United States District Court, S.D. New York.
Stella MITCHELL, Hwa-Mei C. Gee, Barbara LaChance, Durpatty Persaud, and Janet Ramsey, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
METROPOLITAN LIFE INSURANCE COMPANY, INC. d/b/a Metlife, Defendant.
No. 01 Civ. 2112 (WHP).
July 20, 2001.

# Memorandum of Law in Support of Defendant's Motion for Disqualification of Lieff, Cabraser, Heimann & Bernstein, LLP

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*PRELIMINARY STATEMENT*

Plaintiffs, five present or former employees of Metropolitan Life Insurance Company ("MetLife"), brought this lawsuit alleging individual and class claims of employment discrimination against MetLife arising from their employment within the MetLife Financial Services division ("MLFS") -- the division of MetLife that is responsible for selling its financial products, through account representatives who work at its agencies throughout the country. MetLife now moves to disqualify one of the two law firms representing plaintiffs -- Lieff, Cabraser, Heimann & Bernstein, LLP -- because shortly before this lawsuit was commenced, the firm knowingly recruited as a partner in its New York office an attorney who, for most of the preceding two years, represented MetLife in the defense of a series of individual and class claims which specifically implicated the activities of MLFS employees. Lieff Cabraser's continued representation of plaintiffs under these circumstances would violate several Canons of the New York Code of Professional Responsibility ("Code"), and no remedy short of disqualification will remove the potential prejudice to MetLife, let alone the undeniable appearance of impropriety that results from these ethical violations.

The facts and circumstances giving rise to this motion did not occur by chance. Lieff Cabraser invited the attorney in question -- Wendy Fleishman -- to join its partnership notwithstanding its knowledge that (i) Ms. Fleishman had engaged in the prolonged and substantial representation of MetLife while employed as Counsel at Skadden, Arps, Slate, Meagher & Flom LLP; and (ii) the Lieff Cabraser firm intended to serve as co-counsel in the instant suit against MetLife. Recognizing this obvious dilemma, Ms. Fleishman sought to obtain a waiver of conflicts resulting from her prior representation of MetLife; Lieff Cabraser nonetheless proceeded to commence this lawsuit against MetLife notwithstanding the failure to secure such a waiver.

That Ms. Fleishman was engaged in the virtually full-time representation of MetLife (often as lead counsel) immediately prior to her joining Lieff Cabraser is undisputed. In the course of that representation, Ms. Fleishman gained an intimate knowledge of MLFS that extended to virtually every aspect of its operations and the policies and procedures applicable to the employees within it. Much of this acquired knowledge was obtained through representation of (and/or interviews with) managerial and other employees of MetLife, as well as attorneys within the MetLife Law Department. As detailed more fully below, Ms. Fleishman gained, over the course of a two year period, and in part through numerous privileged communications and the revelation of client confidences, an intimate knowledge of the workings of the very MetLife division whose practices are at issue in this case. In the course of her representation of MetLife, Ms. Fleishman interviewed and/or defended numerous MLFS employees and managers, in the process gaining frank and candid assessments of their activities that only a senior defense counsel can learn in the course of privileged dialogue. And, in

the course of her representation of MetLife, Ms. Fleishman gained a unique perspective -- a window into MetLife's litigation and settlement strategy, and decision making processes -- that only a senior defense counsel can possess. In sum, there can be no legitimate dispute that Ms. Fleishman was privy to precisely the types of core client confidences that the Code deems sacrosanct and the preservation of which the Code compels.

MetLife's understandable anxiety over Ms. Fleishman's sudden appearance as a member of the firm now litigating against it is not alleviated, as a matter of law or fact, by Lieff Cabraser's purported efforts to screen her from the attorneys directly handling the litigation. Mindful of the mandate of the ethical rules to prevent any conceivable harm from the inappropriate use of confidential information, as well as the appearance of impropriety, the federal and state courts in New York have consistently rejected screening as a remedy where the facts and circumstances present tangible risks of disclosure, however inadvertent. Those risks are clearly presented here, in that: (i) Lieff Cabraser is a small firm; (ii) the Lieff Cabraser New York office -- where Ms. Fleishman works -- has only twelve lawyers (three of whom are assigned to this case); (iii) Ms. Fleishman works closely with one of the attorneys assigned to this case; and (iv) Ms. Fleishman has collaborated with several of the attorneys assigned to this case on the preparation of an amicus brief in a similar class action employment discrimination lawsuit.

In this environment, there is no foolproof way to screen Ms. Fleishman from all the dialogue concerning *Mitchell* that will inevitably pervade Lieff Cabraser's New York office, not to mention the myriad of depositions, document productions, in person and telephone conferences, brief preparations and the like that can be anticipated in this sizeable litigation, and that will undoubtedly be taking place in very close range of her and her office. Nor is there any way to monitor whether there has been disclosure, however inadvertent. In weighing the relative risks to, and burdens on, the parties, we respectfully submit that MetLife should not, under these unique facts, be asked to assume the substantial risks presented here. Lieff Cabraser invited Ms. Fleishman to join its partnership with its eyes open -- it could have elected not to do so, or it could have elected to forego its participation in this suit. MetLife should not be asked to bear the risk of the choices made by the Lieff Cabraser firm.

