United States District Court, S.D. New York.
Stella MITCHELL, Hwa-Mei C. Gee, Barbara Lachance, Durpatty Persaud and Janet Ramsey, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
METROPOLITAN LIFE INSURANCE COMPANY, INC., d/b/a METLIFE, Defendant.
No. 01 CIV. 2112(WHP).

March 21, 2002.

Adam T. Klein, Esq., Outten & Golden LLP, New York, for Plaintiffs.

James M. Finberg, Esq., Kelly M. Dermody, Esq., Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA, for Plaintiffs.

Allen I. Fagin, Esq., Amy B. Regan, Esq., Proskauer Rose LLP, New York, for Defendant.

MEMORANDUM AND ORDER

PAULEY, District J.

***1** Defendant Metropolitan Life Insurance Company ("MetLife") moves to disqualify Lieff, Cabraser, Heimann & Bernstein, LLP ("Lieff Cabraser"), one of the two law firms representing plaintiffs. MetLife seeks disqualification on the ground that Wendy R. Fleishman, now a Lieff Cabraser partner, defended MetLife in a number of lawsuits while employed by her former firm, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). For the reasons stated below, the motion is granted.

Background

Plaintiffs, five current or former MetLife employees, assert individual and class claims of gender discrimination arising out of their employment within the MetLife Financial Services ("MLFS") division of the company. The MLFS division of MetLife, through its account representatives located nationwide, markets and sells the company's financial and insurance products. The complaint, filed on March 13, 2001, alleges that MetLife has engaged in a continuing policy and practice of gender discrimination in hiring, promotions, job assignments, compensation and other terms and privileges of employment. The complaint alleges that women are underrepresented in each level of MLFS and that the company maintains a gender-based "glass ceiling" by reserving for male employees the support and opportunities for advancing within MLFS. The complaint further alleges that the company engaged in retaliation in response to complaints of gender inequality. Plaintiffs bring this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and New York State and City antidiscrimination statutes.

Two law firms presently represent plaintiffs, the Lieff Cabraser firm and Outten & Golden LLP. In January 2001, about two months prior to the filing of the complaint in this action, attorney Wendy Fleishman left her position as counsel with Skadden and joined Lieff Cabraser's New York office as a partner. Lieff Cabraser, a 54-lawyer firm based in San Francisco, California, employs approximately twelve attorneys in its New York office. At the time Fleishman was set to change firms, she informed a MetLife officer that the Lieff Cabraser firm had a matter against MetLife and requested a waiver of conflicts on account of her prior representation of the company. The MetLife officer was unable to locate any action brought against the company by Lieff Cabraser, presumably because the action had yet to be filed. No waiver was provided and Fleishman did not pursue the matter further.

Lieff Cabraser maintains that, upon Fleishman's arrival at the firm, it erected screening measures to ensure that confidential information regarding MetLife could not pass to any Lieff Cabraser employee. The record reflects, however, that Lieff Cabraser's conflicts attorney did not circulate any memorandum formally establishing screening procedures until March 9, 2001, some two months after Fleishman joined the firm. (Affirmation of Wendy Fleishman dated Aug. 8, 2001 ("Fleishman Aff.") ¶ 27; Declaration of Steven M. Tindall dated Aug. 4, 2001 ¶¶ 4-5.)

***2** Before her departure in January 2001, Fleishman had worked at Skadden since 1993 as counsel in its products liability department. In the fall of 1998, Skadden (together with another law firm) was selected as national coordinating counsel for sales practices related lawsuits brought against MetLife. In the sales practices lawsuits,

Skadden defended MetLife against claims relating to the conduct of employees in the MLFS field force, the same group that employed the plaintiffs in this action. Fleishman was part of the team assembled by Skadden to defend those lawsuits. Prior to its retention as national coordinating counsel, Skadden represented MetLife in a number of matters where Fleishman also had senior-level involvement.

