict with the duty to maintain ethical standards of professional responsibility. (*Jessen, supra*, 111 Cal.App.4th at p. 705.) When faced with this dilemma, “[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145-1146 (*Speedee*).

“Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring ““the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.”

[Citation.]’ [Citation.] To this end, a basic obligation of every attorney is ‘[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.’ [Citation.]” (*SpeeDee, supra*, 20 Cal.4th at p. 1146.) This duty of confidentiality continues after the attorney’s services end. (*Id.* at p. 1147.)

To protect the attorney-client relationship’s confidentiality, the Rules of Professional Conduct provide that an attorney “shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.” (Rules Prof. Conduct, rule 3-310(E) (Rule 3-310(E)); *SpeeDee, supra*, 20 Cal.4th at p. 1146.)

A disqualifying conflict of interest generally arises under Rule 3-310(E) in two situations: (1) “where the attorney successively represents clients with potential or actual adverse interests” and (2) “where the attorney simultaneously represents clients with potential or actual adverse interests.” (*Jessen, supra*, 111 Cal.App.4th at p. 705; see also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283-284 (*Flatt*)). In a successive representation case, “the ‘governing test requires that the client demonstrate a “substantial relationship” between the subjects of the antecedent and current representations’ in order to obtain the disqualification of the target attorney. [Citation.]” (*Jessen*, at p. 705, original italics; *Flatt*, at p. 283.) “When the facts involve simultaneous representation, the rule of disqualification, ‘in all but a few instances, . . . is a *per se* or “automatic” one.’ [Citation.]” (*Jessen*, at p. 705, original italics; *Flatt*, at p. 284.) Here, the parties agree this is a successive representation case.

“[T]he substantial relationship test is “intended to protect the confidences of former clients when an attorney has been in a position to learn them.” [Citation.]” (*Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1213 (*Knight*)). The test “turns on two variables:” (1) the attorney’s interaction with the former client and (2) “the relationship between the legal problem involved in the former representation and the

legal problem involved in the current representation.” (*Jessen, supra*, 111 Cal.App.4th at p. 709.)

Where the attorney’s level of interaction with the former client placed the attorney in a position to learn the client’s confidences *and* a substantial relationship exists between the two representations, it is *conclusively presumed* the attorney received confidential information and the attorney’s disqualification “is mandatory.” (*Flatt, supra*, 9 Cal.4th at p. 283; *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847 (*Cobra Solutions*) [“the attorney is automatically disqualified”]; *Knight, supra*, 149 Cal.App.4th at p. 1214; *Jessen, supra* 111 Cal.App.4th at p. 706; *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452 (*Ahmanson*).)

In applying the substantial relationship test, “the trial court must first identify where the attorney’s former representation placed the attorney with respect to the prior client.” (*Jessen, supra*, 111 Cal.App.4th at p. 710; see also *Cobra Solutions, supra*, 38 Cal.4th at p. 847.) Specifically, the court must determine whether the attorney had a direct and personal attorney-client relationship with the former client or a more peripheral and attenuated relationship. (*Jessen*, at pp. 709-711; see also *Cobra Solutions*, at p. 847.)

Where the attorney had a direct relationship and was “personally involved in providing legal advice and services to the former client,” the court will presume confidential information passed to the attorney “because a direct attorney-client relationship is inherently one during which confidential information ‘would normally have been imparted to the attorney by virtue of the nature of [that sort of] former representation,’ . . . . [Citations.]” (*Jessen, supra*, 111 Cal.App.4th at p. 709; see also *Ahmanson, supra*, 229 Cal.App.3d at p. 1454.) Disqualification in that instance will turn *solely* on “the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation.” (*Jessen*, at pp. 709, 711.)

If the attorney was not in a direct relationship with the former client, the court will not presume the attorney received confidential information absent a showing “the attorney was in a position vis-à-vis the client to likely have acquired confidential information material to the current representation.” (*Jessen, supra*, 111 Cal.App.4th at p. 710; see also *Cobra Solutions, supra*, at 38 Cal.4th at p. 847.) A more probing examination of the attorney’s role in representing the former client is required to determine whether the work the attorney performed put him or her in a position to likely receive client confidences. (*Jessen*, at pp. 710-711; see also *Cobra Solutions*, at p. 847.)

