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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RITCH WINTER, et al., Plaintiffs and Respondents, v. 4SPORTS & ENTERTAINMENT AG, et al., Defendants and Appellants.	B272417 Los Angeles County Super. Ct. No. BC600745

APPEAL from an order of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Jackson Lewis, Paul V. Kelly, Gregg E. Clifton, Sherry L. Swieca, and Benjamin A. Tulis for Defendants and Appellants.

Lavely & Singer, Michael D. Holtz and David B. Jonelis for Plaintiffs and Respondents.

INTRODUCTION

Appellants 4sports & Entertainment AG (4sports) and Claude Lemieux appeal from an order denying their motion to disqualify counsel for respondents Ritch Winter and Wintersports Ltd. (Wintersports).[1] Appellants contend respondents' attorney, Martin Singer and his firm Lavely & Singer Professional Corporation (collectively, Singer), must be disqualified because Singer previously represented 4sports in a matter substantially related to the current litigation.

We conclude the trial court did not abuse its discretion in denying appellants' motion to disqualify Singer. Substantial evidence supports its finding that the facts and legal issues in Singer's prior representation of 4sports and Winter are not substantially related to the facts and legal issues in the current litigation between Winter and 4sports. Accordingly, Singer would not have received confidential information from 4sports in the prior matter that is *material* to the current dispute. Also, the usual tension between a client's freedom to counsel of its choice, and a former client's interest in preserving confidences disclosed to its attorney, is not present here.

FACTS AND PROCEDURAL BACKGROUND

1. *The Parties*

Ritch Winter is a certified agent with the National Hockey League Players' Association (NHLPA). Wintersports is Winter's "loan-out company" for his services as an NHLPA certified agent. 4sports is a management company that manages sporting events

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[1] For ease of reference, we refer to 4sports and Lemieux jointly as "appellants" or "4sports" and Winter and Wintersports jointly as "respondents" or "Winter."

and represents athletes, including National Hockey League (NHL) players. Claude Lemieux is a former NHL player and President of 4sports North America, a subsidiary of appellant 4sports.

In 2011, 4sports hired Winter as a consultant to help it recruit professional hockey players in North America. Three years later, in May 2014, Winter and 4sports entered into a second consulting agreement ("Consulting Agreement") under which Winter would provide his consulting services to 4sports from January 2014 through December 2019 for 25,000 Swiss francs per month plus expenses. Under that agreement, Winter also was to oversee legal matters for 4sports. He also arranged a line of credit for 4sports, which 4sports could use only for purposes jointly agreed to by Winter and Lemieux under the Consulting Agreement.

2. ***The Prior Representation*: *Winter and 4sports v. Globalcraft et al.***

a. *Scope of the prior representation*

4sports alleges Winter conceived a business plan, before he signed the Consulting Agreement, to increase revenues for the NHLPA and the NHL. Winter convinced 4sports to enter a joint venture agreement known as the AMSA with two business partners, including Globalcraft Capital LLC (Globalcraft). That joint venture was to develop a plan for the 2015 World Cup of Hockey under an agreement with the NHLPA, Winter, and others (the NHLPA Agreement). Winter was the designated project manager of the NHLPA Agreement.

Winter declares he retained Lavely & Singer—specifically Martin Singer—in 2014 to represent him and 4sports in a dispute that arose with Globalcraft and others (the Globalcraft parties)

under these agreements (the Globalcraft matter). Singer had represented Winter in various matters for about 10 years.

Winter declares that the scope of Lavely & Singer's representation in the Globalcraft matter was "limited to preparing a demand letter to those third parties" regarding their breaches of the Globalcraft Agreements[2] and that it lasted only two months, from June to July 2014. Singer also declares the scope of his representation in that dispute was limited to preparing "a single demand letter (and briefly reviewing a response) in June–July 2014," on behalf of Winter and 4sports regarding third parties' breaches of the Globalcraft Agreements.

Winter and Singer declare that Winter was the exclusive point of contact with Lavely & Singer. All information given to Singer about the dispute came from Winter. Winter states this was consistent with his oversight of 4sports's legal matters under the Consulting Agreement and as "Managing Director" of 4sports. Winter and Singer affirm that Winter "was a sender or addressee on all correspondence with Lavely & Singer and was the point of contact for all phone calls throughout" the representation. Winter further declares he knew of only two emails that Lavely & Singer also sent to Lemieux; they attached the draft and then final demand letter to Globalcraft. Only Winter provided comments to Lavely & Singer and ultimately approved the demand letter's content. Singer does not recall speaking to Lemieux and none of his time entry records indicate he did so.

Lemieux states Winter began communicating with Singer on behalf of 4sports in early 2014 regarding the issues 4sports

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[2] We refer to the agreements at issue in the Globalcraft matter collectively as "the Globalcraft Agreements."

was having with the other parties to the AMSA. Lemieux declares Lavely & Singer was retained to provide legal services to 4sports, "including: (1) communicating with adverse parties, including parties to the NHLPA . . . Agreement and the AMSA, on behalf of 4sports; and, (2) providing legal advice and counsel with respect to 4sports'[s] rights and responsibilities under the agreements, as well as its options for the overall legal strategy going forward."

