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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650841/2013
GEM HOLDCO, LLC
vs.
CHANGING WORLD TECHNOLOGIES,
SEQUENCE NUMBER : 008
DISQUALIFY COUNSEL

INDEX NO. ______
MOTION DATE 12/4/14
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). 208-214
Answering Affidavits — Exhibits ______ | No(s). 231-241
Replying Affidavits ______ | No(s). 242-250

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S): ______

Dated: 1/9/15

SHIRLEY WERNER KORNREICH
J.S.C.
______, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GEM HOLDCO, LLC, GEM VENTURES, LTD., GLOBAL EMERGING MARKETS NORTH AMERICA, INC., CHRISTOPHER BROWN, EDWARD TOBIN, and DEMETRIOS DIAKOLIOS,

Index No: 650841/2013

DECISION & ORDER

Plaintiffs,

-against-

CHANGING WORLD TECHNOLOGIES, L.P, CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, JEAN NOELTING, RIDGELINE ENERGY SERVICES, INC., DENNIS DANZIK, BRUCE A. MACFARLANE, TONY KER, RICHARD CARRIGAN, DOUGLAS JOHNSON, and KELLY SLEDZ,

Defendants.

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CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, and JEAN NOELTING,

Third-Party Plaintiffs,

-against-

CHRISTOPHER BROWN, EDWARD TOBIN, and DEJA II, LLC,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 008 and 009 are consolidated for disposition.

Defendants Changing World Technologies, L.P. (CWT), Ridgeline Energy Services, Inc. (Ridgeline) and Dennis Danzik (the Ridgeline Defendants) move to disqualify Schlam Stone & Dolan LLP (Schlam Stone) from serving as counsel for defendants CWT Canada II Limited

Partnership (CWT Canada), Resource Recovery Corporation (RRC), and Jean Noelting (the CWT Defendants). Seq. 008.[1] The CWT Defendants oppose and move to supplement the record on the disqualification motion. Seq. 009. The motions are denied for the reasons that follow.

I. Background & Procedural History

The court assumes familiarly with its decisions on the motions to dismiss the first and third amended complaints (respectively, the FAC and the TAC), which set forth the allegations in this case. *See* Dkt. 120 & 201. When this action was originally commenced on March 11, 2013, the only alleged wrongdoers named as defendants were CWT Canada and RRC. CWT also was named as a defendant because plaintiff GEM Holdco, LLC (GEM) sought to enjoin the CWT Defendants from selling CWT to the Ridgeline Defendants.[2] Schlam Stone was retained and appeared on behalf of those originally named defendants. Bruce A. MacFarlane, RRC's director, chose to retain Schlam Stone because of his decade-long satisfaction with the legal services of its lead counsel, Jeffrey M. Eilender, Esq.

On April 29, 2013, GEM filed the FAC, asserting claims against the Ridgeline Defendants. Under the UPI (discussed in the prior decisions), the CWT Defendants have to pay for the Ridgeline Defendants' legal costs in this action. MacFarlane, therefore, suggested to Danzik, Ridgeline's principal, that Schlam Stone represent all defendants in this litigation. At the time, GEM's claims against both sets of defendants concerned the same issues (the subscription requests) and, hence, their incentives in this litigation appeared aligned.

[1] Former defendants Tony Ker and Richard Carrigan were part of this motion, but since there are no longer any outstanding claims against them, they have withdrawn from the motion without prejudice. *See* Dkt. 249 at 7 n.2.

[2] The court denied GEM's injunction motion in an order dated March 13, 2013. *See* Dkt. 53.

After meeting with Mr. Eilender, Danzik signed a retainer letter dated May 2, 2013 (the Retainer Letter). *See* Dkt. 212. The Retainer Letter expressly and extensively contemplates future conflicts between the CWT Defendants and the Ridgeline Defendants:

