SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GUZEL GANIEVA, *Plaintiff,* v. LEON BLACK, *Defendant.*	Index No. 155262/2021 IAS Part 58 Hon. David B. Cohen **Motion Seq. No. 013**

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANT'S COUNSEL

PERRY GUHA LLP
E. Danya Perry
Peter A. Gwynne
Alexander K. Parachini
1740 Broadway, 15th Floor
New York, NY 10019
(212) 399-8330

Attorneys for Defendant Leon Black

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

PRELIMINARY STATEMENT

Bluntly, Plaintiff Guzel Ganieva's motion to disqualify Defendant Leon Black's long-standing counsel in this litigation (the "Motion" (NYSCEF Doc. No. 190)), Perry Guha LLP ("Perry Guha" or "PG"), is a shameful one. For a number of reasons—each one independently sufficient—Ganieva cannot remotely satisfy the appropriately high standard that would warrant denying a client his counsel of choice.

Ganieva alleges that, shortly before filing this civil action (and some 7 years after the events at issue), she made a complaint of sexual assault against Defendant Leon Black to the Manhattan District Attorney's Office ("DANY"). As part of that complaint, she further claims to have (indirectly) provided supposedly "confidential information" to then-Executive Assistant District Attorney Joan Illuzzi-Orbon. Because Illuzzi-Orbon now works as an independent contractor with PG on certain limited matters, Ganieva simply assumes that, as a result, (i) Illuzzi-Orbon would be conflicted from working on this matter, and (ii) this putative conflict should be imputed to PG such that the drastic measure of disqualification is appropriate. Neither assumption is accurate. Even assuming—incorrectly, as set forth below—that Illuzzi-Orbon would be disqualified from this matter, there simply is no basis for imputing any such conflict to PG.

First, as the sworn and unrebutted testimony accompanying this Opposition establishes,[1] Illuzzi-Orbon is not "associated" with PG under the ethical rules. Illuzzi-Orbon works as an "independent consultant," including with PG, on a very limited basis. She works only on

[1] In opposition to Ganieva's Motion, we also file herewith the Affirmations of E. Danya Perry ("Perry"), Samidh Guha ("Guha"), Joan Illuzzi-Orbon ("Illuzzi-Orbon"), and ethics expert Bruce A. Green ("Green"). Through her own counsel, Illuzzi-Orbon also has offered to provide the Court with a sealed supplemental affirmation containing additional information if the Court believes that would assist in its consideration.

specifically designated matters—two, currently—that the parties co-originate and that have nothing to do with Black. She devotes fewer than ten hours per week to these specific matters; maintains her own consultancy independent of PG, with her own clients; does not share other files or work in an office with PG; and works on an hourly basis, ensuring that she does not receive any income from PG's representation of Black, or even related to PG's overall performance. As a matter of law, Illuzzi-Orbon's circumscribed relationship as an independent contractor does not constitute "association" under the ethical rules.

Second, even if Illuzzi-Orbon were somehow deemed "associated" with PG, the testimony makes clear that there has been *no* flow of any even arguably relevant information between Illuzzi-Orbon and PG. They took great care to ensure that, on the one hand, Illuzzi-Orbon did not share any information regarding Black, and, on the other hand, that PG did not share any information regarding Black. Indeed, the nature of Illuzzi-Orbon's independent consultancy and the rigor of the precautions taken by PG and Illuzzi-Orbon are such that, until Ganieva's attorneys reached out to PG days before filing this Motion, PG had no idea what, if any, role Illuzzi-Orbon played in any effort by DANY relating to Black. Simply put, no relevant information has passed between PG and Illuzzi-Orbon. *This is undisputed.* And critically, *DANY has blessed PG's screening procedures and has deemed them to be compliant with ethical rules, in writing*. This alone should be sufficient to defeat this Motion.

Finally, aware that there was no actual impropriety and unable to support any claim that there was, Ganieva resorts instead to contending that the circumstances here lend themselves to the "appearance of impropriety." This argument is as wrong as it is desperate. Not only is the appearance of impropriety, standing alone, insufficient to justify the "drastic remedy" of disqualification, such a remedy should be avoided for prudential reasons: "courts must be wary

not to take action which will discourage other attorneys from entering government employment," *Spinner v. City of New York*, 2002 U.S. Dist. LEXIS 26390, at *20, *57 (E.D.N.Y. May 22, 2002), and if Ganieva's novel standard became the law, public sector attorneys would be severely hamstrung in their ability to pursue careers in the private sector.

Thus, even assuming the truth of Ganieva's allegations and arguments, no potential conflict of Illuzzi-Orbon's could be imputed to PG. But the truth of her allegations should *not* be assumed. Although Illuzzi-Orbon and PG have acted, in an extreme abundance of caution, as though Illuzzi-Orbon were conflicted, Ganieva has not met her heavy burden to demonstrate such a conflict even exists—as set forth in detail below.

For her own tactical reasons, Ganieva's Motion cynically attempts to impugn Illuzzi-Orbon's motives; Illuzzi-Orbon's and PG's commitment to the survivors they represent; and Black's entitlement to the counsel of his choice—all while offering no legal basis and no factual support whatsoever for such a draconian sanction. While the allegations here are made cavalierly and without basis, this is not a casual matter to Black, nor to Illuzzi-Orbon or PG. In these circumstances, the possibility that disqualification is sought for improper gamesmanship is exactly the reason such motions are strongly disfavored.

That Black is treating the Motion seriously—because of its significance to himself and his lawyers—does not mean the allegations should be taken seriously. And, indeed, *this is not a close call*. As explained more fully below, Ganieva's Motion to disqualify PG should be denied.

STATEMENT OF FACTS

The relevant facts are not meaningfully in dispute. Indeed, Ganieva has put forward almost no facts at all, and certainly nothing to contradict the testimony of the three lawyers submitted

herewith. Each factual statement below is supported in the Affirmations that accompany this Opposition.

I. Perry Guha LLP

PG is a litigation boutique founded in November 2019 by Danya Perry and Samidh Guha, both former federal prosecutors with impeccable records. Perry served in several significant supervisory roles in federal and state government and Guha practiced as a partner at two major international law firms. PG is a growing firm that, in addition to its full-time lawyers, also maintains relationships with other attorneys who have the title "of counsel." Each has a uniquely tailored arrangement to meet the particular needs of that attorney and of PG. Illuzzi-Orbon, as detailed below, is "of counsel" to PG.

PG began representing Black in this case almost immediately after it was filed in early June 2021. PG was the only counsel of record in this matter until October 2021, when it was joined by the Quinn Emanuel firm.[2] PG, through Perry, has always been, and remains, lead counsel in this case; as such, PG is indispensable to its client's defense, and its disqualification would be significantly and needlessly prejudicial to him. While the Motion strains to denigrate PG and strongly (and, again, shamefully) implies that its lawyers might flout ethical rules for money, the accompanying Affirmations establish that such rank aspersions are dead wrong.

II. Illuzzi-Orbon's "Independent Contractor" Relationship with Perry Guha

Illuzzi-Orbon, a legendary former line prosecutor and executive at DANY for over three decades, left that office in January 2022. She began representing a select few clients, focusing on advocating for survivors of sexual misconduct. Perry met Illuzzi-Orbon in late March 2022, while

[2] Since then, Susan Estrich, a member of the two-person firm Estrich Goldin LLP, has filed a still-pending motion for admission *pro hac vice*.

Illuzzi-Orbon was consulting on a case in which PG was also involved.

Perry and Illuzzi-Orbon developed a strong professional relationship and, in the summer of 2022, discussed collaborating on behalf of survivors of sexual violence. Illuzzi-Orbon indicated that she was interested only in limited, part-time work with PG, as she intended to maintain her own independent practice and also wanted the ability to devote time to her family and newborn grandchild. Perry and Illuzzi-Orbon decided to work together to pursue new client representations, focusing on survivors of sexual abuse and misconduct in light of the newly enacted New York Adult Survivors Act.