These communications included emails between Winter and Singer in June 2014, including one seeking " 'strategic advice' on how to respond to correspondence from parties to the AMSA regarding issues with 4sports'[s] performance under the contract," and another attaching the agreements and a memorandum summarizing 4sports's legal problems arising from the agreements. Lemieux declares that this memorandum Winter sent Singer "included confidential and privileged information regarding 4sports [and] details about 4sports'[s] position on pursuing litigation." He states Singer sent an email to Winter and himself with a draft letter to send to one of the AMSA parties on behalf of 4sports.

Lemieux further declares Singer was a participant on telephone calls with Lemieux and other 4sports principals regarding legal matters and strategies relating to the NHLPA Agreement and AMSA, and that while representing 4sports, Singer and others in his firm "received privileged and confidential information regarding 4sports'[s] litigation strategy, business plans and customs, and business relationships." Lemieux avers he "understood that Attorney Singer was representing 4sports and at all times acting on behalf of the agency during the course of internal discussions and external

communications with parties to the NHLPA . . . Agreement and AMSA." He states Singer "continued to act on behalf of 4sports and provide advice and counsel to 4sports regarding the ongoing conflict with the parties to the AMSA and the NHLPA . . . Agreement, issues which remain unresolved and which have a direct bearing on the termination of Winter's contract with 4sports and the allegations in Plaintiffs' Complaint."

b. *Allegations in the demand letter*

In the demand letter to the Globalcraft parties that Singer drafted on behalf of Winter and 4sports, Singer stated that he was "litigation counsel" for Winter and 4sports and was writing the letter as formal notice of the parties' dispute as required by the parties' agreements. Essentially, Winter and 4sports contended the Globalcraft parties were attempting "to take over the entire [2015 World Cup of Hockey] project to the exclusion of [Winter and 4sports] . . . in violation of their contractual rights."

The letter asserted the Globalcraft parties breached their agreements by: (1) communicating directly with the NHLPA about the 2015 World Cup of Hockey project without first receiving approval from Winter, 4sports's designated project manager; (2) failing to make a previously identified individual available to take an active role in the project, whose involvement was "the main selling point . . . presented to [Winter and 4sports] in inducing them to enter into the [a]greements"; and (3) refusing "to provide daily status updates regarding the progress on" the proposal for the 2015 World Cup of Hockey.

3. ***The Current Representation: Winter et al. v. 4sports et al.***

a. *Respondents' complaint*

In November 2015, approximately 18 months after Singer sent the demand letter, respondents filed a complaint against appellants alleging causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, based on the Consulting Agreement; fraud; intentional interference with prospective economic advantage; and declaratory relief.

The complaint alleges 4sports breached the Consulting Agreement by (1) drawing down on the line of credit arranged by Winter without Winter's consent; (2) prohibiting Winter from contacting 4sports's clients after trying to lure a Wintersports employee to 4sports; (3) failing to pay salaries and expenses and reimburse Winter for expenses; and (4) violating NHLPA regulations, which could affect 4sports's status as an agent and require termination of the Consulting Agreement. Winter also alleges appellants interfered with respondents' relationships and prospective economic advantage by contacting 4sports's clients and falsely claiming Winter had bad relationships with certain hockey teams and could not "get the job done for the players."

b. *Appellants' cross-complaint*

In January 2016, appellants answered the complaint and cross-complained against respondents for breach of contract and breach of the implied covenant of good faith and fair dealing, based on the Consulting Agreement; fraud; defamation and commercial disparagement; intentional interference with contractual relations; intentional interference with prospective business relations; and unfair competition.

The cross-complaint alleges that the Consulting Agreement terms also provided that " '4sports may terminate th[e] agreement effective immediately if Wintersports fails to provide [ ] services to fulfill the terms of th[e] agreement' "; included language drafted by Winter identifying himself as the "Project Manager" of the NHLPA . . . Agreement and tasking himself to " 'continue to manage the project and overse[e] all strategic decisions' "; and included language drafted by Winter "describing how funds received from the NHLPA and [its executive director] would be distributed, with the largest percentage of these monies going to himself and his business, Wintersports."

Appellants allege respondents breached the Consulting Agreement and committed fraud, among other things, by (1) making false statements, including, "false and fanciful business plans and revenue projections," false promises to 4sports's clients, false claims 4sports drew down on the line of credit without authorization, false claims Lemieux violated NHLPA regulations, and false statements concerning "substance abuse and alcoholism on the part of certain clients and principals of 4sports"; (2) "ceas[ing]or significantly diminish[ing] . . . scouting and recruitment of new players to help grow the business of 4sports"; (3) disclosing 4sports's client's private information; (4) "threaten[ing] to terminate [the Consulting Agreement], [and] recruit[ing] away employees and consultants of 4sports"; (5) "attempt[ing] to recruit and steal away existing clients under contract to 4sports, to leave the agency and join his new firm"; and (6) "ke[eping] 4sports in the dark about the status of the NHLPA . . . Agreement, and withh[o]ld[ing] from 4sports knowledge and information that [Winter] possessed that he and

the joint venture partners were in breach of their responsibilities and commitments to the NHLPA under that agreement."