> At the present time, based upon the facts known to us, including those supplied to us by you, we do not perceive any actual conflict of interest among CWT, RRC, CWT Canada, Ridgeline, you personally, and Mr. Noelting. We understand, of course, that in this case of joint representation, **there is a possibility that RRC, CWT Canada's and Mr. Noelting's status as ongoing clients of our firm could be perceived as adversely affecting our ability to represent you, Ridgeline, and CWT with complete loyalty and exercise of independent judgment. Certainly, joint representation can result in shared and divided loyalty**. Although we are not currently aware of any actual or reasonably foreseeable adverse effects of such shared or divided loyalty because everyone's interests appear to be aligned, **it is possible that issues may arise as to which our representation of you, Ridgeline, or CWT may be materially limited by our representation of RRC, CWT Canada, or Mr. Noelting**. We bring this possibility to your attention **so that you can decide for yourself whether you are sufficiently concerned with this possibility that you do not wish joint representation**. We also believe that there are significant advantages of joint representation. These include economy, efficiency, and the presentation of a united front based on the common interests of everyone in vigorously defending against GEM's claims.

Dkt. 212 at 3 (emphasis added). The Retainer Letter continues:

> We anticipate that **if a conflict or dispute were to arise or if for any other reason joint representation does not continue, we would continue to represent RRC, CWT Canada, and Mr. Noelting**. Accordingly, we are now asking you, Ridgeline, and CWT to consent to our continued and future representation of RRC, CWT Canada, and Mr. Noelting, and to **agree not to assert any such conflict of interest or seek to disqualify us from representing RRC, CWT, and Mr. Noelting in this or any other matter, notwithstanding any adversity or litigation that may exist or develop**. By signing and returning to us the agreement and consent set forth at the end of this letter, you, Ridgeline, and CWT **are consenting to such an arrangement and waive any conflicts regarding that arrangement**.

Id. (emphasis added).

The Retainer Letter further clarifies what would happen if Schlam Stone withdrew from representing the Ridgeline Defendants:

> Notwithstanding such waiver and consent, depending on the circumstances, there remains some degree of risk that we would be disqualified from representing anyone, including RRC, CWT Canada, and Mr. Noelting, in the event of a dispute.
>
> In the event of our withdrawal from representation of you, Ridgeline, or CWT in this matter, you, Ridgeline, or CWT would likely be required to retain new counsel who might not be as familiar with the case as our firm would be, and substantial expense may be involved as such new counsel familiarizes him/herself with the case.

Id. at 4. The Retainer Letter discloses that the Ridgeline Defendants' confidential, attorney-client communications would be shared with the CWT Defendants. *Id.*

Immediately thereafter, Schalm Stone began representing the Ridgeline Defendants. On June 10, 2013, Schalm Stone filed a motion to dismiss the FAC, which the court decided in an order dated December 24, 2013. At a February 6, 2014 preliminary conference, a discovery schedule was ordered, which set a June 30, 2014 deadline for the production of ESI and a compliance conference for July 31, 2014. *See* Dkt. 135. Three weeks before that conference, on July 10, 2014, the parties called the court with ESI disputes. *See* Dkt. 182. Apparently, among other issues, defendants did not produce their ESI by the June 30 deadline. Following the court's instructions, on July 29, 2014, the parties filed a joint letter outlining their disputes. *See* Dkt. 192. Additionally, as directed by the court, Mr. Eilender filed an affirmation explaining why certain defendant custodians' ESI was not produced. *See* Dkt. 189. Mr. Eilender explained that he did not produce any ESI from the Ridgeline Defendants because his relationship with them had broken down, leading Mr. Eilender to file a motion to withdraw on July 25, 2014. Mr. Eilender continues to represent the CWT Defendants.

After the letter and affirmation were filed, the parties (plaintiffs' counsel, Mr. Eilender, and Mr. Danzik, who participated *pro se*) called the court to discuss adjourning the motion to

withdraw and the July 31 conference. The court adjourned the motion until August, but it was agreed that plaintiffs and the CWT Defendants would appear on July 31 to discuss their ESI, but all disputes concerning the Ridgeline Defendants' ESI would be resolved at a September 11, 2014 conference, at which time new counsel for the Ridgeline Defendants had to be ready to discuss such matters. *See* Dkt. 193. The July 31 conference was held. Two weeks later, the parties resolved Mr. Eilender's withdrawal motion by stipulation dated August 12, 2014, pursuant to which Greenberg Traurig LLP appeared as new counsel on behalf of the Ridgeline Defendants. *See* Dkt. 196. Additionally, in an order dated August 28, 2014, the court decided the pending motion to dismiss the TAC.