In short, both common sense and applicable law dictate that, rather than compel MetLife to continue to endure the risk of its defense being undermined by its own former lawyer, this Court should disqualify Lieff Cabraser and require that plaintiffs continue the prosecution of this lawsuit through its other counsel -- Outten & Golden LLP -- or through new counsel of their own choosing.

## *STATEMENT OF FACTS*[FN1]

FN1. Except where otherwise indicated, this Statement of Facts is based on the Complaint, the documents referenced therein, communications between plaintiffs' counsel and defendant's counsel concerning the conflict-of-interest issues giving rise to this motion, and the affidavits submitted herewith. In presenting the information contained in the affidavits, MetLife's counsel has endeavored to provide the Court with sufficient information to evaluate the disqualification motion without revealing privileged information in the process.

### I. *ALLEGATIONS IN THE COMPLAINT*

The Complaint was filed on March 13, 2001, nearly two months after Ms. Fleishman joined Lieff Cabraser. In addition to alleging individual claims of employment discrimination and retaliation on behalf of the five named plaintiffs, it purports to state class claims of gender discrimination against MetLife with respect to hiring, promotions, working conditions, job assignments, compensation, and other terms and conditions of employment, and of retaliation in response to complaints of discrimination. The class claims are asserted under Title VII on behalf of a purported class consisting of similarly situated past, present, and future female employees who have been employed within MLFS, denied employment opportunities within MLFS or who were deterred from applying for positions within MLFS since August 27, 1999. (Fagin Aff., Exh., A, ¶¶ 1, 7, 18-20) They are also asserted under the New York State Human Rights Law and the Administrative Code of the City of New York for those plaintiffs and purported class members employed, denied

employment opportunities or deterred from applying for positions within MLFS since March 13, 1998, in New York State and/or New York City.

## II. *PLAINTIFFS' COUNSEL*

The Complaint identifies the law firms of Lieff Cabraser and Outten & Golden as plaintiffs' counsel. Although it is unclear when Lieff Cabraser's representation of plaintiffs commenced, Outten & Golden has been representing plaintiffs at least since the time certain of the plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Fagin Aff., Exh., A)

According to published materials, Lieff Cabraser is a fifty-attorney law firm with four national offices located in San Francisco, Boston, New York, and Nashville. Two of the four attorneys of the Lieff Cabraser firm who are identified in the Complaint as counsel of record, Rachel Geman and Leila K. Helal, work in the firm's New York office, which consists of approximately twelve attorneys. Richard T. Seymour, a Lieff Cabraser partner in the firm's New York office, has also appeared as an attorney of record on this matter. The other two Lieff Cabraser attorneys identified in the Complaint as counsel of record, James M. Finberg and Kelly M. Dermody, work in the firm's San Francisco office. (Fagin Aff., Exhs., A, B)

## III. *WENDY FLEISHMAN'S REPRESENTATION OF METLIFE*

In January 2001, Wendy Fleishman, a 1977 graduate of Temple University School of Law with extensive legal experience with employment and class action issues, became a partner in the Lieff Cabraser firm in its New York office. Immediately before joining the firm, Ms. Fleishman held the position of Counsel in Skadden's New York office, where, for two full years preceding her departure from that firm, she performed substantial work, at a senior-level, on matters for MetLife. Skadden's billing records reflect that in calendar year 1999, Ms. Fleishman spent over 1,800 client billable hours representing MetLife in connection with almost fifty matters; and, in calendar year 2000, Ms. Fleishman spent over 1,540 client billable hours representing MetLife in connection with almost forty matters. (Sullivan Aff., ¶5)

Ms. Fleishman's senior-level representation of MetLife related primarily to the defense of claims concerning the conduct of employees in the MLFS field force, the same group in which the plaintiffs and the putative class members worked or applied to work. During the period in question, MetLife was defending numerous lawsuits -- including class actions -- arising from claims that employees within the MLFS field force had engaged in improper practices with respect to their sale of MetLife financial products. One such litigation, for which Ms. Fleishman had primary responsibility (as of the latter part of 1998), was *Dornberger, et al. v. Metro. Life Ins. Co.,* 182 F.R.D. 72 (S.D.N.Y. 1998) (Sand, J.), which in 1998 was certified as a class action on behalf of a class of thousands of MetLife overseas policyholders (and former policyholders) who had purchased MetLife whole life insurance policies.[FN2] (Sullivan Aff., ¶ 7; Elberg Aff., ¶ 7) In addition, Ms. Fleishman was responsible for representing MetLife in numerous other sales practices lawsuits. (Sullivan Aff., ¶ 10; Elberg Aff., ¶ 6; Seltzer Aff., ¶ 2; Finnegan Aff., ¶ 2)

> FN2. Skadden's representation of MetLife in *Dornberger* commenced in October 1998, when the firm entered into an agreement (which continues to date) to serve as MetLife's national coordinating counsel for sales practices litigation. Prior to then, MetLife had been represented in *Dornberger* by Proskauer Rose LLP ("Proskauer"). Proskauer had conducted an extensive fact investigation with respect to the *Dornberger* matter, including the preparation of various memoranda and analyses based on numerous interviews with account representatives, managers and other MetLife officials. Ms. Fleishman had access to the totality of this work product. (Sullivan Aff., ¶ 8)