The cross-complaint also alleges the issues that arose with the NHLPA Agreement and AMSA "caused Winter to be significantly distracted from his primary duties as a certified agent under the terms of the [Consulting Agreement], including his failure to fulfill various basic and essential responsibilities in the areas of recruiting, managing players, negotiating contracts, and assisting 4sports in efforts to grow its athlete representation business."

c. *The motion to disqualify Singer*

When appellants filed their answer and cross-complaint, they also moved to disqualify Martin Singer and Lavely & Singer as counsel for respondents. Appellants submitted Lemieux's declaration in support of their motion, and respondents submitted declarations from Winter and Singer in support of their opposition. Both sides filed various objections to the declarations. The trial court mostly overruled the parties' objections. (It sustained two of respondents' objections to the Lemieux declaration for lack of personal knowledge and foundation. That ruling is not contested on appeal.) The trial court issued a tentative ruling denying appellants' motion. After hearing oral argument on its tentative decision, the court adopted it as its final order. No reporter was present for that hearing, and Appellants do not appear to have requested a settled statement. Thus, we do not have a record of the parties' oral argument or the trial court's oral comments to the parties at the hearing. Appellants timely appealed and petitioned for a writ of supersedeas and immediate stay, which we granted.

DISCUSSION

1. ***Standard of review***

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] 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 supported by substantial evidence. [Citations.] 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.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143–1144.) Where no factual disputes exist, "the appellate court reviews the trial court's determination as a question of law." (*Id.* at p. 1144.)

In exercising our appellate review, we presume the order of the lower court is correct and "all intendments and presumptions are indulged to support it on matters to which the record is silent." (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1451 [*Ahmanson*].) "The trial court's 'application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.)

2. ***Rules governing disqualification of an attorney in a successive representation***

An attorney may not "accept employment adverse to . . . [a] former client where, by reason of the representation of the . . . former client, the [attorney] has obtained confidential information material to the employment." (Rules Prof. Conduct, rule 3-310(E).) "When disqualification is sought because of an attorney's successive representation of clients with adverse

interests, the trial court must balance the current client's right to the counsel of its choosing against the former client's right to ensure that its confidential information will not be divulged or used by its former counsel." (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [*Cobra*].) Thus, while the duty of loyalty is the primary concern in potentially conflicting simultaneous representations, the "chief" concern in potentially conflicting successive representations is the protection of client confidentiality. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283–284 [*Flatt*].)

To disqualify an attorney in the case of a successive representation, therefore, the former client has the burden to show either (1) the attorney "actually possesses confidential information adverse to the former client," or (2) a " 'substantial relationship' " exists between the former and current representations. (*Ahmanson, supra,* 229 Cal.App.3d at p. 1452, citation omitted.) Upon establishing the existence of a substantial relationship, the court will presume the attorney possesses confidential information adverse to the former client; the former client need not prove actual possession of confidential information. (*Ibid.*; *Khani v. Ford Motor Co.* (2013) 215 Cal.App.4th 916, 920 [*Khani*].) This presumption "avoids the ironic result of disclosing the former client's confidences and secrets through an inquiry into the actual state of the lawyer's knowledge and it makes clear the legal profession's intent to preserve the public's trust over its own self-interest." (*Ahmanson,* at p. 1453.)

Where the former client fails to demonstrate the successive representations are substantially related, however, "the moving party must prove the lawyer in fact obtained such information—

i.e., 'some showing of the nature of the communications or a statement of how they relate to the current representation.' " (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 9:406.8a [quoting from *Elliot v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562, 570–572, where the court held "conclusory statements" in declaration that former client " 'confided . . . in . . . attorneys information germane and vital to [the current representation]' " insufficient to establish receipt of confidential information]; see *Ahmanson, supra,* 229 Cal.App.3d at p. 1454 [attorney's receipt of confidential information is presumed "only" upon showing of substantial relationship between successive representations].)

Where the attorney directly performed legal services for the former client, as is the case here, a successive representation is deemed 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 v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 713 [*Jessen*].) The court's inquiry, therefore, "focuses 'upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation.' " (*Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 681 [*Farris*] [quoting Rest.3d, Law Governing Lawyers, § 132, com. d(iii) and clarifying "information" for purposes of substantial relationship test means " 'confidential' information"].)

"The 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, supra,* 215 Cal.App.4th at p. 921.) Therefore, an attorney's knowledge of a former client's " 'overall structure and practices' [does] not of itself require disqualification unless it [is] found to be 'material'—i.e., directly in issue or of critical importance—in the second representation." (*Farris, supra,* 119 Cal.App.4th at p. 680.)

With these principles and our standard of review in mind, we consider the nature of the Globalcraft matter compared to the nature of the current controversy.

3. ***The trial court applied the correct legal standard***

As an initial matter, appellants contend the trial court applied the wrong legal standard because it did not consider the allegations of appellants' cross-complaint in determining whether the two matters were substantially related and discounted Lemieux's declaration, faulting 4sports for failing to provide evidence of the confidential communications between Singer and 4sports.

a. *Presumption of confidentiality*

The trial court's order makes clear it correctly applied the standard governing the presumption of confidentiality in substantially related matters. It stated: " 'In successive representation cases, if a "substantial relationship" between the former representation and current litigation is shown, a presumption arises that the attorney has obtained confidential information from the former client.' [Citation.] 'Absent such a showing, the moving party must prove the lawyer in fact obtained

such information; i.e., "some showing of the nature of the communications or a statement of how they relate to the current representation." ' [Citation.]"