Regardless of whether the attorney had a direct or more limited relationship with the former client, the client must establish a substantial relationship between the former and current representations to disqualify the attorney. (*Cobra Solutions, supra*, 38 Cal.4th at p. 847.) “[A] ‘substantial relationship’ exists whenever the ‘subjects’ of the prior and the current representations are linked in some rational manner. [Citation.]” (*Jessen, supra*, 111 Cal.App.4th at p. 711.) “Thus, successive representations will be ‘substantially related’ when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.” (*Id.* at p. 712.)

This inquiry “focuses ‘upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation.’ [Citations.]” (*Farris v. Fireman’s Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 681 (*Farris*)). “[T]he substantial relationship test is broad and not limited to the ‘strict facts, claims, and issues involved in a particular action.’ [Citation.]” (*Knight, supra*, 149 Cal.App.4th at p. 1213.) “The ‘aggrieved client’ need only satisfy a ‘low threshold of proof’ . . . . [Citation.]” (*Id.* at p. 1214.)

The substantial relationship test “does not require the former client to *prove* the former attorney possesses confidences which could be used to the former client’s disadvantage. Instead, it proscribes the subsequent representation solely on the ground that subsequent representation, because of its substantial relationship to the former, places the attorney in a situation where he or she could breach the duty of confidentiality to the former client.” (*Ahmanson, supra*, 229 Cal.App.3d at p. 1452, original italics.) Inquiry into the “‘actual state of the lawyer’s knowledge’” is prohibited. (*Farris, supra*, 119 Cal.App.4th at pp. 681, fn. 7, 683, 688; *Jessen, supra*, 111 Cal.App.4th at p. 710.)

“This standard, with its conclusive presumption of knowledge of confidential information, is ‘justified as a rule of necessity’ because “‘it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to ‘engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.’” [Citations.] The conclusive presumption also avoids the ironic result of disclosing the former client’s confidences and secrets through an inquiry into the actual state of the lawyer’s knowledge and it makes clear the legal profession’s intent to preserve the public’s trust over its own self-interest. [Citations.] [Citation.] [¶] . . . [¶] ‘[I]n the usual case when the substantial relationship of the matters is established, the inquiry ends and the disqualification should be ordered. If it were otherwise, a weighing process would be inevitable. The rights of the former client would be lined up against those of the new client, perhaps to the detriment of both. The purpose of the substantial relationship test is to avoid such an inquiry.’ [Citation.]” (*Jessen, supra*, 111 Cal.App.4th at p. 706.)

C. *The Substantial Relationship Between Augustini’s Representations of KFM and the City Required the Trial Court to Disqualify Augustini*

The trial court found a substantial relationship existed between Augustini’s successive representations of KFM and the City because both representations raised

issues regarding KFM's ownership, finances, structure, and operations. Based on that substantial relationship, the trial court presumed Augustini received confidential information from KFM relevant to the City's alter ego allegations and therefore concluded disqualification was mandatory. We affirm the trial court's ruling because the court properly applied the foregoing standards and substantial evidence supports its factual findings regarding the relationship between the two representations.<sup>4</sup>

Augustini had a direct relationship with KFM because he personally provided KFM legal advice and services regarding the Fromknecht buyout. (*Jessen, supra*, 111 Cal.App.4th at p. 709; see also *Cobra Solutions, supra*, 38 Cal.4th at p. 847; *Farris, supra*, 119 Cal.App.4th at p. 679.) He met with KFM personnel, received information from KFM necessary to negotiate and draft the buyout agreement, negotiated the agreement, and drafted it. Although Augustini disputes he actually received confidential information from KFM, he does not dispute he had a direct and personal attorney-client relationship with KFM.

Based on this direct relationship, we presume Augustini received confidential information from KFM and the only remaining question is whether a substantial relationship exists between Augustini's representations of KFM and the City. (*Jessen, supra*, 111 Cal.App.4th at p. 709; *Farris, supra*, 119 Cal.App.4th at p. 679 [because a direct relationship existed between the attorney and former client "the only issue before the trial court was whether there was a substantial relationship between" the prior and current representations].)

Augustini represented KFM in negotiating and documenting the buyout of a shareholder who also served as an officer and director. The nature of this dispute customarily involves issues regarding the corporation's value, finances, and governance.

