

To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



STAR ONE S.A.,

Petitioner-Appellant,

against

ANDESAT S.A. E.M.A., ANDESAT S.A. E.M.A. CORP.,
and AKERMAN SENTERFITT,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT STAR ONE S.A.

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INTRODUCTION

This is an appeal from the denial of a motion to disqualify a conflicted attorney who represented a client in contentious contract negotiations with an adversarial counterparty, then switched sides and, on behalf of the counterparty, brought an arbitration proceeding against his former client alleging breach of a successor contract that had modified the one he drafted. The IAS judge denied the motion to disqualify, holding that the attorney's representation of his former client was not "substantially related" to his subsequent representation of his client's adversary. That conclusion was wrong, both on the law and on the facts. This Court should reverse.

QUESTIONS INVOLVED

- (1) In an arbitration involving claims for breach of a contract that replaced and restructured the relationship established between the same parties in an earlier contract, is an attorney permitted to assert claims on behalf of one party, where the same attorney represented the opposing party in negotiating and drafting the earlier contract?

Trial Court's Answer: Yes.

- (2) On a motion brought by a former client to disqualify an attorney now representing an adversary, is the movant required to identify "specific confidential information" possessed by its former counsel in order to prevail?

Trial Court's Answer: Yes.

STATEMENT OF FACTS

The parties to this dispute are two South American telecommunications companies. The appellant, which was the petitioner in the proceeding below, is a Brazilian satellite services provider called Star One S.A. The respondents, Andesat S.A. E.M.A., and Andesat S.A. E.M.A. Corp. (collectively, “Andesat”), are two related entities based in Colombia and Florida, respectively. Andesat is owned in roughly equal proportions by shareholders domiciled in Colombia, Venezuela, Bolivia, Ecuador, and Peru, which were the members of a regional organization called the “Community of Andean Nations” (“CAN”) at the time when Andesat was formed. R. 240. Andesat was established to develop a satellite business that would exploit certain “orbital positions” that had been assigned to the CAN. *Id.* The law firm Akerman Senterfitt LLP, counsel to Andesat in this proceeding, is also a respondent.

Star One and Andesat are parties to an arbitration now pending before the International Court of Arbitration of the International Chamber of Commerce, to be conducted here in New York. In that arbitration proceeding, Andesat has alleged that Star One breached various contractual obligations to provide satellite access to Andesat. Star One denies the allegations. Andesat is represented in the arbitration by the Akerman firm, including its partner Charles Beeman. Prior to his representation of Andesat, however, Mr. Beeman was outside counsel to Star One

and its parent company, and, on behalf of Star One, he negotiated and drafted the original set of contracts on the same subject matter between Star One and Andesat – a set of contracts whose alleged breach features prominently in the charges brought by Andesat in the pending arbitration.

This appeal originates from a petition brought by Star One, pursuant to CPLR 7502, seeking an order disqualifying Mr. Beeman and the Akerman firm as counsel for Andesat in the arbitration. Star One argued below that Mr. Beeman’s prior representation of Star One in prolonged contract negotiations with Andesat prevents him (and by extension, his firm) from representing Andesat, against the interests of Star One, in litigation related to alleged breach of the parties’ contracts.

The parties do not dispute that Mr. Beeman formerly represented Star One, or that the interests of Mr. Beeman’s current client are materially adverse to Star One in the pending arbitration. They do dispute, however, whether Mr. Beeman’s representation of Andesat in the arbitration is “substantially related” to his former representation of Star One in the contract negotiations that led to the arbitration. To resolve this dispute, it is important for the Court to understand a bit of background.

A. The 2002 Agreements

The relationship between Andesat and Star One had its origins in 2000, before Star One was incorporated, when Andesat and Star One’s parent, the

Brazilian telecommunications company Embratel, started discussions about the possibility of working together in a joint venture for the purpose of placing a communications satellite in orbit above Latin America. R. 242. Andesat had been granted exclusive access to an “orbital position” located at 67° West longitude, from which a satellite could provide telecommunications services on the “Ku” frequency band to the CAN market and the rest of South America, as well as South Florida. R. 27, 41, 240. Star One was incorporated as a subsidiary of Embratel shortly after the discussions with Andesat began. R. 41, 225. Star One was operating a fleet of telecommunications satellites, but it did not have access to orbital positions from which satellites were authorized to broadcast on the Ku band, and it needed that capability to serve the emerging broadband and other markets. R. 225-26.

As a result of these mutual and complementary interests (Andesat had an orbital position it wished to exploit for commercial purposes, and Star One had the capacity and desire to operate a satellite in that position), the two companies agreed in 2001 that Star One would join a joint venture known as “Bolivarsat.”¹ R.

¹ Prior to Star One’s participation in the project, Andesat had created Bolivarsat as a joint venture with the French satellite manufacturer Alcatel, which originally was to build and launch the satellite. Alcatel later withdrew from Bolivarsat, the joint venture that was to operate the satellite, and Star One took its place, while Alcatel eventually built and launched the satellite. R. 225-26. These facts are not relevant for purposes of the current appeal.

28, 87. Over the course of approximately 16 months, they negotiated a series of complicated arrangements that would govern their initial relationship. These negotiations culminated in the execution, in April 2002, of a set of contracts collectively referred to by the IAS court as the “2002 Agreements.” (Certain of the papers below also refer to them as the “Bolivarsat Agreements” or the “Bolivarsat Contracts.”) The 2002 Agreements provided, in short, that Star One would acquire a satellite and launch it into Andesat’s exclusive orbital position. The satellite would be operated by the joint venture, Bolivarsat, under the control of Star One. Star One would use the satellite to provide Ku-band services to Brazil and other countries in South America. R. 226-27. In exchange for allowing Star One use its orbital position, Andesat would be granted an “indefeasible right of use” (or “IRU”) of two transponders on Star One’s satellite and the exclusive right to provide satellite services to customers in the territories of the CAN member nations. R. 227. In essence, Andesat allowed Star One to launch a satellite into Andesat’s celestial real estate, and in return Star One let Andesat use part of the satellite for its own purposes. While Star One was to pay the enormous cost of building and launching the satellite, Andesat was to bear a significant share of operating expenses.

The 2002 Agreements were complicated documents, and they took well over a year to negotiate, draft, and execute. For purposes of these negotiations, Star

One's principal outside counsel was Charles Beeman, who at the time was a partner in the Miami office of the law firm Hughes, Hubbard & Reed LLP and was licensed to practice law in New York and Florida. R. 42-43. Mr. Beeman and his firm were outside counsel to Star One's parent company, Embratel, providing advice on a variety of matters. R. 42, 256. They began representing Embratel in the initial negotiations with Andesat before Star One was formed. R. 256-57. After Star One was incorporated in 2000, it did not have its own in-house legal team, and it continued to rely on the in-house and outside legal team that advised Embratel. R. 42, 257. In January 2001, soon after it was founded, Star One formally hired Mr. Beeman to advise it with respect to negotiating and drafting what became the 2002 Agreements with Andesat. R. 73-75.