In connection with her representational activities, Ms. Fleishman represented, defended at deposition, and interviewed various employees (or former employees) in MLFS, including account representatives, managers, and other officials. Their job titles included, among others: Territorial Vice President, Regional Vice President, Regional Administrator, General Manager, Sales Manager, Branch Administrator, Director of Marketing and Training, Director of Territorial Sales, and Account Representative. (Sullivan Aff., ¶ 10; Finnegan Aff., ¶ 5; Seltzer Aff., ¶¶ 4, 6; Elberg Aff., ¶ 4) Several of these individuals would be members of the putative class in this action, while others had decision-making authority over plaintiffs or other members of the putative class. By way of example, a manager who supervised one of the named plaintiffs in this case, who is clearly a key witness with respect to plaintiffs' claims (and is listed in Plaintiffs' Initial Disclosure as a witness), was interviewed by Ms. Fleishman in the course of her representation of MetLife. (Fagin Aff., Exh., C)

In the course of her representation of MetLife in these numerous matters, Ms. Fleishman obtained confidential and privileged information concerning the operations of, and various policies and procedures pertaining to, the MLFS field force, including the evaluation of the performance of field force employees, both generally and specifically in connection with their alleged sales practices improprieties. This acquired knowledge included, among other things, detailed information regarding:

- the procedures for hiring MetLife account representatives;
- the procedures for training account representatives (and the materials used in connection therewith);
- the procedures for supervising account representatives;
- the organizational structure of MetLife's field force and changes in its organizational structure;
- the products sold by account representatives;
- the sales techniques and methods utilized by account representatives;
- the sales literature and sales materials used by account representatives;
- the regulatory environment in which account representatives operate and MetLife policies and procedures for monitoring regulatory compliance;
- the internal audit system used for branches within MetLife's field system;
- MetLife's ombudsman program and corporate ethics and compliance systems;
- the intake, processing, review and investigation of customer complaints about account representatives (including access to numerous customer complaint files);
- MetLife's response to, and supervisory action plans regarding customer complaints about account representatives;
- policies and procedures regarding the discipline and termination of MetLife account representatives and managers in the field force;
- the nature and extent of misconduct by account representatives and managers found to warrant (or not warrant) disciplinary action and documentation regarding disciplinary actions taken with respect to various members of the field force;
- policies and procedures regarding the demotion of MetLife account representatives and managers in the field force;
- the consolidation of agency branches within the field system;
- performance expectations and procedures for performance measurement of account representatives and managers within the field force; and
- personnel files and other documents maintained with respect to field force personnel. (Sullivan Aff., ¶ 12; Finnegan Aff., ¶¶ 5, 7; Seltzer Aff., ¶¶ 4, 5)

Because this information was obtained under the cloak of the attorney-client privilege, it was far more extensive -- and conceivably far more revealing -- than the objective information that would be provided in discovery between adverse parties.

On a broader level, Ms. Fleishman was routinely privy to highly confidential and privileged written and oral communications -- such as internal MetLife Law Department memoranda and legal and factual analyses -- concerning, among other things: the merits of various litigations; the valuation of the potential range of recoverable damages; settlement strategy and settlement structure; and MetLife's attitude toward the settlement of individual and class litigation. (Sullivan Aff., ¶ 11; Finnegan Aff., ¶¶ 4, 8; Seltzer Aff., ¶¶ 5-7; Elberg Aff., ¶ 6)

In short, Ms. Fleishman was privy to substantial information - much of it highly sensitive, privileged, and confidential -- relating both to the core issues of hiring, compensation, promotion, and demotion that are, according to the Complaint, central to this lawsuit, and to the Company's overall litigation and settlement strategies.

## IV. MS. FLEISHMAN'S UNSUCCESSFUL EFFORTS TO OBTAIN A WAIVER OF *ETHICAL OBJECTIONS ARISING FROM HER JOINING LIEFF CABRASER*

In or about early January 2001, Ms. Fleishman called Kaiper Wilson, an officer of MetLife and an Associate General Counsel, to inform Ms. Wilson that she would be leaving Skadden to join Lieff Cabraser. Ms. Fleishman revealed that the Lieff Cabraser firm had a matter (which she described as a discrimination case) against MetLife and asked for a waiver of conflict-of-interest objections. Ms. Wilson responded at the time that she did not have the authority to grant any such waiver, and no waiver has since been provided by MetLife. (Wilson Aff., ¶¶ 5-7)

