

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER**  
*Justice*

**PART 61**

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MERIAL INC., MERIAL SOCIÉTÉ PAR ACTIONS SIMPLIFIÉE,  
BOEHRINGER INGELHEIM GMBH,

Petitioners,

**INDEX NO. 650137/2018**

**MOTION DATE 1/10/2018**

- v -

**MOTION SEQ. NO. 001**

ABIC BIOLOGICAL LABORATORIES LTD., PHIBRO ANIMAL  
HEALTH CORPORATION, KING & SPALDING LLP,

Respondents.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 12, 15, 20, 21, 22, 23, 24, 25, 26

were read on this application to/for Injunction/Restraining Order

**Upon the foregoing documents, it is**

**OSTRAGER, J.,**

Petitioners commenced this special proceeding by order to show cause and verified petition seeking an order disqualifying the law firm of King & Spalding LLP from representing Respondents Abic Biological Laboratories Ltd. (“Abic”) and Phibro Animal Health Corporation (“Phibro”) in an arbitration before the International Chamber of Commerce (“ICC”) in which Abic and Phibro are adverse to Merial Société Par Actions Simplifiée (“Merial SAS”), a former client of King & Spalding. Petitioners also sought to enjoin the arbitration pending the adjudication of the motion. Upon review of the parties’ submissions, the Court directed an evidentiary hearing which was conducted on February 20 and February 21, 2018 and at which

five witnesses testified. The ICC arbitration is captioned *Abic Biological Laboratories Ltd and Phibro Animal Health Corporation v. Merial SAS.*, Case No. 23306/MK. The ICC arbitration was commenced on December 20, 2017 and by agreement of the parties Merial SAS does not have to take any action in the ICC arbitration in the near term, so no stay of the arbitration is required.

The evidence adduced at the hearing established that King & Spalding has intermittently represented all Petitioners at one time or other from at least 1998 to 2011 with respect to transactions and litigation in the animal health and animal vaccine space. King & Spalding also jointly represented the Petitioners in the past. And, King & Spalding has represented the U.S. affiliate of Petitioner Boehringer Ingelheim GmbH (“Boehringer”) as recently as December 2017. Boehringer acquired the Merial group of companies in 2017.

The transactions and litigations in which King & Spalding represented the Petitioners included issues with respect to patents and licenses. According to the testimony of a King & Spalding senior partner, the 2011 engagement for Merial may have extended significantly beyond 2011.

King & Spalding also has a historic relationship with Phibro which involved, as did King & Spalding’s prior representations of Petitioners, patents and license agreements in the animal health and animal vaccine space. Phibro was unaware of King & Spalding’s historic representation of the Petitioners until the issue of King & Spalding’s representation of Phibro became an issue in the summer of 2017.

On June 19, 2017, King & Spalding sent a letter to Dr. Judy Jarecki-Black, Head of Patent Prosecution and Patent Litigation for Merial, informing Merial SAS that King & Spalding was representing Abic and Phibro in connection with a patent licensing issue involving Merial

SAS. King & Spalding had significant prior dealings with Dr. Jarecki-Black in connection with King & Spalding's prior work for one or more Merial affiliates. On June 30, 2017 Dr. Jarecki-Black promptly responded to King & Spalding by asserting that King & Spalding's prior representation of the Petitioners and their affiliates conflicted King & Spalding from being adverse to the Petitioners and that Petitioners would not waive the conflict. King & Spalding responded by letter dated July 12, 2017 that it was free to represent Phibro because the "firm's former matters for Merial are not the same or substantially related to the Abic and Phibro matter" and that the "firm also has not obtained any confidential information belonging to Merial (or Boehringer Ingelheim) pertinent to the Abic and Phibro matter." Dr. Jarecki-Black reiterated Merial's position in a subsequent letter to which King & Spalding responded on August 1, 2017. This special proceeding was initiated approximately three weeks after King & Spalding's near Christmas eve filing of the ICC arbitration.