Ultimately, Illuzzi-Orbon and PG agreed that Illuzzi-Orbon would work as an independent contractor, and they formalized the relationship in a "Consulting Agreement" that specifically labeled her, and that treats her, as an "independent contractor." The agreement anticipates that she will work approximately 10-20 hours per week for PG at an hourly rate, principally on new matters that PG and Illuzzi-Orbon co-originate. It also provides that Illuzzi-Orbon will continue to originate matters and represent clients independent of PG. To date, Illuzzi-Orbon and PG have worked together on two discrete matters (and she has consulted for less than one hour on a third), which have nothing to do with Black.

III. The Screening Measures Implemented

In entering into their agreement, Perry reviewed PG's active matters with Illuzzi-Orbon, including PG's representation of Black. Immediately, and before Perry gave any description of the representation, Illuzzi-Orbon requested not to hear anything further about Black. Perry agreed that neither she nor anyone else at PG would discuss PG's representation of Black with Illuzzi-Orbon. Illuzzi-Orbon provided no additional information. Since that time, Illuzzi-Orbon has not told PG anything about the reason for her request to be completely excluded from PG's representation of

Black or indeed anything about any activities at DANY that might relate to Black at all, nor has anyone inquired. All PG lawyers and staff have been informed of this agreement, and have scrupulously abided by it. And no information regarding PG's representation of Black ever has been or ever will be exchanged.

Not only is this the parties' explicit agreement, but Illuzzi-Orbon has access only to those electronic files for matters on which she works, and she has no access to any documents, work product, or records regarding PG's representation of Black. PG does not have any central repository of physical case files, so Illuzzi-Orbon has no access to hard copy documents related to PG's representation of Black. Additionally, she does not have access to PG's billing software or to any time records or other administrative information regarding PG's representation of Black. Likewise, PG does not have access to files for any of the clients Illuzzi-Orbon represents independently—nor to any from her career at DANY.

These measures were implemented out of an abundance of caution, not because PG had any reason to believe that Illuzzi-Orbon had an actual conflict. Based on public reports following evident leaks by Ganieva and her lawyers, PG was aware that Ganieva had made a complaint, but, in part because DANY had never reached out to Black, the matter certainly did not seem to have progressed into a true investigation. And certainly no one at PG had any reason to know of any involvement that Illuzzi-Orbon might have had in Ganieva's complaint to DANY.

IV. Wigdor LLP Makes Knowingly Inaccurate Allegations of a Conflict

As part of the effort to expand their shared practice representing survivors of sexual violence, in anticipation of the Adult Survivors Act, Illuzzi-Orbon, Guha, and Perry sat for a joint interview with Law360 on October 12, 2022. Law360 published an article based on the interview that same day.

Hours after the article was published online, Douglas Wigdor of Wigdor LLP, the law firm representing Ganieva, sent a series of vituperative text messages to Illuzzi-Orbon regarding her decision to affiliate with PG, alleging in substance that it was ethically and morally unsound for her to have done so. Illuzzi-Orbon responded that he misunderstood her relationship with PG, and that neither she nor PG had ever disclosed any information about Black or Wigdor's clients.

Late that same evening, Perry received a letter from Jeanne Christensen of Wigdor LLP, alleging a purported conflict requiring PG's disqualification. Because Perry had never discussed Black's case with Illuzzi-Orbon—and knew nothing about any specific activities purportedly undertaken by DANY regarding Ganieva or any of the allegations in the pleadings—Perry heard of this purported information for the first time from Christensen's letter.

The next day, Perry responded by letter, correcting many of the inaccuracies in Christensen's letter. Shortly thereafter, Christensen fired off a shockingly *ad hominem* email, congratulating PG for setting a standard for new lows; again baselessly alleging that Black was PG and Illuzzi-Orbon off to harm her clients; threatening to "expose the truth of [PG's] twisted conduct"; and pronouncing PG "guilty of…wrongdoing."

Guha thereafter reached out to Douglas Wigdor to again correct the inaccuracies in his and Christensen's communications, and reassured him that no information regarding Black or Ganieva had been shared in either direction. In response, Wigdor posited that even if he accepted those representations, he was still concerned about the appearance of impropriety and insisted that PG should withdraw from the matter. Guha asked Wigdor to provide any authority for his theory that the appearance of impropriety alone warranted disqualification, but Wigdor did not do so.