More specifically, the affidavits submitted on behalf of MetLife by its in-house and outside legal counsel reveal that from the fall of 1998 through her resignation from Skadden in January 2001, Fleishman devoted a substantial portion of her professional time to the defense of MetLife matters. Skadden's billing records from 1999 reflect that Fleishman spent over 1,800 client billable hours representing MetLife in almost fifty matters. In 2000, Fleishman accrued over 1,540 client billable hours representing the company in almost forty matters. In many of those matters, Fleishman, as a senior-level attorney, had the primary day-to-day responsibilities as lead outside counsel.

Although none of her work directly related to employment discrimination, Fleishman's defense of MetLife enabled her to become conversant with detailed confidential information regarding the internal operations, policies and procedures of MLFS in general and with specific connection to the alleged sales practices charges. Fleishman became privy to information regarding the procedures for hiring, training, supervising, compensating and disciplining account representatives, the organizational structure of the MLFS field force and changes to that structure, as well as performance expectations and procedures for measuring the performance of account representatives and managers within the field force. Fleishman primarily learned of this information under the cloak of attorney-client privilege in discussions with the company's employees, managers, and in-house corporate legal staff.

In addition, Fleishman represented, defended at depositions, and interviewed various MetLife employees (or former employees), including account representatives, managers and other officials. Many of the employees interviewed by Fleishman worked in the MLFS division. Indeed, several of the employees she interviewed may qualify as members of the putative class in this action, while others had decision-making authority over certain of the named plaintiffs or other members of the putative class. For example, Fleishman interviewed the manager who supervised one of the named plaintiffs in this action, Hwa-Mei Gee; this manager is listed in plaintiffs' initial disclosures as a potential witness. Moreover, Fleishman interviewed the territorial vice president and the territorial administrator for the southern territory; two named plaintiffs, Barbara LaChance and Janet Ramsey, worked within that territory. In fact, plaintiff LaChance alleges that she discriminatorily was denied the position of territorial administrator, a position occupied by the very same person Fleishman interviewed. Fleishman also interviewed branch administrators and directors of marketing and training.

***3** During the course of her representations, Fleishman also was privy to privileged communications concerning MetLife's settlement strategy. She learned of the company's approach to structuring and valuing proposed settlements as well as its attitude toward settlement of individual suits and class actions.

From these facts, MetLife argues that Fleishman became intimately familiar with confidential MetLife policies and information that are substantially related to the subjects that are at issue in this employment discrimination lawsuit. Therefore, as MetLife contends, Fleishman is subject to a personal conflict of interest under Canons 4, 5 and 9 of the Code of Professional Responsibility and disciplinary rules promulgated thereunder. MetLife further contends that since Fleishman personally must be disqualified, this disqualification is imputed to the Lieff Cabraser firm. In this regard, MetLife submits that the screening procedures implemented by Lieff Cabraser are insufficient to insulate the firm from disqualification in this action.

In response, Lieff Cabraser argues that there is no substantial relationship between this employment discrimination action and the sales practices related litigations in which Fleishman represented MetLife. Still, in her affirmation submitted to the Court, Fleishman does not materially dispute the nature and extent of the information she gained in her prior representations of MetLife. While she attempts to deflect through artful formulations her knowledge about the hiring, training, supervising and disciplining of MLFS employees, such assertions only are made in the context of a specific lawsuit. (*See* Fleishman Aff. ¶ 11.) No broad disclaimer of knowledge of those areas is made. Notably, Fleishman's affidavit is peppered with bald statements to the effect that nothing she learned would have any bearing on the present action. (*See* Fleishman Aff. ¶¶ 17-20.) Such statements, however, seem to be misplaced given Lieff Cabraser's claimed efforts to screen Fleishman from any participation in this action. In any event, Lieff Cabraser argues that

even if Fleishman should be disqualified, the taint does not extend to the entire firm because Fleishman has been effectively screened from any involvement in this case.

Discussion

In this circuit, the American Bar Association Code of Professional Responsibility prescribes the appropriate guidelines for the professional conduct of the bar. *NCK Org. Ltd. v. Bregman,* 542 F.2d 128, 130 n. 2 (2d Cir.1976); *Hull v. Celanese Corp.,* 513 F.2d 568, 571 n. 12 (2d Cir.1975); *see also* Local Civil Rule 1.5 (grounds for attorney discipline include conduct violative of the New York State Lawyer's Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York).