## V. LIEFF CABRASER'S POSITION WITH RESPECT TO POTENTIAL ETHICAL *IMPROPRIETIES*

On April 17, 2001, MetLife's counsel sent a letter to Lieff Cabraser expressing its concern over the apparent conflict of interest that was presented by Ms. Fleishman's prior work for MetLife and her new relationship with Lieff Cabraser. (Fagin Aff., Exh., D) By letter dated April 25, 2001, Lieff Cabraser expressed the view that any ethical issues arising from Ms. Fleishman's activities were resolved by virtue of the fact that Ms. Fleishman had been screened... from the *Mitchell* litigation since the time of her arrival at the firm. (Fagin Aff., Exh., E) In an effort to demonstrate that screening measures would be effective, the letter also asserted that the partners responsible for the litigation had no involvement with Ms. Fleishman at all, and that, even though she had elsewhere been described by Lieff Cabraser as having extensive employment law experience (Fagin Aff., Exh., B), she was not handling any employment discrimination matters for the firm. (Fagin Aff., Exh., E) MetLife's counsel is aware, however, (without the benefit of any discovery on this issue) of an amicus brief prepared by Lieff Cabraser in another class action employment discrimination lawsuit, authored by Ms. Fleishman, together with four of the Lieff Cabraser attorneys handling the *Mitchell* lawsuit: Richard T. Seymour (a partner in Lieff Cabraser's New York office); Kelly M. Dermody and James M. Finberg (both of whom are partners in Lieff Cabraser's San Francisco office); and Rachel Geman (an associate in Lieff Cabraser's New York office). (Fagin Aff., Exh., F) Furthermore, we have also learned that Ms. Fleishman is part of a team of lawyers working on litigation involving Sulzer hip implants; this team includes Leila K. Hilal, one of the Lieff Cabraser New York office lawyers working on the *Mitchell* case. (Fagin Aff., Exh., B)

## *ARGUMENT*

## I. LIEFF CABRASER MUST BE DISQUALIFIED FROM REPRESENTING PLAINTIFFS BECAUSE OF THE PAST REPRESENTATION OF METLIFE BY *ITS NEWLY ACQUIRED PARTNER*

In light of the prior representation of MetLife by a partner of the firm, Lieff Cabraser's representation of plaintiffs violates Canons 4, 5, and 9 of the Code. These Canons, and the Disciplinary Rules enacted thereunder, operate in conjunction to disqualify a law firm from representing a party to a litigation where, as here, one of the firm's partners or associates previously represented an adverse party in substantially related matters. Furthermore, disqualification cannot be avoided through the use of screening mechanisms if, as will be the case here, the tainted attorney will continue to work in close proximity with the attorneys handling the litigation, and thus there is a discernable risk that screening measures may not be 100% effective.

### A. *Applicable Ethical Standards*

A district court is responsible for supervising the members of its bar. In performing this task, district courts within the Second Circuit consult the guidelines for professional conduct set forth in the Code. *See* e.g., *Bennett Silvershein Assoc. v. Furman,* 776 F. Supp. 800, 803 (S.D.N.Y. 1991) (Mukasey, J.) ("This Circuit has reviewed attorney disqualification motions under Canon 4 of the Model Code of Professional Responsibility."). The Code contains Canons, Ethical Considerations, and Disciplinary Rules. The Canons are statements that generally express the standards of conduct expected of attorneys in their interactions with the public and involvement with the legal system. The Ethical Considerations represent the aspirations toward which all lawyers should strive. Finally, the Disciplinary Rules are pronouncements of the minimum level of conduct below which no attorney can practice without becoming subject to disciplinary action. *See* Code of Professional Responsibility, Preliminary Statement (29 McKinney 1992).

Ethical Canons 4 and 5 address the protection of client confidences. Canon 4 provides that "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides that "A lawyer should exercise independent professional judgment on behalf of a client." A corresponding Disciplinary Rule provides, in pertinent part:

[A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
(1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
(2) Use any confidences or secrets of the former client except as permitted by DR 4-101 (C) or when the confidence or secret has become generally known.
N.Y. Jud. Law § DR 5-108A (McKinney 1992).

Generally, the rule against successive representation "concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely to that client information communicated in confidence in the course of the representation," including "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject." *Ulrich v. Hearst Corp.,* 809 F. Supp. 229, 236 (S.D.N.Y. 1992) (Leval, J.).

Representation of a client who is adverse to a former client may also violate Canon 9, which admonishes lawyers to avoid even the appearance of impropriety. *Cheng v. GAF Corp.,* 631 F.2d 1052, 1055-1056, 1059 (2d Cir. 1980), *vacated on other grounds,* 450 U.S. 903, 101 S. Ct. 1338 (1981); *Marshall v. New York State Div. of Police,* 952 F. Supp. 103, 112 (N.D.N.Y. 1997) (in addition to conflict of interest, facts also establish unacceptable appearance of impropriety under Canon 9).

The prohibition on representing a client adverse to the interests of a former client extends to the tainted attorney's entire law firm. DR 5-105(D) provides, in relevant part:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under ... DR 5-108(A) ... except as otherwise provided therein.

N.Y. Jud. Law § DR 5-105(D) (McKinney 1992). Significantly, the Rule makes no allowance for avoiding disqualification through the use of screening measures.[FN3]

> FN3. New York's rules are, in this regard, consistent with those of most other states, which similarly do not recognize screening as a cure for ethical objections when a lawyer moves from one firm to another. *See* Lee A. Pizzimenti, *Screen Virite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice,* 52 U. Miami L. Rev. 305, n.30 (1997) (stating that only four states have promulgated rules allowing for screening).