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<sup>4</sup> Because the presumption that Augustini received confidential information is sufficient to justify his disqualification, we need not address the trial court's additional finding that Augustini actually received confidential information.

Setting a price at which to buyout the shareholder and the payment terms (e.g., a lump sum or installments) necessarily present issues regarding the corporation's value and finances. Similarly, other terms of the transaction involve issues regarding the shareholder's buyout rights as defined in the governing corporate documents, the type and number of shares the shareholder held, who had the right to purchase the shares, and who must approve the transaction for the corporation. Because Fromknecht was an officer and director in addition to a shareholder, issues regarding the functions he performed, or thought he should perform, also could arise.

Some of these same subjects are implicated by the City's allegation that Kreuzer is KFM's alter ego. Alter ego is an equitable doctrine that allows a plaintiff to disregard a corporation's ordinary status as a legal entity distinct from its shareholders, officers, and directors "where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora Diamond*)). "Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners." (*Ibid.*)

A plaintiff must establish two elements to pierce the corporate veil and hold the equitable owners responsible for the corporation's liabilities: (1) "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist" and (2) "there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 538.) Courts have identified a host of factors that may be considered in applying the alter ego doctrine, including (1) failing to adequately capitalize the corporation; (2) vesting ownership and

control in a single individual; (3) concealing the identity of the responsible ownership, management, and financial interest; (4) commingling personal and corporate funds and assets; (5) failing to maintain proper corporate records or follow other corporate formalities; and (6) using the corporation as a mere shell or conduit for the affairs of the owner. (*Id.* at pp. 538-539; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811.) “No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.” (*Sonora Diamond*, at p. 539.)

We agree with the trial court’s conclusion that a substantial relationship exists between the subjects of Augustini’s representation of KFM in the Fromknecht buyout and his representation of the City on its claim that Kreuzer is KFM’s alter ego. Information regarding KFM’s ownership, finances, value, and governance is “material to the evaluation, prosecution, settlement or accomplishment of [both] representation[s] given [their] factual and legal issues . . . .” (*Jessen, supra*, 111 Cal.App.4th at p. 713; cf. *Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 760 (*Western Continental*) [knowledge of former client’s operating practices acquired through prior representation substantially related to alter ego claim made against former client in subsequent litigation]; *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 488 [attorney’s prior employment as corporation’s general counsel was substantially related to later litigation alleging the corporation was the alter ego of another company it owned].)

#### D. *Augustini’s Challenges to the Court’s Ruling*

Augustini asserts numerous arguments challenging the trial court’s decision to disqualify him, but each one fails because Augustini misunderstands the substantial relationship standard and the nature of a conclusive presumption.

First, Augustini contends he “rebutted any ‘presumption’ that he received ‘confidential’ information” through his representation of KFM by explaining the

representation's nature, denying he received any confidential information, and showing neither he nor the Case Firm retained any files or bills from the KFM representation. The presumption that arises from the substantial relationship test, however, is not a rebuttable presumption; it is a "conclusive presumption." (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 603 (*Brand*); *City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 327; *Jessen, supra*, 111 Cal.App.4th at p. 706; *Ahmanson, supra*, 229 Cal.App.3d at p. 1452.) The court may not "inquir[e] into the actual state of the lawyer's knowledge' acquired during the lawyer's representation of the former client" (*Jessen*, at p. 711; *Farris, supra*, 119 Cal.App.4th at p. 681, fn. 7) and therefore the attorney may not "rebut" the presumption by denying he or she received confidential information. Indeed, a declaration by the attorney denying he or she had access to or received confidential information during the prior representation is irrelevant. (*Farris*, at p. 688.)

The substantial relationship test and the invocation of a conclusive presumption are "intended to protect the confidences of former clients when an attorney has been in a position to learn them." [Citation.] (*Knight, supra*, 149 Cal.App.4th at p. 1213.) The only way to overcome the presumption is to prevent it from arising in the first place. That can only be done by showing the attorney was not in a position during the prior representation to learn the former client's confidences and therefore "there is no realistic chance that confidences were disclosed." (*Jessen, supra*, 111 Cal.App.4th at p. 708, quoting *Ahmanson, supra*, 229 Cal.App.3d at p. 1455.) As explained above, Augustini was in a position to learn KFM's confidences because of his direct and personal relationship with KFM during the prior representation.