On September 10, 2014, the parties submitted another joint discovery letter in advance of the September 11 conference. *See* Dkt. 204. In that letter, the parties informed the court that plaintiffs and the Ridgeline Defendants had reached a settlement. At the September 11 conference, many of the discovery disputes were resolved, and further production deadlines were agreed to in a stipulation filed the following day. *See* Dkt. 207. However, at that conference, counsel for the Ridgeline Defendants discussed moving to disqualify Schalm Stone from representing the CWT Defendants, even though the Ridgeline Defendants had already settled with plaintiffs. A continuing conflict supposedly still existed due to forthcoming cross-claims by the CWT Defendants against the Ridgeline Defendants and recently commenced Canadian litigation between the parties, in which the Ridgeline Defendants allege they were fraudulently induced to enter into the UPI because they were supposedly lied to about CWT's plant producing renewable diesel fuel (even though Danzik was running the company and likely was in a position to conduct due diligence to ensure that the plant was producing the right kind of fuel). That lawsuit was commenced in Canada pursuant to the UPI's forum selection clause.

The Ridgeline Defendants filed the instant motion to disqualify on September 19, 2014. On September 22, 2014, Schlam Stone, on behalf of the CWT Defendants, filed an answer and third-party complaint, asserting counterclaims, cross-claims, and third-party claims. *See* Dkt. 217 & 219. The CWT Defendants opposed the instant motion on October 14, and the Ridgeline Defendants replied on October 22. Oral argument was scheduled for October 28.

However, two days before oral argument, on October 26, 2014, the CWT Defendants filed a sur-reply [Dkt. 251-257], which the court has not considered. After oral argument on October 28, the court reserved decision on the instant motion, and expressly denied Mr. Eilender's request to consider his sur-reply papers. *See* Dkt. 277 (10/28/14 Tr. at 16-17). To ensure an appeal of right under CPLR 5701(a)(2),[3] on November 4, 2014, Mr. Eilender filed a motion for leave to consider his sur-rely, which the court is now denying, with one caveat. As discussed below, the court has considered the case of *Zador Corp. v Kwan*, 31 CalApp4th 1285 (1995) as persuasive authority; it was discussed at oral argument.[4] All other arguments made in the sur-reply have not been considered and, in any event, are irrelevant because the motion is, as explained below, decided in the CWT Defendants' favor based on arguments made in the original briefing.

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[3] *See 1471 Second Corp. v Nat of NY Corp.*, 2014 WL 7372925 (2d Dept Dec. 30, 2014), citing *Serradilla v Lords Corp.*, 12 AD3d 279, 280 (1st Dept 2004).

[4] Though *Zador* is a California case decided under California law, New York law is similar. More importantly, as set forth below, *Zador*, which involved similar circumstances and a virtually identical conflict waiver, contains an excellent discussion of how to approach conflicts arising during a joint representation. It should be noted that *Zador*, decided in 1995, continues to be widely cited by California state and federal courts. *See, e.g., S.E.C. v Tang*, 831 FSupp2d 1130, 1140 (ND Cal 2011) (noting that *Zador* is the leading California case on joint representations); *see also Sharp v Next Entm't, Inc.*, 163 CalApp4th 410, 429-30 (2008).

II. *Discussion*

It is well established that the right to be represented by counsel of one's choice is "a valued right [and] any restrictions must be carefully scrutinized." *Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-70 (1st Dept 2013), quoting *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 (1987). Moreover, "in the context of an ongoing lawsuit, disqualification ... can [create a] strategic advantage of one party over another." *Id.* "[M]otions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts ... Such motions result in a loss of time and money, even if they are eventually denied. This Court and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused." *Solow v W.R. Grace & Co.*, 83 NY2d 303, 310 (1994); *see Mayers v Stone Castle Partners, LLC*, 2015 WL 94652, at *3 (1st Dept Jan. 8, 2015) (disqualification motions made for "tactical purposes" should be denied, even if confidential information was transmitted). For these reasons, "movant must meet a heavy burden of showing that disqualification is warranted." *Ullmann-Schneider*, 110 AD3d at 470, citing *Broadwhite Assocs. v Truong*, 237 AD2d 162 (1st Dept 1997).