Courts in this Circuit have frequently disqualified both the attorney with the conflict and the law firm at which that

attorney works, upon finding a violation of Canons 4, 5 and/or 9. *See e.g., NCK Organization, Ltd. v. Bregman,* 542 F.2d 128, 129 (2d Cir. 1976) (affirming disqualification of counsel for ethical violations under Canons 4 and 9); *In re Manshul Constr. Corp.,* No. 97 Civ. 4295, 1998 WL 405039, at *6 (S.D.N.Y. July 20, 1998) (Batts, J.) (disqualification warranted under Canon 9 based on possibility that attorney, in her new representation against former client, may improperly use confidences gained in her representation of former client to his detriment); *Rosman v. Shapiro,* 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (Sprizzo, J.) (disqualification of attorney based on "appearance of impropriety is so great, the Court in the exercise of its supervisory powers cannot allow the situation to go uncorrected"); *see also Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303, 309, 610 N.Y.S.2d 128, 131 (1994) (considering disqualification of attorney for violation of Code of Professional Responsibility DR 4-101, DR 5-108 and Canon 9); *Alicea v. AngelinaBencivenga,* 270 A.D.2d 125, 704 N.Y.S.2d 578 (1st Dep't 2000) (relying on New York Code of Professional Responsibility DR 5-108(A) to disqualify counsel); *In the Matter of Walden Federal Sav. & Loan Assoc.,* 212 A.D.2d 718, 719, 622 N.Y.S.2d 796, 797 (2d Dep't 1995) (same).

In sum, consistent with the Code, New York courts have routinely resorted to disqualification as a means to insure that a party is not subjected to any unfair disadvantage when one of its former lawyers joins a firm representing an adversary.

B. *Lieff Cabraser's Representation of Plaintiffs Violates Canons 4. 5, and 9*

Lieff Cabraser's representation of plaintiffs falls squarely within the prohibitions of Canons 4, 5 and 9. Indeed, the Canons are intended to prevent precisely the scenario that is presented here; a party to a litigation facing the specter of its defense being compmised by an opposing counsel who was privy to privileged and confidential information learned in the course of a prior attorney-client relationship.

Consistent with DR 4-101(B), the courts in this Circuit have applied the following three-part test to determine whether representation of a client that is adverse to a former client violates Canon 4:
(1) The moving party is a former client of the adverse party's counsel;
(2) There is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issue in the present lawsuit; and
(3) The attorney whose disqualification is sought has access to, or was likely to have access to, relevant privileged information in the course of his prior representation of the client.

*See Evans v. Artek Sys. Corp.,* 715 F.2d 788, 791 (2d Cir. 1983); *Loomis v. Consol. Stores, Corp.,* No. 98 Civ. 8735, 2000 U.S. Dist. LEXIS 12391, at *6 (S.D.N.Y. Aug. 29, 2000) (Sweet, J.); *Red Ball Interior Demolition Corp. v. Palmadessa,* 908 F. Supp. 1226, 1239 (S.D.N.Y. 1995) (Sweet, J.); *United States Football League v. National Football League,* 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985) (Leisure, J.). Since there is no question that Ms. Fleishman represented MetLife, and that she was privy to confidential and privileged communications in the course of that representation, the only question, for purposes of determining whether Canon 4 is implicated here, is whether there is a "substantial relationship" between the subject matter of Ms. Fleishman's prior representation of MetLife and the issues in the present lawsuit.

The courts are particularly inclined to find the "substantial relationship" test satisfied where, by virtue of the prior relationship, the attorney became privy to confidential information or knowledge which provides a litigation advantage that would not otherwise be available. *See, e.g., Bennett Silvershein Assoc. v. Furman,* 776 F. Supp. 800, 804 (S.D.N.Y. 1991) (Mukasey, J.) (matters are substantially related if the attorney gained an advantage from a prior relationship otherwise not available, even if the advantage only concerned background issues).

For example, in *Ullrich v. Hearst Corp.,* 809 F. Supp. 229 (S.D.N.Y. 1992), an attorney was disqualified from representing three former Hearst employees in their employment discrimination claims against the company, based on

the court's determination that the attorney's former representation of Hearst afforded him "continuous access" to confidential information that was closely linked to issues that were relevant to the current employment discrimination litigations. *Id.* at 233. Specifically, the court found that, even though the attorney did not handle any claims involving the three plaintiffs, he had extensive experience with Hearst's performance evaluation process, and thus had knowledge of general performance levels of other employees against whom plaintiffs would be measured. The court concluded that this experience presented a "clear likelihood that confidential information imparted to the attorney by the former client will be used against the interests of [the] former client," and thus required disqualification. *Id.* at 236.

The Court in *Red Ball Interior Demolition Corp.,* 908 F. Supp. at 1244, was similarly concerned with preventing the use of insights gained by counsel through his previous representation of an adverse party. In *Red Ball,* a civil action for breach of fiduciary duty, the attorney (Horwitz) was disqualified from representing defendant Palmadessa because he had previously represented plaintiff Red Ball in a criminal proceeding. Although the Court recognized that the questions of law and fact were different in the civil action and the criminal proceeding, it found disqualification was proper because the witnesses, testimony, and other evidence germane to each action were likely to overlap. Furthermore, the Court stated, "even taking [defendant's] contentions that Horowitz gained no knowledge during his past representation of Red Ball as true, the fact that Horowitz had at least some access to such facts and witnesses presents enough of an appearance of a conflict of interest to meet the successive representation test and to warrant disqualification." *Id.* at 1245. *See also Fernandez v. City of New York,* No. 99 Civ. 0777, 2000 U.S. Dist. LEXIS 3503, at *3-4 (S.D.N.Y. Mar. 21, 2000) (Chin, J.) (law firm disqualified from representing plaintiff in false arrest and malicious prosecution case because there was a reasonable likelihood that firm's earlier representation of defendant in investigation by Internal Affairs Bureau of off-duty employment by defendant resulted in acquisition of confidential information and could be useful to plaintiff).