The Court of Appeals has cautioned that motions to disqualify counsel are not to be granted indiscriminately because they interfere with a party's right freely to choose counsel and may be interposed for tactical reasons. *See Board of Educ. v. Nyquist,* 590 F.2d 1241, 1246 (2d Cir.1979); *Government of India v. Cook Indus., Inc.,* 569 F.2d 737, 739 (2d Cir.1978). Thus, the moving party must meet a "high standard of proof" before a lawyer is disqualified. *Evans v. Artek Sys. Corp.,* 715 F.2d 788, 791 (2d Cir.1983); *Government of India,* 569 F.2d at 739; *Bennett Silvershein Assocs. v. Furman,* 776 F.Supp. 800, 802 (S.D.N.Y.1991). Any doubts, however, should be resolved in favor of disqualification. *Hull,* 513 F.2d at 571.

***4** Under the restrained approach adopted by the Second Circuit, relief will be granted only when the facts concerning the lawyer's conduct poses a significant risk of trial taint. *Glueck v. Jonathan Logan, Inc.,* 653 F.2d 746, 748 (2d Cir.1981); *Nyquist,* 590 F.2d at 1246. This risk is commonly encountered "where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation ..., thus giving his present client an unfair advantage." *Armstrong v. McAlpin,* 625 F.2d 433, 444 (2d Cir.1980) (quoting *Nyquist,* 590 F.2d at 1246), *vacated on other grounds and remanded,* 449 U.S. 1106 (1981).

Ordinarily a lawyer may not knowingly reveal a confidence of his client or use that confidence if it would work to the client's disadvantage. 22 N.Y.C.R.R. § 1200.19 (McKinney Supp.2002) (codifying DR 4-101); *Evans,* 715 F.2d at 791; *Fund of Funds, Ltd. v. Arthur Andersen & Co.,* 567 F.2d 225, 235 (2d Cir.1977). As a result, Disciplinary Rule 5-108 of the Code of Professional Responsibility provides that without consent of a former client,

> a lawyer who has represented a client in a matter shall not ... [t]hereafter 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.

22 N.Y.C.R.R. § 1200.27(A)(1). The rule against successive representations "concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely to that client information communicated in confidence in the course of the representation," such as "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject, and innumerable other uses." *Ullrich v. Hearst Corp.,* 809 F.Supp. 229, 236 (S.D.N.Y.1992) (Leval, J.). Disciplinary Rule 5-105(D) creates a rebuttable presumption that a lawyer's personal conflict of interest is imputed to her current firm. 22 N.Y.C.R.R. § 1200.24(D); *Kassis v. Teacher's Ins. & Annuity Assoc.,* 93 N.Y.2d 611, 616-17, 695 N.Y .S.2d 515, 518-19 (1999).

Disqualification of a lawyer or firm on the basis of a prior representation of an adverse party typically requires a showing of a substantial relationship between the subject matter of the prior representation and the issues in the present litigation. *Evans,* 715 F.2d at 791; *Red Ball Interior Demolition Corp. v. Palmadessa,* 908 F.Supp. 1226, 1239 (S.D.N.Y.1995); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.,* 113 F.Supp. 265, 268-69 (S.D.N.Y.1953) (Weinfeld, J.). As it has refined the standard, the Second Circuit has determined that as a practical matter, motions to disqualify should be granted only when "the relationship between issues in the prior and present cases is 'patently clear" ' or that the issues involved are "identical" or "essentially the same." *Government of India,* 569 F.2d at 739-40. After a thorough examination of the leading successive representation cases, Judge Leisure of this court articulated the relevant standard as follows: "if the facts giving rise to an issue which is material in both the former and the present litigations are as a practical matter the same, then there is a 'substantial relationship' between the representations for purposes of a disqualification." *United States Football League v. National Football League,* 605 F.Supp. 1448, 1459 (S.D.N.Y.1985).