Moreover, Augustini's description of his representation of KFM and his denial that he received confidential information at most creates a conflict in the evidence. The trial court, however, resolved that conflict in KFM's favor and we must defer to the

trial court's ruling because substantial evidence supports it. (*SpeeDee, supra*, 20 Cal.4th at pp. 1143-1144.)

Second, Augustini contends the motion should have been denied because KFM failed to show any information he received was actually confidential and nonetheless all of the information KFM claims he received is discoverable in this action. Again, KFM does not have to prove Augustini actually received confidential information (*Cobra Solutions, supra*, 38 Cal.4th at p. 847; *Knight, supra*, 149 Cal.App.4th at p. 1214) and we may not inquire into the actual state of Augustini's knowledge (*Jessen, supra*, 111 Cal.App.4th at p. 711; *Farris, supra*, 119 Cal.App.4th at p. 681, fn. 7). The contention that the information is discoverable also fails to "reflect the proper legal standard." (*Farris*, at p. 685.) As the *Farris* court stated in rejecting the same argument, "[The current clients] may be entitled to 'much of the information' [the attorney] had access to [during the prior representation], but [they] are not entitled to have, through discovery or through the mind and experience of [the attorney], the confidential information [he] is presumed to have acquired during his prior representation of [the former client]." (*Ibid.*)

The core value at issue in successive representation cases is the confidentiality of the communications between attorney and client. (*Flatt, supra*, 9 Cal.4th at p. 283; *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331 (*Adams*)). The attorney is disqualified from representing a current client against a former client when the two representations are substantially related to "preserve public trust in the scrupulous administration of justice[,] the integrity of the bar[, and] ethical considerations that affect the fundamental principles of our judicial process. [Citations.]" (*SpeeDee, supra*, 20 Cal.4th at pp. 1145-1146.) It is irrelevant that the information the former client shared with the attorney during the prior representation may be discoverable in later litigation. The potential discoverability of the information the client shared with

the attorney in confidence does not eliminate the injury to the foregoing interests when an attorney uses information he or she received from a former client to sue that client.

Third, Augustini contends KFM failed to show he received confidential information that he is trying to use against it in this action because KFM “failed to adduce *any* evidence” addressing the fact that 12 years separates his representations of KFM and the City. (Original italics.) According to Augustini, it “is likely that [KFM’s] ‘corporate structure’ and ‘capitalization’ have changed significantly” since he represented KFM in 1999 as demonstrated by Kreuzer starting a new company in 2004, selling the name “‘KFM Engineering,’” and doing business under the name “‘Kreuzer Consulting.’” To support this contention, Augustini cites the *Farris* court’s statement, “We certainly can envision circumstances where the passage of time might be shown to have eliminated a prior substantial relationship due to such events as changes in corporate structure, turn over in management, and the like.” (*Farris, supra*, 119 Cal.App.4th at p. 686.) We do not find the argument persuasive.

The statement from *Farris* is dicta because only one year separated the successive representations in that case and the former client had not undergone any change in corporate structure or management. (*Farris, supra*, 119 Cal.App.4th at p. 686.) More importantly, Augustini again fails to recognize the basis for applying the substantial relationship test. “[W]hether [Augustini] actually possesses confidential information that would work to his advantage in his current representation [of the City] is not the test. Rather, the test is whether a substantial relationship exists between the subjects of the two compared representations.” (*Id.* at p. 683.)

In *Brand*, the Court of Appeal held “the passage of 12 years” between the two representations could not “overcome the conclusive presumption” arising from the substantial relationship test because the former client was “not required to run the risk” the attorney would use the client’s confidential information to its detriment. (*Brand, supra*, 124 Cal.App.4th at p. 607.) The *Brand* court refused to consider whether the

passage of time rendered the confidential information obtained from the former client useless because considering that issue would “subvert[]” “the base purpose of the conclusive presumption” by requiring “an ‘inquiry into the actual state of the lawyer’s knowledge.’”” (*Ibid.*)

Fourth, Augustini contends the repeated offer to allow him to remain as the City’s attorney if the City dismissed Kreuzer shows he did not receive confidential information from KFM and that Kreuzer was merely using the threat of disqualification for tactical reasons. According to Augustini, KFM and Kreuzer would never agree to allow him to remain as the City’s attorney if he truly received confidential information from KFM. Again, Augustini fails to recognize the true basis for his disqualification: the substantial relationship between his prior representation of KFM and the City’s alter ego claim gives rise to a conclusive presumption he received confidential information from KFM material to the alter ego claim. If the City dismissed Kreuzer, there would be no alter ego claim and the substantial relationship between the two representations would cease to exist. Moreover, Rule 3-310(E) allows the former client to consent to the attorney representing adverse interests.