These decisions demonstrate that the substantial relationship test is readily satisfied here because, as a senior-level attorney for MetLife, Ms. Fleishman became intimately familiar with information that will have a direct bearing on the outcome of the individual and class claims. As discussed more fully above, in the course of over 3,300 hours spent representing MetLife in the two years immediately preceding her joining Lieff Cabraser, Ms. Fleishman became fully conversant with virtually all aspects of the operations of MLFS, including the procedures for hiring, compensating, training, evaluating, disciplining, and terminating account representatives and/or managers within MLFS. (Sullivan Aff., ¶ 12; Finnegan Aff., ¶ 5; Seltzer Aff., ¶¶ 4, 5) Having obtained information in the course of attorney-client privileged communications, her knowledge includes confidential information that would not otherwise be discoverable, and thus could significantly compromise MetLife's defense. To cite just one obvious example: Ms. Fleishman would be uniquely able to offer strategies for challenging the non-discriminatory reasons offered by MetLife for allegedly discriminatory employment practices.[FN4] Furthermore, having interviewed and defended at deposition several of the witnesses who might offer these explanations (including, among others, the former manager of one of the named plaintiffs (Fagin Aff., Exh., C)), Ms. Fleishman would be privy to confidential information that could serve to challenge credibility; to prepare cross-examination; and to otherwise seek to challenge explanations of management determinations that are at issue.

> FN4. Under the three-part test enunciated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973), upon a showing by plaintiff of a prima facie case of discrimination, the burden of production shifts to MetLife to articulate a nondiscriminatory reason for the challenged conduct. The burden then shifts to plaintiff to demonstrate pretext.

On a broader level, as a senior member of MetLife's defense team, Ms. Fleishman has had confidential and privileged exchanges with several of the principal decision makers within MetLife, during which she became privy to their strategic thinking on litigation issues such as settlement, discovery, and class actions. On the basis of those discussions, she can reach informal judgments, in advance, regarding the effectiveness of contemplated strategies and can anticipate MetLife's reactions thereto. This acquired knowledge thus likewise creates the risk of unfair advantage that Canons 4 and 5 were designed to prevent.

In short, the similarity and overlap between the issues confronted by Ms. Fleishman in her prior representation of MetLife

and those issues that will be, or likely will be, confronted in this lawsuit satisfy the "substantial relationship" test. Put simply, Ms. Fleishman possesses information about MLFS -- its employees; its managers; its operations; and its policies -- that an adversary has no right to know. Access to this information disqualifies her from representing plaintiffs in this action and, by virtue of DR 5-105(D), disqualifies her law firm as well.

C. Disqualification of Lieff Cabraser by Virtue of Wendy Fleishman's Prior Representation of MetLife Is Not Avoided by Screening Ms. Fleishman from *the Attorneys Directly Involved in this Litigation*

Lieff Cabraser's defense of its decision to proceed with the representation of plaintiffs, notwithstanding its recruitment of Ms. Fleishman as a partner prior to this suit being brought, ultimately rests on its assertion that any ethical improprieties are cured by screening measures that were adopted before Ms. Fleishman joined the firm. First, "screening" is never mentioned in the Code as an antidote for an otherwise permissible representation. Indeed, the only mention of screening in the Code relates to former government lawyers. New York Code of Professional Responsibility DR 9-101(B)(1). The absence of any mention of screening in other situations involving impermissible successive representations is telling and itself makes plain the clear stance of the Code with respect to this issue. Second, the applicable authorities in this Circuit, as well as in New York,[FN5] hold that such screening measures will not prevent disqualification, particularly where the facts and circumstances present a discernable risk that the screening will not serve its intended goal of eliminating any risk of ethical violations, the inappropriate use or disclosure of confidential information, and/or the appearance of impropriety.[FN6]

FN5. New York State authorities are particularly relevant since this disqualification motion ultimately turns on an evaluation of the Code. *See Pastor v. Trans World Airlines, Inc.,* 951 F. Supp. 27, 30 (S.D.N.Y. 1996) (Glasser, J.); *Decora Inc. v. DW Wallcovering, Inc.,* 899 F. Supp. 132, 136 n. 4, 140 n. 9-10 (S.D.N.Y. 1995)(Koeltl, J.). Furthermore, plaintiffs are proceeding with claims under the New York State and City Human Rights Law which, in the absence of Title VII claims, would be adjudicated in the New York state courts, where screening measures have consistently been met with skepticism and disapproval. *See, e.g. Solow v. W.R Grace & Co.,* 83 N.Y.2d 303, 313, 610 N.Y.S.2d 128, 135 (1994) ("If an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable."); *Trustco Bank New York v. Melino,* 164 Misc. 2d 999, 1004-1006, 625 N.Y.S.2d 803, 807-808 (N.Y. Sup. Ct. Albany County 1995) ("the impermeability of a Chinese Wall [is not] an attainable concept.").