***5** The substantial relationship test serves an important function. It permits a court to "assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation." *Cheng v. GAF Corp.,* 631 F.2d 1052, 1056 (2d Cir.1980) (quoting *T.C. Theatre,* 113 F.Supp. at 268), *vacated on other grounds and remanded,* 450 U.S. 903 (1981). As the Second Circuit has held, "a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case ." *Government of India,* 569 F.2d at 740. To require such proof would "put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." *Government of India,* 569 F.2d at 740; *see also T.C. Theatre,* 113 F.Supp. at 269. All that must be shown is that the attorney whose disqualification is sought was likely to have access to relevant privileged information in the course of his prior representation of the client. *Evans,* 715 F.2d at 791; *Cheng,* 631 F.2d at 1056-57.

While admitting that Fleishman acquired "general background information" about MetLife (Transcript of Oral Argument dated Sept. 5, 2001 ("Tr.") at 25), Lieff Cabraser contends that the nature and subject matter of client confidences revealed to Fleishman are insufficient to justify disqualification under the substantial relationship test. This Court disagrees.

Unlike the cases cited by Lieff Cabraser, this is not a case where a lawyer previously represented a client in a narrowly-defined, single-issue lawsuit or may have simply assisted a client in settlement discussions in a small number of cases. *See Matthews v. LeBoeuf, Lamb, Greene & MacRae,* 902 F.Supp. 26, 31 (S .D.N.Y.1995) (motion to disqualify denied where plaintiff's lawyers, formerly associated with defendant law firm, did not possess confidential information about the subject matter of the lawsuit and only participated in two or three settlement discussions unrelated to the current lawsuit); *Vestron, Inc. v. National Geographic Soc'y,* 750 F.Supp. 586, 595 (S.D.N.Y.1990) (motion to disqualify denied where in a prior representation plaintiff's law firm only acquired confidences about defendant's "general litigation posture in trademark suits," a matter not relevant to the current breach of contract suit); *Beck v. Board of Regents,* 568 F.Supp. 1107, 1112 (D.Kan.1983) (motion to disqualify denied where the only evidence of substantial relationship offered by the movant was type of claim asserted in two disparate actions, a prior employment discrimination action and a current medical negligence and premises liability action, and no effort was made to show the relevance to the pending action of any confidential information communicated during the prior representation).

***6** Rather, here, MetLife has demonstrated that Fleishman, as a result of her prolonged and extensive prior representations of the company, acquired or was privy to confidential institutional information about MetLife, its MLFS division and MLFS personnel and that this information is relevant to this pending action in which plaintiffs, on an institutional level, attack the company's employment policies and practices. Fleishman's role in defending MetLife in sales practices related litigation afforded her access to confidential information pertaining to how account representatives and managers within MLFS were hired, trained, supervised, compensated and disciplined; how general performance levels of MLFS employees and managers were evaluated and would be measured against their colleagues; and how MetLife's management and corporate legal department assess exposure to suits of this magnitude and approach litigating or settling such cases. Plainly, this knowledge is substantially related to disputed factual issues material to the resolution of the present action.

For example, as already indicated, Fleishman would have become fully familiar with the process by which MLFS branch managers evaluated the conduct and performance of account representatives. In this case, plaintiffs contend that this process is entirely subjective and a principal cause of gender inequality of MetLife. Specifically, in challenging MetLife's methods of evaluating performance, the complaint alleges that MetLife established "discriminatory and subjective requirements for hiring, job assignment, and promotion which have the effect of excluding qualified women and which have not been shown to have any significant relationship to job performance or to be necessary to the proper and efficient conduct of MetLife's business." (Compl.¶ 68(k).)

There are further, more direct examples of substantial relationship. One of the named plaintiffs, Barbara LaChance, claimed in her amended charge of discrimination that she could not succeed as an account representative because, as a result of her gender, she received insufficient training and was denied opportunities to develop client and other business relationships. Certainly, with the benefit of confidential information acquired from MetLife about the extent and nature of

training provided to account representatives, Fleishman would be positioned to offer strategies for challenging any non-discriminatory reasons proffered by MetLife to rebut those charges. The requirement that a plaintiff show pretext in response to management's purported non-discriminatory explanation for its conduct is a burden imposed by the framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973). In a similar vein, Fleishman learned about production requirements and the methods for measuring the performance of account representatives. This information would be useful to rebut MetLife's proffered explanation that the company terminated plaintiff Durpatty Persaud because of her failure to meet such production requirements.

***7** Perhaps dispositive of the matter, Fleishman personally interviewed managers who had decision-making authority over certain named plaintiffs and who, at least in one documented instance, have been identified as potential witnesses. Fleishman would be privy to confidential information that could serve to challenge credibility, to prepare cross-examinations, and to otherwise contest their proffered justifications for the adverse employment decisions challenged by plaintiffs. Taken together, these circumstances establish a sufficiently close factual nexus between Fleishman's previous representations of MetLife and the matters fairly raised in the current employment discrimination action to pose a significant risk of trial taint to the disadvantage of MetLife. It is no surprise, then, that Fleishman sought a waiver of conflicts from MetLife on account of her prior representations in advance of joining the Lieff Cabraser firm.

Courts in this district have ordered disqualification in comparable contexts, such as where an attorney or law firm gained extensive or highly confidential knowledge about a client through a prior, broad-based representation and that knowledge pertained to a subsequent lawsuit to the disadvantage of the client. In *United States Football League v. National Football League,* 605 F.Supp. 1448 (S.D.N.Y.1985), a newly formed football league and its members brought an antitrust action against an established football league and its members. Judge Leisure granted the new league's motion to disqualify the established league's law firm because it advised the new league on a variety of corporate matters concerning the league's formation and financing, but which nonetheless related to the far-reaching acts of anticompetitive conduct alleged in the complaint. In broad terms, Judge Leisure concluded that "[m]ore general legal representation can be relevant to a later litigation, but only if the later litigation fairly puts in issue the entire background of the movant." *USFL,* 605 F.Supp. at 1459. Then, in considering the particular facts of the case before him, Judge Leisure determined that

> knowledge of a former client's financial and business background is not in itself a basis for disqualification if the client's background is not in issue in the later litigation.
>
> If, however, the litigation must deal with questions of the movant's market behavior, then the challenged attorney's knowledge of the business plans, economic organization, prospective market position and other such background information about the movant becomes relevant. This is particularly true in antitrust cases. The more wide-ranging the allegations of the complaint, the more likely it is that background legal work will be relevant to the instant litigation.

USFL, 605 F.Supp. at 1460; *see also Fernandez v. City of New York,* No. 99 Civ. 777(DC), 2000 WL 297175, at *1 (S.D.N.Y. Mar. 21, 2000) (motion to disqualify plaintiff's law firm granted in false arrest and malicious prosecution action because a "reasonable likelihood" existed that the law firm's prior representation of defendant police officer in an internal affairs bureau investigation of off-duty employment resulted in access to confidential information potentially "useful" to plaintiff); *Red Ball,* 908 F.Supp. at 1244-45 (motion to disqualify defendant's attorney granted where, even though "the questions of law and fact were somewhat different" in the attorney's prior representation of plaintiff in a criminal action, "the witnesses, testimony and other evidence" overlapped with the present action).

***8** Lieff Cabraser is being overly formalistic in their approach to disqualification, as the relevant inquiry is not limited to whether there are common legal claims or theories between the representations, but extends to whether there are common factual issues that are material to the adjudication of the prior and current representations. And, on its motion, MetLife has made a strong showing that the confidential information received by Fleishman concerning charges that MLFS employees engaged in sales practices improprieties is substantially related to an understanding of employment-related polices within MLFS and employment decisions made by MLFS managers and therefore relevant to plaintiffs' employment discrimination claims.

Saliently, Lieff Cabraser's approach is undercut by the published writings of its expert, Professor Charles

Wolfram, a prominent legal ethicist. In discussing the substantial relationship test and the threat derived from acquisition of confidential information from a former client, Professor Wolfram wrote:

> In that respect let me turn to the playbook problem. There have been cases suggesting that if you know something about the way the client's head works you know something that's relevant for purposes of applying the substantial relationship test. I think those cases often are misguided, sometimes they're correct. I think if re-examined under what I hope is the sharper lens of the factual-reconstruction test, it will turn out that some of them indeed are cases of substantial relationship, but some of them have not been. Those cases that are cases of substantial relationship would be cases where what you probably learn about the client's inclination, the client's willingness to settle, the client's unwillingness ever to be deposed is both relevant and unknown to others in the second litigation. That is to say it's still a secret. It was a secret obviously when you obtained it but it's still a secret that others don't know it.

Charles W. Wolfram, *The Vaporous And The Real In Former-Client Conflicts,* 1 J. Inst. for Study of Legal Ethics 133, 138 (1996) (*quoted in* Declaration of Hal R. Lieberman dated Aug. 12, 2001 ("Lieberman Decl.") ¶ 16.) As Lieff Cabraser conceded at oral argument, Fleishman was privy to highly privileged communications originating with MetLife's corporate law department regarding settlement strategies in class action litigations. (Tr. at 34.)

Accordingly, upon examination of the issues in Fleishman's prior representations of MetLife and in the present action, this Court is constrained to conclude that she suffers from a disabling conflict of interest under the rules of conduct prescribed in Canons 4 and 5 of the Code of Professional Responsibility.[FN1] Client confidences are not so inert as to limit their usefulness to defined legal disciplines or practice areas. They are fungible, and once disclosed can be applied by an experienced lawyer in ways too numerous to anticipate at this stage of the proceeding. As the Second Circuit observed, "[t]he dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." *Emle Indus., Inc. v. Patentex, Inc.,* 478 F.2d 562, 571 (2d Cir.1973).

> FN1. Because a conflict has been found on the basis of Canons 4 and 5, this Court need not reach MetLife's argument that disqualification is warranted to avoid an appearance of impropriety under Canon 9.

***9** Given Fleishman's personal conflict of interest, operation of DR 5-105(D) compels the result that the conflict be imputed to the Lieff Cabraser firm as well. *See Cheng,* 631 F.2d at 1057.[FN2] Nothing presented by Lieff Cabraser persuades this Court that the screening measures implemented by the firm suffice to prevent its disqualification.

> FN2. Although *Cheng* was vacated on jurisdictional grounds, its substantive holding was reaffirmed by the Second Circuit in *Cheng v. GAF Corp.,* 747 F.2d 97, 98 (2d Cir.1984), *vacated on other grounds,* 472 U.S. 1023 (1985). *See Baird v. Hilton Hotel Corp.,* 771 F.Supp. 24, 27 n. 1 (E.D.N.Y.1991) ("it is abundantly clear that the Second Circuit considers its first *Cheng* decision to be sound").

The Second Circuit has expressed consistent skepticism about screening as a remedy for conflicts of interest and declared that such procedures ultimately must be rejected if they are subject to doubt. *See Cheng,* 631 F.2d at 1058; *Fund of Funds,* 567 F.2d at 229 n. 10. Indeed, the New York Code of Professional Responsibility does not recognize the use of screening devices except in cases involving former government lawyers or judges, *see* 22 N.Y.C.R.R. § 1200.45(B)(codifying DR 9-101(B)), and recently the ABA House of Delegates voted to reject a proposal to permit screening to avoid disqualification. (Lieberman Decl. ¶ 20.) Courts have only approved screening procedures in the limited circumstances where a conflicted attorney possesses information unlikely to be material to the current action and has no contact with the department conducting the current litigation, which typically occurs only in the context of a large firm. *Compare In re Del-Val Fin. Corp. Sec. Litig.,* 158 F.R.D. 270, 274-75 (S.D.N.Y.1994) (imputed disqualification rebutted by screening procedures where conflicted attorney joined a 400-lawyer firm and was involved in the prior representation only in a peripheral manner) *and Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303, 307-08, 314, 610 N.Y.S.2d 128, 130, 133-34 (1994) (imputed disqualification rebutted because the conflicted attorneys transferred to a 350-plus lawyer firm, their involvement in the prior representation had been negligible, and the principle attorneys responsible for the matter left the firm

