STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2017-37

BRIAN J. FOURNIER, Plaintiff, v. FLATS INDUSTRIAL, INC, et al. Defendants,	)	ORDER ON PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL FOR DEFENDANTS

Plaintiff Brian J. Fournier ("Brian") has moved this Court to disqualify the law firm Verrill Dana, LLP ("Verrill Dana") as counsel for Defendants Douglas A. Fournier, Patrick M. Fournier, and Beth B. Fournier (collectively the "Individual Defendants") and Defendant Penobscot Bay Tractor Tug Co., Inc. ("Pen Bay") (collectively "Defendants"). Defendants oppose the motion. A hearing was held on the motion on November 27, 2017 in Cumberland County Superior Court. Attorney Brendan P. Rielly appeared for Brian and Attorneys Brett R. Leland and Harold J. Friedman appeared for Defendants.

FACTUAL BACKGROUND[1]

Pen Bay operates tugboats in and around Bucksport and Searsport, Maine with an office in Belfast, Maine. (Complaint ¶ 9.) During his lifetime, Arthur J. Fournier ("Arthur") was the sole owner, director, and manager of Pen Bay. (Complaint ¶¶ 9, 10.) Arthur passed away on November 16, 2013, and his will distributed ownership of Pen Bay equally between his three children: Brian,

[1] The facts described in this section are taken from Brian's operative pleading in this matter, the Amended and Verified Complaint (the "Complaint") filed July 5, 2017 in the Cumberland County Superior Court prior to transfer here to the Business and Consumer Court. The Court includes these facts merely to contextualize the instant motion. Nothing in this section should be construed as a finding of fact by the Court.

Douglas Fournier ("Douglas"), and Patrick Fournier ("Patrick"). (Complaint ¶¶ 9, 23.) Arthur's will named his wife, Beth Fournier ("Beth"), as personal representative of his estate. (Complaint ¶ 15.) Beth was appointed Special Administrator by the Cumberland County Probate Court and used her authority as such to appoint herself to Pen Bay's board and then name herself President and Treasurer of Pen Bay. (Complaint ¶¶ 18, 20.) Sometime thereafter Beth appointed Douglas and Patrick to Pen Bay's board. (Complaint ¶ 22.) Brian is a shareholder, but neither a director nor manager, of Pen Bay.

Pen Bay is now owned in equal shares by Brian, Douglas, and Patrick. Beth remains Pen Bay's President and Treasurer. Brian alleges that the Individual Defendants control and manage Pen Bay, and brings several direct claims against all Defendants arising out of the Individual Defendants' alleged failure to share Pen Bay's business records with him, along with alleged mismanagement and self-dealing by the Individual Defendants in their operation and management of Pen Bay. Brian also brings a derivative claim on behalf of Pen Bay against the Individual Defendants.

Verrill Dana had previously represented Beth individually in matters related to the probate of Arthur's estate. *See generally In re Estate of Arthur J. Fournier, Jr.*, Cum. Cty. Prob. Ct. 2013 -1627 (*Mazziotti, J.*); *In re Nix's Mate Equip. Trust*, Cum. Cty. Prob. Ct. 2016-0583 (*Mazziotti, J.*). At a shareholder meeting, acting in their capacity as directors, the Individual Defendants consented on behalf of Pen Bay to Verrill Dana's dual representation of Pen Bay and themselves individually. (Complaint ¶¶ 125-26.) Brian objected to the dual representation and did not consent. (Complaint ¶ 122, 127.) Notwithstanding his objection, Brian was outvoted by Douglas and Patrick, and Verrill Dana is now counsel for all Defendants: Pen Bay and the Individual Defendants. Brian now brings the instant motion to disqualify Verrill Dana as counsel for not only

Pen Bay, but each of the Individual Defendants as well.

STANDARD OF REVIEW

Our Law Court is highly deferential to a trial court's decision whether disqualification is proper. *Estate of Markheim v. Markheim*, 2008 ME 138, ¶ 27, 957 A.2d 56. This Court must be "mindful that motions for disqualification are capable of being abused for tactical purposes, and justifiably wary of this type of strategic maneuvering." *Morin v. Maine Educ. Assoc'n*, 2010 ME 36, ¶ 8, 993 A.2d 1097 (quotations and omissions omitted). Therefore, disqualification is appropriate only when the moving party produces evidence supporting two findings: (1) "that continued representation of the nonmoving party by that party's chosen attorney results in an affirmative violation of an ethical rule" and (2) "that continued representation by the attorney would result in actual prejudice to the party seeking that attorney's disqualification." *Id.* ¶¶ 9-10. The moving party must point to specific, identifiable harm she will suffer in the litigation by opposing counsel's continued representation; mere general allegations are insufficient. *Id.* ¶ 10.

DISCUSSION

Brian alleges that Verrill Dana's concurrent representation of Pen Bay and the Individual Defendants violates many of the Maine Rules of Professional Conduct, including Rules 1.6, 1.7, 1.9, 1.13. Defendants deny that Verrill Dana's dual representation violates any of the ethical rules and that any conflict stemming from Verrill Dana's concurrent representation of Pen Bay and the Individual Defendants has been resolved by consent.

The Court notes that Brian's motion presents a significant question regarding a lawyer's ethical duties in representing a closely-held corporation as well as its individual directors or managers when a minority shareholder purports to bring a derivative action on behalf of the corporation against those individuals. *See* M.R. Prof. Con. 1.13 cmt. (14). The problem is

compounded when, as here, there are no disinterested directors or managers and the directorship-management forms an allied bloc of majority shareholders, which will inevitably conclude that joint representation is not counter to the corporation's interests and consent to the joint representation. *See* Restatement (Third) of the Law Governing Lawyers, § 131 cmt. g. However, the Court need not determine whether Verrill Dana's continued representation of Pen Bay and the Individual Defendants would violate any ethical rules in order to decide the instant motion to disqualify counsel. Brian has failed to adduce evidence of actual prejudice he will suffer from Verrill Dana's continued representation of Defendants, and his motion therefore fails the second prong of the *Morin* test and must be **denied**.

At the outset, Brian questions whether the *Morin* test applies to this case. Brian points out that *Morin* involved different ethical rules, did not involve a derivative claim, and relied on the reasoning expounded in *Adam v. MacDonald Page & Co.*, 644 A.2d 461 (Me. 1994), which involved successive representations and held that the former client was required to show that the former attorney had actually acquired relevant, confidential information to be disqualified from representing the other side in a subsequent suit. *Id.* at 464-65. Regardless of *Adam*'s applicability to Brian's motion, the scope of *Morin*'s holding—that is, that it applies to all motions to disqualify counsel—is apparent from its plain language. *Morin*, 2010 ME 36, ¶¶ 9-10, 993 A.2d 1097. Furthermore, *Morin* is explicit that the actual prejudice requirement is grounded not in the specific rules at issue justifying the motion to disqualify, but rather to discourage the use of disqualification motions for strategic purposes and as an "obvious vehicle for abuse." *Id.* ¶¶ 8, 10 (citation omitted). Finally, the U.S. District Court for the District of Maine has consistently applied *Morin*'s actual prejudice requirement to motions to disqualify regardless of the ethical violations alleged by movants. *See, e.g., Concordia Partners, LLC v. Ward*, No. 212-cv-138-GZS, 2012 U.S. Dist.

LEXIS 109540 (D. Me. Aug. 6, 2012); *Doe v. Reg'l Sch. Unit No. 21*, No. 2:11-cv-25-DBH, 2013 U.S. Dist. LEXIS 16700 (D. Me. Feb. 7, 2013).

Morin itself shows that the movant bears a heavy burden in demonstrating actual prejudice. In that case, an employee and her counsel shared confidential information with an attorney conducting an "independent investigation" because they were told the investigating attorney did not represent the employer, and they were not aware that the attorney's firm would later represent the employer in defending against the employee's discrimination suit. *Id.* ¶¶ 3-6. Morin and her counsel testified that they disclosed litigation and settlement strategy to the other attorney and were generally unguarded during the investigation based on his assurances. *Id.* ¶ 12. Nonetheless, the Law Court held that on these facts the employee "failed to point to any particular prejudice she has suffered or will suffer." *Id. See also Concordia Partners, LLC*, 2012 U.S. Dist. LEXIS 109540 at *21-22 (finding no actual prejudice where attorney at law firm did significant work for an opposing party in prior litigation).

Here, Brian's claims of actual prejudice are thinner than the employee's in *Morin.* Brian first alleges that Pen Bay is "apparently" paying for the legal representation of the Individual Defendants. (Brian Fournier Aff. ¶ 10.) Second, Brian claims that without independent counsel for Pen Bay, there is "no hope of any investigation into the corporate wrongdoings" of the individual Defendants. (Pl.'s Mot. at 8-9.) Both sides urge this Court to explore these allegations and determine their truth to decide Brian's motion, but such an inquiry is unnecessary here. *Morin* and the cases decided since indicate that the movant must do more than point to sworn allegations to substantiate a showing of prejudice and, furthermore, that even if true, the prejudice Brian alleges is inadequate to support disqualification in this case. *See Morin*, 2010 ME 36, ¶ 11, 993 A.2d 1097; *Concordia Partners,* 2012 U.S. Dist. LEXIS 109540 *21-22; *Reg'l Sch. Unit No. 21*, 2013 U.S.

Dist. LEXIS 16700 *36-37.

In essence, Brian urges this Court to reject *Morin* in favor of the "modern view . . . that it is generally improper due to conflict of interests for counsel to attempt to represent the corporation . . . while also representing the individuals charged with harming the corporation . . . ." 13 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 6025 at 442 (perm. ed. rev. vol. 1991). Brian cites to several cases in other jurisdictions as persuasive authority adopting this modern trend, and particularly relies on *Stepack ex rel. Southern Co. v. Addison*, 20 F.3d 398 (11th Cir. 1994). The Court has reviewed *Stepack* and the other cases cited, and finds that they are generally factually distinguishable from the motion at bar. *Stepack* involved a large public corporation with separate management than those accused of misconduct. In contrast, there is no management of Pen Bay other than Beth, Douglas, and Patrick. The other cases similarly discuss large public corporations, and the rules developed by courts in other jurisdictions to handle motions to disqualify in derivative actions brought on behalf of such corporations simply do not fit when applied to a small, closely-held corporation subject to Maine law's disqualification rules. *See Morin*, 2010 ME 36, ¶¶ 9-10, 993 A.2d 1097. This Court thus declines to apply the "modern view," and instead follows the established Maine Law Court precedent discussed *supra*. *See id.*

CONCLUSION

By reason of the foregoing IT IS HEREBY ORDERED:

> That Plaintiff Brian J. Fournier's motion to disqualify counsel for defendants be **DENIED**.
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> The Clerk is instructed to enter this Order on the docket for this case, by incorporating it be reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: December 4, 2017

___/s_____
Richard Mulhern
Judge, Business & Consumer Court