There is no dispute among the parties that Mr. Beeman was integral to those negotiations. From January 2001 to May 2002, Hughes Hubbard billed Star One nearly \$775,000 for its work on the project. R. 29, 45. Mr. Beeman and his team were responsible for ensuring compliance with applicable regulations, acquiring necessary permits and licenses, negotiating with Andesat over the compromises and exchanges inherent in each party's contribution to the joint venture, and drafting the contract language to ensure that the written documents accurately reflected the agreements between the parties. R. 42-43, 259-61.

In order to accomplish these tasks on Star One's behalf, Mr. Beeman was granted full access to Star One's executive management and relevant internal documents, and of necessity he had to discuss with his client Star One's confidential negotiating positions and business objectives as to every aspect of the compromises and trade-offs inherent in the complex agreements. R. 42-43. Mr. Beeman knew the value Star One placed on the orbital access it was getting from Andesat, and he also knew the value Star One placed on the right of use it was granting Andesat in return for access to that orbital position. This was a key point of contention in the negotiations: Andesat initially demanded more than double the transponder capacity it was eventually granted in the 2002 Agreements, and it was only after direct negotiations between Mr. Beeman and Andesat's president that Star One convinced Andesat to accept less. R. 43. Mr. Beeman also advised Star One about regulatory approvals required from individual nations within the broadcasting range of a commercial satellite, a critical part of any transaction in a highly regulated industry. *Id.*

The 2002 Agreements were signed in late April of 2002, and Mr. Beeman's work for Star One concluded at that time. He and his firm continued to advise Star One's parent company, Embratel, in a variety of matters until at least 2008. R. 45.

B. Mr. Beeman's Real-Estate Work For Andesat

Approximately one month after the 2002 Agreements were signed, Mr. Beeman was approached by Luis Hernando Escobar, the president of Andesat, who had led the 2002 negotiations on behalf of his company. Mr. Escobar told Mr. Beeman that Andesat planned to open an office in Miami, and he asked Mr. Beeman whether Hughes Hubbard would be willing to represent Andesat in connection with the necessary real estate transactions. R. 263. According to Mr. Beeman's affirmation below, he told Mr. Escobar that "since the subject-matter of the proposed representation was not related to the Bolivarsat Agreements, [he] did not foresee that the proposed representation would conflict with the interests of Embratel or Star One." *Id.* Out of "an abundance of caution," however, Mr. Beeman sought Embratel's consent before agreeing to the representation. R. 263-64. He sent an e-mail to the general counsel of Embratel, stating that in his view, "this matter poses no conflict with Embratel, [but] I would nonetheless seek your consent." R. 612. Embratel's general counsel wrote back the next day, stating that "I see no problem to you rendering legal advice[] to Andesat on local real estate matters." R. 613. Mr. Beeman's firm accepted the representation and, as far as the record reveals, performed it satisfactorily.

C. The 2004 Agreements

Meanwhile, several months after the 2002 Agreements were signed, there was a severe market contraction in South America, both generally and in particular with respect to satellite services. R. 43. By Star One's estimates, for example, long-term demand for these services in the relevant markets was approximately 40% lower in October of 2002 than the parties had estimated as recently as the previous June. R. 606. In addition, in late 2002 Star One was granted the right by the Brazilian government to broadcast Ku-band satellite signals from an orbital position (65° West) from which Star One had long been serving customers on the "C" band, on a satellite that was nearing the end of its useful life. R. 607. This new access created the possibility for the first time of launching a "hybrid" satellite operating in both the C and Ku bands; that option would allow Star One to replace its aging C-band satellite and initiate Ku-band service from a single satellite, providing substantial economies over building and launching separate satellites for the two bands. In addition, the hybrid option ensured an existing market (existing C-band customers) for a part of the satellite's capacity, substantially reducing the commercial risk associated with the enormous cost of building and launching a new satellite. In the context of a severe market downturn, these considerations, among others, led Star One to conclude that it no longer made economic sense to risk the enormous investment for the construction and launch of a Ku-band-only

satellite with no existing customers into Andesat's orbital position. *Id.* As a result, Star One approached Andesat in November 2002 and suggested that the parties meet to reassess their business plan. R. 605-07.

Over the course of the next five months, Andesat and Star One discussed various alternatives to their original arrangement. In May 2003, they signed a Memorandum of Understanding expressing their mutual "willingness to renegotiate the original agreements in order to seek their commercial and social objectives." R. 177. This re-negotiation, in which Star One was represented by its newly-constituted in-house legal team along with Brazilian outside counsel, continued until March 2004, when the parties signed a new set of agreements, referred to in the court below as the "2004 Agreements." The essence of the revised relationship was as follows: While preserving the Bolivarsat Joint Venture in modified form, the parties would concentrate their efforts on operating a satellite in Star One's position at 65°W. Star One would acquire a "hybrid" C and Ku-equipped satellite and launch it into its own orbital position. In exchange for Andesat agreeing to terminate the 2002 Agreements, in which Andesat had a right to use some of the satellite's capacity as well as the obligation to provide the rights to the orbital slot and to pay certain of the costs of satellite operations, Star One agreed to provide Andesat with free use of a portion of the new satellite to broadcast Ku-band service to its member countries. R. 249.

Under the new Agreements, Andesat no longer had any financial obligation, but it agreed to assist Star One in securing regulatory approvals (“landing rights”) from Andesat’s member countries to transmit signals to and receive signals from their territories. R. 191-92. In addition, Andesat’s right to use the satellite was conditioned on Star One receiving landing rights from all of the nations that formed CAN. R. 191. The 2002 Agreements had not contained any provisions regarding landing rights, although the allocation of the risks and responsibilities for securing such regulatory approvals was inherent in that deal as it is in any such satellite transaction. Under the 2002 Agreements, Andesat’s ability to exploit its exclusive marketing rights in the CAN territories depended on securing such rights from its member nations; however, because Andesat’s rights depended on approvals from the governments under whose authority it operated, there was no need to provide for regulatory risk in the contract: Andesat bore its own risk that its home governments would not grant landing rights, as did Star One.

In contrast, in the depressed market conditions underlying the 2004 Agreements, the ability to operate in CAN markets as well as the remainder of Latin America became much more important to the viability of the investment for Star One. Accordingly, the new Agreements conditioned Andesat’s right to free use of the satellite on Star One obtaining landing rights in the territories of Andesat’s home governments. Thus, while the specific allocation of risks under

the two contracts was different as a result of changed market circumstances, the underlying considerations that had to be addressed by the parties and their counsel were very much the same.

Various provisions from the 2002 Agreements regarding remedies for breach, limitations on liability, *force majeure*, and choice of law were reproduced in substantially similar form in the 2004 Agreements.