Fifth, citing *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309 (*Gregori*), Augustini argues the trial court erred because KFM failed to establish the confidential information he received would give the City an unfair advantage. The substantial relationship standard, however, did not require KFM to make any such showing. “[T]he substantial relationship test . . . require[es] the former client to ‘show *no more* than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.’ . . . [Citation.]” (*Jessen, supra*, 111 Cal.App.4th at p. 707, original italics.)

*Gregori* is not a successive representation case. Instead, it involved a motion to disqualify an attorney based on a “social relationship” the attorney had with a

secretary for the opposing counsel. (*Gregori, supra*, 207 Cal.App.3d at p. 295.) The section of the *Gregori* case Augustini relies on addressed whether the attorney “should be disqualified because . . . his behavior create[d] an appearance of impropriety that cannot be countenanced without undermining the integrity of the judicial system.” (*Id.* at p. 305.) The cited portion of *Gregori* did not address the substantial relationship test and therefore does not apply.

Finally, Augustini contends Rule 3-310(E) does not apply because his representation of the City is not adverse to a former client. He explains he previously represented KFM only, not Kreuzer, and he directed the City’s alter ego allegations against Kreuzer only. In Augustini’s view, the alter ego allegations “would *help* [KFM] because there would be another person to shoulder the liability” and therefore his representation of the City is not adverse to his former client, KFM. (Original italics.) Augustini, however, reads Rule 3-310(E) and his alter ego allegations too narrowly.

Rule 3-310(E) prohibits an attorney from accepting employment adverse to a former client when the attorney obtained confidential information from the former client that is material to the employment. The rule does not limit its prohibition to an attorney who makes allegations against his or her former client in a later lawsuit. It applies even when the former client is not a party to the current lawsuit if the current representation is adverse to the former client. (*Metro-Goldwyn-Meyer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1843-1844 [“The proscription exists where counsel’s employment is ‘adverse to the client or former client,’ and can exist even though a prior client is not a party to the litigation”].)

Under every definition of the word, Augustini’s representation of the City is “adverse” to KFM. (See Merriam-Webster Online Dict. <<http://www.merriam-webster.com>> [as of Aug. 2, 2012] [defining adverse as “1: acting against or in a contrary direction: hostile <hindered by adverse winds> [¶] 2a: opposed to one’s interests <an adverse verdict> <heard testimony adverse to their position>; especially:

unfavorable <adverse criticism> [¶] b: causing harm: harmful <adverse drug effects> [¶] 3 archaic: opposite in position”). Augustini sued KFM on the City’s behalf, alleging KFM owed the City millions of dollars and that KFM was nothing more than a sham Kreuzer used to work a fraud on the City. Accordingly, the City’s employment of Augustini is plainly adverse to KFM and the alter ego allegations make the two representations substantially related for the reasons set forth above.

Rule 3-310(E) requires the application of strict standards to protect the fiduciary nature of the attorney-client relationship. (*Pound, supra*, 135 Cal.App.4th at p. 78; *Adams, supra*, 86 Cal.App.4th at p. 1340 [“[R]ule 3-310(E) must be vigorously applied to protect a former client’s legitimate expectations of loyalty and trust”). “We . . . accept the possibility, given the realities of present-day law practice and law office management [citation], of some overinclusion as a necessary byproduct of the paramount solicitude for the maintenance of the public’s trust in the fairness of the justice system and in the integrity of the bar manifested by the rule of necessity. [Citation.]” (*Jessen, supra*, 111 Cal.App.4th at p. 714.)