As the Second Department recently explained:

> The disqualification of an attorney is a matter which rests within the sound discretion of the court. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion. [It is improvident] to disqualify [a law firm when the former clients/current defendants executed a waiver in which they] specifically waived any conflict of interest that might arise from [the law firm's] representation of the plaintiff [if t]he waiver fully informed [] defendants of the potential conflict of interest[. B]y executing the waiver, [] defendants consented to have [the law firm] represent [plaintiff] notwithstanding that conflict.

Grovick Props., LLC v 83-10 Astoria Blvd., LLC, 120 AD3d 471, 473-74 (2d Dept 2014) (citations and quotation marks omitted).

The Ridgeline Defendants argue that Schlam Stone may not represent the CWT Defendants because doing so would run afoul of Rules 1.7 and 1.9 of the New York Rules of Professional Conduct. *See* 22 NYCRR 1200. As the CWT Defendants correctly aver, Rule 1.7 governs conflicts of interest between current clients and, hence, is inapplicable because the instant motion concerns conflicts between current and former clients.[5] The Ridgeline Defendants concede this point. Rule 1.9, however, is applicable, since it governs duties to former clients. Rule 1.9 provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require

[5] *See Anderson & Anderson LLP-Guangzhou v N. Am. Foreign Trading Corp.*, 45 Misc3d 1210(A), at *3 (Sup Ct, NY County 2014) (noting that the Rule covers, *inter alia*, conflicts between the lawyer and the client).

with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

It is undisputed that Rule 1.9 applies. It is further undisputed that, in the absence of a conflict waiver, Rule 1.9 would prohibit Schlam Stone from further representing the CWT Defendants in this action.

The issue here is whether the conflict wavier in the Retainer Letter permits Schlam Stone to continue representing the CWT Defendants. The Ridgeline Defendants aver that the sort of confidential information shared with an attorney in a joint representation inherently gives rise to the very unfair advantages that Rule 1.9 seeks to prohibit. This concern, they argue, warrants disqualification. In opposition, the CWT Defendants rightly explain that the Ridgeline Defendants have it backwards for reasons best articulated in *Zador*:

> [W]hen the prior representation involves joint clients, and the subsequent action relates to the same matter, the substantial relationship test adds nothing to disqualification analysis. This is because **a substantial relationship between the former representation and the subsequent action is inherent in such situations**. In other words, clients A and B are jointly represented by C until C discovers a conflict between the legal position of A and B. Client B retains separate counsel. Client A then sues Client B. In these circumstances, a substantial relationship will **always exist between C's prior representation of B and the litigation between A and B** ... In addition, although the substantial relationship test determines whether confidences were likely disclosed, **in a joint client situation, confidences are necessarily disclosed**. In fact, the joint client relationship is an exception to the attorney-client privilege.

Zador, 31 CalApp4th at 1294 (emphasis added).

Though the parties dispute whether confidential information was transmitted, this is both unremarkable and irrelevant for the reasons set forth in *Zador*. If the transmission of confidential

information in a joint representation vitiated the validity of conflict waiver, notwithstanding the Retainer Letter's disclaimers to the contrary, virtually all conflict waivers would be ineffectual.

Unsurprisingly, as a result, New York courts have recognized that, where a valid conflict wavier exists, the traditional concerns about confidential information are inapposite. *See St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 90 (1st Dept 2004).[6] Indeed, the validity of conflict waivers is well established. *See Centennial Ins. Co. v Apple Bldrs. & Renovators, Inc.*, 60 AD3d 506 (1st Dept 2009), citing *St. Barnabas*, 7 AD3d at 91; *see also Grovick*, 120 AD3d at 604. For a conflict waiver to be valid, the former client must provide informed consent. *St. Barnabas*, 7 AD3d at 9, citing *Schneider v Saiber Schlesinger Satz & Goldstein, LLC*, 260 AD2d 321 (1st Dept 1999) and *Yasuda Trust & Banking Co., v 250 Church Assocs.*, 206 AD2d 259 (1st Dept 1994); *see Snyder v Snyder*, 57 AD3d 1528 (4th Dept 2008); *see also Ferolito v Vultaggio*, 99 AD3d 19, 27 (1st Dept 2012) ("an attorney may represent such clients where a disinterested lawyer would believe that the lawyer can competently represent the interest of each client and that each consents to the representation after full disclosure of the implications of simultaneous representation as well as the advantages and risks involved").

