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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PATRÓN SPIRITS INTERNATIONAL AG, et al., Plaintiffs, Cross-Defendants and Respondents, v. AJENDRA SINGH, Defendant, Cross-Complainant and Appellant.	B234187 c/w B235464 (Los Angeles County Super. Ct. No. SC104853)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Summary judgment in favor of Patron and DeJoria is reversed. Order disqualifying Attorney Miller from representing Singh is reversed.

Miller Barondess, Alexander Sasha Frid and Jennifer Mira Hashmall for Defendant, Cross-Complainant and Appellant.

Jones Day, Brian O'Neill, Brian D. Hershman, Cary D. Sullivan and Peter E. Davids for Plaintiffs, Cross-Defendants and Respondents.

Ajendra Singh was employed by Patrón Spirits International, A.G. (Patron), a producer and distributor of premium tequila. In 2003, Singh was allegedly promised an extraordinary bonus, based on the value of the company, if he remained with the company for an additional five years. In 2008, shortly after the five year period was completed, Singh's employment was terminated, purportedly for sexual harassment of, and abusive conduct toward, his subordinates. Thereafter, Singh asserted a claim to the promised bonus. Patron brought the instant action for declaratory relief, seeking a declaration that it owes Singh nothing. Singh filed a cross-complaint against Patron and John Paul DeJoria, the Patron officer who allegedly promised him the bonus, for breach of contract and other causes of action. In Singh's cross-complaint, he sought payment of the bonus.[1]

Patron sought summary judgment on the basis of a statement Singh had made in an unrelated case in 2006. In the course of a dispute regarding the ownership of Patron, Singh submitted a sworn affidavit in which he stated that the promised bonus had been only a possibility, and that no plan to pay him the bonus had ever been formalized. In light of this admission, the trial court granted summary judgment. On appeal, Singh contends that, while this admission may constitute evidence against him to be weighed at trial, it does not justify entry of summary judgment in light of his subsequent declaration and other evidence to the contrary. We conclude that neither the doctrine of judicial estoppel nor the doctrine of *D'Amico v. Board of Medical Examiners* (1974)

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[1] Although Singh contends his termination was baseless and a mere pretext for denying him the bonus, he did not plead a cause of action for wrongful termination.

11 Cal.3d 1 (*D'Amico*) applies to give Singh's 2006 declaration conclusive effect in this case, and therefore reverse.

In addition, Singh challenges the order of the trial court disqualifying his counsel. Singh's attorney was disqualified on the basis that he, and his prior law firm, previously represented Patron. As we conclude that Patron has failed to establish that Singh's chosen counsel was in a position to have obtained confidential information from Patron relevant to this matter, we reverse the disqualification order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts*

The company now known as Patron was, at one point, an Anguillan corporation which went by the name of Caribbean Distillers Corporation, Ltd. (CDC). CDC eventually had two subsidiaries: (1) Patrón Spirits Company, a United States entity; and (2) CDC S.A. de C.V. (CDC Mexico), a Mexican subsidiary, which actually produces the tequila. The company originated in 1989, and was founded by Martin Crowley and DeJoria, each as 50% shareholders.[2] Crowley was the creative and driving force behind the company, while DeJoria was a self-described "passive investor."

Originally, CDC did not produce its own tequila, but simply entered into a supply agreement with a Mexican tequila distillery, Siete Leguas. As demand for Patron tequila increased, CDC needed to produce its own tequila. In 2001, Crowley

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[2] Originally, Crowley and DeJoria formed a Nevada corporation which would ultimately become CDC's United States' subsidiary.

hired Singh. Singh was appointed President and sole director[3] of CDC and the sole administrator in charge of CDC Mexico. In 2002, under Singh's direction, construction began on CDC Mexico's own tequila factory.

In 2003, Crowley unexpectedly suffered a fatal heart attack. A dispute arose as to the rightful owner of Crowley's 50% interest in CDC. DeJoria argued that he had a right to purchase Crowley's shares; the Crowley estate disagreed. At one point, the Crowley estate sought to sell Crowley's shares to Bacardi. Litigation ensued, in Anguilla, regarding the proper disposition of Crowley's interest.

In the meantime, CDC was to continue onward in Crowley's absence. There was uncertainty regarding CDC's future without Crowley. DeJoria was eager to secure the assistance of individuals necessary to keep the company running. He identified four executives whom he considered the "core" individuals necessary for day-to-day management and operation of the company: Singh (production and operations); Edward Brown (sales); Vadim Fridman (finance); and Francisco Alcaraz (tequila maker).

In September 2003, DeJoria met with Brown, Alcaraz, and Fridman at the Fairmont Hotel in Santa Barbara. Singh was unable to attend the meeting, but learned of it shortly thereafter. At the meeting, DeJoria presented the executives with

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[3] While the record indicates it is an undisputed fact that Singh was appointed sole director of CDC at this time, the record is also clear that, by 2003, there were other directors of CDC. It also appears that Singh did not remain President of CDC.

a one-page handwritten document beginning with the words "Mr. V.V.I.P.'s."[4] As the parties dispute whether this document constitutes an agreement, we refer to it as the "V.V.I.P. Plan." The document is unsigned, although DeJoria concedes that he wrote it. The V.V.I.P. Plan reads as follows in its entirety:

"Mr. V.V.I.P.'s

"10% Salary Raise Oct. 1, 2003

" 'A' @ net $200,000,001-- (value $250,000,000 today)

1 1/4% = $2,500,000 plus Salary + Bonus

(700,000 [unintelligible, possibly "Rest of Staff"])

"AA net $200,000,001 to $350,000,000.--.

2% (3,000,000) plus 'A'

($1,000,000 [unintelligible, possibly "Rest of Staff"] no %)

"AAA net over $350,000,000--

2 1/2% plus 'A' plus AA

($1,500,000 [unintelligible, possibly "aprox + Rest of Staff"] No %

"Min. 5 years Employed, Happy or Sale of Company.

"After J.P. Debt Anguilla [unintelligible] % paid in Lew [*sic*] of Bonus after. . . . It's Bigger than Bonus."

"If Still With Us and you die . . . beneficiary gets 'A' + 50% min of A or AA or not to [unintelligible, possibly "exceed"] % of sale."

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[4] The four executives were Very, Very, Important Persons.

While certain terms of the V.V.I.P. Plan are unintelligible, it appears to provide for a 10% raise as of October 1, 2003, and a substantial bonus based on the "net" value of the company (presumably CDC), to take effect upon five years of employment with the company[5] or its sale.

Singh was not present at the meeting in Santa Barbara. DeJoria asked that Singh meet with him personally to hear the details of the plan. Singh flew to Austin, Texas, to meet with DeJoria. At that time, DeJoria gave Singh a copy of the V.V.I.P. Plan.

The dispute in this case surrounds whether the V.V.I.P. Plan was intended to, and did, go into effect at the time it was given to the executives in question. Patron and DeJoria take the position that the V.V.I.P. Plan was understood to be simply an *idea* which DeJoria was considering implementing *if he succeeded in gaining full ownership of CDC*. Singh, however, takes the position that the V.V.I.P. Plan was effective immediately. The 10% raise did, apparently, go into effect.[6]

As the litigation regarding the Crowley estate's shares of CDC continued, CDC continued to operate and grow. During this time, Singh periodically spoke with Brown about the possibility of implementing a stock option plan to effectuate the terms of the

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[5] The V.V.I.P. plan states "Happy" after "5 years Employed." Singh stated in his declaration that this term required *him* to be happy in order to receive the bonus, not that it required CDC to be happy with his work.

[6] Singh offered as an undisputed material fact: "The salary raise in fact went into effect as of October 1, 2003, constituting part performance of the V.V.I.P. Agreement." Patron disputed the fact, but Patron's dispute appears to concern whether the V.V.I.P. Plan was an agreement and not whether the salary raise went into effect.

V.V.I.P. Plan in a manner which would be more advantageous from a taxation point of view. It is undisputed that no such plan was put into effect.

At some point, Fridman left CDC, in order to become co-executor of Crowley's estate. In November 2007, each of the remaining V.V.I.P.'s, Brown, Alcaraz, and Singh, received a "special bonus" of $1,000,000. Singh takes the position that the bonuses were understood to constitute advances on the amounts which would soon be due under the V.V.I.P. Plan; Patron disagrees.[7]

Ultimately, in April 2008, the dispute over the ownership of Crowley's shares in CDC was finally resolved by settlement. Under the settlement agreement, CDC was to be redomiciled to Switzerland and would become Patron, it would repurchase the estate's shares, and a 30% interest in Patron would then be sold to Bacardi. This came to pass; on November 21, 2008, Bacardi purchased its 30% interest in Patron. Thus, DeJoria and Bacardi became the joint owners of Patron.