Among the three hearing witnesses sponsored in support of Petitioner's motion to disqualify King & Spalding was a highly credentialed ethicist, Roy D. Simon, who has extensively published and taught law school classes on the subject of legal ethics. Mr. Simon testified for several hours and opined, based on his fairly extensive review of the documents in evidence and all the relevant facts and circumstances recited in the submissions of the parties, that King & Spalding's adverse representation against its former clients violates Section 1.9 of the New York Code of Professional Conduct. King & Spalding offered no expert testimony to rebut Mr. Simon's expert opinion, although it is ultimately for the Court to decide whether disqualification is appropriate.

"Under [Rule 1.9] a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing

counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse.” *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y. 2d 123 (1996).

Here, based upon the testimony of a senior King & Spalding partner, there is no question that King & Spalding attorneys previously represented the Petitioners. And, this testimony was corroborated by the testimony of the former General Counsel of the Merial group of companies who testified that the Merial group of companies has a common General Counsel (who frequently engaged King & Spalding) and a centralized payroll function.

There is also no question based on the hearing record that King & Spalding interfaced over a long period of time on patent and licensing issues in the animal health and animal vaccine space with the personnel of the Merial group who would be involved in defending the claims that are the subject of the ICC arbitration, including most particularly Dr. Jarecki-Black. And, while it is conceded that none of the transactions, patents, and licenses about which King & Spalding represented various Merial entities are involved in the ICC arbitration, King & Spalding is presently representing interests that are materially adverse to its former clients. Consequently, the first and third prongs of the *Tekni-Plex* test are met. King & Spalding clearly knows a great deal about how the Merial entities approach issues relating to patents and licenses in the animal health and animal vaccine space.

The remaining issue, passing any appearance of impropriety, is whether the matter involved in King & Spalding’s current and former engagements are substantially related. The Court agrees with Petitioners’ expert that they are and that King & Spalding is disqualified from continuing to represent Abic and Phibro in the ICC arbitration in which Abic and Phibro’s interests are materially adverse to King & Spalding’s former clients (who were listed on King &

Spalding's website as current clients at the time King & Spalding first advised Merial that King & Spalding was acting on behalf of Abic and Phibro).

As Mr. Simon testified, the language of Section 1.9 of the New York Rules of Professional Conduct is not statutory. Rather, against the background of case law interpreting the standards by which to judge motions to disqualify counsel, Section 1.9 must be viewed in the specific context in which a disqualification motion is made. According to Comment 3 to New York's Rules of Professional Conduct,

[m]atters are 'substantially related' for purposes of [Rule 1.9] if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

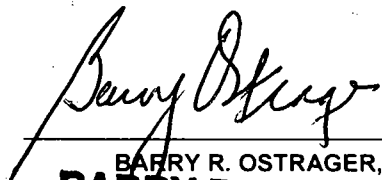
Here the eye of the needle through which King & Spalding wishes to thread in order to be adverse to its former clients is too small for King & Spalding to escape the conclusion which a reasonable lawyer like Mr. Simon came to that King & Spalding's multiple representations of Petitioners on issues meaningful to the limited number of players in the animal health and animal vaccine space would materially advance Abic and Phibro's interests *vis-a-vis* Merial. Of particular relevance to this conclusion is the interaction King & Spalding had with Dr. Jarecki-Black, who will play an integral role in Merial's defense of the arbitration that Abic and Phibro have initiated against Merial.

Finally, as previously noted, in the summer of 2017 there was an extensive exchange of correspondence between the parties about the King & Spalding representation of Abic and Phibro as parties with interests adverse to Petitioners. Consequently, the Court does not view this disqualification motion as a litigation tactic to gain strategic advantage over Abic and Phibro. Rather, there apparently was a deep-felt view by each of Merial and King & Spalding in

the rectitude of their positions, and when King & Spalding filed the ICC arbitration it did so with the full expectation, as outlined in the summer 2017 correspondence, that Merial would challenge in this forum King & Spalding's representation of clients with interests adverse to Merial which Merial promptly did.

It is therefore ORDERED AND ADJUDGED that the petition is granted and King & Spalding LLP is disqualified from representing Abic and Phibro in the ICC proceeding it initiated against Merial.

2/22/2018



BARRY R. OSTRAGER, J.S.C.  
**BARRY R. OSTRAGER**  
JSC

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE