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).
2001.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

I. WENDY FLEISHMAN'S PRIOR AND EXTENSIVE REPRESENTATION OF *METLIFE IS SUBSTANTIALLY RELATED TO THE PRESENT LITIGATION*

A. The Substantial Relationship Test is Satisfied Where Confidential *Information Learned in the Prior Representation is Relevant to the Present Litigation*

Plaintiffs do not dispute that the first two requirements for disqualification of Lieff Cabraser have been satisfied: a prior representation of an adverse party and the receipt by Ms. Fleishman of confidential and privileged information. They seek to avoid disqualification by arguing the absence of a substantial relationship between Ms. Fleishman's prior representation of MetLife and the present lawsuit -- an argument bottomed on plaintiffs' repeated and mistaken focus on the dissimilarity between the causes of action alleged in the prior lawsuits and the present litigation (*see e.g.,* Pl. Mem. at 3-6 and n.2, 18-19), and the legal issues involved. However, as plaintiffs' expert, Professor Charles W. Wolfram, himself recognized, the applicable cases hold that the focus of inquiry should not be on the claims themselves (or even the issues presented by the pleadings), but rather on the nature of the confidential *information* obtained by the attorney in question and the relevance of that *information* to the pending litigation. (*See* Wolfram Decl., ¶ 8; *see also* Liebernan Decl., ¶ 16)[FN1]

> FN1. In several of the leading disqualification cases in this Circuit, the court determined that the substantial relationship test was satisfied even though the underlying claims in the two cases differed. (MetLife Mem. at 15-17) In each of these cases cited in defendant's moving brief, the court found the substantial relationship test was met because the attorney learned confidential *information* that was relevant to the subsequent litigation. The cases cited by plaintiffs do not hold otherwise. In fact, in *Beck v. Bd. of Regents,* 568 F. Supp. 1107 (D. Kan. 1983), one of the principal cases relied on by plaintiffs, the court specifically rejected the motion to disqualify because of the movant's effort to establish a substantial relationship based on the types of claims asserted in the present and former representation, rather than the relevance of any confidential information learned in the prior litigation. *Id.* at 1112. Similarly, in *Vestron, Inc. v. Nat'l Geographic Soc'y,* 750 F. Supp. 586 (S.D.N.Y. 1990), the motion to disqualify was denied, not merely because of the dissimilarity of the claims alleged in the two lawsuits, but also because of the failure to identify confidential information that was learned in the prior litigation that was relevant to the subsequent litigation.

Indeed, Professor Wolfram has advocated an in-depth, three-step approach to determining the relevance of the confidential information learned in the course of the prior representation:

First, the court reconstructs the scope of the facts involved in the former representation and projects the scope of the facts that will be involved in the second representation. Second, the court assumes that the lawyer obtained confidential client information about all facts within the scope of the former representation. Third, the court then determines whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a

lawyer would consider it useful in advancing the interests of the client in the latter representation. That approach, while more painstaking than more general tests, is preferable.

Modern Legal Ethics, at 370; *see also Silver Chrysler Plymouth, Inc. v. Chrysler Motors Co.,* 518 F.2d 751, 753 (2d Cir. 1975), *overruled on other grounds, sub. nom. Armstrong v. McAlphin,* 625 F.2d 433 (2d Cir. 1980), *vacated,* 449 U.S. 1106 (1981) (cited in Pl. Mem. at 13 for proposition that "[t]horough consideration of the facts is ... required").