D. The Present Dispute

As work progressed on the Star One satellite, several disagreements arose between the parties. In May 2006, for example, Star One reminded Andesat that its right to use the satellite was conditioned on obtaining landing rights from Venezuela, which had not yet provided such authorization. R. 62. Andesat initially disputed that assertion, arguing that any obligations it had regarding the acquisition of landing rights were themselves conditioned on various preliminary steps that were supposed to have been taken, and allegedly had not been taken, by Star One. The parties also disagreed about the required launch date of the satellite. The contracts called for the satellite to be launched in October 2006, but Alcatel encountered construction delays that Star One asserted fell within the *force majeure* clause of its agreements with Andesat, pushing back the anticipated launch date until November 2007. Andesat disputed Star One's explanation, asserting that the construction delays were not covered by the *force majeure*

clause. R. 65. By the time the satellite went into commercial operation on December 20, 2007, relations between the parties were frayed, and each believed the other had breached various contractual obligations.

In January 2008, Star One's president, Gustavo Silbert, wrote to Mr. Escobar, Andesat's president, and informed him that as a result of Andesat's failure to obtain landing rights from Venezuela, Star One no longer had an obligation under the 2004 Agreements to provide Andesat with access to the Star One satellite. R. 277. Mr. Escobar wrote back 12 days later and disputed Star One's assertion. According to Mr. Escobar, the contracts had allocated to Star One the responsibility to obtain Venezuelan landing rights, and the failure to obtain those rights was not a proper ground to deny Andesat its IRU. R. 278-80.

At the conclusion of his letter to Star One, Mr. Escobar demanded that Star One, within five business days, provide Andesat the satellite access it believed it was due under the 2004 Agreements. R. 280. If that condition was not met, Mr. Escobar asserted that Andesat would "immediately declare" that Star One had breached the 2004 Agreements, and would "proceed to request . . . arbitration in New York." *Id.* This arbitration, Mr. Escobar wrote, would "demand[] payment, not only for the compensation owed to us [under the 2004 Agreements], but also for all the damage caused from the date you first fail[ed] to comply" with the original 2002 Agreements. *Id.* According to Mr. Escobar's letter, as a result of

Star One's "non compliance" with the 2002 Agreements, the Andean Community had revoked Andesat's right to exploit the 67° West Orbital position, causing considerable monetary damages to Andesat. *Id.*

E. Andesat Hires Charles Beeman

The parties subsequently engaged in brief settlement negotiations. According to Mr. Escobar, however, Star One broke off the negotiations abruptly in approximately March 2008. At that point, Mr. Escobar called Mr. Beeman – Star One's former attorney, who was still representing Star One's parent, Embratel. According to Mr. Beeman's affirmation below, Mr. Escobar informed him in this initial phone call that the original 2002 Bolivarsat agreements between Star One and Andesat had been superseded by a new set of contracts, and that "business differences" had arisen between the parties over fulfillment of their responsibilities under those contracts. R. 264-65. The purpose of Mr. Escobar's call was to ask Mr. Beeman to call Embratel on Andesat's behalf and express Andesat's desire to continue settlement discussions. *Id.* Recognizing the potential conflict with Star One (but not, apparently, with his still-current client, Embratel), Mr. Beeman reviewed the 2004 Agreements and concluded that, in his judgment, they were "not substantially related to the transactions described in the Bolivarsat Agreements." R. 265. On the basis of that conclusion, he agreed to make the call. He spoke briefly to his principal contact in Embratel's legal department, passing on Mr.

Escobar's desire to continue negotiations. Nothing came of the discussion. R. 266.

Three months later, Mr. Beeman resigned his partnership at Hughes Hubbard and joined the Akerman firm. *Id.* During the following weeks, in addition to transitioning various matters he brought with him from Hughes Hubbard, Mr. Beeman also "focused on . . . developing new business opportunities in collaboration with [his] new colleagues. Among those opportunities was that of representing Andesat in connection with the Arbitration [against Star One]." R. 267. Mr. Beeman does not disclose what communications, if any, he had had in the intervening months with Mr. Escobar before leaving Hughes Hubbard that led him to see representation of Andesat against Star One as a new business opportunity.

Over the course of several months after his arrival at Akerman, Mr. Beeman and one of his new partners, Luis O'Naghten, "had intermittent discussions with Andesat regarding the alternatives that might be available to it in the event no settlement was achieved." R. 268. Finally, in February 2009, Mr. Escobar informed Mr. Beeman and Mr. O'Naghten that Andesat wished to bring an arbitration proceeding against Star One, using the Akerman firm as counsel. *Id.* For this proposed representation, unlike the one several years earlier regarding Andesat's real estate transaction, Mr. Beeman did not inform Star One or Embratel

of Andesat's request, nor did he seek their consent. Instead, he consulted with his firm's general counsel, who agreed with Mr. Beeman's assessment that the representation did not present a conflict with his former client. R. 267-68. Akerman thus accepted the representation.

F. Andesat Brings An Arbitration Claim Against Star One

During the next two months, the Akerman firm prepared an arbitration request on Andesat's behalf, alleging that Star One had breached both the 2002 and 2004 Agreements, and seeking substantial damages. According to his subsequent affirmation, Mr. Beeman assisted Mr. O'Naghten in preparing the arbitration documents by teaching him about the satellite industry and by "reviewing and revising the drafts of the Request for Arbitration." R. 268. During the first two months of Akerman's representation of Andesat, Mr. Beeman's work "constituted approximately 19% of the total time [the Akerman firm] expended on the matter." *Id.* Andesat's Request for Arbitration was filed on March 26, 2009 and signed by Mr. O'Naghten on behalf of the Akerman firm. R. 68. Mr. Beeman's name did not appear on any publicly filed or served documents.

The Request for Arbitration asserted that Star One breached both the 2002 and 2004 Agreements. See R.-50 ("Andesat and Star One reached agreements in 2002 and 2004 pursuant to which Andesat would be granted an indefeasible right of use ("IRU") to certain transponder capacity on a satellite to be acquired and

placed into orbit by Star One. Star One breached both agreements.”). Specifically, the Request asserted that Star One’s failure to build and launch the Bolivarsat Satellite contemplated by the 2002 Agreements “had disastrous consequences for Andesat,” including the loss of its exclusive rights to commercially exploit the Andean orbital position, and the “enmity of the Venezuelan government.” R. 61. The Request also alleged several breaches of the 2004 Agreements, including the failure to launch the satellite on time in 2006 (in contravention of various notice requirements purportedly set out in the *force majeure* clause), R. 65, and the eventual failure to provide Andesat the IRU it was promised in the 2004 Agreements. R. 66.

Ultimately, Andesat claimed that Star One’s breach of both contracts caused “enormous damage,” *id.*, including the loss of its right to exploit the IRU granted in the 2004 Agreements, the permanent loss of its right to exploit the 67° West orbital position, and various out-of-pocket expenses incurred “[i]n connection with its performance of the 2002 Agreement and the 2004 Agreement,” now “rendered . . . meaningless” by Star One’s alleged breach. R. 67. As predicted in Mr. Escobar’s original demand letter, Andesat therefore thus sought two categories of damages: (1) “the commercial value of the Andesat IRU,” and (2) “all expenses incurred by Andesat since its inception.” *Id.*

G. The Disqualification Motion

Andesat's arbitration request gave no indication of Mr. Beeman's involvement in the litigation. Star One had not been informed of any potential conflict or asked to consent to the representation, and Andesat's Request had been signed by an unfamiliar attorney on behalf of an unfamiliar law firm. While preparing its defense, however, Star One learned that Mr. Beeman had left Hughes Hubbard and joined the Akerman firm and that he was in some manner participating in the arbitration against Star One. Star One immediately raised the question with Andesat's counsel and, when those discussions failed to resolve the issue, promptly moved in the IAS court to disqualify Mr. Beeman and the Akerman firm from the arbitration.² R. 21. It was only in response to this motion that Star One learned that Akerman's representation of Andesat had originated with Mr. Beeman and that Mr. Beeman had played an integral role in the preparation of the arbitration claims and pleadings.

After briefing and argument, the IAS court denied Star One's petition to disqualify the Akerman firm. The petition was decided on the papers after oral argument; the court below did not conduct an evidentiary hearing or otherwise take

² The arbitration was stayed pending the resolution of the motion to disqualify. At Andesat's request, the process of constituting the tribunal was resumed following the IAS court's ruling, over the objection of Star One. Whether the stay will remain in effect has been referred by the ICC to the arbitral tribunal, once constituted.

live testimony from any witnesses. Justice Lowe cited two grounds for his ruling. *First*, in the court’s view, the “specific issues raised in the arbitration” were not “identical to” or “essentially the same as” the issues at stake in the prior representation. R. 17. Because Andesat claimed in the arbitration that Star One had misinterpreted the “landing rights” provision of the 2004 agreement – a provision not contained in the 2002 agreement – Justice Lowe believed that the questions at issue in the current arbitration were not substantially related to the issues at stake in Mr. Beeman’s prior representation of Star One. R. 18. *Second*, the court noted that “Star One has not pointed to any specific confidential information that Beeman may have learned that is substantially related to the current dispute.” *Id.*

This appeal followed.

SUMMARY OF ARGUMENT

The IAS court made two errors in denying the petition to disqualify Mr. Beeman and the Akerman firm.

First, the court erroneously concluded that the issues in the arbitration, which it construed very narrowly as limited to landing rights, were not “identical to” or “essentially the same as” the issues at stake in Mr. Beeman’s prior representation of Star One. However, the pending arbitration request does not limit itself to allegations that Star One breached the 2004 Agreements, which

Justice Lowe held were distinct from the 2002 Agreements that Mr. Beeman negotiated. To the contrary, the request for arbitration seeks a determination that Star One breached the 2002 Agreements as well as the 2004 Agreements, and it seeks damages stemming from both alleged breaches. Even if this were not the case, the representations would still be substantially related. The contracts involved the same parties, in the same industry, addressing the same or heavily overlapping economic, regulatory, and commercial issues; indeed, the 2004 Agreements expressly stated that they were intended to “compensate” Andesat for termination of their 2002 antecedents.

The IAS court held that the two representations were distinct because the pending arbitration involves allegations regarding “landing rights,” which were not discussed explicitly in the 2002 Agreements. But landing rights are essential to the operation of any communications satellite and thus were necessarily at issue in the negotiation and drafting of the 2002 Agreements, even if the business context at the time did not require a specific term addressing the point. By not addressing the point, the 2002 Agreements left each party to bear its own risk that landing rights would not be obtained. Given the central importance of landing rights to the operation of a telecommunications satellite, Mr. Beeman was necessarily involved in discussions with Star One’s counsel and management on this critical topic. In addition, many of the claimed breaches of the 2004 Agreements involve provisions

that were reproduced in virtually identical form from the 2002 Agreements. Any reasonable attorney evaluating the situation would conclude that there is a substantial risk that Mr. Beeman possesses confidential information pertaining to these subjects that could give his current client an unfair advantage in the arbitration.

Second, the IAS Court erred by holding that Star One had a burden to identify “specific confidential information” known to Mr. Beeman in order to prevail on a motion for disqualification. New York law is clear that parties moving to disqualify conflicted attorneys “need not actually spell out the claimed secrets and confidences in order to prevail.” Rather, a party must show that there is a “substantial risk” that the challenged attorney possesses relevant confidential information and that there is therefore a “reasonable probability” that he has a disqualifying conflict. Star One has made that showing.

Finally, even if the IAS court had been correct that the pending arbitration concerned issues that were not substantially related to those under discussion with his clients in Mr. Beeman’s prior representation of Star One, it was still error to deny the motion, because the circumstances of Mr. Beeman’s current representation of Andesat create, at the very least, a disqualifying appearance of impropriety. This representation originated when Andesat reached out to Star One’s former counsel for the express purpose of taking advantage of his perceived

relationship with Star One. When that relationship failed to produce the intended effect (hastening a settlement), Andesat hired Mr. Beeman and his new partners to bring an adversarial proceeding against Star One, without ever disclosing Mr. Beeman's involvement to Star One or seeking its consent, as Mr. Beeman had done several years earlier on an indisputably unrelated matter. Instead, rather than disclosing the representation, Andesat's moving papers were signed by a lawyer and law firm whose names were unfamiliar to Star One. Under such circumstances, the appearance of impropriety alone is sufficient to disqualify Andesat's counsel from continuing the representation.

STANDARD OF REVIEW

The decision to grant or deny a disqualification motion is committed to the discretion of the Supreme Court. *Hirschfeld v. Stahl*, 194 A.D.2d 388, 388 (1st Dep't 1993). That discretion is vested equally in the IAS Court and this Court. *See, e.g., Northern Westchester Professional Park Assocs. v. Bedford*, 60 N.Y.2d 492, 499 (1983); *Jacques v. Sears, Roebuck & Co.*, 30 N.Y.2d 466, 471 (1972) ("Appellate Division has the same power to exercise discretion as the trial court.") (citing CPLR 5501(c); 7 Weinstein-Korn-Miller, N. Y. CIV. PRAC., ¶ 5501.22; Cohen and Karger, POWERS OF THE NEW YORK COURT OF APPEALS, at 583)); Siegel, N.Y. PRACTICE § 529 (3d ed. 1999). Moreover, as a division of the Supreme Court, this Court has the authority to review any factual findings made by

the trial court, particularly where, as here, those findings are not dependent on an assessment of the credibility of live witness testimony. *See Northern Westchester Professional Park Assocs.*, 60 N.Y.2d at 499; *Society of New York Hosp. v. Burstein*, 22 A.D.2d 768 (1st Dep’t 1964); Siegel, N.Y. PRACTICE § 529.

ARGUMENT

The governing law is undisputed. Rule 1.9(a) of the New York Rules of Professional Conduct states that

[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 a former client unless the former client gives informed consent, confirmed in writing.

N.Y. Rules of Prof’l Conduct R. 1.9(a). Rule 1.10 further provides that

[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule . . . 1.9, except as otherwise provided therein.

Id. at R. 1.10(a). The relevant rules are identical in Florida, where Mr. Beeman is also a member of the bar, and where he practices. *See Fla. R. Prof’l Conduct 4-1.9(a)* (Florida’s analog of N.Y. R. 1.9(a)); *Id.* R. 4-1.10(a) (analog of N.Y. R. 1.10).

As the IAS court explained, the parties agree that

[u]nder [Rule 1.9], a party seeking to disqualify its adversary’s attorney must prove: “(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that

the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse.”

R. 12 (quoting *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131 (1996)).³ See also *Estate of Jones v. Beverly Health & Rehab. Servs., Inc.*, 68 F. Supp. 2d 1304, 1308 (N.D. Fla. 1999) (under Fla. R. 4-1.9, an attorney may be disqualified if the movant proves (1) the existence of a prior attorney-client relationship with the movant, and (2) the matters in the pending suit are substantially related to the previous matter). The parties further agree that in this case, the first and third prongs for disqualification are met: there is no dispute that Mr. Beeman had a prior attorney-client relationship with Star One, or that the interests of Star One are materially adverse to the interests of Andesat, Mr. Beeman’s current client. The only issue to be determined in this litigation, therefore, is whether “the matters involved” in Mr. Beeman’s prior representation of Star One are “substantially related” to issues at stake in the current arbitration. They are.⁴

³ The Rules of Professional Conduct were adopted by New York on April 1, 2009, replacing the former Code of Professional Responsibility. The language discussing an attorney’s responsibilities to former clients (formerly found in DR5-108), and imputation of an attorney’s conflict to his law firm (formerly found in DR5-105(d)), remains substantially unchanged. Both parties and the lower court therefore relied below (and Star One continues to rely in this brief) on cases such as *Tekni-Plex* (cited above) applying the previous standards.

⁴ The task of determining whether a lawyer should be disqualified from representing a party in an arbitration is properly undertaken by the IAS court, overseen by this Court, because “matters of attorney discipline are beyond the

I. THE PENDING ARBITRATION IS “SUBSTANTIALLY RELATED” TO MR. BEEMAN’S REPRESENTATION OF STAR ONE.

According to the Comments to New York’s Rules of Professional Conduct,

[m]atters are “substantially related” for purposes of [Rule 1.9] if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

N.Y. Rules of Prof’l Conduct R. 1.9, Cmt. [3]⁵; *see also* Restatement (Third) of the Law Governing Lawyers § 132 Cmt. d(iii) (if the prior matter did not involve litigation, whether it is substantially related is determined “by reference to the work that the lawyer undertook and the array of information that a lawyer

jurisdiction of arbitrators. ” *Bidermann Indus. Licensing, Inc. v Avmar N.V.*, 173 A.D.2d 401, 402 (1st Dep’t 1991). “Issues of attorney disqualification similarly involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client’s choosing, and cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries engaged in.” *Id.* (internal citations omitted).

⁵ The New York Rules of Professional Conduct have been adopted by this Court. *See* 22 NYCRR Part 1200. This Court has not enacted the Comments, which are published by the New York State Bar Association and are intended “to provide guidance for attorneys in complying with the Rules.” *See* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm (last visited July 9, 2010). The Comments, as with the remainder of the Rules, are based on the ABA Model Rules of Professional Conduct, and are regularly cited by this Court and others throughout the country in determining the meaning and scope of professional conduct rules.

ordinarily would have obtained to carry out that work”); *Jones*, 68 F. Supp. 2d at 1310 (under the Florida Rules of Professional Conduct, for matters “[t]o be substantially related, the matters need only be akin to the present action in a way reasonable persons would understand as important to the issues involved.”) (internal marks and citations omitted).

The lower court concluded that although there are “connections between the 2002 Agreements and the 2004 Agreements,” R. 17, Mr. Beeman’s representation of Star One in the 2002 negotiations was not substantially related to his subsequent representation of Andesat in the current arbitration brought pursuant to the 2004 Agreements, because “the specific issues raised in the arbitration,” *id.*, involve provisions of the 2004 Agreements (specifically, the sections governing “landing rights”) “that were not part of the 2002 Agreements.” R. 18. This conclusion was erroneous. First, the factual premise was incorrect, because the Request for Arbitration raises at least as many issues directly related to the 2002 Agreements as it does issues “unique” to the 2004 Agreements. Moreover, even the issues the court believed involved nothing more than construction of the 2004 Agreements still implicate issues about which any reasonable lawyer would conclude that Mr. Beeman possesses confidential information from Star One.

A. The Arbitration Request Alleges Breach Of The 2002 Agreements.

First, the IAS court erred by concluding that the only issue at stake in the pending arbitration is the “landing rights” issue purportedly unique to the 2004 Agreements. In fact, although the “landing rights” issue is important to the pending arbitration, it is not the only issue on which Andesat relies. The Request for Arbitration is 19 pages long. Nearly half of those pages are devoted to a detailed discussion of the 2002 Agreements, and to various allegations that Star One breached those Agreements. Indeed, Andesat devotes more space to allegations regarding the 2002 Agreements than to any other single topic. *See, e.g.*, R. 50 (“Andesat and Star One reached agreements in 2002 and 2004 Star One breached both agreements.”); *id.* (“In short, Star One breached its obligations under the 2002 Agreement because it found a better deal.”); *id.* (“Star One’s breach of the 2002 Agreement was devastating to Andesat.”); *id.* at 51 (“Star One recognized that its breach of the 2002 Agreement rendered it liable for damages to Andesat.”); *id.* (“The compensation granted to Andesat in the 2004 Agreement was less than half of the compensation called for in the 2002 Agreement.”); *id.* at 59 (“Star One’s enthusiasm for the venture with Andesat was short lived.”); *id.* at 60 (“Faced with Star One’s *fait accompli*, Andesat responded by stating that it expected that Star One would ‘continue to honor [its] obligations to Andesat and the Andean Community.’); *id.* (“Star One’s delay in performance of the 2002

Agreement posed dire consequences for Andesat.”); *id.* (“Without regard either to its obligations or the negative impact on Andesat, on November 18, 2002, Star One informed Andesat that it had breached the 2002 Agreement . . . for three alleged reasons. . . . None of these reasons excused Star One’s performance under the 2002 Agreement.”); *id.* at 61 (“Star One’s breach of the 2002 Agreement had disastrous consequences for Andesat.”); *id.* at 67 (“Star One’s numerous breaches caused Andesat’s rights to exploit the 67°W orbital position to be revoked.”).