The Ridgeline Defendants further argue that the alleged fraud at issue in the new Canadian lawsuit merits deeming the conflict waiver unenforceable.[7] The Ridgeline Defendants

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[6] Therefore, the Ridgeline Defendants' policy based arguments, such as preventing "the appearance of impropriety" [*see Solow*, 83 NY2d at 309], are also irrelevant. *See Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 153 (1st Dept 2006) ("the motion court erred in finding that the 'appearance of impropriety' warranted disqualification of [] counsel. In doing so, the court ignored three basic principles of law on this subject: that **if the representation does not violate another ethical or disciplinary rule, there can be no appearance of impropriety**") (emphasis added); *see also Mayers*, 2015 WL 94652.

[7] They also argue that the CWT's Defendants' cross-claims, which, *inter alia*, also concern alleged breaches of the UPI, warrant disqualification. However, as discussed herein, disputes

maintain that at the time Danzik signed the conflict waiver, he was not in a position to provide informed consent because he assumed the interests of both sets of defendants were aligned. This, however, does not matter. Aside from the questionable nature of the fraud claim,[8] the very point of a conflict waiver is that some future, unforeseen conflict may arise, misaligning the incentives underlying the joint defense. That was made clear in the Retainer Letter.

Indeed, if the conflict was expected, it is unlikely a joint defense agreement would have been entered into. It is to no avail to allege that the other defendant secretly knew about a conflict, since if that mere allegation warranted disqualification, disqualification would be a *fait accompli*. Prior knowledge of the conflict is inherently intertwined with the merits of the claim giving rise to it, making it virtually impossible to adjudicate on a disqualification motion. Since, as here, it is premature to reach the merits on a disqualification motion, there is no way to rebut the alleged conflict. Ergo, if a claim of knowledge of the conflict were enough to warrant disqualification, disqualification would almost always result.

The Ridgeline Defendants, nonetheless, argue this does not matter and that equity militates in favor of disqualification in this case. The court disagrees. As the CWT Defendants persuasively argue, if disqualification were warranted in this case, it would follow that virtually all conflict waivers would be unenforceable, a result which is at odds with this state's legal policy. Such a result would significantly impair the ability of co-defendants to mount a joint

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under the UPI were foreseeable and, thus, are not grounds for disqualification.

[8] Section 3.6 of the UPI states that, except as otherwise warranted in the contract, the buyer is accepting the assets as is, with no warranty as to their condition or suitability for any purpose. *See* Dkt. 241 at 24.

defense, leading to significant litigation inefficiencies and increased legal costs for litigants, who would unnecessarily have to hire more lawyers to perform duplicative and expensive work.

A review of the portion of the Retainer Letter cited earlier makes clear that Danzik provided informed consent. In fact, the Ridgeline Defendants do not meaningfully quibble with the general sufficiency of the waiver language in the Retainer Letter. Rather, they argue, disqualification is warranted because "[t]he facts here are extreme." *See* Dkt. 249 at 6. Simply put, they contend the joint defense agreement was predicated on the litigation being about a non-payment dispute with plaintiffs, not a fraudulent inducement case between defendants. *See id.* at 6-7 ("Had Danzik known the underlying transaction was a complete sham ... he would never have signed the [Retainer Letter] and agreed to a joint defense.").[9]

Leaving aside the merits of the fraud claim (which, additionally, may well have a reasonable reliance problem since Danzik was running the very company with the alleged bad diesel fuel for approximately 4 months before the UPI was executed and 6 months before agreeing to a joint defense), it is of no moment that the specifics of the conflict may not have been foreseen. The Retainer Agreement expressly contemplated unforeseen conflicts. *See* Dkt. 212 at 3 ("joint representation can result in shared and divided loyalty. Although we are not currently aware[10] of any actual or reasonably foreseeable [conflicts], it is possible that issues

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[9] It should be noted that the Ridgeline Defendants cite no authority supporting the arguments that the date the conflict arose or that it involved related litigation are bases for disqualification. To the contrary, such arguments have been rejected by the First Department. *See St. Barnabas*, 7 AD3d at 92 (rejecting argument "that the retention letter waives only those future conflicts that might arise from the employment matters, for which St. Barnabas retained the Rosenman firm at the time the letter was executed, and not conflicts arising from the SMS matter, for which St. Barnabas did not retain the Rosenman firm until two years later").