before the current representation) *with Decora Inc. v. DW Wallcovering, Inc.,* 899 F.Supp. 132, 141 (S.D.N.Y.1995) (implied disqualification not rebutted by screening procedures because conflicted attorney joined a small firm of 44 lawyers and did not work in a department separate from the one handling the current action) *and Yaretsky v. Blum,* 525 F.Supp. 24, 29-30 (S.D.N.Y.1981) (implied disqualification not rebutted by screening procedures because conflicted attorney joined a firm with about 30 lawyers in its New York office and worked in the department handling the case) *and Kassis,* 93 N.Y.2d at 618, 695 N.Y.S.2d at 519 (implied disqualification not rebutted by screening procedures because conflicted attorney joined a firm with about 26 lawyers and acquired confidential information likely to be material in the litigation). In addition, to rebut the presumption, the screening measures must have been established from the first moment the conflicted attorney transferred to the firm or, at a minimum, when the firm first received actual notice of the conflict. *See Marshall v. State of New York Div. of State Police,* 952 F.Supp. 103, 111 (N.D.N.Y.1997) ("a screening device implemented only after a disqualified lawyer has been with a firm will not provide adequate protection of confidences"); *Del-Val Financial,* 158 F.R.D. at 274-75 (presumption rebutted partly on ground that the screening device was implemented immediately upon discovery of the conflict).

***10** In this case, the screening measures put in place by Lieff Cabraser do not suffice to avoid disqualification. Fleishman had extensive exposure to relevant confidential information in the course of her representations of MetLife. Although Fleishman personally is not involved in prosecuting this action, she works in the 12-lawyer New York office of a relatively small firm. Two of the attorneys in the New York office are assigned to this case, and Fleishman is working directly with one of them on another significant class action suit. Given that Fleishman works in close proximity to attorneys responsible for this action, and regularly interacts with at least one of them, there exists a continuing danger that Fleishman may inadvertently transmit information gained through her prior representations of MetLife. *See Cheng,* 631 F.2d at 1058.

Parenthetically, Professor Wolfram's writings again impeach the position taken by Lieff Cabraser. In his treatise on legal ethics, Professor Wolfram observes:

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

Charles W. Wolfram, *Modern Legal Ethics* § 7.6.4, at 402 (West 1986).

Timing also militates against upholding the efficacy of the screening measures adopted by Lieff Cabraser. The record shows that the firm did not formally implement the screen until March 9, 2001, almost two months after Fleishman joined the firm and well after the time the firm had actual notice of the conflict. A screening device implemented only after a disqualified lawyer has joined the firm, in an instance where the firm knew of the problem at the time of her arrival, further diminishes the possibility that screening remedies the conflict present this case. *See Decora,* 899 F.Supp. at 141.

Under the circumstances arising in this case, the potential of inadvertent disclosure would lurk constantly in the background. As a result, this Court finds that the presumption of shared confidences has been not been rebutted. This Court notes that disqualification is unlikely to prejudice plaintiffs in any material way since MetLife interposed its motion at the outset of the litigation and plaintiffs can continue to be represented by the Outten firm. *See Fields-D'Arpino v. Restaurant Assocs., Inc.,* 39 F.Supp.2d 412, 415 n. 3 (S.D.N.Y.1999); *Decora,* 899 F.Supp. at 141-42. Thus, the Lieff Cabraser firm must be disqualified.

Conclusion

Accordingly, based on the record established by the parties, this Court reluctantly grants defendant MetLife's motion to disqualify the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP from representing plaintiffs in this action. While not calling into question the good faith of the Lieff Cabraser firm in dealing with this sensitive issue, disqualification is necessary to prevent the real possibility of trial taint in this matter of importance to all parties.

***11** This Court will permit plaintiffs four weeks to retain additional counsel, if they so desire. Thereupon, counsel

are directed to appear for a status conference on April 26, 2002 at 11:00 a.m. in Courtroom 11D, United States Courthouse, 500 Pearl Street, New York, New York.

SO ORDERED: