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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

EMMETT FURLA OASIS FILMS, LLC, et al., Plaintiffs and Appellants, v. MORGAN CREEK PRODUCTIONS, INC., Defendant and Respondent.	B271157 (Los Angeles County Super. Ct. No. BC599301)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Reversed and remanded.

Hamrick & Evans, A. Raymond Hamrick and Kenneth A. Kotarski, for Plaintiffs and Appellants.

Glaser Weil Fink Jacobs Howard Avchen & Shapiro and Craig H. Marcus, for Defendant and Respondent.

In 2012, the law firm Glaser Weil Fink Jacobs Howard Avchen & Shapiro and attorneys Patricia L. Glaser and Craig Marcus (collectively "Glaser Weil" or "the attorneys") represented Randall Emmett, George Furla, and Randall Emmett/George Furla Productions, LLC (EFP) in an arbitration proceeding. In 2015, Glaser Weil began representing Morgan Creek Productions, Inc. (Morgan Creek), in the instant proceeding against Emmett, Furla, and Emmett Furla Oasis Films, LLC (EFO). Emmett, Furla, and EFO sought Glaser Weil's disqualification. The trial court denied the motion. We reverse the trial court order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint in the instant matter, Emmett and Furla are "producers and executives in the entertainment industry" who have produced and financed numerous major motion pictures. The complaint describes Emmett, Furla, and EFO as "prolific financiers and producers of motion pictures."

Glaser Weil's Representation of Emmett, Furla, and EFP in the Fox Arbitration

In April 2012, Ted Fox initiated an arbitration proceeding against Emmett, Furla, and two entities, EFP and Georgia Film Fund Two, LLC (collectively "the respondents"). Fox held a partial interest in EFP. In his arbitration claim, Fox alleged the respondents breached written agreements that afforded him an option to buy additional ownership interests in EFP and in the films of Emmett, Furla, and EFP. He claimed the respondents failed to make payments due to him based on his existing ownership interests in EFP and in Emmett, Furla, and EFP films. Fox also alleged the respondents unlawfully denied him the percentage of the gross receipts of the films of EFP, Emmett,

and Furla to which he was entitled. Fox asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent concealment, intentional misrepresentation, breach of fiduciary duty, constructive fraud, conversion, and unfair business practices. He sought declaratory relief and an accounting of the respondents' books and records.

Glaser Weil represented the respondents in the arbitration proceeding and filed a response to the arbitration statement denying Fox's claims. The respondents alleged that over a year after Fox acquired his interest in EFP, Emmett and Furla created a new entity, Hedge Fund Film Partners, to handle "financing activities" distinct from EFP's "film production activities." The respondents argued Fox had not participated in the new entity's film financing activities or taken on any of the associated risks. They asserted Fox therefore had no contractual right to Hedge Fund Film Partners' compensation or fees earned. To explain this argument, the response provided a history of the financing activities of EFP and Hedge Fund Film Partners, including the following:

> "Prior to 2010, EFP and its principals used only one financing source to produce all of their films. . . . In approximately 2010, EFP expanded its film production activities, and also terminated its relationship with the previous single-source financier. This paradigm shift necessitated the pursuit of new financing sources for EFP's motion picture production. . . . EFP principals [Emmett] and [Furla] created Hedge Fund Film Partners ("HFFP"), an entity separate from EFP, for the purpose of financing motion picture production."

The response also discussed Hedge Fund Film Partners' financing work, highlighting activities that involved Emmett and

Furla taking on personal financial risk: "[Hedge Fund Film Partners'] financing activities included (but were not limited to): a. Locating third-party sources for equity and debt financing for motion picture production, and negotiating complex financing agreements with these third parties. b. Securing pre-production bridge loans that preceded the permanent production financing. These bridge loans necessitated *personal guarantees by Emmett and Furla in the range of $1 million to $5 million.* c. Securing tax credit financing, which separately *required Emmett and Furla to personally guaranty potential tax-credit shortfalls in excess of $1 million.* d. Securing completion bonds and guarantees of overages beyond contingencies, which required additional *personal guaranties by Emmett and Furla in excess of $1 million.*" (Italics in original.)

Glaser Weil represented the respondents in the Fox arbitration until late March 2013.

The Morgan Creek Litigation

In September 2013, "Emmett/Furla Films" and Morgan Creek entered into a "term sheet" agreement regarding the co-financing of a film about the life of musician Tupac Shakur. The parties agreed to each finance 50 percent of the budget for the Tupac film, subject to certain conditions. In October 2015, Emmett, Furla, and EFO (collectively "plaintiffs") filed suit against Morgan Creek.[1] Plaintiffs alleged that in September 2015, Morgan Creek indicated it would not fulfill its obligations under the term sheet agreement unless EFO agreed to new terms and provided evidence of its ability to finance its share of the project. Plaintiffs asserted this was improper because the

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[1] Plaintiffs alleged EFO was erroneously identified as "Emmett/Furla Films" in the term sheet agreement.

parties' agreement did not require EFO to provide evidence of its ability to finance its share of the project. According to plaintiffs, Morgan Creek subsequently demanded that EFO deposit 50 percent of the picture's budget in escrow or secure the same by a letter of credit, or Morgan Creek would consider EFO's rights in the project to be terminated.

Plaintiffs additionally contended Morgan Creek breached other terms of the agreement by unilaterally starting pre-production of the picture, engaging in casting, and hiring personnel. The complaint asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty on behalf of EFO against Morgan Creek. The complaint also asserted a claim for "breach of contract with respect to a third party beneficiary" on behalf of Emmett and Furla. The complaint alleged that while Emmett and Furla were not parties to the term sheet agreement, they were intended beneficiaries because the agreement provided for them to receive "producer credits, one (1) executive producer credit, and one (1) production company credit."

In November 2015, Glaser Weil, on behalf of Morgan Creek, served discovery requests on Emmett. In one set of requests for production of documents, EFO was defined as "Emmett Furla Oasis Films, LLC, and all affiliates or subsidiaries, including all predecessors and successors, Emmett/Furla Films and Emmett Furla Productions, and all its employees, agents, representatives, attorneys, accountants, partners, joint venturers, and assigns acting on their behalf, including, but not limited to EMMETT and FURLA." The demand for production included requests for "communications to or from EFO relating to EFO's ability to perform its financing obligation relating to the film";

"communications to or from any person relating to EFO's ability to provide financing for the film"; and "communications to or from any person relating to EFO's efforts to raise or secure money to provide financing for the film."

A set of requests for admission propounded to Emmett asked for an admission that in October and November 2015, EFO "could not contribute" $12 or $15 million " 'in escrow or secure same by an irrevocable letter of credit.' "

In December 2015, Morgan Creek filed a cross-complaint against EFO, "Emmett/Furla Films," and doe defendants. Morgan Creek alleged Emmett/Furla Films and/or EFO (EFF/EFO) breached the term sheet agreement by failing and refusing to provide agreed-upon funding. The cross-complaint asserted: "[EFF/EFO] also repeatedly attempted to reduce its funding obligation, at the expense of the quality of the Film and long term profits, thus strongly suggesting that [EFF/EFO] never had and could not raise the money it agreed to contribute to the project." The cross-complaint further alleged: "[Morgan Creek] is informed and believes that, in reality, [EFF/EFO] simply does not have the money to satisfy its financing obligation pursuant to the Term Sheet. When asked to tender proof of funds, [EFF/EFO] was unable to do so and, instead, proffered bank statements from an unrelated third party. Moreover, certain of [EFF's/EFO's] fabricated conditions to financing . . . were plainly designed to offset and reduce its upfront obligation, precisely because [EFF/EFO] does not have the money."

The cross-complaint asserted claims for breach of contract and breach of the covenant of good faith and fair dealing, sought rescission of the term sheet agreement, and requested declaratory relief.

The Disqualification Motion

In November 2015, plaintiffs' counsel demanded that Glaser Weil cease representing Morgan Creek against plaintiffs. Glaser Weil denied any conflict. In January 2016, plaintiffs filed a disqualification motion.

The motion was brought on behalf of EFO, Emmett, and Furla. The notice of motion indicated these three parties would collectively be referred to as "EFO" or "Plaintiffs." Plaintiffs argued the Fox arbitration and the dispute with Morgan Creek were substantially related. They contended "one of the key issues in the Fox Arbitration was EFO's financing activities and capabilities with regard to motion pictures, while one of the signature issues in this matter is whether Plaintiffs can 'fulfill' their financing obligations with regard to the Tupac picture." They further argued that in order to defend against Fox's claim seeking to recover a percentage of EFO's film financing fees, plaintiffs provided Glaser Weil "confidential documents regarding EFO's film financing activities and various information regarding the structure of EFO's film financing operations."

Furla submitted a declaration in support of the motion. He declared EFO was formerly known as Emmett/Furla Films Productions, LLC, but the company "changed its name" to EFO in or around July 2013. According to Furla, in connection with the Fox arbitration representation, the respondents provided Glaser Weil with confidential documents, including "extensive information about the manner in which EFO and their related companies operated in the entertainment field." Furla additionally declared: "Because the Fox Arbitration involved a broad based investor/owner dispute, Glaser Weil obtained intimate knowledge, not only of EFO's film financing activities,

but knowledge about the inside details of EFO's business operations and financial health, including confidential information regarding Plaintiffs' books and records, Plaintiffs' profits and losses from their various projects, Plaintiffs' ability to finance films and secure investors, Plaintiffs' trade secrets and other confidential information in regards to producing, developing, and financing pictures, and Plaintiffs' general practices, litigation strategies, and business customs."

In opposition to the motion, Glaser Weil argued it never represented EFO, which did not even exist when Glaser Weil ceased representing EFP in March 2013. Glaser Weil further contended plaintiffs falsely represented EFP had merely changed its name to EFO; the attorneys offered evidence that EFO was a separately incorporated entity.

Glaser Weil also asserted the Fox arbitration and the dispute with Morgan Creek were entirely unrelated. The opposition characterized the Fox arbitration as a partnership dispute between co-owners of a company requiring the interpretation of an ownership interest contract, while the Morgan Creek dispute was "between two unaffiliated entities concerning whether Morgan Creek satisfied certain conditions that triggered EFO's payment obligation." Glaser Weil contended neither the Fox arbitration nor the Morgan Creek dispute concerned film financing. The opposition further argued that even if "film financing" was at issue, Glaser Weil could not have obtained confidential information "about its former client's [EFP's] film financing activities because no such activities occurred (and EFO did not yet exist)," and it never represented Hedge Fund Film Partners, the entity that *was* engaged in film financing.

In reply, plaintiffs argued Morgan Creek had ignored "the fact that Glaser Weil *did* previously represent Plaintiffs Randall Emmett and George Furla ("Emmett/Furla"), who are the owners of [EFO], [EFP], and other related entities . . . . Moreover, Glaser Weil disregards the fact that its prior representation of Emmett/Furla and their related entities is 'substantially related' to its current representation of Morgan Creek here." Plaintiffs further contended "the ability and methods used to secure financing by Emmett/Furla –whether it was through EMMETT/FURLA LLC (as alleged by Fox) or by other sources available to Emmett/Furla (i.e., their hedge fund) –were directly at issue in the Fox Arbitration."

In an accompanying declaration, plaintiffs' counsel stated he previously defended EFP against Glaser Weil in the arbitration of an attorney fee dispute. In the course of those proceedings, counsel reviewed Glaser Weil's invoices related to the Fox arbitration. Plaintiff's counsel thus "learned that Glaser Weil retained expert accountants on behalf of Emmett/Furla and their related entities, and these expert accountants appear to have reviewed and/or been involved with issues pertaining to Emmett/Furla's movie deals; their sources of capital; the manner in which they ran their business; their liabilities; their bank statements, ledgers, and tax returns; and other confidential information. Moreover, I reviewed an invoice dated November 30, 2012, in which Craig H. Marcus (one of the attorneys representing Morgan Creek in this matter) states the following billing entry on October 25, 2012: 'REVIEW AND ANALYSIS OF E-MAIL FROM CLIENT RE LIABILITIES ASSOCIATED WITH FILM FINANCING EFFORTS.' "

Furla submitted a declaration explaining he was the co-founder and co-chairman of both EFO and EFP. Furla declared that in 2013, he and Emmett sold one-third of their interest in EFP to a third company and formed a new LLC named Emmett Furla Films, LLC, which, two months later, changed its name to EFO. Furla declared: "At all relevant times, Randall Emmett and I owned and continue to own these entities, as well as handle the day-to-day management for all of these entities . . . ."

Trial Court Ruling

The trial court denied plaintiffs' motion.[2] The court concluded that although Glaser Weil represented Emmett and Furla in the Fox arbitration, and now represents Morgan Creek against Emmett and Furla, "in their moving papers, Plaintiffs do not argue that the subject of the current representation is substantially related to the subject of the former representation as it pertains to Emmett and Furla as individuals."

The court further found Glaser Weil did not represent EFO and rejected plaintiffs' argument that a "unity of interests" between the various Emmett/Furla entities merited treating them as one for conflict purposes. The court concluded there was insufficient evidence that EFP and EFO "which engaged in two conceptually distinct transactions should be considered as one for purposes of an attorney disqualification analysis. [¶] As such, the Court finds that Glaser Weil is not engaging in successive representation of the same entity client. Accordingly, the Court need not engage in the substantial relationship analysis. Moving

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[2] The trial court issued a detailed written tentative order; following a hearing the court adopted the tentative, without modification, as the final order.

Plaintiffs have not met their burden of demonstrating that Defendant's counsel should be disqualified."

This appeal followed.

DISCUSSION

Plaintiffs contend the trial court abused its discretion in failing to determine whether there is a substantial relationship between the Fox arbitration and Morgan Creek matter. We agree and remand for further proceedings.

I. Applicable Legal Principles

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citations.] Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The 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." (*People Ex Rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*SpeeDee Oil*).)

"An attorney's representation of a client in a matter against a former client implicates the duty of confidentiality. 'Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. . . . 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." (Bus. & Prof. Code, § 6068, subd. (e).)' [Citation.]" (*Fremont Indemnity Co. v. Fremont General Corp.* (2006) 143 Cal.App.4th 50, 66, citing *SpeeDee Oil, supra,* 20 Cal.4th at p. 1146.)

This case presents an issue of "successive representation," which occurs when an attorney serves "as counsel to a successive client in litigation adverse to the interests of the first client." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) The "enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an 'informed written consent' waiving the conflict. (Rules Prof. Conduct, rule 3–310(E).)[3] If the attorney fails to obtain such consent and undertakes to represent the adversary, the former client may disqualify the attorney by showing a ' "substantial relationship" ' between the subjects of the prior and the current representations. [Citation.] . . . When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client. [Citations.]" (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847.)

We review a trial court's ruling on a disqualification motion for abuse of discretion. "If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings

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[3] Rule of Professional Conduct 3-310(E) states: "A member 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."

supported by substantial evidence. [Citation.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [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." (*SpeeDee Oil, supra,* 20 Cal.4th at pp. 1143-1144.)

II. The Trial Court Erred in Failing to Apply the Substantial Relationship Test

Glaser Weil represented Emmett and Furla in the Fox arbitration and now represents Morgan Creek against Emmett and Furla. Because of this successive representation, the trial court was required to apply the substantial relationship test.

"[W]hen ruling upon a disqualification motion in a successive representation case, the trial court must first identify where the attorney's former representation placed the attorney with respect to the prior client." (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710 (*Jessen*).)

"[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,' and therefore it will be conclusively presumed that the attorney acquired confidential information relevant to the current representation if it is congruent with the former representation." (*Jessen, supra,* at p. 709.)

"If the court determines that the placement was direct and personal, this facet . . . is settled as a matter of law in favor of disqualification and the only remaining question is whether there is a connection between the two successive representations, a study that may not include an 'inquiry into the actual state of the lawyer's knowledge' acquired during the lawyers' representation of the former client. [Citation.]" (*Jessen, supra,* at pp. 710-711.)

Here, the trial court found Glaser Weil directly represented Emmett and Furla as individuals in the Fox arbitration and there is no indication in the record that the attorney-client relationship was "peripheral or attenuated." (*Jessen,* at p. 710.) As a result, the only question before the trial court was whether there was a substantial relationship between the two representations. (*Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 679 (*Farris*).) The trial court did not make this determination because it concluded plaintiffs did not argue there was a substantial relationship between the Fox arbitration and the Morgan Creek matter as to Emmett and Furla.

The record demonstrates otherwise.[4] In the disqualification motion, plaintiffs, perhaps unwisely, noted at the

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[4] On appeal, respondents argue the trial court applied the substantial relationship test as to Emmett and Furla individually and properly concluded the two representations are not substantially related. We reject this characterization of the court's ruling. The trial court stated its conclusion that plaintiffs had not argued the two representations are substantially related as it pertained to the individuals and it conducted no further analysis of the issue. The remainder of the court's ruling concerned the entities, leading to the court's conclusion there was no successive representation and it therefore need not apply the substantial relationship test. (*People v. Eubanks* (1996) 14

outset that the motion would refer to EFO, Emmett, and Furla *collectively* as " 'EFO or Plaintiffs.' " Then, in the motion, plaintiffs made arguments such as: "By virtue of their representation of Plaintiffs in the Fox Arbitration, Glaser Weil was provided with confidential information pertaining to EFO's film financing and business related activities . . . . In order to defend [against Fox's claim seeking a percentage of EFO's film financing fees], Plaintiffs provided Glaser Weil, among other things, confidential documents regarding EFO's film financing activities and various information regarding the structure of EFO's film financing operations."