FN6. The scholarly authorities on the subject also state that screening should be rejected where, as here, the tainted attorney had an extensive relationship with the former client. *See* Lee A. Pizzimenti, *Screen Virite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice,* 52 U. Miami L. Rev. 305, 334 (1997) (stating that screens are particularly inappropriate where the tainted lawyers had a material role in representing their former client); Tom Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem,* 10 U. Ark. (Little Rock) L.J. 37, 52-53 (1987) (concluding that screening was appropriate only if the tainted lawyer realistically did not receive significant confidential client information (an approach which was utilized by the Second Circuit in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir. 1975)).

The Second Circuit has recognized that, "[i]f after considering all of the precautions taken by the [ ] firm whose disqualification is sought this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect [the former client] or members of the public to consider the attempted quarantine to be impenetrable." *Cheng v. GAF Corp.,* 631 F.2d 1052, 1058 (2d Cir. 1980), *vacated on other grounds,* 450 U.S. 903, 101 S. Ct. 1338 (1981). Based on this reasoning, the *Cheng* Court ruled that disqualification was necessary to "guard against the inadvertent use of confidential information," notwithstanding the fact that: a screen had been implemented preventing the tainted attorney from any involvement in litigation against that attorney's previous client; the tainted attorney worked in a department separate from the one in which the case at issue was being handled; and the firm had submitted affidavits

attesting that the tainted attorney had not worked on the matter and that he had not disclosed any confidential information or discussed the merits of the action with colleagues. *Id.* at 1057.

In concluding that disqualification was warranted, the *Cheng* Court was particularly influenced by the fact that the law firm in question was a thirty-five attorney firm, twenty-one of whom worked in the same office. Under those circumstances, the Court found that there was an unacceptable risk that the tainted attorney would unintentionally or inadvertently transmit information he gained through his prior representation of the former client. *Id.* at 1058. *See also Fields-D'Arpino v. Restaurant Assoc., Inc.,* 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) (Pauley, J.) (screening procedures must be examined closely and rejected if any doubt as to their efficacy remains); *see also United States v. Uzzi,* 549 F. Supp. 979, 984 (S.D.N.Y. 1982) (Sand, J.) (finding that "where the former client's secrets and confidences are threatened, the former client is entitled to the prophylactic protection of law firm disqualification").

Relying on *Cheng,* in *Decora v. DW Wallcovering, Inc.,* 899 F. Supp. 132, 140 (S.D.N.Y. 1995) (Koeltl, J.) the District Court disqualified counsel for defendants despite the firm's implementation of screening measures designed to isolate the tainted associate -- who had previously represented plaintiff in another action while with a different law firm -- from all communications relating to the case. The court reasoned that the relatively small size of the firm -- forty-four attorneys in total -- and the associate's close working relationship with other attorneys in the department, created an unreasonable risk of disclosure.[FN7] *Id.* at 140-141.

> FN7. Although the *Decora* court considered the fact that screening measures had not been implemented from the outset of the litigation, the court's decision was clearly influenced by the above-referenced factors. *Id.* at 141.

Numerous other federal and state courts in New York similarly have been persuaded that disqualification was warranted because of the relatively small size of the firm in question. *See Marshall v. State of New York Div. of Police,* 952 F. Supp. 103, 112 (N.D.N.Y. 1997) (the size of the 15 lawyer firm "raises doubts that even the most stringent screening mechanisms could have been effective in this case"); *Yaretsky v. Blum,* 525 F. Supp. 24, 30 (S.D.N.Y. 1981) (Motley, J.) (court "very skeptical about the efficacy of any screening procedures" where tainted attorney is part of an office of fewer than 30 lawyers and interacts on a daily basis with the people from whom the tainted attorney is screened from disclosing confidences of his former client); *Kassis v. Teacher's Ins. & Annuity Assoc.,* 93 N.Y.2d 611, 618, 695 N.Y.S.2d 515, 519 (1999) (26 attorney law firm disqualified despite the implementation of screening measures); *Adams v. Lehrer McGovern Bovis, Inc.,* 208 A.D.2d 377, 617 N.Y.S.2d 9 (1st Dep't 1994) ("Regardless of the best efforts of the attorneys involved, the erection of an adequate internal barrier to prevent the possibility that confidential information concerning defendant could inadvertently flow from defendant's former counsel to the other attorneys at her new firm during the litigation of this ongoing matter is simply not possible, in light of the small size of the new firm, which employs only four attorneys."); *see also Van Jackson v. Check 'N Go of Ill., Inc.,* 114 F. Supp. 2d 731, 733 (N.D. Ill. 2000) ("The small size of the firm also weighs heavily against an effective screen. Although K&D does not explain the structure of the firm, it cannot have the formal divisions of large firms which often help facilitate a successful Chinese Wall. In such a small firm, it is questionable whether a screen can ever work."); *Steel v. Gen. Motors Corp.,* 912 F. Supp. 724, 744 (D.N.J. 1995) ("Often a law firm will attempt to use screening measures to obviate a conflict of interest. This is not appropriate in this case. First, the smaller the firm, the less likely such screening measures will be effective. In several cases, courts have disapproved of screening measures," *aff'd, sub. nom., Cardona v. GMC,* 942 F. Supp. 968 (D.N.J. 1996) (citations omitted)).

Here as well, and for similar reasons, screening measures must be rejected as a means to avoid disqualification because they do not -- and cannot -- provide adequate assurances that conflict-of-interest concerns will be avoided. Even without taking any discovery on the issue, we know that Ms. Fleishman has already actively collaborated with the lawyers involved in the *Mitchell* case in a matter with direct relevance to this case, by participating in the drafting of an amicus brief in a significant class action, employment discrimination lawsuit (involving class action issues that will undoubtedly present themselves in this case). *Robinson v. Metro-North Commuter R.R.,* Nos. 94 Civ. 7374/95 Civ. 8594, 2000 U.S.

Dist. LEXIS 14240 (S.D.N.Y. Sept. 27, 2000), *appeal filed,* No. 00-9417 (2d Cir. 2000). We also know, again without taking any discovery, that Ms. Fleishman is actively working with at least one of the Lieff Cabraser lawyers assigned to the *Mitchell* case on another extensive matter. (Fagin Aff., Exh., B) There is nothing surprising about this; given the size of the Lieff Cabraser firm generally (and its New York office in particular), Ms. Fleishman's experience and credentials as a class action litigator, and the large number of Lieff Cabraser lawyers working on the *Mitchell* case, there is every reason to believe that her contact with Lieff Cabraser lawyers working on the *Mitchell* case has extended -- and will extend -- beyond these two matters of which we have knowledge. In sum, there is simply no way to remove the risk that Ms. Fleishman will come into contact with one or more of the attorneys assigned to this litigation and the concomitant risk of disclosure -- inadvertent or otherwise -- of MetLife client confidences. Under these circumstances, it is patently unfair for MetLife to bear this enduring risk throughout the pendency of what may very well be a lengthy litigation.[FN8]

FN8. *See* Tom Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem,* 10 U. Ark. (Little Rock) L.J. 37, 54 (1987) ( "The problem with [screening] ... is simply that a client can often never know for sure when or whether his confidence has been abused. That the trustworthy must suffer for the sins of the rest is unfortunate, but client confidence must be the key."); Monroe Freedman, *The Ethical Illusion of Screening,* Legal Times, Nov. 20, 1995 ("The traditional conflict-of-interest rules on switching sides were designed to protect the former clients' confidences, even at the expense of reducing lawyers' employment [sic] mobility. The evasion of these rules through screening jeopardizes client confidences in order to increase lawyers' job opportunities. This, of course, makes a monkey of the claim that the law is a profession and not a business.... We can only hope that screening is an idea whose time has come to nothing.").

The text of the Code, the policy interests underlying the ethical rules pertaining to client confidences and the appearance of impropriety, and the underlying equities, all compel the conclusion that, rather than causing MetLife to endure the risk that screening measures will not be 100% effective, responsibility should be placed with those who created the conflict situation in the first place. As discussed above, this conflict did not arise inadvertently, or after the fact. Before the lawsuit was commenced, Lieff Cabraser was on notice of the nature and extent of Ms. Fleishman's prior representation of MetLife. Lieff Cabraser must have been aware that Ms. Fleishman sought -- but failed to receive -- a waiver from MetLife of the obvious conflict. Accordingly, the Lieff Cabraser firm had the opportunity to reconsider its offer of partnership to Ms. Fleishman, and had the opportunity -- before this suit was brought -- to withdraw from this representation. They chose to do neither, to the detriment of their former client. Furthermore, disqualification is unlikely to materially prejudice plaintiffs since the litigation is at the earliest Stages,[FN9] and plaintiffs can continue to be represented by the Outten firm. *See, e.g., Field-D'Arpino v. Restaurant Assoc., Inc.,* 39 F. Supp. 2d 412, 415 n.3 (S.D.N.Y. 1999) (Pauley, J.) (finding "that the disruption and delay attendant to displacing an attorney of record is mitigated here because discovery has not begun"); *United States v. Uzzi,* 549 F. Supp. 979, 984 (S.D.N.Y. 1982) (Sand, J.) (observing that "neither the defendant nor challenged counsel have a considerable investment in the retention in this proceeding"); *Decora v. DW Wallcovering, Inc.,* 899 F. Supp. 132, 141-1422 (S.D.N.Y. 1995) (Koeltl, J.) (reasoning that because plaintiff moved for disqualification at the outset of the litigation, defendants did not lose the benefit of longtime counsel's specialized knowledge of its operations and did not incur an unduly burdensome loss of time and money in being compelled to retain new counsel (*citing Gov't. of India v. Cook Indus., Inc.,* 569 F.2d 737, 739 n.11 (2d Cir. 1978)). Surely, whatever harm to plaintiffs would result from disqualification is outweighed by the risks posed to MetLife, the clear appearance of impropriety, and the infringement on the policies underlying the Code if disqualification were not ordered.

FN9. The discovery that has taken place thus far has been with the express understanding between counsel that it will not prejudice the arguments made in this motion.

*CONCLUSION*

For the foregoing reasons, MetLife's motion for the disqualification of Lieff, Cabraser, Heimann & Bernstein, LLP should be granted.

Stella MITCHELL, Hwa-Mei C. Gee, Barbara LaChance, Durpatty Persaud, and Janet Ramsey, on behalf of themselves and all others similarly situated, Plaintiffs, v. METROPOLITAN LIFE INSURANCE COMPANY, INC. d/b/a Metlife, Defendant.