We do not read the trial court's order as requiring 4sports to prove Singer received confidential information in the first instance. Rather, we read the trial court's order, in conjunction with the record, to find 4sports failed to present sufficient evidence to prove the factual and legal issues presented in the Globalcraft matter were substantially related to the factual and legal issues in the current matter. (*Khani, supra,* 215 Cal.App.4th at p. 921 [substantial relationship test requires "comparison . . . of *evidence* bearing on the materiality of the information the attorney received during the earlier representation" (italics added)].) Singer therefore, did not *presumably* receive confidential information *material* to the current dispute by virtue of his representation of 4sports in the Globalcraft matter. To prevail on its motion, then, 4sports would have had to prove Singer *actually* received confidential information material to this litigation. The trial court found it did not.

b. *The cross-complaint's allegations*

Nor can we find the trial court failed to consider the allegations in the cross-complaint. Although the trial court did not mention the cross-complaint in its order, the cross-complaint was before the court, 4sports referred to the cross-complaint in its moving and reply papers, and the Lemieux declaration,[3] which

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[3] The trial court's statement that appellants relied "exclusively" on Lemieux's declaration also does not demonstrate the court's application of the wrong legal standard as appellants

the trial court referenced in its order, contained statements that were the same or substantially similar to the allegations in the cross-complaint. Without a reporter's transcript, however, we are unable adequately to determine this issue; we do not know whether the trial court or the parties mentioned the facts alleged in the cross-complaint at the hearing on appellants' motion. Accordingly, we presume the trial court considered those facts when assessing whether the Globalcraft matter and the current litigation were sufficiently related to require Singer's disqualification. (See *Ahmanson*, *supra,* 229 Cal.App.3d at p. 1451 [appellate court indulges presumptions to support lower court's judgment "on matters as to which the record is silent"].)

In any event, because, as we discuss below, substantial evidence in the record supports the trial court's finding that the Globalcraft matter and the current dispute are not substantially related, we find the trial court did not abuse its discretion in denying appellants' motion to disqualify Singer. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [reciting well-settled principle: " 'That a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]"].)

4. ***The Globalcraft matter vs. the current dispute***

The parties do not dispute Singer and Lavely & Singer represented 4sports in the Globalcraft matter. They do disagree over whether Singer represented *both* Winter and 4sports. The

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contend. The Lemieux declaration was indeed the only *evidence* appellants presented to support their motion to disqualify Singer.

record before us does not reveal whether Lavely & Singer had a written retainer agreement with one or both parties. At oral argument, appellants' counsel said she did not know if a retainer agreement existed. We presume the trial court resolved this issue in Winter's favor given the parties' competing declarations and Singer's written representation to third parties that he was "litigation counsel" for both Winter and 4sports.

In any event, Singer was personally involved in the representation, albeit through Winter on behalf of himself and 4sports, and thus is presumed to have been in a position to receive confidential information relevant to that representation from his clients. (*Cobra, supra,* 38 Cal.4th at p. 847.) Accordingly, the question before us is whether *confidential* information Singer received in the former representation is *material* to the current representation. In other words, given the facts and legal issues, could confidential information Singer was in the position to obtain in the course of representing 4sports in the Globalcraft matter be used to 4sports's disadvantage and Winter's advantage in Winter's current litigation with 4sports concerning the Consulting Agreement? (*Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1213–1214 [*Knight*] [finding substantial relationship where facts learned in prior representation "could be used to [the defendants'] advantage" given the allegations in defendants' cross-complaint].) We find it could not.

a. *The facts and legal issues in the two matters are distinct*

The Globalcraft matter concerned Winter's and 4sports's dispute with the Globalcraft parties regarding their purported breaches of the Globalcraft agreements. The complaint and

cross-complaint, on the other hand, concern the current parties' obligations, performance, and rights under the Consulting Agreement and interference with each other's business relationships. Both matters involve contract issues, but the contracts are different and concern different underlying facts and different parties.

Although the cross-complaint alleges and Lemieux declares Winter breached the Consulting Agreement in part by failing to manage the NHLPA Agreement properly and neglected his duties under the Consulting Agreement to tend to issues with the Globalcraft Agreements, we fail to see, and 4sports has failed to demonstrate, how confidential information Singer could have learned in advising 4sports how to respond to the Globalcraft parties' purported breaches of the Globalcraft Agreements would be material to the "evaluation, prosecution, settlement or accomplishment" of Winter's prosecution of his complaint or defense of the cross-complaint. (*Jessen, supra,* 111 Cal.App.4th at p. 713.)

The current representation does not center on those third parties' obligations under the Globalcraft Agreements. Nor did the Globalcraft matter involve advice to 4sports regarding Winter's obligations to 4sports under the Consulting Agreement. Whether Winter also breached the Globalcraft Agreements or mishandled them giving 4sports cause to terminate the Consulting Agreement is a separate and distinct factual and legal issue, not part of Singer's representation of Winter and 4sports in their dispute regarding the Globalcraft parties' attempt to take over the 2015 World Cup of Hockey project by failing to adhere to provisions in the Globalcraft Agreements.