E. *The Trial Court Properly Disqualified Augustini from Representing the City Against the Other Named Defendants*

Augustini contends the trial court exceeded its authority by disqualifying him from representing the City “in any capacity” in this action. According to Augustini, the trial court lacked authority to disqualify him from representing the City against the other defendants because (1) none of them sought to disqualify him; (2) none of them joined in KFM’s motion; and (3) the City is not using any confidential information he obtained from KFM against the other defendants. We reject Augustini’s contention because he fails to cite any authority to support it and allowing him to continue representing the City against the other defendants would undermine the purpose for disqualifying Augustini from representing the City against KFM.

“It is now firmly established that where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm [citations] at least where an effective ethical screen has not been established [citation].” (*Adams, supra*, 86 Cal.App.4th at p. 1333; *Farris, supra*, 119 Cal.App.4th at p. 689, fn. 17.) “Normally, an attorney’s conflict is imputed to the law firm as a whole on the rationale ‘that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information.’ [Citation.]” (*Cobra Solutions, supra*, 38 Cal.4th at pp. 847-848; *SpeeDee, supra*, 20 Cal.4th at pp. 1153-1157; *Flatt, supra*, 9 Cal.4th at p. 283.) “Therefore, once the attorney is shown to have had probable access to former client confidences, the court will impute such knowledge to the entire firm, prohibiting all members of the firm from participating in the case.”<sup>5</sup> (*Adams*, at p. 1333; *Cobra Solutions*, at pp. 847-848; *SpeeDee*, at p. 1149; *Flatt*, at p. 283.)

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<sup>5</sup> In *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 (*Kirk*), the Second District recently examined whether this vicarious disqualification rule is an absolute rule mandating disqualification of the entire firm in all cases or a rebuttable presumption the firm may overcome by showing it erected an ethical wall to screen the attorney possessing a former client’s confidential information from any involvement with, or any communication concerning, the representation of interest adverse to the former client. (*Id.* at p. 791.) The *Kirk* court explained the availability of an ethical wall to prevent vicarious firm disqualification in the private law firm context is an open question in California because the our Supreme Court has not squarely decided the matter and there are Court of Appeal decisions on both sides of the issue. (*Id.* at pp. 799-800.) The *Kirk* court concluded, “We do not doubt that vicarious disqualification is the *general* rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case.” (*Id.* at p. 801, original italics.) We need not decide the issue of whether the presumption leading to vicarious law firm disqualification is absolute or rebuttable because the existence of any presumption is sufficient to decide this case. As explained below, Augustini did not and cannot establish an effective ethical wall between the new attorney representing the City against KFM and Augustini if he continues representing the City against all other defendants.

This vicarious disqualification rule extends to attorneys who are not part of the same firm but associate together as counsel to represent the same party when one of the associated attorneys previously represented an adverse party in a substantially related matter. (*Pound, supra*, 135 Cal.App.4th at p. 78.) In *Pound*, counsel for some of the defendants consulted with Attorney Bradley regarding the issues that would eventually give rise to the underlying lawsuit. A few years later, Attorney Jones filed the underlying lawsuit on the plaintiffs' behalf and then associated Bradley as cocounsel. (*Id.* at pp. 73-74.) The defendants moved to disqualify both Bradley and Jones based on Bradley's prior consultation with the defendants' counsel. The trial court disqualified Bradley because of the substantial relationship between his consultation with the defendants' counsel and his joint representation of the plaintiffs, but the trial court refused to disqualify Jones because Bradley did not provide Jones with confidential information regarding the defendants. (*Id.* at pp. 73-75.)

The *Pound* court affirmed Bradley's disqualification, but reversed the decision not to disqualify Jones. The Court of Appeal concluded there was "no logical or substantive manner to distinguish" between attorneys who work together in a firm and independent attorneys who associate together to jointly represent the same client in a single matter. (*Pound, supra*, 135 Cal.App.4th at p. 77.) The *Pound* court explained, "[T]he need to maintain client confidences requires disqualification of a firm when one of the attorneys in the firm has confidential information of the adverse party. The need to maintain client confidences, as well as our obligation to maintain public confidence in the legal profession and the judiciary, would be defeated if we permitted Jones's continued representation of plaintiffs after his having hired Bradley to assist in a case where Bradley previously represented defendants and, in the course of this representation, obtained confidential information. The distinction between hiring Bradley as an associate or partner, on the one hand, and associating him as counsel, on the other hand, does not change the need to protect defendants' confidences. The only effective method to protect

defendants' confidences from the possibility of inadvertent disclosure is also to disqualify Jones." (*Id.* at p. 78.) Based on the cocounsel relationship between Jones and Bradley, the *Pound* court disqualified Jones even though Bradley did not share with Jones any confidential information regarding the defendants. (*Id.* at p. 73.)