In putting the relevant facts before the Court to assist it in performing the foregoing analysis, MetLife cannot be expected to disclose privileged information. *See* Modern Legal Ethics, at 368-69 ("if a client were required to offer evidence on the contents of confidential communications in order to have the client's former lawyer disqualified, the confidentiality of the information would be lost in the very process of attempting to protect it.").[FN2]

FN2. For this reason courts are forced to draw inferences from generalized information in evaluating whether the substantial relationship test is satisfied. This explains why some courts appear to have focused on the similarity of the claims asserted, even though the ultimate goal is to determine the relevance of the information learned. And, because MetLife is circumscribed in the information it can present, it hardly enjoys "a substantial theoretical advantage" as Professor Wolfram asserts. (Wolfram Decl., ¶ 9)

B. The Confidential Information Learned by Ms. Fleishman in Her Prior Representation of *MetLife Bears a Direct Relationship to the Pending Litigation*

Notwithstanding the efforts by Ms. Fleishman and Lieff Cabraser to minimize the substance and scope of the information learned by Ms. Fleishman in her representation of MetLife[FN3], there is an obvious and substantial relationship between the confidential information learned by her to the pending lawsuit. This becomes apparent once the analysis of the prior relationship advances beyond the general observation that Ms. Fleishman's efforts were directed at the defense of sales practices claims, and focuses instead on the type of information that she obtained in defending MetLife in those cases.

FN3. Plaintiffs' characterization of Ms. Fleishman's role is, at best, disingenuous. For example, plaintiffs' comprehensive assertion that Ms. Fleishman was "not privy to *any* information about hiring, training, supervision, or discipline of any member of the sales force in connection with anything other than the integrity and truthfulness of the *representations* made to customers in connection with the sales and marketing of MetLife products" (Pl. Mem. at 4 (quoting Fleishman Affirm., ¶ 11)), is an artful formulation that is belied by the comprehensive knowledge she acquired. (*See e.g.,* Murphy Aff., ¶¶ 5-7) It is also a deliberate manipulation of the record as Ms. Fleishman only made this assertion in connection with her work on the MDL. As set forth more fully below, Ms. Fleishman, who (while at Skadden) stated under oath that she was "intimately familiar with the operations of MetLife," (*see* Regan Aff., Exh. D) indeed was privy to a wide array of information regarding MLFS. Moreover, Ms. Fleishman's repeated, but wholly conclusory, statements that nothing she learned or discussed in connection with her prior representation of MetLife has anything to do with this lawsuit (Fleishman Affirm., ¶¶ 16-20) is mystifying. Either Ms. Fleishman has adopted a totally simplistic and legally unfounded test for determining whether a substantial relationship exists, which rests exclusively on the type of case litigated (a test which she herself advocated against in her motion to disqualify plaintiff's counsel in the *Whalen* case (*see* Regan Aff, Exh. A)) or she claims to possess a substantive, in-depth understanding of this case -- going well beyond the four corners of the Complaint -- which only could have been gained in violation of Lieff Cabraser's purported screen.

First, there is no dispute that Ms. Fleishman, during her thousands of hours of work defending MetLife in dozens of litigated matters, interviewed numerous MetLife employees -- including many individuals employed in what is now MLFS, the MetLife Division at issue in this case.[FN4] It is equally undisputed that, in the course of these interviews, Ms. Fleishnan obtained substantial confidential and privileged information.[FN5] (Sullivan Aff., ¶¶ 9, 11, 12; Regan Aff., ¶ 4; Elberg Aff., ¶¶ 5-7; Finnegan Aff., ¶ 4-8; Seltzer Aff., ¶¶ 5-7; Murphy Aff., ¶¶ 5-6)

FN4. Among the titles of individuals interviewed by Ms. Fleishman were: Regional Administrator; Regional Vice President; Territorial Vice President for the Southern Territory; Territorial Administrator for the Southern Territory; Assistant Vice President, Field Management Training; General Manager; Vice-President and Actuary; Director of Marketing and Training, Mid-Eastern Territory; Account Representative; Director of Territorial Sales; Regional Manager; Branch Administrator; Director of Marketing and Training Services; and National Director, Individual Sales - Advanced Markets. (Regan Aff., ¶ 3; Sullivan Aff. ¶ 10; Finnegan Aff., ¶¶ 4, 6; Elberg Aff., ¶2; Seltzer Aff., ¶ 4)

FN5. Contrary to the assertions of plaintiffs and Professor Wolfram - who understandably may not be sufficiently informed of the nature and extent of Ms. Fleishman's prior representational activities - disqualification is not being advocated here merely because Ms. Fleishman was in contact with employees whom MetLife may choose to call as witnesses. Many of these employees are necessary witnesses, either because they are knowledgeable of the employment practices that are at issue here, or because they have personal knowledge regarding the conduct of, or employment decisions concerning, employees in MLFS.

Second, and although it would be virtually impossible to identify -- let alone learn the substance of-- all the confidential communications to which Ms. Fleishman was privy, a review of the general subject matter of the information Ms. Fleishman obtained from individuals she interviewed within MLFS, from attorneys in MetLife's Law Department, from confidential documents she reviewed and was privy to, and otherwise, make plain the significance and relevance of the information she learned to the present litigation. Among other things, Ms. Fleishman obtained comprehensive knowledge of (Regan Aff., ¶¶ 4, 6; Sullivan Aff., ¶ 12; Finnegan Aff., ¶ 5; Seltzer Aff., ¶¶ 4, 5; Seltzer Reply Decl., ¶¶ 2, 3; Murphy Aff., ¶¶ 5-7):

• the evaluation of the conduct and performance of account representatives by branch managers (which plaintiffs contend is entirely subjective and a principal cause of unequal treatment accorded to women (*See* Fagin Aff., Exh. A, ¶ 26))[FN6];

FN6. Attacking MetLife's methods of evaluating performance, plaintiffs allege in the Complaint that MetLife has established "discriminatory and subjective requirements for hiring, job assignment, and promotion which have the effect of excluding qualified women and which have not been shown to have any significant relationship to job performance..." (Fagin Aff., Exh. A, ¶ 68(k))

• the evaluation of the conduct and performance of branches (which is at issue here because plaintiffs allege that MetLife maintained a "glass ceiling" and failed to promote women into management (*See* Fagin Aff., Exh. A, ¶¶ 6, 26));
• the evaluation of regional management by territorial management (which is similarly at issue due to plaintiffs' allegation of a "glass ceiling," *id.*);
• disciplinary actions taken with respect to particular branch managers and account representatives (including changes in staffing in certain agencies and regions), and the identity of the decision makers who may or may not be involved in such actions;
• production requirements and methods for measuring the performance of account representatives (defendant contends, for example, that the legitimate, nondiscriminatory business reason for terminating Durpatty Persaud was her failure to meet production requirements);
• the handling of "orphaned" policies (which is relevant because plaintiffs claim that female employees receive less investment than male employees, resulting in lower compensation (*See* Fagin Aff., Exh. A, ¶ 26));
• the extent and nature of training provided to account representatives (which plaintiffs contend is a source of the allegedly unequal treatment accorded to women (*See* Fagin Aff., Exh. A))[FN7];

FN7. For example, in her Amended Charge of Discrimination, plaintiff Barbara LaChance claims that when she was hired as an account representative, "MetLife did not provide any training for this position" and that she "could not succeed as an Account Rep without meaningful training or leads that were only given to men." (Fagin Aff., Exh. A, LaChance Amended Charge of Discrimination ¶¶ 5, 6)

• the impact of sales practices compliance on management compensation (which is relevant as plaintiffs claim disparate compensation based on gender (*See* Fagin Aff., Exh. A, ¶ 26));
• the hiring process for account representatives;
• compensation policies for the field force, as well as compensation to and commissions earned by individual account representatives (which is relevant as plaintiffs claim disparate compensation based on gender (*See* Fagin Aff., Exh. A, ¶¶ 26, 68(1))). (Regan Aff., ¶¶ 4, 6; Sullivan Aff., ¶ 12; Finnegan Aff., ¶ 5; Seltzer Aff., ¶¶ 4, 5; Seltzer Reply Decl., ¶¶ 2, 3; Murphy Aff., ¶¶ 5-7)

he fact that the information revealed to Ms. Fleishman may, in the first instance, have been obtained in furtherance of MetLife's defense of sales practices claims, does not, as plaintiffs appear to suggest, diminish its relevance to *this* case. As MetLife pointed out in its moving brief, and as plaintiffs apparently concede, a significant component of any claim of discrimination is the evaluation of the nondiscriminatory reason or reasons offered for a challenged employment decision. (MetLife Mem. at 17-18) Information concerning such nondiscriminatory reasons is relevant regardless of the context in which it is learned. Moreover, in light of the numerous litigations spawned by the alleged sales practices improprieties, and the very significant attention that these litigations received at MetLife, it is not surprising that information concerning the treatment of MLFS employees accused of sales practices violations would be highly relevant to an understanding of employment-related policies and practices within MLFS and employment decisions made by MLFS managers, and hence to the defense of employment claims directed at MLFS.

Furthermore, and quite apart from her detailed knowledge of employment practices and policies impacting MLFS, and of the treatment accorded particular employees within MLFS, Ms. Fleishman learned, on a more global level, how decisions concerning employees in MLFS were made; how their performance was measured; how they were supervised; how they were trained; how they were rewarded; what conduct was acceptable and what was unacceptable; how and when they were disciplined; and the strategy pursuant to which claims arising from the alleged misconduct of employees were litigated or settled. (Sullivan Aff., ¶¶ 9, 11; Seltzer Aff., ¶¶ 5-7; Finnegan Aff., ¶¶ 4, 7, 8; Elberg Aff., ¶ 6) As Mr. Lieberman concluded: "[t]his is highly valuable *institutional* information that has obvious relevance to the current action involving an *institutional* attack on MetLife's ... practices and policies." (Lieberman Decl., ¶ 19) (emphasis added).

In short, MetLife is not seeking "to devise a hitherto unrecognized rule that prior representation of a client in litigation precludes later representation of an adversary in all other litigated matters," as Professor Wolfram asserts. (Wolfram Decl., ¶ 12) To the contrary, MetLife seeks to implement the established rules encompassed by the substantial relationship test, as enunciated in the Code, which require disqualification here because the confidential information learned by Ms. Fleishman is uniquely relevant to the pending litigation, and thus presents the risk of an unfair litigation advantage that the ethical rules were specifically designed to prevent.

C. *The Class Action Nature of the Claims Underscores the Need for Disqualification*

Any doubts as to whether Ms. Fleishman's acquired knowledge satisfies the substantial relationship test are resolved by consideration of the impact of the class claims asserted in this case. Although plaintiffs vaguely suggest that their class claims will turn largely on an evaluation of statistical evidence (Pl. Mem. at 2), the case law concerning the adjudication of class action claims reveals that this case may well require the evaluation of the *individual* claims of an as yet unknown number of MLFS employees or former employees.[FN8]

> FN8. Plaintiffs have purportedly brought this class action on behalf of a "Class of all female past, present, and future employees who have been employed within the Insurance and Financial Services Division of MetLife or its successor group, if any, since August 27, 1999 ... and all female applicants for those positions with MetLife who have been, continue to be, or in the future may be, denied employment opportunities or were deterred from applying for those positions during this same time period..." (Fagin Aff., Exh. A, ¶ 18) Plaintiffs' New York State and City law claims date back to March 13, 1998. (Fagin Aff., Exh. A, ¶¶ 19, 20) Plaintiffs estimate that there are approximately 6,000 current account representatives alone, 25% of whom are women.

(Fagin Aff., Exh. A, ¶ 6)

The need for evaluation of individual claims may arise in at least four distinct contexts as this litigation unfolds. First, in order to establish their right to class certification under Rule 23(a), plaintiffs may offer anecdotal evidence from various class members. *See e.g., Sheehan v. Purolator, Inc.,* 839 F.2d 99, 103 (2d Cir. 1988). Second, in support of their class claim of a pattern and practice of discrimination, plaintiffs will likely offer anecdotal evidence to support, or provide context for, whatever statistical showing they are contemplating. *See e.g., Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 286, 293 (2d Cir. 1999). Third, regardless of whatever evidentiary showing plaintiffs may offer, MetLife is certainly free to offer anecdotal evidence of the nondiscriminatory reasons for alleged adverse employment actions. Fourth, and perhaps most importantly, if a class is certified and upon a finding of class discrimination, the court is required to conduct a second phase of litigation, in which *each* individual class member's claim is evaluated separately, and any inference of discriminatory conduct can be rebutted based on a showing by the employer of individual facts and circumstances that explain the adverse treatment received by any particular employee. *See e.g., Dillon v. Coles,* 746 F.2d 998, 1004 (3d Cir. 1984).

Given the myriad opportunities for the Court to be confronted with evidence concerning individual allegations of discrimination, not only against the named plaintiffs, but against other as yet unidentified class members, and the remarkably broad sweep of the Complaint (alleging discrimination in virtually every aspect of the employment relationship), there is simply no way to anticipate in advance the full extent to which the vast stores of information acquired by Ms. Fleishman could become relevant. Given the harm that would be posed to the putative class if its attorney were disqualified in the late stages of the litigation process, the Court should be loath to bear any risk that Ms. Fleishman's knowledge will one day surface as an impediment to a fair trial, and thus require disqualification. The correct course, mandated by both the spirit and letter of the Code, is to avoid the risk of disclosure now, at the earliest opportunity, by ordering disqualification.[FN9]

FN9. Ironically, plaintiffs overlook this serious risk of substantial delay in the prosecution of this case on their behalf as well as the large class they purport to represent, and instead make unfounded accusations about delays resulting from MetLife's decision to file this motion. As plaintiffs are well aware, MetLife has fully cooperated in discovery, notwithstanding the pendency of this motion. Defendant has served its responses to plaintiffs' initial discovery requests, has repeatedly indicated its willingness to proceed with depositions, and is prepared to produce over 80,000 pages of documents upon the execution of a Confidentiality Order.

II. THE SCREENING MEASURES UTILIZED BY LIEFF CABRASER ARE *INADEQUATE TO AVOID DISQUALIFICATION*

Plaintiffs' relatively cursory alternative argument in response to MetLife's motion to disqualify-- that even if Ms. Fleishman should be disqualified, Lieff Cabraser's screening measures prevent disqualification of the firm -- is based on the arguments that: (i) the firm's screening measures were once found to be sufficient to prevent disqualification of the firm (Pl. Mem. at 9 (citing *Barbanti v. W.R.Grace*))[FN10]; (ii) some cases in New York appear to recognize that, in appropriate circumstances, screening may prevent disqualification of a law firm where one of its attorneys is tainted by a conflict (Pl. Mem. at 22); and (iii) the Lieff Cabraser firm is structured in such a way as to reduce or eliminate the risk of confidential information being leaked. (Pl. Mem. at 7-9) Each of these contentions is either erroneous or unavailing.

FN10. The ruling in *Barbanti v. W.R. Grace* has no bearing on the present motion because the ethical code applied in that case -- the Washington Rules of Professional Conduct -- explicitly endorses the use of screens, and the court's determination that the law firm would not be disqualified was premised on its finding that the explicit criteria set forth in that code had been satisfied. New York, like most jurisdictions, does not sanction screening measures as a means to avoid disqualification. (*See* Lieberman Decl., ¶ 20)

First, neither the New York Code nor the ABA Model Rules recognizes the use of screening procedures, except in cases involving former government lawyers or judges; indeed, just weeks ago the ABA House of Delegates voted to reject a

proposal to permit screening to avoid disqualification. (Lieberman Decl., ¶ 20).

Second, "screens are not authorized in New York to avoid firm-wide disqualification except (if at all) in narrowly circumscribed situations where the laterally transferring lawyer has not acquired *any* significant or material information about her former client..." (Lieberman Decl., ¶ 21) As set forth above, this is hardly the case here.[FN11]

> FN11. The recent New York Court of Appeals decision on which Professor Wolfram relies, *Kassis v. Teacher's Ins. & Annuity Ass'n,* 93 N.Y.2d 611,617, 695 N.Y.S.2d 515, 519 (1999), makes plain the Court's inclination to consider screening *only* where the "information acquired by the disqualified lawyer is *unlikely to be significant or material* in the litigation." *Id.* at 617, 695 N.Y.S.2d at 519 (emphasis added). As Professor Wolfram himself observes, "few decisions have approved the screening technique as substitute therapy for the more radical imputed-disqualification quarantine." Modern Legal Ethics, at 401. "Judicial acceptance of screens, to the limited extent it has occurred, has been grudging and guarded." Wolfram, Screening, at 143.

Third, courts in New York that have permitted screening require objective evidence that the screening will be foolproof, such as: where the conflict is traceable to an attorney in a particular department that has no contact with the department conducting the litigation, which typically occurs only in the context of a large law firm; and where screening measures have been established from the first possible moment. (Lieberman Decl., ¶¶ 20-25) Neither condition has been satisfied here. As set forth in detail in the Lieberman Declaration (¶ ¶ 23-27), no screen was put into place until almost *two months after* Ms. Fleishman joined Lieff Cabraser. Further, as discussed in MetLife's moving brief (at 23), Lieff Cabraser is a small firm with an even smaller New York office,[FN12] and Ms. Fleishman works in close proximity with several of the attorneys responsible for this case.

> FN12. It is beyond dispute that this case has a New York center of gravity: the case was commenced here; two of the Lieff Cabraser attorneys assigned to the matter are in its New York office; plaintiffs' co-counsel, Outten & Golden, is located here; MetLife is headquartered here; and many of the witnesses identified in plaintiffs' initial disclosures work here (*see* Fagin Aff., Exh. C). It is unavoidable that a substantial portion of the litigation activities in this case will take place within Lieff Cabraser's New York office.

Moreover, and of critical significance, it is undisputed that Ms. Fleishman has (in her first seven months at Lieff Cabraser) already come into direct and ongoing professional contact with *each* of the attorneys handling the *Mitchell* matter. There is no reason to believe (and certainly nothing in any of the Lieff Cabraser affidavits to suggest) that she will not continue to do so.[FN13] In short, Ms. Fleishman has had, and will continue to have, significant professional interaction with the lawyers assigned to this case. As such, the opportunity for even inadvertent disclosure is considerable. As Professor Wolfram has noted:

> FN13. Lieff Cabraser is organized into a number of interrelated and overlapping practice teams. Thus, Ms. Fleishman, Mr. Finberg and Ms. Geman are each members of the "Products Defects" team. Both Ms. Fleishman and Ms. Hilal are members of the "Medical Devices/Pharmaceutical Products" team. Ms. Fleishman has already worked with Mr. Seymour, Mr. Finberg and Ms. Dermody on at least one matter; with Ms. Geman on two already commenced litigations; and with Ms. Hilal on at least six already commenced litigations. (Regan Aff., Exh. C)

In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens. Whether the screen is breached will be virtually impossible to ascertain from outside the firm. On the inside, lawyers whose interests would all be served by creating leaks in the screen and not revealing the leaks would not regularly be chosen as guardians by anyone truly interested in assuring that leaks did not occur. Modern Legal Ethics, at 402.

The objective facts and circumstances demonstrate the real risks of an even inadvertent disclosure of confidential information that could compromise MetLife's litigation efforts. Clearly. if the purpose of the ethical rules is to establish "freedom from apprehension," as plaintiffs' expert acknowledges (Modern Legal Ethics, at 361) then screening cannot be accepted here as a means to avoid disqualification.

CONCLUSION

For the foregoing reasons, and the reasons set forth in MetLife's moving brief, 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.