Singh states that, while the settlement was pending, Brown told him that, as part of the settlement terms, the V.V.I.P. Plan would be converted into a stock option plan, under which he would be given the same percentage he was allegedly promised in the V.V.I.P. Plan. However, this did not come to pass.

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[7] Singh states that no one at Patron other than the V.V.I.P.'s received these bonuses, and suggests that this fact supports the conclusion that the bonuses were in some way related to the V.V.I.P. agreement. The bonus to Brown was paid by Patrón Spirits Company, the U.S. subsidiary of CDC; the bonuses to Singh and Alcaraz were paid by CDC itself. In neither instance did the Unanimous Written Consent of the board resolving to pay the bonus indicate that it was an advance on an obligation owed under the V.V.I.P. Plan. We also note that, in Singh's cross-complaint, he seeks damages in the amount purportedly due him under the V.V.I.P. Plan, with no offset for the $1,000,000 bonus already paid.

On October 16, 2008, Patron terminated Singh's employment. Patron takes the position that it terminated Singh due to documented incidents of sexual harassment and abusive behavior. Singh takes the position that Patron terminated him simply to avoid paying him the substantial amounts to which he was entitled under the V.V.I.P. Plan.

Bacardi had purchased its 30% interest in Patron for $476 million. Based on that figure, Patron had a value of over $1.58 billion. Indeed, Patron does not dispute that, in 2008, Patron's valuation was "at least $1.5 billion." If Singh were entitled to compensation under the V.V.I.P. Plan based on that valuation, he would be entitled to an amount in excess of $35 million.[8]

2. *Allegations of the Pleadings*

On September 15, 2009, Patron brought suit against Singh, seeking a declaratory judgment that it did not owe Singh any amounts beyond what it had already paid him.

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[8] The actual amount sought by Singh changed throughout the litigation. In his cross-complaint, Singh originally sought "1 1/4% of $200M ($2.5M), plus 2% of $150M ($3M), plus 2 1/2% of the value of [Patron] above $350,000,000." Assuming a total valuation of $1.58 billion, the value of Patron in excess of $350,000,000 is $1,230,000,000. Two and one-half percent of that figure is $30,750,000. Adding that to the $5,500,000 already sought results in a total of $36,250,000. By the time of his declaration in opposition to the motion for summary judgment, Singh argued that he was entitled to 2.5% of the *entire value of the company* (not merely the amount in excess of $350,000,000) *plus* the $5.5 million under sections A and AA of the V.V.I.P. Plan, for a total bonus of $45 million. This is a nearly $9 million increase in the amount sought. The key language of the V.V.I.P. plan reads, "AAA net over $350,000,000--2 1/2% plus 'A' plus AA." While Singh's original complaint interpreted that paragraph to apply to the amount of Patron's net worth in excess of $350,000,000, Singh now reads that paragraph to apply to the entirety of Patron's net worth as long as it is in excess of $350,000,000. While the issue is not before us, we note that, under Singh's current interpretation of the V.V.I.P. Plan, if Patron's net value was $350,000,000, he would be entitled to a bonus of $5.5 million (as the "AAA" language would not be triggered), but if its net was $350,000,001, he would be entitled to a bonus of $14.25 million (and 2 1/2 cents).

Patron alleged that the V.V.I.P. Plan had not constituted a promise to pay Singh. Patron further alleged that, even if the V.V.I.P. Plan had been a promise to pay Singh, it could not bind Patron as it was made without board approval.

On December 9, 2009, Singh cross-complained against Patron and DeJoria, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, fraud (against DeJoria alone) and unjust enrichment. In his cross-complaint, Singh alleged that the V.V.I.P. Plan was a binding agreement, which was partially performed by the 10% raise in October 2003. Alleging that he had satisfied his obligations under the agreement by completing five additional years of employment with CDC, Singh sought full payment of the amounts promised in the V.V.I.P. Plan. Singh alleged that DeJoria had intended to, and did, bind CDC to the V.V.I.P. Plan. Singh alleged that, although there was no formal resolution adopting the V.V.I.P. Plan, all three then-directors of CDC, DeJoria, Singh, and Fridman, were parties to it and intended it to bind Patron.[9]

In his promissory estoppel cause of action, Singh alleged that both DeJoria and Brown made repeated verbal promises to him that the V.V.I.P. plan was in full force and effect. Singh alleged that he relied on those promises to continue working for CDC.

In his unjust enrichment cause of action, Singh alleged that CDC grew exponentially due, in part, to his efforts. However, with respect to this cause of action,

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[9] The parties make no mention of Corporations Code section 310, governing corporate contracts in which a director has a material financial interest. As Singh and Fridman clearly stood to gain from the V.V.I.P. Plan, it appears that the requirements of that statute would apply.

Singh did not seek an amount in quasi-contract to compensate him for his efforts, but again sought the amount he believed was due him pursuant to the V.V.I.P. Plan.

3. *The Discovery Dispute and Singh's Anguillan Affidavit*

As the litigation proceeded, Singh filed a motion to compel further responses to his requests for document production. Among many documents sought, Singh sought all agreements relating to the compensation of Brown, Fridman, and Alcaraz. He also sought documents reflecting whether an employee stock plan was eventually created to account for the V.V.I.P. compensation.

In the course of their investigation of the case, Patron's attorneys discovered an affidavit submitted by Singh in the Anguillan litigation regarding the disposition of the Crowley estate's shares. This affidavit, which first came to the court's attention in opposition to the motion to compel, would ultimately be critical to the trial court's disposition of this case, so we discuss the circumstances in which it arose in some detail.

It appears that, at the time of the affidavit, there were three members of the CDC board: DeJoria; Singh; and Gigi Osco-Bingemann, on behalf of the Crowley estate. DeJoria and Osco-Bingemann were adversaries in the Anguillan litigation; Singh was considered to be the neutral and independent member of the CDC board. Singh, on behalf of CDC, had filed an application in the Anguillan court requesting that CDC be joined to the proceedings for the purpose of approving and ratifying certain actions Singh and DeJoria had taken at a CDC board meeting. Although Singh's application was apparently dismissed, DeJoria then filed an application seeking identical relief.

In opposition, on March 27, 2006, an affidavit was filed by both Osco-Bingemann and Fridman. In it, Osco-Bingemann and Fridman argued that Singh had acted less than honorably in fulfilling his responsibilities as a director of CDC. After itemizing various alleged improprieties, Osco-Bingemann and Fridman argued that Singh had a "massive financial conflict of interest" which purportedly explained why Singh allegedly favored DeJoria over the Crowley estate in his actions. Specifically, Osco-Bingemann and Fridman identified the conflict of interest as the V.V.I.P. Plan. They declared, "Soon after Mr. Crowley passed away, Mr. De Joria personally promised to pay each of the four persons which comprised the CDC management team a bonus in the event CDC was sold."[10] The declaration went on to explain the terms of the V.V.I.P. Plan.[11] It then stated, "It is no wonder that Mr. Singh has done what he has done since Mr. Crowley passed away. The promise of riches has apparently been worth more to Mr. Singh than personal integrity or his purported relationship with Mr. Crowley. [¶] Throughout these proceedings, Mr. Singh has failed to disclose this massive conflict of interest to this Honourable Court." Arguing that Singh was biased in favor of DeJoria, Osco-Bingemann and Fridman requested the

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[10] We note that Osco-Bingemann and Fridman characterize the V.V.I.P. Plan as DeJoria's "personal promise" to pay the bonus in the event CDC was sold. They did not characterize it as a promise on behalf of CDC. Curiously, they did not characterize it as a promise to pay *in the event DeJoria obtained 100% control of CDC* (which was, in fact, the key issue to be resolved in the Anguillan litigation).

[11] It also stated, "We are aware of this promise by Mr. DeJoria because Mr. Fridman was present at this meeting and was one of the four persons included as part of CDC's management team who would receive such payment. Mr. Fridman has since left his management position and no longer is employed by CDC or any of its subsidiaries and therefore is no longer eligible to receive any such bonus payment."

court to order that the Crowley estate be given the right to appoint an additional person to the CDC board so that the board would be balanced evenly, in light of the 50/50 split in share ownership between DeJoria and the Crowley estate. Alternatively, they requested that Singh be immediately removed from the board and replaced with an independent director.[12] Both Osco-Bingemann and Fridman swore to the truth of the statements in the affidavit.

On April 12, 2006, Singh filed a supplemental affidavit, under oath, in opposition to the affidavit of Osco-Bingemann and Fridman (Singh's Anguillan affidavit). In pertinent part, Singh declared as follows: "Mr. Fridman and Ms. Osco-Bingemann proceed to refer to a meeting where the possibility of a 'bonus' for the members of the management team was discussed. What was omitted was the fact that I was not present at any such meeting and I was not aware of it. I did have separate discussions with Mr. De Joria pertaining to the possibility of implementing an Incentive Plan for the key Management group vesting over a five year period but these arrangements were never formalized. As of the date of the swearing of this Affidavit, there is no such plan in existence."

Upon discovering Singh's Anguillan affidavit, Patron submitted it to the court in support of Patron's opposition to Singh's motion to compel production of documents. In reply, Singh submitted a declaration attempting to distance himself from the apparently damaging admissions in his Anguillan affidavit. First, he stated that he did

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[12] They also suggested the alternative proposal that the board be increased to five directors: two aligned with DeJoria; two aligned with the Crowley estate; and an independent director.

not propose the language in the affidavit; it was prepared by an attorney who represented him "both individually and as a Director" of CDC in the Anguillan litigation. Second, he stated that the " 'Incentive Plan' " mentioned in his Anguillan affidavit was *not* the V.V.I.P. Plan, but was, instead, "meant to refer to the employee stock bonus plan that Mr. Brown informed me on many occasions was going to be created and which would contain the same material economic terms contained in the V.V.I.P. Agreement, but that, at the time I signed the Affidavit had not yet been established." "In any event," Singh declared, "at all times, I believed the V.V.I.P. Agreement to be a binding contract that did not need to be formalized."

In ruling on the motion to compel, the trial court specifically indicated that it was "not making any substantive determination regarding the merits or application" of Singh's apparent admissions in his Anguillan affidavit. However, the court noted that, in light of Singh's admissions therein, the only relevant issue was whether something occurred between the date of Singh's Anguillan affidavit and Singh's termination "that formalized the terms of the V.V.I.P." Plan or provided for its compensation in some other plan. As such, the court concluded that much of Singh's requested discovery was not relevant, and could not lead to the discovery of relevant information.

Indeed, the trial court denied the motion to compel in its entirety, with a single exception. The court granted the motion to compel the compensation agreements of the other three V.V.I.P.'s, but only up to the time of Singh's termination in October 2008. Singh argues this ruling was in error, on the theory that, if the other V.V.I.P.'s received compensation in the amount of the V.V.I.P. Plan after he was terminated, that would

support the conclusion that he, too, would have been entitled to V.V.I.P. compensation had he not been terminated.

4. *The Motion for Summary Judgment by Patron and DeJoria*

On February 10, 2011, Patron and DeJoria moved for summary judgment on the basis that the V.V.I.P. Plan was never an enforceable contract, but only documented a possible future one. Patron and DeJoria took the position that the V.V.I.P. Plan was simply an idea jotted down by DeJoria for a possible compensation plan he would offer the V.V.I.P.'s in the event he gained full control of CDC, which never occurred. The motion was supported by a declaration from Brown to that effect. It was also supported by evidence that CDC's financial statements, which had been approved by Singh, confirmed that no such plan was in existence.[13] Without a doubt, though, the key piece of evidence on which Patron and DeJoria relied was Singh's Anguillan affidavit stating the V.V.I.P. Plan was not formalized by the time he executed that affidavit.[14]

As to Singh's Anguillan affidavit, he admitted at his deposition that everything in the affidavit was, in fact, true and correct. While he testified that the affidavit was "very carefully worded by my attorney," he agreed that he had read the Anguillan

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[13] Patron relied on letters sent from CDC (and/or its U.S. subsidiary) to its outside auditors, relating to CDC's annual financial statements. The letters indicate that commitments such as "[d]eferred compensation, bonuses, pensions and profit-sharing plan, or severance pay" have been properly recorded and disclosed in the financial statements, which did not mention the V.V.I.P. Plan. The letters are signed by Singh on behalf of CDC, except with respect to its wholly-owned U.S. subsidiary.

[14] This was supplemented by Singh's deposition testimony that he relied on the V.V.I.P. Plan itself as the enforceable agreement, not any events formalizing it after the date of his Anguillan affidavit.

affidavit of Osco-Bingemann and Fridman and that he and his attorney then drafted his Anguillan affidavit together. Singh testified, as he had when his Anguillan affidavit first came to light in the discovery dispute, that the Anguillan affidavit referred to the stock option plan, which had not been formalized. However, he admitted that, when his Anguillan affidavit referred to "separate discussions with Mr. DeJoria pertaining to the possibility of implementing an Incentive Plan," he was, in fact, talking about the October 2003 meeting he had with DeJoria in Austin, where he had been given the V.V.I.P. Plan.

5. *Singh's Opposition to Summary Judgment Motion*

Singh submitted a declaration in opposition to the summary judgment motion. It stated, among other things, that the customary practice at CDC was to do business without formal board resolutions. As to his Anguillan affidavit, he stated that, when he referred to "separate discussions with Mr. DeJoria pertaining to the possibility of implementing an Incentive Plan," he was referring to "a stock incentive plan to implement the cash bonus promised in the V.V.I.P. agreement. This was a mechanism that I discussed with Brown and other executives that would allow the V.V.I.P.s to gain favorable tax treatment . . . of the cash bonus DeJoria promised in the V.V.I.P. Agreement. The cash bonus and the stock incentive plan were two separate things. That is why I do not refer to the cash bonus promised in the V.V.I.P. Agreement in this affidavit. I have always maintained that the cash bonus in the V.V.I.P. Agreement was not just a mere possibility and not contingent on any other event including the implementation of any stock incentive plan." He further stated, "I read the affidavit,

signed it under oath and stand by its contents. If I was not clear in my affidavit about the terms or the difference between the cash bonus in the V.V.I.P. Agreement and the stock incentive plan, as discussed above, it is because the affidavit was not drafted by me or my personal attorney. Rather it was prepared and drafted by Patron's attorneys to support DeJoria's position that he was entitled to Crowley's fifty percent stake in Patron." Singh continued, "Counsel explained to and assured me that the paragraph refers to a separate stock incentive or stock option plan, not the cash bonus promised to me by DeJoria in the V.V.I.P. Agreement. I trusted these lawyers and believed that they represented my best interests."

In addition, Singh also relied on the Anguillan affidavit of Osco-Bingemann and Fridman for its characterization of the V.V.I.P. Plan.[15] Specifically, the affidavit indicated that the V.V.I.P. Plan was a promise to pay in the event CDC was sold; it did not state that the V.V.I.P. Plan was conditioned on DeJoria obtaining 100% of the company.

Curiously, Singh also submitted several items of evidence which supported Patron's position in the summary judgment motion. Singh included an excerpt from

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[15] Patron objected to the use of the affidavit in this manner as hearsay. The trial court did not rule on the objection. All affidavits are hearsay, as they are evidence of statements "made other than by a witness while testifying at the hearing." (Evid. Code, § 1200, subd. (a).) However, by statute, a summary judgment motion is to be made, and opposed, by affidavits, declarations, depositions, and other out of court testimony. (Code Civ. Proc., § 437c, subds. (b)(1) & (b)(2).) Whether an affidavit made by a witness in connection with one action is inadmissible when submitted in connection with a summary judgment motion in another action is a question not briefed by the parties. We see no reason why Fridman's Anguillan affidavit should be barred from evidence on summary judgment if it would have been admissible had Fridman prepared it in connection with this action.

Brown's deposition to the effect that, subsequent to Singh's termination, Patron instituted a stock-based compensation plan. Alcaraz, the fourth V.V.I.P., received nothing under this plan, at DeJoria's direction. Singh also included excerpts from DeJoria's deposition which confirmed his position that the V.V.I.P. Plan was simply an idea that he would implement if he obtained 100% of CDC, which he never did. Moreover, Singh included damaging excerpts from his own deposition. Singh testified that, after the October 2003 meeting with DeJoria in Austin, Singh had no further discussions with DeJoria about the V.V.I.P. Plan. Moreover, Singh testified that he *never had any discussions with DeJoria about a stock option plan.* He again testified that his Anguillan affidavit referred not to the V.V.I.P. Plan, but "the stock option plan that was being done by Ed Brown at the time that was not in writing." However, he agreed that the reference in his Anguillan affidavit to "separate discussions with Mr. DeJoria" referred to his October 2003 meeting with DeJoria in Austin, because he had no other meeting with DeJoria.

6. *Reply in Support of Summary Judgment*

In support of their reply memorandum, Patron and DeJoria argued that, under the *D'Amico* rule, the trial court could disregard Singh's declaration to the extent that it contradicted his prior sworn affidavit. Moreover, they submitted additional excerpts from Singh's testimony indicating that Singh submitted his Anguillan affidavit with the intent of misleading the Anguillan court. Specifically, they submitted the following excerpt:

"Q. And you were telling the court that in fact you do not have a financial conflict of interest because the V.V.I.P. agreement was never formalized –

"A. Not the V.V.I.P.

"Q. -- and as of the date of the swearing of the affidavit, there is no such plan in existence. [¶] That's what you were representing to the court under penalty of perjury. Correct?

"A. I'm not – I'm not saying that V.V.I.P. was not in place.

"Q. So you were tricking the court?

"A. My lawyer was.

"Q. Oh, your lawyer was tricking –

"A. Yes.

"Q. – the court –

"A. That's –

"Q. – and you were going along with it?

"A. Well, I mean, if she thought that was legal to do, I mean, you guys do that every day.

"Q. You believe that the –

"A. I believe – I believe what she --

"Q. -- lawyers trick the court every day?

"A. I believe what she -- I believe what she wrote, and I believe that what she was doing the right thing.

"Q. Well, you believe that that was deceptive. Right? Because you were responding to an allegation by leaving out critical information. That's what you were doing. Isn't that right?

"A. I – I was – my lawyer was responding to that – to their affidavit and she did it the way she thought."

7. *Hearing, Ruling, and Appeal*

The trial court issued a tentative ruling in favor of Patron and DeJoria, on the basis that the *D'Amico* rule prohibited Singh from defeating summary judgment by contradicting his own sworn testimony. At the hearing on the motion, Singh's counsel argued that the *D'Amico* rule does not apply to an affidavit in a prior case. The trial court stated, "He can just go in one court and say one thing under oath and go in another court and say another thing and you're supposed to ignore it?" Singh's counsel responded, "Unless judicial estoppel applies --" The trial court stated, "It doesn't work that way. Not in my world." Summary judgment was granted. Judgment was entered in favor of Patron and DeJoria. Singh filed a timely notice of appeal.

8. *The Disqualification Motion*

While the summary judgment motion was being briefed, Patron and DeJoria moved to disqualify Singh's counsel. Singh had originally been represented by different counsel, and had then been in pro. per. Ultimately, he retained Attorney Louis "Skip" Miller of Miller Barondess to represent him. Patron and DeJoria moved to

disqualify Attorney Miller, but not his entire firm,[16] from the representation, on the basis that Attorney Miller had previously represented Patron. Specifically, Attorney Miller's former law firm, Christensen Miller, had been CDC's primary outside counsel, and had represented CDC in a wide variety of matters. The disqualification motion in this case eventually focused on three matters, as well as Attorney Miller's general knowledge of Patron.

a. *The Seagram Litigation*

Attorney Miller was lead trial counsel in a lawsuit brought by Seagram & Sons against CDC's predecessor. The litigation apparently involved an arrangement by which Seagram would produce Patron tequila at a factory which was a joint venture between Seagram and Patron. CDC's predecessor argued that Seagram failed to produce tequila sufficiently similar to Patron tequila. It is undisputed that the Seagram litigation was resolved in July 2001, at or before the time Singh was hired by CDC.

Patron and DeJoria argued that issues in the Seagram litigation are substantially related to two of the issues in this case. Specifically, they argued that "issues of valuation" were at issue in the Seagram litigation.[17] It is clear, however, that any issues

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[16] Patron had threatened to move to disqualify the entire firm, but ultimately sought only to disqualify Attorney Miller, as long as Attorney Miller was effectively screened from the matter.

[17] Since the V.V.I.P. Plan calculated the bonus based on the "net" value of CDC, the valuation of CDC in October 2008 is purportedly at issue in this case. We note, however, that Patron and DeJoria conceded that the value of Patron was at least $1.5 billion at that time. In any event, it appears to us that the valuation issue in this case is not one of the valuation of CDC in the abstract, but the "net" valuation as intended by the V.V.I.P. Plan.

of valuation of the company in the Seagram litigation related only to its value in 2001, and not its value in 2008. Patron and DeJoria also argued that issues related to Singh's "purported contributions" to CDC were at issue in the Seagram litigation.[18] This is so because, according to Patron and DeJoria, the tequila factory constructed by Singh was, in fact, at issue in the Seagram litigation. This is factually erroneous. The joint venture factory at issue in the Seagram litigation opened in 1997, and, by April 1998, was producing tequila.[19] In contrast, ground was not broken on the tequila factory Singh constructed until 2002.

b. *The Skyy Spirits Matter*

According to Patron, Attorney Miller represented Patron in 2003 "in connection with Skyy Spirits' attempted but ultimately aborted takeover." During this time, Attorney Miller obtained "highly confidential valuation information regarding the company," which Patron and DeJoria argued is substantially related to the issue of valuation at issue in this case.[20] Again, at most, Attorney Miller obtained information regarding the valuation of CDC in 2003, not its valuation in 2008.

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[18] As Singh stated a cause of action for unjust enrichment, the value of his contributions to CDC are at issue.

[19] According to CDC, the tequila was dreadful.

[20] DeJoria declared, "I . . . discussed with Mr. Miller extremely confidential financial issues and potential company valuations in connection with the attempted takeover by Skyy Spirits."

c. *The Siete Leguas Matter*

Siete Leguas is the company from which CDC purchased its tequila before it began distilling its own. A dispute arose between Siete Leguas and CDC regarding ownership of the Patron trademark in the United States. Thereafter, Siete Leguas repudiated supply agreements which had been negotiated with CDC. This led to litigation, in 2003. CDC was represented by the Christensen Miller firm. It is not clear to what extent Attorney Miller participated in the litigation of this matter; he was clearly not the lead attorney. In September 2003, the Siete Leguas litigation was settled. Attorney Miller reviewed the confidential settlement agreement. It cannot be argued, however, that the settlement agreement constitutes confidential client matters with respect to this case, as Singh was the individual who executed the settlement agreement on behalf of CDC. This does demonstrate, however, that Attorney Miller had some level of interaction with Singh on behalf of CDC.

d. *General Knowledge of CDC*

Attorney Miller was the engagement and billing partner for CDC at the Christensen Miller firm. As a result, according to Patron and DeJoria, he had access to, and acquired, confidential information relating to CDC's litigation philosophy, the approach of CDC's decisionmakers[21] toward settlement, and similar information. Similarly, Patron and DeJoria suggest that Christensen Miller was counsel for CDC "on issues of corporate governance during the relevant time period," so Attorney Miller

[21] It appears that CDC's main decisionmaker during the bulk of Christensen Miller's representation of CDC was Crowley. Any information regarding Crowley's approach to litigation and settlement would be useless in the current litigation.

would have had access to confidential information regarding the way in which CDC governed itself. Patron and DeJoria took the position that corporate governance issues are substantially relevant to the instant litigation, in that Singh's complaint relies on the theory that CDC operated informally and did not require a board resolution to confirm the V.V.I.P. Plan.

9. *Opposition to the Disqualification Motion*

In opposition to the motion, Attorney Miller attempted to downplay his prior representation. He stated that he had no prior attorney/client relationship with the current Patron entity or DeJoria. Attorney Miller admitted that he defended the deposition of DeJoria in the Seagram matter, but did this as counsel for CDC's predecessor, not as counsel for DeJoria. He stated that he had no dealings with DeJoria since the Seagram matter in 2001, and had never represented DeJoria. As for the Skyy matter, Attorney Miller had no recollection of it. In any event, Singh argued there was no substantial relationship between the prior representations and the instant case, and that Attorney Miller did not obtain any confidential valuation or corporate governance information.

10. *Reply in Support of Disqualification Motion*

While Patron conceded that Attorney Miller had not represented *Patron*, it argued that Attorney Miller had represented CDC, its predecessor. DeJoria presented evidence that Attorney Miller had, in fact, represented DeJoria, despite his protestations to the contrary. Specifically, DeJoria submitted, under seal, a November 21, 2003 letter from Attorney Fink, a partner at the Christensen Miller firm, to DeJoria, Singh, Brown,

and representatives of the Crowley estate, disclosing actual and/or potential conflicts among the parties and giving them an opportunity to waive them. The letter specifically indicated that both Crowley and DeJoria had previously entered into a "consent to representation" and conflict waiver agreeing that the firm "should represent both of their interests" in connection with the Seagram matter. Patron and DeJoria also argued that, to the extent Attorney Miller claimed that confidential information had not been relayed to him, such information had been relayed to other attorneys at Christensen Miller, and Attorney Miller should be charged with imputed knowledge.

11. *Hearing, Ruling, and Appeal*

After a hearing, the disqualification motion was granted. The trial court found a substantial relationship between the instant case and Attorney Miller's prior involvement in all three matters as well as his involvement in corporate governance issues. The trial court concluded issues of valuation and Singh's contributions to Patron are at issue in this case. The court noted that the same facility Singh built for Patron was at issue in the Seagram litigation. As we stated above, this is untrue.[22] The court concluded issues of corporate governance are at issue in this case, as Singh claims CDC entered into binding agreements without formal board approval. Finally, the court found significant the fact that Singh signed the Siete Leguas settlement agreement in September 2003, the same month in which the V.V.I.P. Plan was purportedly created.

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[22] The trial court also stated that Attorney Miller himself wrote the November 21, 2003 conflict letter. This is also untrue; his partner, Attorney Fink, wrote the letter.

Singh filed a timely notice of appeal.[23] We consolidated the two appeals.

ISSUES ON APPEAL

As to Singh's appeal of the summary judgment, he argues that neither the *D'Amico* rule nor judicial estoppel prevents him from contradicting his Anguillan affidavit with a declaration in this matter. We agree, and conclude summary judgment was inappropriately granted.[24] As to the order disqualifying Attorney Miller, Singh argues that the evidence does not support the conclusion that a substantial relationship exists between Attorney Miller's prior representations of CDC and DeJoria and the instant matter. We again agree, and reverse the disqualification order.

DISCUSSION

1. *The Summary Judgment*

While we have set forth, at length, the factual and procedural background of this case, the summary judgment was ultimately granted on a single issue. Singh appeared to state, under oath, in the Anguillan affidavit, that the V.V.I.P. plan was discussed, but never formalized and never came into effect. In opposition to the summary judgment motion, Singh stated, to the contrary, that the V.V.I.P. Plan did not need to be

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[23] On appeal, Singh sought judicial notice of several documents filed in the Siete Leguas matter, in order to demonstrate that, although Christensen Miller was counsel of record for CDC in that matter, Attorney Miller was not. As this issue is irrelevant to our disposition of the appeal, we have denied the request for judicial notice.

[24] Singh also challenges the trial court's ruling on the motion to compel, specifically arguing that the court should have compelled CDC to provide the compensation agreements of the other V.V.I.P. executives for the time period after Singh's termination. As we shall discuss, Singh already possesses this information, to the extent to which he is entitled to it.

formalized, and came into effect when it was presented to the V.V.I.P.'s. If Singh's Anguillan affidavit, either by means of the *D'Amico* rule or judicial estoppel,[25] bars consideration of his declaration to the contrary, Singh simply cannot pursue any cause of action based on the V.V.I.P. Plan, and summary judgment was appropriately granted. We first consider the *D'Amico* rule, then turn to the doctrine of judicial estoppel. Concluding that neither rule precludes Singh's causes of action in this case, we then briefly consider whether a summary judgment was otherwise appropriately granted.

a. *D'Amico*

Normally, in reviewing a motion for summary judgment, we "construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co*. (1993) 14 Cal.App.4th 16, 19.) In *D'Amico*, however, our Supreme Court held that, "when discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of those stern requirements applicable in a normal case are relaxed or altered in their operation." (*D'Amico*, *supra*, 11 Cal.3d at p. 21.) Specifically, when there is a clear and unequivocal admission by a party, at deposition, a subsequent declaration to the contrary cannot establish substantial evidence of a triable issue of fact. (*Ibid.*) "The reasons for this attitude

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[25] Patron and DeJoria did not seek summary judgment on the basis of judicial estoppel, and the trial court did not grant it on that basis. However, in his opening brief on appeal, Singh volunteered the argument that the doctrine of judicial estoppel would not support the summary judgment, and Patron and DeJoria then pursued the argument as a possible alternative basis for affirming the judgment.

toward the legitimate products of discovery are clear. As the law recognizes in other contexts (see Evid. Code, §§ 1220-1230) admissions against interest have a very high credibility value. This is especially true when . . . the admission is obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts. Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits." (*Id*. at p. 22.) In short, "[w]here a plaintiff's admissions in a deposition contradict statements in the plaintiff's affidavits opposing the summary judgment, 'the rule of liberal construction loses its efficacy and the granting or denial of the motion for summary judgment depends upon the issues of credibility. Accordingly, when a defendant can establish his defense with the plaintiff's admissions sufficient to pass the strict construction test imposed on the moving party . . . , the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive.' [Citations.]" (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1503.)

In this case, we are not concerned with a declaration which contradicts a previous admission of Singh at deposition.[26] Summary judgment was granted in this case on the

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[26] This is not entirely so. In certain instances, Singh's declaration is contradicted by statements made at his deposition. For example, at deposition, Singh admitted that the line in his Anguillan affidavit regarding "separate discussions with Mr. DeJoria pertaining to the possibility of implementing an Incentive Plan" referred to the October

basis that Singh's declaration contradicted Singh's *Anguillan affidavit*. Thus, the question presented is if the *D'Amico* rule applies only to deposition testimony in the instant case, or if, in the alternative, it applies to sworn testimony in a previous action.

The issue was addressed in *Jogani v. Jogani* (2006) 141 Cal.App.4th 158 (*Jogani*). In that case, the plaintiff alleged he had an oral partnership agreement with the defendants to manage the defendants' real estate business, in exchange for 50% of the profits, assuming certain targets were met. (*Id*. at p. 163.) However, when the plaintiff was sued in an unrelated matter, and was subject to a judgment debtor examination, he failed to mention his involvement in (or even the existence of) the partnership. (*Id*. at p. 163.) The defendants in the instant matter sought to bind the plaintiff to his testimony at the judgment debtor examination under the rule of *D'Amico*. The court held that *D'Amico* did not apply, explaining, " '[The *D'Amico* rule] might be described as pre-trial estoppel. Though the context in which it is utilized is different, it serves the same function as judicial estoppel: it operates to prevent a party from playing "fast and loose" with the courts by creating "sham" issues of fact. . . . ' " (*Id*. at p. 177.) It further stated, " 'The rule of pre-trial estoppel says that a party cannot say one thing at a deposition only to reverse course when his deposition is used against him in a motion for summary judgment in the same litigation.' " (*Ibid.*) The court concluded that

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2003 meeting in Austin. In his declaration in opposition to the motion for summary judgment, he states that the same sentence referred to "a stock incentive plan" which was "a mechanism that I discussed with Brown and other executives" over a number of years. To the extent that Singh's declaration states that the passage refers to anything other than his October 2003 meeting in Austin with DeJoria, *D'Amico* applies.

D'Amico rule did not apply to the judgment debtor testimony, which could simply be raised at cross-examination at trial. (*Id*. at pp. 177-178.)

It is true that the *Jogani* case can be distinguished on the basis that the prior testimony in that case (a judgment debtor examination) was not submitted to the court, while the prior testimony in this case (Singh's Anguillan affidavit) was submitted to the court. This distinction, however, is significant for the application of judicial estoppel, which we discuss below, not the application of pre-trial estoppel under *D'Amico*. The *D'Amico* rule generally applies to deposition testimony, which was not submitted to a court. Submission to a court simply makes no difference with respect to the application of *D'Amico.*

In any event, we agree with the analysis in *Jogani*. Admissions against interest are normally admissible, but not conclusive. *D'Amico* gives greater weight to specific admissions – those which are obtained in the context of an established pretrial procedure whose purpose is to elicit facts. An affidavit in a prior action is an admissible admission against interest, and may be conclusive due to application of judicial estoppel, but, as it is not the legitimate product of discovery, it does not trigger the application of the *D'Amico* rule.

Patron and DeJoria had moved for summary judgment on the basis that the V.V.I.P. Plan was not an enforceable agreement, but simply consisted of notes regarding a possible future agreement, which never went into effect. Singh's declaration in opposition to the summary judgment motion stated that the V.V.I.P. Plan "was not just a mere possibility and not contingent on any other event . . . . " This

statement is sufficient to raise a triable issue of fact on whether the V.V.I.P. Plan was, in fact, immediately effective. The trial court concluded, however, that Singh's declaration on this point could be disregarded under *D'Amico*, because it contradicted his prior Anguillan affidavit. Under *D'Amico* and *Jogani*, special deference is accorded to *prior deposition testimony*, such that a declaration contradicting the prior deposition testimony *in the same action* is disregarded. As Singh's Anguillan affidavit was simply prior testimony in another action, and not prior deposition testimony in the same action, it is not granted the higher deference provided for in *D'Amico*. Thus, Singh's Anguillan affidavit does not justify disregarding Singh's declaration testimony to the contrary. The trial court erred in granting summary judgment on this basis.

b. *Judicial Estoppel*

" ' "Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from 'asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceedings. . . . ' " . . . It is an " 'extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.' " ' [Citation.]" (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130-131.) It is an equitable doctrine which has some vagueness in its application. (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 351.) The doctrine is invoked by courts in their discretion. (*Ibid.*)

"In California, courts consider five factors in determining whether to apply judicial estoppel: 'The doctrine [most appropriately] applies when "(1) the same party

has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." ' [Citations.]" (*Gottlieb v. Kest, supra,* 141 Cal.App.4th at p. 131.)

"[T]he application of judicial estoppel tenders a question of fact only if a determination of fact is necessary to make a ruling on the claim. [Citation.] If the facts material to a determination of judicial estoppel are undisputed, a question of law is presented." (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 843.) When raised on summary judgment, the issue becomes whether there is a triable issue of fact concerning any of the determinative factors. (*Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 959, fn. 8.)

On appeal, Patron and DeJoria argue that judicial estoppel is an alternative basis for upholding the summary judgment. They therefore must show that all five factors have been established as a matter of law. There is no dispute regarding the first two factors: Singh took two positions; and Singh took those positions in judicial proceedings. Singh disputes the remaining three factors. We consider the fourth (the two positions are totally inconsistent) and the fifth (the first position was not taken as the result of ignorance, fraud or mistake), before turning to the third (the party was successful in asserting the first position).

(1) *Inconsistency*

As to the factor of inconsistency, Singh argues that the position he takes in the current litigation – that the V.V.I.P. Plan was an enforceable contract from the time it was presented to him in 2003 – is not inconsistent with the position he took in his Anguillan affidavit. Singh argues that, despite the way Patron and DeJoria would interpret Singh's Anguillan affidavit, the affidavit did not assert that the *V.V.I.P. Plan* was unenforceable, but only that the *stock incentive plan* was unenforceable. We conclude that Singh's Anguillan affidavit is simply not amenable to the tortured interpretation Singh would give it.

We set forth the language of Singh's Anguillan affidavit, interlineating, in italics, the language Singh would add to it in order to make it consistent with his current testimony:

"Mr. Fridman and Ms. Osco-Bingemann proceed to refer to a meeting where the possibility of a 'bonus' for the members of the management team was discussed. What was omitted was the fact that I was not present at any such meeting and I was not aware of it. *I was, however, aware of the meeting shortly after it took place, when Fridman called me, faxed me a copy of the bonus document, and reviewed its terms with me.*[27] I did have separate discussions with Mr. DeJoria pertaining to the possibility of implementing *the very same bonus plan, shortly thereafter, at a meeting in Austin when*

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[27] Indeed, although Singh's Anguillan affidavit states, "I was not present at any such meeting and I was not aware of it," when Patron and DeJoria stated in their separate statement of undisputed facts that "Singh was not present at the September 2003 meeting at the Fairmont and was not aware of the meeting," Singh *disputed* the fact, on the basis that he was made aware of the meeting shortly after it had occurred.

DeJoria 'made it clear that the [bonus plan] was a contract, not merely an offer or a proposal.' I accepted the offer, which was not contingent upon anything. Subsequently, over several years, I discussed with Brown and other executives, but not DeJoria, a*[] Stock* Incentive Plan for the key Management group vesting over a five year period, *which would effectuate the bonus plan in a manner allowing for favorable tax treatment, but was by no means a necessity for the bonus plan to be effective* but these arrangements were never formalized. As of the date of the swearing of this Affidavit, there is no such *Stock Incentive* plan in existence, *but the bonus plan is binding and effective*."

Clearly, Singh's Anguillan affidavit is not consistent with his current testimony. In order for Singh's interpretation to be accepted, "separate discussions with Mr. DeJoria," which concededly occurred in 2003, must be interpreted as discussions with Brown, years later. This is impossible. Clearly, Singh's Anguillan affidavit was referring to the V.V.I.P. Plan, not a stock incentive plan. Thus, it is wholly inconsistent with the position he has taken in this case.

(2) *Not the Result of Ignorance, Fraud, or Mistake*

Singh argues that judicial estoppel cannot apply because he never intended his Anguillan affidavit to state that he had no rights under the V.V.I.P. Plan, and to the extent the affidavit made such a statement, it was the fault of Patron's attorney, who drafted the Anguillan affidavit. Singh argues that "[a]ny lack of clarity in the Anguillan declaration resulted from Singh's mistaken reliance on the assurances of Patron's counsel."

Singh's argument is unpersuasive, given that it contradicts his deposition testimony, and is, to that extent, barred by *D'Amico*. Singh testified to the following facts: Singh read the affidavit of Osco-Bingemann and Fridman in the Anguillan litigation, and drafted his responsive affidavit together with his attorney.[28] The attorney "[v]ery carefully worded" the affidavit. The attorney was "tricking the court," and Singh went along with it. Singh believed what his attorney wrote in the affidavit, and believed she was doing the right thing.

Singh's deposition testimony establishes that there was no "mistaken reliance" on counsel. Singh was involved in the drafting of the Anguillan affidavit, and believed the "very careful[] word[ing]" of the affidavit was appropriate. Singh therefore cannot argue that the Anguillan affidavit was the result of ignorance, fraud or mistake.

(3) *Success in Asserting the First Position Not Established*

The third necessary element for the application of judicial estoppel is that the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true). There is no evidence in the record as to whether the Anguillan court accepted Singh's position as true.[29]

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[28] In the declaration Singh filed in the course of the discovery dispute, Singh stated that the attorney represented him "both individually and as a director" of CDC in the Anguillan litigation.

[29] The lack of evidence on this point may be due to the fact that Patron and DeJoria did not seek summary judgment on the basis of judicial estoppel. On appeal, Patron and DeJoria suggest that there is some evidence in the record on the issue. Specifically, it appears that Singh remained on the board of CDC for some time after his Anguillan affidavit was filed. However, there is nothing in the record indicating *why* he remained on the board. If, for example, the Crowley estate withdrew its request for Singh to be

Patron and DeJoria argue that, in egregious circumstances, judicial estoppel can be applied without evidence that the party was successful in asserting the first position. Indeed, there is some authority for this position. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 119.) However, subsequent to that case, the United States Supreme Court explained the significance of the success factor in the doctrine of judicial estoppel, stating, "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' [citation], and thus poses little threat to judicial integrity." (*New Hampshire v. Maine* (2001) 532 U.S. 742, 750-751.) Thereafter, California appellate courts began to question whether judicial estoppel can ever apply in the absence of success in the prior proceeding. (*The Swahn Group, Inc. v. Segal, supra,* 183 Cal.App.4th 831, 848; *Gottlieb v. Kest, supra,* 141 Cal.App.4th 110, 146-147.)

In any event, even if judicial estoppel could apply in the absence of success in the first proceeding, we conclude that this case does not present the extreme circumstances that would justify application of the exception. It is no more egregious than any other case in which the other four elements of judicial estoppel are present, but there was no evidence of success before the prior tribunal. We again find *Jogani* persuasive. In that case, the plaintiff had several lawsuits pending against him when he transferred all of his real estate holdings to a partnership with his brothers. When the lawsuits resulted in judgments against him, the plaintiff was subjected to judgment

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removed from the board, the fact that Singh remained on the board would not be evidence that the Anguillan court adopted Singh's position as true. There is simply an absence of evidence in the record on this factor.

debtor exams. At each one, the plaintiff denied any interest in the partnership or the properties he had transferred to it. As a result, plaintiff's creditors settled for fractions of the judgments they had against him. Thereafter, plaintiff brought suit against his brothers for breach of the partnership agreement. (*Jogani, supra,* 141 Cal.App.4th at pp. 164-167.) While it could not be disputed that the plaintiff obtained a benefit from his prior denials of the partnership at the judgment debtor exams, the facts were not so egregious as to justify the imposition of judicial estoppel in the absence of a court having been misled by his statements. (*Id*. at p. 182.) Indeed, one could argue that the circumstances in *Jogani* were more egregious than those in the instant case, as the *Jogani* plaintiff made the statements in the judgment debtor exams to hide assets from his creditors, while Singh made the statements in his Anguillan affidavit in order to remain on the Patron board with DeJoria.