The same rationale justifies the trial court's decision to disqualify Augustini from representing the City in any capacity in this case. If Augustini remained the City's attorney on all claims except those against KFM, he essentially would be in the same cocounsel relationship *Pound* prohibits. Dividing the claims on which Augustini and another attorney represent the City would not distinguish this case from *Pound*. Augustini and the other attorney would represent the same client in the same lawsuit and would necessarily have to coordinate and discuss strategy, discovery, trial preparation, and trial.

Augustini contends he could remain the City's attorney against all other defendants because the alter ego issue is limited to KFM and Kreuzer. In Augustini's view, his ethical duty to preserve client confidences would prevent him from sharing KFM's confidential information with the City's attorney on the claims against KFM. He further contends the trial court could order him not to discuss the alter ego issue with the City's new attorney and not to participate in discovery or other proceedings relating to the alter ego issue. Augustini fails to recognize the rationale behind the controlling disqualification rules and how those rules operate.

"The purpose behind former rule 4-101 [Rule 3-310(E)'s predecessor] is to prevent dishonest conduct as well as to avoid placing the honest practitioner in a position where he may be forced to choose between conflicting duties or interests." (*Western Continental, supra*, 212 Cal.App.3d at pp. 758-759.) A disqualification order's purpose is not to punish the attorney. (*Kirk, supra*, 183 Cal.App.4th at p. 815.) Rather, its purpose is to protect the former client's confidences from both intentional and inadvertent disclosure. (*Pound, supra*, 135 Cal.App.4th at p. 78.) The order protects the former

client's confidences by removing the attorney from a "situation where he or she *could* breach the duty of confidentiality to the former client." (*Ahmanson, supra*, 229 Cal.App.3d at p. 1452, italics added.) Allowing Augustini to remain the City's attorney on any claims would keep Augustini in a situation where he *could* breach his duty of confidentiality and therefore defeats, rather than furthers, the disqualification order's purpose.

In limited circumstances, an ethical wall or screen may be employed to allow a *firm* to represent interests adverse to one of its attorneys' former clients if the attorney possessing the former client's confidential information is isolated from the firm's other attorneys and employees. To be effective, an ethical wall must screen the attorney possessing the former client's confidential information from having "any involvement with the litigation, or any communication with attorneys or [e]mployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed." [Fn. omitted.] [Citation.]" (*Kirk, supra*, 183 Cal.App.4th at p. 810, italics added.) The ethical screen must be imposed when the conflict arises. "It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion." (*Ibid.*)

An ethical wall does not allow the attorney possessing the former client's confidential information to have any involvement in representing interests adverse to the former client, but rather screens the attorney from the firm's representation of those adverse interests. Accordingly, we reject Augustini's suggestion that he may continue representing the City as long as he does not participate in the City's claims against KFM and does not share KFM's confidential information with the City's other attorney.

If Augustini remains involved in this litigation in any capacity, the conflict requiring his disqualification from the claims against KFM also remains. Indeed, he still would have the ongoing duty to preserve KFM's confidences at every peril to himself (see *SpeeDee, supra*, 20 Cal.4th at p. 1146) and the conflicting duty to zealously advocate

on the City's behalf (see *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 359). Hiring a second attorney to represent the City on the specific claim giving rise to the conflict does not eliminate the conflict if Augustini otherwise remains involved in the City's representation. In the *Pound* court's words, "[t]he only effective method to protect [KFM's] confidences from the possibility of inadvertent disclosure is also to disqualify [Augustini from representing the City against all other defendants in this action]."<sup>6</sup> (*Pound, supra*, 135 Cal.App.4th at p. 78.)

### III

#### DISPOSITION

The order is affirmed. KFM shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

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<sup>6</sup> Augustini also objects to the trial court's statement in its ruling that the defendants in the related Malpractice Action should seek to disqualify him as the City's counsel. That statement, however, is irrelevant to this appeal. We address the propriety of the trial court's later ruling disqualifying Augustini in the Malpractice Action in our opinion in his separate appeal from that ruling.