These allegations are not window dressing or simple background. They are essential to Andesat’s claims. Andesat alleges in the pending arbitration that Star One breached the 2002 Agreements, and it seeks damages directly related to that purported breach. Specifically, Andesat claims that Star One is responsible for reimbursing all of Andesat’s operating expenses “since its inception” in 1997. R. 67. It makes this request because under the 2004 Agreements, Andesat is not permitted to recover lost profits in the event of breach. R. 209. It may, however, recover expenses incurred in reliance on the breached contract. But its request for damages is not limited to expenses incurred in reliance on the 2004 Agreements. It includes substantial expenses incurred *before* the execution of the 2004 contracts. Expenditures made before the 2004 Agreements were signed were not made in reliance on those Agreements. Therefore, to attempt to support this portion of its claim, Andesat argues that Star One breached the 2002 Agreements, including the

assertion that Star One's purported breach of the those Agreements caused the Andean Community to revoke Andesat's right to exploit the Andean orbital position, purportedly rendering Andesat's entire 13-year business operation "meaningless." *Id.*

This is the same theory Andesat has been pursuing from the moment it first accused Star One of breaching the 2004 Agreements. In his January 2008 letter to Star One, Andesat's president, Mr. Escobar, threatened Star One with an arbitration proceeding in which Andesat would seek damages for breach of *both* contracts. *See* R. 280 (threatened arbitration would "demand[] payment, not only for the compensation owed to us [under the 2004 Agreements], but also for all the damage caused from the date you first fail[ed] to comply" with the original 2002 Agreements). Weeks after sending that letter, Mr. Escobar reached out to the lawyer who had negotiated the 2002 Agreements for Star One, asking him to intervene on Andesat's behalf with his then-current client, Embratel, and ultimately hiring him to bring an arbitration claim making the threatened allegations, against Star One.

The law does not permit Mr. Beeman to represent Andesat in an adversarial proceeding alleging, even in part, that Star One breached the contract he drafted on its behalf. No one, including Mr. Beeman, disputes that he possesses confidential information regarding Star One's negotiation and interpretation of the 2002

Agreements. Among other things, the 2002 Agreements contain carefully drafted and negotiated provisions limiting liabilities for breach. *See* R. 144, 165-66, 589. The conclusion is inescapable that Mr. Beeman had to have had discussions with Star One concerning its objectives as to those limitations, which were carried over almost verbatim into the 2004 Agreements (*see* R. 194-95, 208-09) and would assume great importance in the Arbitration if Andesat could establish a breach. Indeed, in the normal course of advising a client on any contract negotiations and then drafting contract provisions, an attorney gives advice to his client on, among other things, the limits of its obligations under the contract, the exact meaning of various provisions, potential vulnerabilities, and defenses in the event of breach. It can be “reasonably” assumed, therefore, that in the course of representing Star One in negotiating and drafting the 2002 Agreements, Mr. Beeman came into possession of confidential information about Star One’s legal strategies with respect to each of these subjects.

Such information would be vital to an adversary in determining which arguments to press, in substantive briefing, in questioning witnesses, and in settlement negotiations. And it is undisputed in this case that Mr. Beeman played a substantial role in crafting the legal arguments to be pursued in the arbitration. R. 268. Under such circumstances, disqualification is required. *See, e.g.*, Restatement (Third) of Law Governing Lawyers § 132, Cmt. d(iii) (“When the

prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work.”) (citing, e.g., *U. S. Football League v. Nat’l Football League*, 605 F.Supp. 1448 (S.D.N.Y. 1985) (law firm that had recruited franchisees and negotiated leases for sports league could not represent competing league in antitrust suit initiated by the former client); *Aleut Corp. v. McGarvey*, 573 P.2d 473 (Alaska 1978) (lawyer who had represented corporation and knew particular property acquisition was bad investment could not then represent shareholders in derivative suit alleging false representations about investment in corporation’s proxy statement)).

B. The Allegations Regarding The 2004 Agreements Involve Issues Related To The 2002 Agreements.

Even if the IAS court had been correct that the current arbitration only involved allegations that Star One breached the 2004 Agreements, disqualification would still be required because of the substantial overlap of issues between the 2002 and 2004 contracts.

As an initial matter, even if there were *no* overlap between the specific contract provisions at issue in the arbitration and the provisions of the 2002 Agreements, the nature of the two agreements themselves is sufficient to compel the conclusion that Mr. Beeman’s two representations are substantially similar for purposes of the disqualification rules. The 2004 Agreements were a renegotiation

of the 2002 Agreements. The new agreements were between the same parties, and the subject matter is the same – terms and conditions relating to the use of transponders in telecommunications satellites positioned to serve the Andean and South American markets. Indeed, the 2004 Agreements on their faces recite that they represent a “substantial modification of the [2002] commercial arrangements,” R. 186, and that “the Parties have agreed to modify certain terms and conditions” and thus provide for “consideration” for the termination of the earlier contracts. R. 190. Certain of the new contracts were referred to as “Amendments to the Original Bolivarsat Documents.” *Id.* And some provisions of the original contracts were reproduced virtually without change in the new. That the 2004 Agreements represented the evolution of the prior relationship in response to changed market conditions rather than an entirely new transaction is beyond dispute.

There were certainly differences between the two sets of contracts: the original agreements contemplated a joint venture in which the parties would jointly exploit Andesat’s access to the 67° West orbital position controlled by the Andean Community; the new agreements shelved the joint venture and involved the parties’ exploitation of Star One’s access to the 65° West position, controlled by Brazil. But the relevant markets, the risks to be allocated by the agreements, and the essential purpose of both sets of contracts was the same.

In fact, Andesat relies on a number of provisions of the 2004 Agreement that were incorporated almost verbatim from their 2002 predecessors. Andesat asserts, for example, that Star One misused the *force majeure* clause as an improper excuse for delaying construction of the satellite (*see* R. 65 (“Andesat rejected the force majeure allegation and stated that such an explanation did not excuse Star One’s failure of performance. Accordingly, Star One’s failure to put the C1 satellite in orbit by the end of October 2006 was a breach of the 2004 Agreement.”)). That clause, including the notice requirements that Andesat now claims Star One breached, was reproduced in substantially identical form from the 2002 Agreements. *Compare* R. 142, 588 *with* R. 213-14. The arbitration will also invariably involve construction of the various remedy provisions that are similar in both sets of agreements (*compare* R. 144, 165-66, 589 *with* R. 208-09), and potentially, the similar provisions governing limitations on liability (*compare* R. 144, 165-66, 589 *with* R. 194-95, 209). In negotiating these provisions of the 2002 Agreements for Star One, Mr. Beeman had to have spoken to his client about their concerns and attitudes toward potential breach and litigation risk. If Andesat could prove a breach, the limitations on available remedies could prove central to its claims for damages.

Andesat argued below that any confidential information Mr. Beeman possessed on this subject has been rendered obsolete by the passage of time,

particularly in light of the changes in the satellite market that compelled renegotiation of the 2002 Agreements. The passage of time is “a circumstance that may be relevant in determining whether two representations are substantially related.” R. 1.9, Cmt. [3]. Here, however, where the two representations involve the same parties, the same rights, and the same commercial markets, and where the information (about Star One’s internal valuations) has not otherwise been made public, Mr. Beeman cannot know whether (and Andesat has not established that) the information he possesses is no longer current enough to give his client an advantage – particularly where, as here, the circumstances compel the conclusion that Andesat sought out Mr. Beeman at least in part precisely because of his familiarity with the transaction. In any event, Andesat claims damages stemming from alleged breach of the initial agreements, about which Mr. Beeman’s original knowledge is undoubtedly relevant.

Moreover, even with respect to the IAS court’s narrow conclusion below, the “landing rights” issue is not unique to the 2004 Agreements, such that Mr. Beeman can be presumed to know nothing of value about Star One’s confidential information on the subject. Because the right to “land” signals for retransmission to customers is essential to the telecommunications business, the allocation of risk and responsibility for acquiring landing rights was just as critical in the 2002 negotiations as in the 2004 negotiations. After all, without landing rights in the

target market, a satellite operator cannot market its services at all. And because these rights are controlled by governments, they are subject to political risk and interference, making a party's relationship with the regulator extremely important. To be sure, the 2002 Agreements treated the issue differently from the 2004 Agreements, because adverse economic conditions had required a change in marketing priorities: in 2004, Star One needed assurance of access to the Andean markets to make the project viable economically in a down market, whereas under the 2002 Agreements, Andesat had exclusive rights to market in CAN member nations and Star One was largely indifferent to landing rights there. As a result, the 2004 Agreements put the risk of not receiving landing rights in all of the Andean nations – Andesat's home jurisdictions – on Andesat, whereas in 2002, where each party was to operate in its own home territory, each party bore its own risk that landing rights would not be granted. Nevertheless, the need for the lawyers to discuss with their clients their views and approaches to these regulatory approvals in order to arrive at the appropriate contractual allocation of risk was the same in both cases.

As a result, the fact that landing rights were treated *differently* in the two agreements does not mean that the respective issues surrounding the allocation of risk of acquiring those rights are not *related*. Any reasonable lawyer would believe that there is a substantial risk that Mr. Beeman possesses confidential

information about Star One's views on landing rights and its business strategies surrounding the treatment of those rights in the contracts. Moreover, that overlap is at the heart of Andesat's contention that Star One raised the landing rights issue as a pretext to justify non-compliance. In short, Andesat itself puts directly in issue whether Star One had a good-faith belief that the acquisition of landing rights was a critical component of the deal – and thus the importance of such rights to Star One in general.

This is all the rules require to compel disqualification of a potentially conflicted attorney. Contrary to the IAS Court's decision, Star One did not have the burden of proving that the 2002 and 2004 contracts were "identical," or that *every* issue at stake in the current arbitration was also an issue in the former representation. Rather, the two representations have to be interconnected enough so that "a reasonable lawyer would conclude that there is . . . a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." R. 1.9, Cmt. [3]. *See also Jones*, 68 F. Supp. 2d at 1310 ("To be 'substantially related' the matters 'need only be akin to the present action in a way reasonable persons would understand as important to the issues involved.'") (quoting *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1341, 1346 (5th Cir. 1981)); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir.

1978) (“[T]he determination of whether there is a substantial relationship turns on the possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought. The rule thus does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other. . . . [I]t is not appropriate for the court to inquire into whether actual confidences were disclosed.”).

In the normal course of representing a client in contract negotiations, Mr. Beeman would have been expected to have learned substantial confidential information about Star One’s internal legal positions on all of the issues involved in the compromises effected by the two sets of Agreements. Under the circumstances, he and his new firm must be disqualified.

C. Beeman’s Knowledge Of Negotiation Strategies Also Renders The Representations Substantially Similar.

Finally, even if the two sets of contracts had been as completely dissimilar as Andesat asserted below, Mr. Beeman’s knowledge of his former client’s business strategies and negotiating positions would be enough to render the two representations substantially related. As lead negotiator for Star One in the negotiations with Andesat, Mr. Beeman knew his client’s business strategies in this

precise market. He also knew, in the context of negotiations with *this* counterparty, exactly what his client was willing to concede, or compromise, and what positions were set in stone. Such intimate knowledge of a former client's business strategies and bargaining positions is a disqualifying conflict.

As the Restatement explains, the fact that “[a] lawyer might also have learned a former client’s preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations,” is often a factor in determining that representation of his former client’s adversary is substantially related to his representation of the original client. Restatement (Third) of Law Governing Lawyers § 129, cmt. d(iii). To be sure, the Restatement explains that a presumption of disqualification attaches only “when such information will be directly in issue or of unusual value in the subsequent matter,” *id.*, but here, that test is surely met. This lawyer knows this client’s *particular* tactics for dealing with negotiations with *this* adversary in *this* context. He knows the value the former client placed on the particular types of rights and risks at issue in this contract. He knows his former client’s internal assessments of the strengths and weaknesses of the positions it will be forced to take in this proceeding. That is enough to give rise to an inference of disqualification. *See, e.g.*, R. 1.9, Cmt. [3] (“In the case of an organizational client,

general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. *On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.*") (emphasis added); *Jones*, 68 F. Supp. 2d at 1310-11 ("[T]here is an information advantage to [Plaintiff's counsel] in the instant case because of [his] knowledge of [defendant's] corporate posture regarding its defense of nursing home claims, its tactics with regard to the defense of these types of claims and its corporate position regarding their approach to settlement, all of which were learned by [him] during his prior representation."); *Ullrich v. Hearst Corp.*, 809 F. Supp. 229, 236 (S.D.N.Y. 1992) (lawyer disqualified under former New York rule where the knowledge gained in a former representation made it likely that he would know "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"); *Constant v. Kawasaki Motors Corp.*, 826 F.Supp. 427, 429 (M.D. Fla. 1993) (lawyer disqualified from representing plaintiff in motorcycle "crashworthiness" product-liability suit where lawyer previously represented same manufacturer in suits involving same issues and gained confidential information regarding manufacturer's practices used in defending such suits); *Kaselaan & D'Angelo Assoc., Inc. v. D'Angelo*, 144 F.R.D. 235, 244 (D.N.J. 1992)

(disqualifying lawyer defending employee in suit alleging breach of restrictive covenant in employment agreement because lawyer previously represented employer in employment matters concerning same issues and in which lawyer gained knowledge of employer's tactical approach to dealing with departing employees).

These concerns are all the more compelling here, where Mr. Beeman was involved in representing Star One in negotiating complex contracts involving the same parties in the same markets and the same subject matter. Rather than merely having knowledge of how the client handled similar issues with different parties, he was involved in negotiations with this same party on the same issues, even if in a different economic climate resulting in different terms. His knowledge of Star One's innermost thoughts on this transaction are directly relevant to the pending arbitration, and compel disqualification.

II. THERE IS NO REQUIREMENT TO SPECIFY PARTICULAR CONFIDENTIAL INFORMATION IN ORDER TO ESTABLISH A CONFLICT.

In addition to adopting an unduly narrow construction of the scope of the issues involved in the pending arbitration, the IAS court also erred by holding that in order to prevail, Star One was required to identify "specific confidential information" known to Mr. Beeman and relevant in the arbitration. The law is clear that Star One has no such obligation.

The recently enacted Professional Conduct rules specifically explain that a party moving to disqualify its former attorney from representing an adversary need not identify specific confidential information in order to establish the existence of a disqualifying substantial relationship between the two representations:

A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

N.Y. R. Prof'l Conduct 1.9, Cmt. [3]. This comment reflects well-settled New York law. As the Court of Appeals explained in *Jamaica Public Serv. Co., Ltd. v. AIU Ins. Co.*, 92 N.Y.2d 631 (1998), a party seeking to disqualify an adversary's attorney "need not actually spell out the claimed secrets and confidences in order to prevail." *Id.* at 632. Instead, such a party must show that there is a "reasonable probability" that confidences would be used improperly. *Id.* See also *Greene v. Greene*, 47 N.Y.2d 447, 453 (1979) (not necessary for a party seeking disqualification to show that "confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice"); *Westinghouse Elec. Corp.*, 588 F.2d at 224 ("[I]t is not appropriate for the court to inquire into whether actual confidences were disclosed.").

In ruling that Star One had failed to satisfy a purported burden to identify particular information known to its former counsel, the IAS court cited *Lightning Park v. Wise Lerman & Katz*, 197 A.D.2d 52 (1st Dep't 1994). But *Lightning Park* did not hold that parties alleging a substantial relationship between a lawyer's current and former representations must identify specific confidential information. Instead, the *Lightning Park* court commented merely that where a movant *cannot* establish such a substantial relationship, it may nonetheless prevail *instead*, if it is able to show that its former attorney possesses specific confidential information relevant to the current dispute. As this Court explained a decade earlier,

in cases involving the retention of counsel where the opposing party is the attorney's former client, disqualification has been directed on a showing of 'reasonable probability of disclosure' of confidential information obtained in the prior representation. Generally, in such cases an attorney will be disqualified where the party seeking that relief meets his burden by establishing a substantial relationship between the issues in the litigation and the subject matter of the prior representation, *or* where counsel had access to confidential material substantially related to the litigation. Such relief will not be granted, however, where there is no substantial relationship or where the party seeking disqualification fails to identify any specific confidential information imparted to the attorney.

Saftler v. Government Employees Ins. Co., 95 A.D.2d 54, 57 (1st Dep't 1983) (emphases added). Where, however, the moving party alleges that the two representations are themselves related, the question is whether one may reasonably infer that relevant confidential information might have been obtained.

This rule makes ample sense. As the Restatement explains,

[a] concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. . . . The substantial-relationship test avoids requiring disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. . . . When the prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work.

Restatement (Third) of Law Governing Lawyers § 132, Cmt. d(iii).

We readily acknowledge that a movant may not prevail on a disqualification motion based on “generalized allegations” that a prior lawyer possesses confidential information. *See Jamaica Pub. Serv.*, 92 N.Y.2d at 638. But once a party satisfies its burden of moving beyond such generalizations and identifying specific categories of confidences that normally accompany the sort of relationship previously enjoyed with a former lawyer, nothing more is required. It was error for the IAS court to deny the disqualification motion based on Star One's purported failure to identify specific confidential information known to Mr. Beeman.

III. THERE IS A DISQUALIFYING APPEARANCE OF IMPROPRIETY.

Finally, the IAS court did not give sufficient weight to the overwhelming appearance of impropriety that attends this representation. As the Court of Appeals has explained, the protections in the Professional Conduct rules are “designed to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation” *Solow v. Grace & Co.*, 83 N.Y.2d 303, 309 (1994). These protections are necessary in order to foster “the open dialogue between lawyer and client that is deemed essential to effective representation.” *Spectrum Sys. Int’l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991). “[E]ven the *appearance* of impropriety must be eliminated” in order for the system to function effectively. *Kassis v. Teacher’s Ins. & Annuity Ass’n*, 93 N.Y.2d 611, 618 (1999).

If ever there were a case where the appearance of impropriety should give rise to an inference of disqualification, this is it. After having no contact with Mr. Beeman for five years, Andesat’s president called him weeks after threatening arbitration against his former client, for the express purpose of exploiting his relationship with Star One’s parent company in order to restart settlement negotiations. Mr. Beeman agreed to represent Andesat in communicating with his still-current client, Embratel, a clear conflict. When those negotiations failed, Andesat hired Mr. Beeman and his firm to represent it in arbitration against Star

One. Mr. Beeman did not inform Star One of the engagement or seek its consent – despite having previously done so in a matter obviously unrelated to the subject of his prior representation. Even when the arbitration request was filed, Mr. Beeman’s name did not appear in any capacity, despite his having originated the client relationship and having billed nearly twenty percent of the time expended by his firm on the matter. The Akerman firm did not even attempt to erect an ethical wall around Mr. Beeman, or to otherwise screen him from the matter. To the contrary: Mr. Beeman was the relationship partner with Andesat, he billed substantial time to the matter, and he directly briefed his partners on important issues – all while staying in the background so that his former client would have no knowledge of his involvement.

For these reasons, erecting an ethical wall after the fact would not cure the prejudice or remove Akerman’s conflict. Even with no direct involvement by a conflicted lawyer in a representation by his firm, “there is an irrebuttable presumption of shared confidences among attorneys employed by the firm which forecloses the firm from representing others in the future in substantially related matters.” *Solow*, 83 N.Y.2d at 306. Erection of an ethical wall from the outset would have negated the only reason Andesat came to Akerman in the first place, so was never in consideration. Having allowed Mr. Beeman to play such an integral role in the arbitration, Akerman has discarded any possibility of curing this conflict

with an ethical wall. The appearance of impropriety is unavoidable and should preclude continued representation by Mr. Beeman and his new firm.

We recognize that “[a]bsent actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification of an attorney.” *Lovitch v. Lovitch*, 64 A.D.3d 710, 711 (2d Dep’t 2009) (internal citations omitted). But given the unusual facts in this case and the strong facial similarity between the two representations – the fact that the two contracts at issue are between the same parties, on the same subject matter, with similar terms, and are, without dispute, different stages in the same commercial relationship – we respectfully submit that the Court should be very cautious about allowing this representation to proceed.

CONCLUSION

The judgment should be reversed, and the petition should be granted.

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I, Scott A. Chesin, attorney for defendants-appellants, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2007. The typeface is Times New Roman. The main body of the brief is in 14-point type. Footnotes and point headings are in compliance with § 600.10(d)(1)(i). The brief contains 10,951 words as counted by the Microsoft Word word-processing program.

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