Furla's first declaration stated that in the course of the Fox arbitration, Glaser Weil obtained "confidential information regarding *Plaintiffs'* books and records, *Plaintiffs'* profits and losses from their various projects, *Plaintiffs'* ability to finance films and secure investors, *Plaintiffs'* trade secrets and other confidential information in regards to producing, developing, and financing pictures, and *Plaintiffs'* general practices, litigation strategies, and business customs." (Italics added.)

Plaintiffs asserted the two representations were substantially related as "Glaser Weil represented Plaintiffs in an action which involved an entertainment related dispute regarding EFO's business operation and Glaser Weil has key information regarding Plaintiffs [*sic*] entertainment litigation strategies and tactics and their financial wherewithal to pursue and defend the subject litigation."

Cal.4th 580, 598 [in the absence of contrary evidence, reviewing court assumes trial court applied the correct legal standard, but will not do so where there is ample evidence the trial court failed to apply complete test].)

To the extent plaintiffs' initial motion did not clearly indicate that plaintiffs were arguing the two representations were substantially related as they pertained to Emmett and Furla, the reply briefing made the point more explicitly. Plaintiffs specifically argued:

> "Glaser Weil disregards the fact that its representation of Emmett/Furla and their related entities is 'substantially related' to its current representation of Morgan Creek here. Specifically, Glaser Weil previously represented Emmett/Furla in an entertainment-related litigation matter that involved film financing issues, and in which there was a Claim for Relief for Accounting asserted against Emmett/Furla (as well as their related entities). Thus, just by virtue of this Accounting claim, the complete financial picture of Emmett/Furla and their related entities would have necessarily been revealed to Glaser Weil, and this includes Plaintiffs' books and records, their assets and liabilities, their credit-worthiness, and their ability to get financing. Now, in this present matter, Defendant Morgan Creek is contending that Emmett/Furla's business entity 'simply does not have the money to satisfy its financing obligation.' However, because of its prior representation, Glaser Weil is already intimately familiar with confidential information pertaining to its former clients' financial abilities."

Plaintiffs argued the former and current representations were substantially related as it pertained to the individuals. As such, the court was required to conduct the substantial relationship analysis. (*Jessen, supra,* 111 Cal.App.4th at pp. 710-711.) A trial court's failure to exercise its discretion "is 'itself an abuse of discretion.' [Citation.]" (*Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 97.)

Moreover, the court's error was prejudicial. "[S]uccessive 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." (*Jessen, supra,* 111 Cal.App.4th at p. 713.) The record includes evidence suggesting such a link may exist between the Fox arbitration and the Morgan Creek litigation.

The amended answer Glaser Weil filed on behalf of the respondents in the Fox arbitration included information regarding Emmett and Furla's financing activities conducted through a third entity, Hedge Fund Film Partners. The answer made the point that it was Emmett and Furla (rather than Fox) who personally guaranteed various loans and financing, and "this was all accomplished by Emmett and Furla in connection with [Hedge Fund Film Partners'] financing activities." Although the answer primarily referred to EFP and Hedge Fund Film Partners, it alleged Fox "wants money for doing nothing; he wants to ride the coattails of *Emmett* and *Furla*, and receive compensation for their considerable efforts and risks, even though he did not participate in any way, shape or form." (Italics added.) The answer thus, at least in part, attributed the film financing work of Hedge Fund Film Partners to Emmett and Furla, two of Glaser Weil's clients in the matter.

The Morgan Creek litigation concerns a different contractual dispute, and, theoretically, would not necessarily implicate Emmett and Furla's financing activities—either

directly or through another entity. Yet, allegations in plaintiffs' complaint, and Morgan Creek's discovery requests directed to Emmett, suggest Emmett and Furla's financing activities may be implicated anyway. The complaint asserts, as a factual matter, that "[a]t all relevant times, Plaintiffs Emmett and Furla have diligently acted as producers to the Picture in obtaining financing, studio distribution deals, and tax credit opportunities in Georgia, except as they have been intentionally ousted and prevented from performing their functions as producers of the Picture by Morgan Creek."