At issue in the Globalcraft matter was the Globalcraft parties' direct communication with the NHLPA to the exclusion of Winter, their failure to provide updates to Winter about the project, and their failure to make a key individual available on the project. In contrast, 4sports alleges Winter engaged in misconduct under the Consulting Agreement by failing to recruit players and grow 4sports's business; attempting to steal 4sports's clients, consultants, and employees; making false statements about 4sports and others; keeping 4sports "in the dark" about the status of the NHLPA Agreement and the Globalcraft parties' and Winter's own breaches of the agreement; and failing to fulfill his responsibilities under the Consulting Agreement, which 4sports alleges included management of the NHLPA Agreement. And, Winter's complaint concerns 4sports's alleged impermissible use of the line of credit Winter established; its failure to pay salaries and expenses; its attempt to steal a Wintersports employee; and its false statements about Winter to 4sports's clients and others.

Based on the allegations in the complaint and cross-complaint, the contractual agreement at the center of Singer's current employment by Winter is the Consulting Agreement, not the Globalcraft Agreements as 4sports contends. Even assuming the Globalcraft Agreements are mentioned in the Consulting Agreement—which the trial court could not determine because 4sports did not produce the Consulting Agreement—Singer's representation of 4sports in the Globalcraft matter was limited to advising 4sports, through Winter, on the Globalcraft parties' breach of the Globalcraft Agreements. Singer did not advise 4sports on Winter's obligations to 4sports concerning his management of the NHLPA Agreement, nor does 4sports contend

Singer represented 4sports in the formation of the Globalcraft Agreements or the Consulting Agreement.

The relationship between the two matters here is more akin to those in *Khani* than in *Knight*, on which appellants heavily rely. In *Khani*, plaintiff sued Ford under California's "lemon law" for defects in a Lincoln Navigator. (*Khani, supra,* 215 Cal.App.4th at p. 919.) Ford moved to disqualify plaintiff's counsel on the ground he previously had represented it in lemon law cases. The trial court granted the motion. (*Ibid.*) The court of appeal reversed, finding the two matters were not substantially related simply because both matters involved litigation concerning the same statute. (*Id.* at pp. 921–922.) The court explained that, while Ford had presented evidence plaintiff's attorney had represented it in lemon law cases, "it did not establish that any confidential information about the defense in those cases would be at issue in this case." (*Id.* at p. 922.) Nor had Ford demonstrated that the allegedly defective Lincoln Navigator or its repair history had been the subject of any lemon law litigation in which the attorney had represented Ford. (*Ibid.*) Finally, the court found the declaration Ford submitted did not show that it had any policies, practices, or procedures "generally applicable to the evaluation, settlement or litigation of California lemon law cases at the time [the attorney] represented Ford." (*Ibid.*) Accordingly, the trial court had abused its discretion in concluding the two matters were substantially related "just because they involved claims under the same statute." (*Ibid.*)

Similarly, the mere fact the Consulting Agreement at issue here refers to the Globalcraft Agreements does not render the Globalcraft matter and the current litigation substantially related any more than did the fact that the two matters in *Khani*

involved the same statute. Like the evidence Ford presented in *Khani*, the evidence 4sports presented—Lemieux's declaration—does not establish that information to which Singer was exposed in advising Winter and 4sports in the Globalcraft matter would be material to his representation of Winter in this matter, even considering 4sports's allegation Winter breached the Consulting Agreement by mismanaging the Globalcraft Agreements.

4sports nevertheless argues the facts here are analogous to *Knight*, where the court found successive representations were substantially related. But, in *Knight*, the successive representations concerned the creation of the *identical business*. (*Knight, supra,* 149 Cal.App.4th at p. 1210.) There, a restaurateur, Knight, consulted with Wideman, the attorney for Knight's sister and brother-in-law, the Fergusons, about entering a partnership with a potential investor to open a branch of Knight's restaurant and assume a bankrupt business's ground lease for its location. (*Id.* at pp. 1210–1211.) The Fergusons sat in on Knight's meetings with Wideman, and Knight ultimately asked the Fergusons to take the place of the investor; they agreed. (*Id.* at pp. 1211, 1214.) Knight testified that she told Wideman about her restaurant, her business concerns and aspirations, her concerns about the lease, her relationship with the investor, and her position regarding potential litigation with the investor over the partnership agreement to assume the lease for the restaurant. (*Id.* at pp. 1211–1212, 1215.)

Knight sued the Fergusons for breach of contract, alleging, among other things, that they had improperly removed her from managing and overseeing the operations of the restaurant. (*Knight, supra,* 149 Cal.App.4th at p. 1211.) The Fergusons

cross-complained, alleging Knight had mismanaged the restaurant and run it as a sole proprietorship instead of a corporation as promised, the Fergusons had assumed the original investor's role after the investor's and plaintiff's "partnership arrangement 'fell apart,' " and they had relied on Knight's promises to their detriment when they took over the ground lease for the restaurant. (*Ibid.*) Wideman substituted in as counsel for the Fergusons and Knight moved to disqualify him; the trial court granted the motion and the court of appeal affirmed. (*Id.* at pp. 1210–1211.)