[10] Mr. Eilender, in a sworn affirmation, represents that he did not know about the fuel issue at the time. *See* Dkt. 240 at 17. The court takes him at his word, since there is no reason to believe

may arise as to which our representation of you ... may be materially limited by our representation of [the CWT Defendants] ... **We bring this possibility to your attention so that you can decide for yourself whether you are sufficiently concerned with this possibility that you do not wish joint representation.**") (emphasis added).

Even though the specific nature of the conflict (i.e. dispute over the fuel) may not have been expressly foreseen, it was quite foreseeable a dispute may arise under the UPI. The UPI contains approximately 15 pages of robust representations and warranties, pre-closing covenants, and conditions precedent to closing. *See* Dkt. 241 at 21-35. The UPI also contains extensive provisions concerning disputes arising under the UPI, including choice of law and forum selection clauses. *See id.* at 35-42. Conflicts arising from the sale of a company are not rare occurrences, and Danzik knows that. After all, Danzik, aside from being a sophisticated businessman, represents himself to be both a lawyer and a scientist. *See* Dkt. 234 at 8 (Danzik told MacFarlane that he is a scientist and "an experienced litigator").

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that Mr. Eilender would risk his reputation or license by lying. Additionally, in reply, Danzik protests that Mr. Eilender never discussed the express terms of the Retainer Letter with him. However, Danzik, who is quite sophisticated, is not legally entitled to maintain ignorance of the express terms of the Retainer Agreement and the conflict waiver contained therein. *See Golden Stone Trading, Inc. v Wayne Electro Sys., Inc.*, 67 AD3d 731, 732 (2d Dept 2009) ("A party who executes a contract is presumed to know its contents and to assent to them"), accord *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 (1920); *see also Holcomb v TWR Express, Inc.*, 11 AD3d 513, 514 (2d Dept 2004) (even those illiterate in English are not excused from understanding the contract). This is particularly true here given Danzik's sophistication, education and law degree. Moreover, all Rule 1.9 requires is written consent. *See Grovick*, 120 AD3d at 604 ("The waiver fully informed the Astoria defendants of the potential conflict of interest and, by executing the waiver, the Astoria defendants consented to have Brooks represent them notwithstanding that conflict"). In other words, it is the content of the writing and the client's signature that matters. An inquiry into what was discussed between the attorney and the client would be burdensome, intrusive, and utterly irrelevant. Rule 1.9, like most writing requirements (e.g., the statute of frauds), obviates the need to test the veracity of alleged subsequent or contemporaneous oral representations that contradict the writing.

Of course, at the time of sale, one cannot predict every possible permutation of conflict that may lead to litigation. If such foresight were required, conflict waivers would be ineffectual. There is no rule that the specific details of a conflict be itemized in a waiver for it to be valid. Rather, the rule of informed consent simply requires the client to be in a position to make an informed decision about whether a potential conflict is a risk worth taking on for the benefits of joint representation. Here, a dispute over the sale was not unforeseeable, and therefore, the wavier covers it. For these reasons, regardless of the existence of a conflict between the CWT Defendants and the Ridgeline Defendants and regardless of the fact that Schlam Stone may be privy to the Ridgeline Defendants' confidential information, by signing the Retainer Letter, Danzik waived his right to seek Schlam Stone's disqualification. "To fail to give effect to [Danzik's] consent under these circumstances would constitute an unwarranted interference with [the CWT Defendants'] right to retain counsel of [their] choice, and with [Mr. Eilender's] ability to retain a longstanding client." *See St. Barnabas*, 7 AD3d at 84. Accordingly, it is

ORDERED that the motion by defendants Changing World Technologies, L.P., Ridgeline Energy Services, Inc., and Dennis Danzik to disqualify Schlam Stone & Dolan LLP from serving as counsel for defendants CWT Canada II Limited Partnership, Resource Recovery Corporation, and Jean Noelting is denied; and it is further

ORDERED that a status conference will be held on January 29, 2015 after oral argument on Motion 10, before which the parties must meet and confer about all outstanding discovery disputes, which will be resolved at the conference.

Dated: January 9, 2015 ENTER:

J.S.C.