Morgan Creek's cross-complaint alleges "Emmett/Furla Films," the signatory on the term sheet agreement, "never had and could not raise the money it agreed to contribute to the project." Yet, Morgan Creek's document requests, propounded on Emmett, defined EFO as *including* Emmett and Furla, then requested documents such as "all communications to or from any person relating to EFO's ability to provide financing" for the Tupac film, and "all communications to or from any person relating to EFO's efforts to raise or secure money to provide financing for the FILM." As Morgan Creek defined "EFO," these production requests demand documents relating to *Emmett* and *Furla's* ability to provide financing and their efforts to secure financing for the Tupac film on EFO's behalf.

The evidence and representations in the record regarding Emmett and Furla's role in securing financing through an entity they owned, combined with aspects of the Morgan Creek litigation thus far, make it necessary for the trial court to determine whether there is a substantial risk Glaser Weil's representation of Morgan Creek against plaintiffs will involve Emmett and Furla's confidential information acquired in the

course of Glaser Weil's prior representation. (*Farris, supra,* 119 Cal.App.4th at p. 681 [former and current representations are substantially related if there is a substantial risk the present representation will involve the use of information acquired in the course of the prior representation; substantial risk exists where it is reasonable to conclude it would materially advance the present client's position in the subsequent matter to use confidential information obtained in the prior representation].)

Substantial evidence supported the trial court conclusion that Glaser Weil did not represent EFO; indeed this fact could not be disputed since EFO did not exist as an entity until after Glaser Weil's representation of EFP ended. But the evidence in the record also indicates viewing EFP and EFO in isolation is too narrow to determine whether there is a disqualifying conflict in this case.

The pleadings in the Fox arbitration and the Morgan Creek dispute, the discovery requests already served, and the declarations filed in the disqualification matter, together paint a picture in which Emmett and Furla are the constants between the various entities they have formed. Emmett and Furla have been involved in both disputes—as respondents in the Fox arbitration, represented by Glaser Weil; as plaintiffs in the Morgan Creek dispute, adverse to Glaser Weil's client; and as the owners, principals, and managers of numerous entities conducting similar or overlapping functions at different points in time, including EFP, Hedge Fund Film Partners, and EFO. Their stake and involvement in the Morgan Creek litigation goes beyond their formal status as third-party beneficiaries of the term sheet agreement. Irrespective of whether there is a unity of interest between EFP and EFO alone, the successive

representation with respect to Emmett and Furla requires consideration of whether disqualification of Glaser Weil is necessary because the Fox arbitration and Morgan Creek litigation are substantially related.[5]

In light of the evidence in the record, reversal is warranted. "[A]lthough an appellate court will generally imply the findings necessary to support the proper exercise of a trial court's discretion [citation], a trial court abuses its discretion when it appears from the record that it 'applie[d] the wrong legal standard.' [Citation.]" (*O'Brien v. AMBS Diagnostics, LLC* (2016) 246 Cal.App.4th 942, 951.) In addition, as noted above, a trial court's failure to exercise its discretion is an abuse of discretion. (*Ashburn v. AIG Financial Advisors, Inc., supra,* 234 Cal.App.4th at p. 97.)

The court's "paramount concern" when presented with a disqualification motion is "the preservation of public trust in the scrupulous administration of justice and the integrity of the bar." (*Jessen, supra,* 111 Cal.App.4th at p. 705.) This case presents an issue of successive representation as to Emmet and Furla. Plaintiffs argued the two representations are substantially related with respect to Emmett and Furla. The trial court was required to apply the substantial relationship test in determining

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[5] We note "[t]he substantial relationship test requires comparison not only of the legal issues involved in successive representations, but also of evidence bearing on the materiality of the information the attorney received during the earlier representation." (*Khani v. Ford Motor Co.* (2013) 215 Cal.App.4th 916, 921.) In this case, applying these aspects of the test may require resolution of conflicts in the evidence presented by the parties, as well as credibility determinations.

whether disqualification was necessary. The court's failure to do so was an abuse of discretion.

DISPOSITION

The trial court order denying plaintiffs' disqualification motion is reversed. The trial court is directed on remand to rehear the motion and to apply the substantial relationship test. (*Jessen, supra,* 111 Cal.App.4th at p. 714.) Appellants shall recover their costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.