In *Knight*, the court determined the attorney's brief representation of Knight was substantially related to the lawsuit between Knight and the Fergusons because both matters involved the identical subject and issues: a business arrangement to create Knight's restaurant and assume a ground lease for its location. (*Knight*, *supra,* 149 Cal.App.4th at p. 1213.) Knight's business and lease were directly in issue in her litigation with the Fergusons and those were the exact subjects about which she had consulted Wideman for advice. In contrast, the subject matters of the Globalcraft matter and the current litigation do not involve the same subject matter or issues at all. One involves third parties' improper communication and violation of their obligations under agreements to prepare a business plan for the 2015 World Cup of Hockey, while the other involves Winter's and 4sports's alleged improper conduct and rights and obligations under their independent Consulting Agreement.

Knight's communications to Wideman about her difficulties with the original investor "could be used to the Fergusons' advantage," given the Fergusons alleged Knight's partnership with the investor had fallen apart, and she had asked them to

take the investor's place. (*Knight, supra,* 149 Cal.App.4th at pp. 1213–1214.) By contrast, 4sports's communications with Singer, through Winter, about its problems with the Globalcraft parties and their relationship under the Globalcraft Agreements, have no bearing on Winter's alleged breach of the Consulting Agreement by his own purported mismanagement of the project under the Globalcraft Agreements. 4sports has presented no evidence that Singer advised 4sports, or that 4sports provided confidential information to Singer, about how the Globalcraft matter affected the rights and obligations of 4sports and Winter *to each other* under the Consulting Agreement. While 4sports need not disclose the actual confidential communications, it bears the burden to present evidence from which the court reasonably can conclude that confidential information *material*—i.e., critically important or directly in issue—to the evaluation of the Globalcraft matter and drafting of the demand letter is also material to the evaluation, prosecution, settlement, or accomplishment of the current litigation. (*Jessen, supra,* 111 Cal.App.4th at p. 713; *Farris, supra,* 119 Cal.App.4th at p. 680.)

Nor has 4sports presented any evidence that its principals communicated with Singer separately about its concerns over Winter's alleged mismanagement of the Globalcraft Agreements from which the court could infer relevant confidential information may have been imparted to Singer. Although Lemieux declared Singer was present during calls with Lemieux and other 4sports principals, significantly, Lemieux did not declare Winter was *not* present on those calls. Moreover, Singer declared he did not recall having ever spoken to Lemieux and his billing records did not reflect that he had. Singer further swore under oath that all of his communications regarding the Globalcraft matter were

with Winter, except for two emails he sent to Winter with a copy to Lemieux at Winter's request. We presume the trial court resolved these conflicting declarations in Winter's favor (*Knight, supra,* 149 Cal.App.4th at p. 1214), and will not disturb that resolution on our review. (*Ahmanson, supra,* 229 Cal.App.3d at p. 1451.) The evidence supports the trial court's finding Winter was either the only person who communicated with Singer or was present during all communications with Singer.

In short, 4sports has presented no evidence as to how its communications with Singer, through Winter, concerning its difficulties with the Globalcraft parties under the Globalcraft Agreements could be used to advantage Winter in his litigation with 4sports over Winter's alleged breach of the Consulting Agreement, inter alia, by mismanaging the project under the Globalcraft Agreements, or 4sports's alleged breaches of the Consulting Agreement.

b. *4sports's "playbook" information is not material to the evaluation, settlement, or trial of the current litigation*

Nor do Lemieux's conclusory statements that Singer and others at Lavely & Singer "received privileged and confidential information regarding 4sports'[s] litigation strategy, business plans and customs, and business relationships" create a "rational link" between the two matters. This is classic "playbook" information that does not require disqualification unless 4sports can demonstrate its litigation strategy or business practices and plans disclosed in the Globalcraft matter are "directly in issue or of critical importance" (*Farris, supra*, 119 Cal.App.4th at p. 680; *Khani, supra,* 215 Cal.App.4th at p. 921) to the " 'evaluation, prosecution, settlement or accomplishment of the current' " matter. (*Farris, supra*, 119 Cal.App.4th at pp. 679–680, citation

omitted; *Khani, supra,* 215 Cal.App.4th at p. 921, citation omitted.) It failed to do so.

Appellants' reliance on *Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752 [*Western*] and *Knight* on this issue is misplaced. In *Western*, during the course of representing both the former client, a subsidiary of a public utility, and Western, a natural gas producer, in a third party dispute, the attorney "gained crucial knowledge" about the subsidiary's internal operating practices and its purported alter-ego status to its parent company. (*Western*, at pp. 756–758, 760.) The attorney then represented Western in an action against the subsidiary and its parent in which the subsidiary's performance as an operator and its alter-ego status were directly at issue, rendering the two matters substantially related. (*Id.* at pp. 760–761.)

Similarly, in *Knight*, Knight's business concerns and litigation position vis à vis the original investor and their relationship were directly in issue in her litigation with the Fergusons, which related to the same business transaction: the assumption of the same lease and a contract to own and manage the restaurant. Thus, Knight's views on potential litigation with the original investor in her restaurant were important to the current litigation, which included allegations relating to the failure of that prior relationship. (*Knight*, *supra,* 149 Cal.App.4th 1207 at pp. 1214–1215). Wideman's knowledge of Knight's business concerns and aspirations for her business also were linked to his employment by the Fergusons, who contended plaintiff improperly managed her business. (*Id.* at 1215.) Having been privy to Knight's concerns about her business and litigation relating to that business, the court found Wideman could exploit

that information in his representation of the Fergusons against Knight. (*Ibid*.)

The same cannot be said here. 4sports has not demonstrated how its business practices or position on litigation relative to the Globalcraft matter is particularly important to its current dispute with Winter. In contrast to Knight, Lemieux proffered no testimony or other evidence to establish how Singer's knowledge of 4sports's business practices and approach to potential litigation with third parties to the Globalcraft Agreements (also known to Winter) is directly in issue in the current matter or critically important to the issues raised by the complaint or cross-complaint or their prosecution, defense, or settlement. And, Singer's declaration contradicts Lemieux's—he stated he "never learned anything about the general business operations of 4[s]ports." Nor do the allegations in the complaint or cross-complaint establish how Singer could exploit his knowledge of 4sports's business practices and position on litigation with third parties in the Globalcraft matter in his representation of Winter in this matter, as the attorneys in *Knight* and *Western* could, where the prior and current matters revolved around the same issues.

Moreover, Lemieux's assertion that *Winter* sent a memorandum to Singer that included "confidential and privileged information regarding 4sports [and] details about 4sports'[s] position on pursuing litigation" does not establish how this information would be material to Singer's representation of Winter in this case. Singer's knowledge of 4sports's business practices and litigation strategy alone does not mandate his disqualification absent a showing that this information is directly in issue or critically important to the current litigation

concerning 4sports's dispute with Winter over the parties' performance under the Consulting Agreement. (*Farris, supra,* 119 Cal.App.4th at p. 680.) Knowledge of a former client's "playbook" may require disqualification in certain circumstances, but those circumstances are not present here. (See, e.g., *id.* at pp. 676–677, 682, 684–685, 688 [disqualifying attorney from representing plaintiff against insurer on coverage claim where attorney had represented insurer in coverage issues for 13 years and had "pervasive participation [in], and [a] personal role in shaping, [the insurer's] practices and procedures in handling . . . coverage claims, practices and procedures" that were directly in issue in the current litigation].) Thus, substantial evidence in the record supports the trial court's finding that 4sports failed to establish a link between Singer's purported knowledge of its "playbook" information and the facts and claims at issue in the current dispute.

c. *Appellants' confidential information would not be protected by disqualifying Singer*

As we have said, where an attorney's potential conflict arises from "the *successive* representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*." (*Flatt, supra,* 9 Cal.4th at p. 283, original italics.) Thus, the substantial relationship test "mediates" between the two interests in conflict in such a situation: "the freedom of the subsequent client to counsel of choice, on the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation, on the other." (*Ibid.*)

We have found substantial evidence supports the trial court's decision that the two matters here are not substantially related. The trial court's decision to deny appellants' motion to disqualify Singer also is bolstered by the fact Singer's disqualification would not ensure confidentiality of the information 4sports disclosed to Singer during the Globalcraft matter. Under these circumstances, respondents' freedom to their counsel of choice in the current litigation does not conflict with appellants' interest in maintaining confidentiality of matters disclosed to Singer in the prior matter.

As discussed *ante*, substantial evidence supports the trial court's finding that *Winter* either was the sole point of contact with Singer or was actively present during communications between 4sports and Singer throughout the two months Singer represented 4sports and Winter in the Globalcraft matter. Accordingly, 4sports could have no expectation that information *Winter* disclosed to Singer, or that its principals disclosed to Singer with Winter present, would remain confidential as to Winter. Thus, as the trial court reasoned, disqualification of Singer would not prevent the use or disclosure of 4sports's confidential information conveyed to Singer during the Globalcraft matter because, if forced to retain a new attorney, Winter could disclose that same information again.[4]

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[4] And, 4sports would be unable to disqualify Winter's new attorney on the grounds the attorney would be exposed to 4sports's confidential information. A client may disclose an adversary's confidential information to his own attorney. (See *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 834 [disqualification of attorney who represented former employee Neal against corporation improper where attorney agreed to represent legal secretary formerly employed by corporation who

We cannot quarrel with this reasoning. 4sports's contention that the trial court had to make numerous assumptions unsupported by the record to reach this conclusion—such as Winter's ability to remember his communications with Singer or that 4sports submitted no documentation to Singer—is without merit. Substantial evidence supports the trial court's conclusion: Winter communicated directly with Singer; Winter, not Lemieux, sent the memorandum to Singer that contained 4sports's confidential and privileged information; and Winter, not Lemieux, provided comments on the demand letter—the very subject of the Globalcraft matter. Thus, any information about 4sports that Singer received was not confidential vis à vis Winter and, therefore, disqualification of Singer would not ensure 4sports's confidences would not be used in the present litigation.

Western is again distinguishable. There, the court rejected Western's argument that the subsidiary's motion to disqualify its attorney should be denied because Western and the subsidiary were joint clients in the first representation and understood confidential information disclosed by one would be shared with the other.[5] (*Western, supra,* 212 Cal.App.3d at p. 761.) The court reasoned that substantial evidence in the record revealed the

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had accessed confidential information relating to corporation's litigation with Neal].)

[5] On appeal respondents contend the trial court's order should be affirmed on the additional ground the joint representation exception applies here. Because we find the current matter is not substantially related to the prior matter, we need not address this issue.

subsidiary had a reasonable expectation of confidentiality concerning some of its disclosures to the attorney. The subsidiary's in-house counsel had declared under penalty of perjury that he had disclosed information to the attorney about the subsidiary's internal operating practices and alter ego status that "he fully expected would remain confidential." (*Id.* at p. 762.) The court agreed with the trial court's conclusion that a subsidiary may reasonably expect its disclosures to its attorney concerning its relationship with its parent will remain confidential unless significant to the dispute. (*Ibid.*)

No such reasonable expectation existed here. There is no evidence 4sports expected Singer to keep any communications 4sports had with Singer confidential from Winter. Nor would that be possible given Winter was involved in all of 4sports's communications with Singer. Moreover, unlike the attorney in *Western*, who had learned confidential information directly relevant to the subsequent representation, Singer did not learn of or discuss the Consulting Agreement in the Globalcraft matter, much less Winter's or 4sports's rights and obligations under that agreement concerning Winter's alleged mismanagement of the Globalcraft Agreements. Even if Singer had learned any such information, he would have learned it from Winter, not 4sports or Lemieux. And, any confidential information Winter would have provided to Singer about Winter's own mismanagement of the Globalcraft Agreements would have belonged to Winter, not 4sports.

4sports also contends Singer's duty of loyalty to 4sports precludes Singer from representing Winter even if Winter may disclose 4sports's confidential information to another attorney. Singer's duty of loyalty is not implicated here. No substantial

relationship between the two matters exists and this is not a case of simultaneous representation. Lemieux declared the issues raised in the Globalcraft matter are still ongoing, but Winter and Singer both declared Singer's representation began and ended over a two-month period in the summer of 2014. (*Flatt, supra,* 9 Cal.4th at pp. 284–285 [explaining claims involving simultaneous representation primarily implicate duty of loyalty and may require disqualification despite lack of commonality, while the substantial relationship test applied in successive representations primarily concerns use of client's secrets in the substantially related matter].) Again, we presume the trial court resolved these factual conflicts in favor of Winter.

Appellants' reliance on *Knight* on this point also is inapt. Although the court rejected Wideman's argument in *Knight* that "his representing the Fergusons cannot prejudice Knight" when the Fergusons "were always present during Knight's consultations with" him (*Knight, supra,* 149 Cal.App.4th at pp. 1214–1215), Winter's presence here is different. Knight herself provided confidential information to Wideman that was material to his representation of the Fergusons against Knight. Here, in contrast, as the trial court determined and substantial evidence supports, *Winter*—not 4sports—was the primary communicator with Singer.

Further, the court in *Knight* noted that Wideman also communicated with Knight's personal attorney "to develop a strategy which anticipated possible future litigation relating to the agreement with [the original investor]. This, in turn, set the framework for the Fergusons to take over his partnership interest." (*Knight, supra,* 149 Cal.App.4th at p. 1215.) Wideman also advised Knight's personal attorney on how to deal with the

bankrupt lessee, which in turn enabled Knight and the Fergusons to assume that lease for the restaurant. (*Ibid.*) The Fergusons were not part of these discussions, which directly bore on the matters raised in Knight's and the Fergusons' lawsuit. Thus, Wideman's representation of the Fergusons against Knight regarding the partnership agreement and lease would place Wideman in the position of injuring his former client to benefit his current clients based on his prior representation. (*Id.* at pp. 1215–1216.) In essence, Wideman had shifted sides from representing Knight in the creation of her business to representing the Fergusons in a dispute over that same business. The Fergusons' presence at the consultation meetings, therefore, did not negate the attorney's duty of loyalty to Knight, precluding his representation of the Fergusons on a substantially related matter. (*Ibid.*)

In contrast, as we have said, information about 4sports's position on litigating over third parties' purported breaches of the Globalcraft Agreements is not directly relevant to 4sports's position on litigating over Winter's alleged conduct with respect to his duties under the Consulting Agreement, even if those duties included managing the project under the Globalcraft Agreements. Thus, Singer will not be placed in a position where he would use confidential information he obtained during the Globalcraft matter to 4sports's detriment in conflict with his duty of loyalty, as the two matters are not related. Nor did Singer discuss litigation strategy or 4sports's business concerns with 4sports individually, as Wideman did with Knight's personal attorney. Singer communicated only with Winter or with Winter as the point person on email or telephone calls including Lemieux or other 4sports principals. The record reflects Lemieux and

4sports were not active participants in providing information to Singer as was Knight with Wideman.

Accordingly, the trial court did not abuse its discretion when it denied appellants' motion to disqualify Singer and Lavely & Singer.

DISPOSITION

The trial court's order denying appellants' motion to disqualify respondents' counsel is affirmed. The previously imposed stay is vacated. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.