We therefore conclude that the summary judgment in this case cannot be upheld on the basis of judicial estoppel. However, as judicial estoppel was not raised as a basis for summary judgment before the trial court, and the doctrine would apply if it can be established that Singh prevailed in asserting the position in his Anguillan affidavit, our conclusion is without prejudice to Patron and DeJoria bringing a second motion for summary judgment raising the issue, or asserting it at trial, if they can produce evidence to support it.

c. *Summary Judgment Should Not Have Been Granted*

As neither judicial estoppel nor the *D'Amico* rule apply to bar Singh from contradicting his Anguillan affidavit, we turn to the issue of whether summary judgment

was otherwise appropriately granted. We need not be detained long with the issue. Singh alleged a cause of action for breach of contract. Patron and DeJoria argue that Singh's only evidence that the V.V.I.P. Plan was an enforceable contract is his own declaration. Singh's declaration, however, is sufficient to raise a triable issue of fact. Nor is that the only evidence. Indeed, one might question why DeJoria would request Singh fly to Austin for the sole purpose of receiving and discussing the V.V.I.P. Plan if that document was not intended to be a binding agreement. Moreover, the Fridman Anguillan affidavit took the position that the V.V.I.P. Plan was binding. Thus, triable issues of fact exist as to Singh's cause of action for breach of contract. The summary judgment motion should not have been granted.[30]

2. *The Discovery Dispute*

Singh moved to compel the production of documents revealing the compensation of the three other V.V.I.P. executives. The motion was granted with respect to their compensation prior to Singh's termination, but denied with respect to the period thereafter. Singh argues that this ruling was error.

"We review the trial court's discovery order under the abuse of discretion standard. [Citations.] Accordingly, we may not substitute our view for that of the trial court unless there is no legal justification for the court's order. [Citation.]" (*Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 649.)

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[30] Patron and DeJoria did not move for summary adjudication of the issues in the alternative to their motion for summary judgment. Therefore, we need not consider whether summary adjudication should have been granted with respect to any individual cause of action.

When considering pre-trial discovery regarding third party employees or former employees, the discovery request implicates the privacy rights of those third parties. (*Life Technologies Corp. v. Superior Court*, *supra*, 197 Cal.App.4th at p. 651.) "The public interest in preserving confidential, personnel information generally outweighs a private litigant's interest in obtaining that information. [Citation.] 'A showing of relevancy may be enough to cause the court to balance the compelling public need for discovery against the fundamental right of privacy. [Citation.] However, the balance will favor privacy for confidential information in third party personnel files unless the litigant can show a compelling need for the particular documents . . . . ' " (*Id*. at p. 652.) "Even when the balance does weigh in favor of disclosure, *the scope of disclosure must be narrowly circumscribed*.' [Citations.]" (*Id*. at pp. 652-653.)

In this case, Singh sought the post-October 2008 compensation information of Brown, Fridman, and Alcaraz because, if Patron "compensated its other executives and employees in a manner consistent with the terms of the" V.V.I.P. Plan, it would provide support for his claim that the V.V.I.P. Plan was, in fact, enforceable. Singh believed the V.V.I.P. compensation might have been provided by means of an employee stock plan established at the time of the global settlement of the litigation regarding the disposition of the Crowley estate's shares. He therefore sought both the salary information of the remaining V.V.I.P. individuals as well as the benefits to which they were entitled pursuant to the employee stock plan.

Assuming, without deciding, that the trial court abused its discretion in limiting the period of discovery, any error was necessarily harmless, as Singh has already

received the discovery to which he may have been entitled. Singh has demonstrated a need for information regarding *whether* Brown, Fridman, and Alcaraz received compensation (or stock) in the amounts set forth in the V.V.I.P. Plan, but has established no compelling need sufficient to overcome the individuals' privacy rights with respect to their *precise compensation* (or stock benefits), if not in the amount set forth in the V.V.I.P. Plan.

By this time, however, Singh has received the information to which he may be entitled. Fridman is no longer with Patron,[31] and conceded that he had no right to compensation under the V.V.I.P. Plan. At the hearing on the motion to compel, Patron's counsel represented that Alcaraz never made a claim for V.V.I.P. benefits, and Brown subsequently testified that Alcaraz received nothing pursuant to the employee stock plan.[32] Thus, the only V.V.I.P. whose compensation could be at issue is Brown. Brown, however, submitted a declaration stating that, at the time of the global settlement, he did receive a new employment agreement, but under the agreement, he did not receive compensation contemplated by the V.V.I.P. Plan. Brown further confirmed that the no shares were set aside under the employee stock plan to account for the amounts purportedly promised the V.V.I.P.'s. In short, Singh has received discovery that none of the other V.V.I.P.'s received compensation in the amounts set

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[31] In his reply brief on appeal, Singh concedes that Fridman left CDC "before 2006."

[32] Singh appears to accept the testimony. He argues that there is reason to believe Brown and Fridman received compensation when the Bacardi deal closed, but does not suggest that Alcaraz did.

forth in the V.V.I.P. Plan. Further disclosure regarding the specifics of their compensation would violate their privacy interests, without a compelling need justifying such an intrusion.

3. *Disqualification of Attorney Miller*

" '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. [Citations.]' [Citation.]" (*Fremont Indemnity Co. v. Fremont General Corp.* (2006) 143 Cal.App.4th 50, 62.) "Other factors to consider in deciding a motion to disqualify counsel include the attorney's interest in representing the client, the financial burden on the client to replace disqualified counsel, and the possibility that the disqualification motion is being used as a litigation tactic." (*Ibid.*)

"We review the ruling on a motion to disqualify counsel generally for abuse of discretion. [Citation.] The scope of the trial court's discretion is limited by the applicable principles of law. [Citations.] We defer to the court's express or implied factual findings if substantial evidence supports the findings and reverse the ruling only

if it does not conform to the applicable legal principles or there is no reasonable basis for the ruling in light of the facts. [Citations.] 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]' [Citation.] An appellate court must carefully review the trial court's exercise of discretion on a motion to disqualify counsel due to the important interests at stake. [Citation.]" (*Fremont Indemnity Co. v. Fremont General Corp., supra,* 143 Cal.App.4th at p. 63.)

"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. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring " 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' [Citation.]" [Citation.] 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." [Citation.]' [Citation.]" (*Fremont Indemnity Co. v. Fremont General Corp., supra,* 143 Cal.App.4th at p. 66.)

"Rule 3-310(E) prohibits the successive representation of clients in certain circumstances without the informed written consent of the client and former client. The rule 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.' [Citation.] If there is a substantial relationship between the subject of the current representation and the subject of the former representation, the attorney's access to privileged and confidential information in the former representation is presumed and disqualification of the attorney from the current representation is mandatory in order to preserve the former client's confidences. [Citations.]" (*Fremont Indemnity Co. v. Fremont General Corp., supra,* 143 Cal.App.4th at pp. 66-67.)

In considering whether there is a substantial relationship between the former and current representations, a court should not look exclusively at the discrete legal and factual issues involved in the representations. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 712.) We also consider whether the attorney acquired confidential information about the client or the client's affairs which is "material to the evaluation, prosecution, settlement or accomplishment of the litigation or transaction given its specific legal and factual issues." (*Id*. at p. 713.) This does not mean that an attorney who represented a former client is forever barred from representing that client's adversaries due to knowledge of the former client's "playbook" – its litigation strategies and attitudes toward settlement. Instead, to create a disqualification, "the information acquired during the first representation [must] be 'material' to the second; that is, it must be found to be directly at issue in, or have some critical importance to, the second representation." (*Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 680.)

The substantial relationship test addresses the situation of an attorney who actually represented the former client in the prior representation. The issue arose as to the test to apply when it was not the challenged attorney who represented the former client, but other attorneys at the challenged attorney's former firm. In *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324 (*Adams*), the court considered the doctrine of imputed knowledge. It is clear that when an attorney is disqualified from a representation, the attorney's entire firm is also disqualified (in the absence of an effective ethical screen), due to the doctrine of imputed knowledge. (*Id*. at p. 1333.) The question before the court in *Adams* was whether, when an attorney leaves one firm for another, all of the confidential client information possessed by others attorneys at the *first* firm is imputed to the moving attorney. The court concluded that the knowledge was not necessarily imputed. (*Id*. at pp. 1333-1334.) Once an attorney leaves a firm, "a blanket rule to prevent future breaches of confidentiality is not necessary because the departed attorney no longer has presumptive access to the secrets possessed by the former firm. The court need no longer rely on the fiction of imputed knowledge to safeguard client confidentiality. Instead, the court may undertake a dispassionate assessment of whether and to what extent the attorney, during his tenure with the former firm, was reasonably likely to have obtained confidential information material to the current lawsuit." (*Id*. at p. 1335.) Thus, when disqualification of an attorney is sought due to the fact that *other* attorneys at the attorney's former firm represented an adversary in a matter with a substantial relationship to the instant one, the court should "determine whether confidential information material to the current representation

would normally have been imparted to the attorney during his tenure at the old firm." (*Id*. at p. 1340.)

The substantial relationship test governs the resolution of a disqualification motion based on the challenged attorney's own prior representation of a client. *Adams* set forth the test governing the resolution of a disqualification motion based on the activities of other attorneys at the challenged attorney's former firm. Many disqualification motions, including at least part of the motion at issue in this case, concern a middle ground, one where the challenged attorney *participated to a limited degree* in the prior representation, but was not the lead counsel. In such a situation, the application of the substantial relationship test turns on two variables: "(1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." (*Jessen v. Hartford Casualty Ins. Co., supra,* 111 Cal.App.4th at p. 709.) If, under the latter factor, the attorney "was personally involved in providing legal advice and services to the former client," the usual substantial relationship test applies. In other words, we presume confidential information has been conveyed and focus only on whether the two legal matters are substantially related. (*Ibid.*) If, however, the former attorney-client relationship "is peripheral or attenuated," we will not presume confidential information has been conveyed "in the absence of an adequate showing that the attorney was in a position vis-à-vis the client to likely have acquired confidential information material to the current representation." (*Id*. at p. 710.)

With the applicable standards thus established, we turn to the disqualification motion in this case. We consider each of the three matters which provided the basis for the disqualification motion, as well as Attorney Miller's general knowledge of Patron.

a. *The Seagram Litigation*

There can be no dispute that Attorney Miller was lead counsel for CDC's predecessor, and also represented DeJoria, in the Seagram litigation. Thus, the only question is whether there is a substantial relationship between the issues in the Seagram litigation and the instant case. The trial court concluded that there is, on the basis that the Seagram litigation implicated issues of corporate valuation and Singh's contributions to Patron.

Preliminarily, we note that the main issues in this case involve the creation and enforceability of the V.V.I.P. Plan. These issues were not at issue in the Seagram litigation, and could not have been, as the Seagram litigation was resolved two years before the V.V.I.P. Plan was ever written. The issue of corporate valuation will arise in this case only if Singh establishes the enforceability of the V.V.I.P. Plan. Even at that point, the issue will not be the valuation of CDC in the abstract, but the meaning of the term "net" as used by DeJoria in the V.V.I.P. Plan and as understood by the V.V.I.P.'s when the alleged meeting of the minds occurred. The issue of Singh's contributions to Patron is relevant to his cause of action for unjust enrichment.

Turning to the trial court's ruling, we conclude it lacks substantial evidence. The trial court concluded that corporate valuation issues were implicated by the Seagram litigation, and similar issues are implicated by this case. The documents from the

Seagram litigation provided to the trial court indicate that the valuation matters at issue in the Seagram matter were the purported losses suffered by CDC's predecessor due to Seagram's alleged breach of a joint venture agreement, including lost profits and the harm to the "value of the Patron Brand." There is no substantial relationship between that determination and either: (1) the meaning of the term "net" in the V.V.I.P. Plan; or (2) the "net" value of CDC in 2008. The trial court also concluded that the value of Singh's contributions to Patron was at issue in the Seagram litigation, because both litigations involved the same factory. As noted above, Singh did not even break ground on his factory until more than a year had passed after final resolution of the Seagram litigation; the Seagram litigation involved a completely different factory. While the value of joint venture factory at issue in the Seagram litigation could conceivably have some tangential relevance to the valuation of the factory Singh built for Patron years later, it is too remote to satisfy the substantial relationship test as a matter of law.

b. *The Skyy Spirits Matter*

Although Attorney Miller had no recollection of the Skyy Spirits matter, DeJoria testified that he specifically discussed with Attorney Miller "confidential financial issues and potential company valuations in connection with the attempted takeover by Skyy Spirits." We therefore conclude that, here, as in the Seagram litigation, Attorney Miller was personally and directly involved in the representation, and the substantial relationship test applies.

In its order granting disqualification, the trial court's only reference to the Skyy Spirits matter is that the overall value of the corporation in 2008 is at issue in this case

and that "[v]aluation was at issue in the Skyy Spirits matter, when it attempted to take over P[atron]." We again conclude the evidence is insufficient to establish a substantial relationship between the two matters. This case may be concerned with the value of CDC in 2008, as defined by the term "net" in the V.V.I.P. Plan. Matters of CDC's valuation in 2003, in connection with a takeover attempt, are not sufficiently similar.[33]

c. *The Siete Leguas Matter*

It is clear that Attorney Miller was not the lead attorney in the Siete Leguas matter. Thus, we must determine whether his involvement was personal and direct or peripheral and attenuated. If the latter, we must then determine whether Attorney Miller was nonetheless in a position to likely have acquired confidential information material to this case. Under the circumstances of this case, it is clear that, regardless of whether Attorney Miller's involvement was direct or attenuated, he was, in fact, likely to have acquired confidential information, as he did, in fact, receive a copy of the confidential settlement agreement.

Thus, the issue is whether the confidential information Attorney Miller may have obtained in the Siete Leguas litigation was material to the instant litigation. Again, we turn to the substantial relationship test, and see no evidence that any confidential information Attorney Miller may have acquired in the Siete Leguas matter had any relationship, much less a material one, to this case. The trial court appeared persuaded by the fact that Singh signed a settlement agreement on behalf of CDC in connection

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[33] The V.V.I.P. Plan itself states "value $250,000,000 today," so it is difficult to see where there can be a dispute in this case regarding CDC's value in 2003.

with the Siete Leguas matter in the same month that the V.V.I.P. Plan was purportedly created. We fail to see the significance of that fact.[34] Temporal proximity alone does not imply that Attorney Miller was privy to any confidential information regarding the V.V.I.P. Plan itself.

d. *General Knowledge of CDC*

Christensen Miller had been CDC's primary outside counsel, and Attorney Miller was the engagement and billing partner for CDC at the Christensen Miller firm. The fact that he was copied on the Siete Leguas settlement agreement confirms that, even when he was not directly involved in CDC matters, he may still have been consulted on them. There is no reason to believe any Christensen Miller attorney working for CDC would not believe Attorney Miller was part of the group of attorneys to whom CDC confidential information could be freely disclosed. Thus, it cannot be disputed that, over the years that Christensen Miller represented CDC, Attorney Miller had access to confidential information relating to matters of CDC's corporate governance, its litigation philosophy, and its attitude toward settlement.

The trial court found Attorney Miller's access to confidential matters regarding CDC's corporate governance[35] to have a substantial relationship to the instant matter, in

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[34] The fact that Singh signed the settlement agreement the same month as the V.V.I.P. Plan is objectively true, clearly known by Singh, and not confidential. That Attorney Miller looked at the settlement agreement implies nothing.

[35] While the trial court noted authority providing that, in the appropriate case, an attorney's knowledge of its former client's attitudes toward settlement and litigation philosophy may justify disqualification, the court did not determine that this authority required disqualification in this case. We agree. At most, Attorney Miller was aware of

that Singh argues that the V.V.I.P. Plan was binding on CDC without board approval because CDC generally did business informally. While the evidence supports the conclusion that Attorney Miller had access to confidential client information regarding matters of "corporate governance" and "corporate procedure," there is no evidence that Attorney Miller had access to confidential client information regarding informal approval of agreements – the only corporate governance issue which would be material to the instant litigation. While we agree that a former client need not disclose the precise confidential information it conveyed to its former attorney in order to prevail on a disqualification motion, we conclude that a party cannot deprive its opponent of its counsel of choice on the general assertion that it conveyed to counsel information regarding the general subject of "corporate governance." We further note that corporate governance issues are relevant in this litigation only to the extent of procedures followed by the board of CDC in 2003. As Singh was on the board at that time, it appears that any information Attorney Miller might possess as the result of his firm's representation of CDC is information which Singh would nonetheless already possess.

In short, substantial evidence does not support the trial court's finding of a substantial relationship between Attorney Miller's prior representations of CDC and DeJoria and the instant matter. The order disqualifying Attorney Miller from representing Singh must therefore be reversed.

CDC's litigation philosophy and attitudes toward settlement in 2001 and 2003, not the attitudes and litigation philosophy of Patron and DeJoria in 2009 and beyond. This is particularly true since the ownership of Patron is not the same as the ownership of CDC at the time of Attorney Miller's representation.

DISPOSITION

The summary judgment in favor of Patron and DeJoria is reversed. The order disqualifying Attorney Miller from representing Singh is reversed. The matter is remanded for further proceedings not inconsistent with the views expressed herein. Singh is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.