V. Prophylactic Steps Taken by Perry Guha

On October 17, 2022, an official from DANY contacted Illuzzi-Orbon, stating that Wigdor

had lodged a complaint with DANY against Illuzzi-Orbon and PG. DANY did not express any concern to Illuzzi-Orbon and simply asked that PG contact DANY, which PG promptly did. In that conversation, DANY again did not voice any concern, but asked that PG email DANY confirming that no information had been shared with Illuzzi-Orbon regarding Black and providing a brief description of PG's screening efforts. PG offered a letter describing the precautions that it and Illuzzi-Orbon had taken, which DANY accepted.

In an abundance of caution based on Wigdor LLP's allegations, PG memorialized its existing screening protocols in a written memorandum to all PG employees. The memorandum reiterated all of the steps PG had taken since Illuzzi-Orbon began consulting to prevent the flow of any information, in either direction, concerning Black. All PG employees acknowledged receipt of the memorandum, affirmed that they had been abiding by the screening protocols described therein, and agreed to continue to abide by those protocols.

On November 11, 2022, DANY provided PG with written assurance that it was "satisfied that there is compliance with the provisions" of the relevant ethical rule. Despite being on notice that DANY approved the steps PG took to ensure compliance with the Rules, Ganieva has declined to withdraw her Motion. This is so, according to her lawyer, because she is upset by the representation, because other hypothetical complainants might also be upset, and because her being upset creates an "appearance of impropriety" warranting disqualification. (*Id.*)

LEGAL STANDARD

Ganieva faces a steep legal hurdle to achieve her goal of disqualifying PG and thereby denying Black counsel of his choice—indeed, his lead counsel with whom he has worked closely since the inception of this case. The law is clear that "the moving party must meet a 'high standard of proof' before a lawyer is disqualified." *Mitchell v. Metro. Life Ins. Co.*, 2002 WL 441194, at *3

(S.D.N.Y. Mar. 21, 2002) (quotation omitted); *see also Ullmann-Schneider v. Lacher & Lovell-Taylor PC*, 110 A.D.3d 469, 470 (1st Dep't 2013). The test is tellingly not one that can be met by mere speculation or appearance of impropriety. *See, e.g.*, *Reilly v. Computer Assocs. Long-Term Disability Plan*, 423 F. Supp. 2d 5, 9 (E.D.N.Y. 2006). This is because "[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. Disqualification of a party's chosen counsel [] is a severe remedy which should *only* be done in cases where counsel's conduct will probably taint the underlying trial." *In re Dream Weaver Realty, Inc.*, 70 A.D.3d 941, 943 (2d Dep't 2010) (quotations omitted, emphasis added); *see also Bd. of Educ. of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). Given the paramount importance of the right to counsel of one's choosing, any restrictions on that right "must be carefully scrutinized." *Ullmann-Schneider*, 110 A.D.3d at 469-70. Courts must be highly alert to the potential for mischief and vigilantly examine whether a motion to disqualify is made for tactical purposes. *See e.g.*, *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp*., 69 N.Y.2d 437, 443 (1987).[3]

[3] Ganieva misstates the law in claiming that "in New York, the presumption is that a former government lawyer's disqualification under Rule 1.11 will be imputed to the entire law firm." (Mot.¶51 (citing *Essex Equity Holdings USA, LLC v. Lehman Bros.*, 29 Misc.3d 371 (Sup. Ct., N.Y. Cty. 2010) for its characterization, in turn, of *Kassis v. Teacher's Ins. & Annuity Assn.*, 93 N.Y.2d 611 (1999)). *First*, *Kassis's* analysis is inapplicable to Rule 1.11: *Kassis* evaluated Rule 1.9's restrictions on attorneys moving between private practice, which are distinct from and less permissive than Rule 1.11's restrictions on attorneys moving from government to private practice. (Green.¶¶15-20.) Contrary to Ganieva's mischaracterization, *Essex* did *not* extend the private-sector presumption of imputation to former government attorneys entering private practice. Even more deceptively, Ganieva implies that *Essex* extends the proposition from *Kassis* that "law firm screening is ineffectual to save a law firm from disqualification . . . ." (Mot.¶51.) In fact, *Essex* painstakingly evaluates the proposition Ganieva cites, rejects it, and instead holds that screening can be sufficient to prevent disqualification. *Essex*, 29 Misc.3d at 381, 386. *Second*, Ganieva goes on to compound these errors by characterizing the inapplicable Rule 1.9 "presumption of

ARGUMENT

I. Any Conflict Illuzzi-Orbon May Have Is Not Imputable to Perry Guha

Even assuming, for analytical purposes, that Illuzzi-Orbon has a conflict that would disqualify her from participating in Black's defense, there are no grounds for imputing any such conflict to PG because (i) Illuzzi-Orbon is not "associated with" PG for purposes of imputation and (ii) PG has implemented strict, effective screening measures that (iii) DANY has blessed. Even if DANY's consent did not definitively resolve the matter—and under the Rules, it clearly does—Ganieva's Motion should still be denied.

A. Illuzzi-Orbon is Not "Associated With" Perry Guha Under Rule 1.11

The Motion depends upon a premise that is fatally flawed: namely, that Illuzzi-Orbon has been "hired" by PG (Mot. §II.B), and that her alleged conflict as a purported employee of PG must therefore be imputed to PG. (*Id.*¶¶15,76.) Ganieva knows that this critical premise is false: as has been explained to her attorneys, Illuzzi-Orbon merely consults with PG as an "*independent contractor*"—currently, on two specifically identified matters—that have *nothing* to do with Black. The actual, undisputed circumstances of her work mean that she is not "associated with" PG for purposes of the relevant rule, Rule 1.11.

As set forth in the Rule and in the accompanying Affirmation of renowned ethics expert Bruce A. Green, the risk of shared confidences—and thus the potential imputation of conflicts and disqualification—arises only when an attorney is "associated" with a law firm. (Green¶25.) Determining whether an attorney is "associated" with a firm is not driven by any label—instead, it depends on "the nature of the relationship, not the names that the firms choose to characterize

imputation" from *Kassis* as a "*per se* [rule of] disqualification." (Mot.¶52.) *Essex* again *explicitly rejects* this view. *Id*. at 378-82.

that relationship." N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1141, ¶9 (2017); *see also Hempstead Video, Inc. v. Inc. Vill. of Valley Stream,* 409 F.3d 127, 135 (2d Cir. 2005) (holding that "of counsel" attorney was not "associated" with firm and denying disqualification); *Kelly v. Paulsen*, 145 A.D.3d 1398, 1399 (3d Dep't 2016) (holding that independent contractor attorney was not "associated" with firm and denying disqualification); Green¶¶26-27. As the Second Circuit explained, "the more narrowly limited the relationship between the 'of counsel' attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be." *Hempstead Video*, 409 F.3d at 135 (rejecting imputation under virtually identical facts).

As explained above and in the undisputed testimony submitted with this Opposition, Illuzzi-Orbon is not "associated" with PG. She is not an employee; she is an independent contractor who consults fewer than 10 hours per week with PG at an hourly rate and only on specific matters—primarily new matters that she originates jointly with PG. Indeed, she has consulted on only two specific matters (and on a third for less than one hour), which have nothing to do with Black. She continues to maintain her own practice independent of PG. She does not share office space with PG and only has ever met Perry and Guha in person on one or two occasions. She has no access to PG's documents relating to its representation of Black, nor any matters except those on which she consults, and PG attorneys have no access to Illuzzi-Orbon's private client files.

Courts frequently find that attorneys who merely consult with a firm on a few discrete matters are not "associated with" that firm for imputation purposes. *See, e.g.*, *Hempstead Video*, 409 F.3d 127 (no imputation where attorney operated his own law practice with independent clients and consulted on a small number of specific matters with firm, had no access to firm's other client files, and firm had no access to files for attorney's other clients); *Kelly*, 145 A.D.3d 1398

(same)*; Montague v. Poly Prep Country Day Sch.*, 2022 WL 1793693 (E.D.N.Y. June 1, 2022) (same). The undisputed facts in the accompanying Affirmations show that, as in the cases cited above, Illuzzi-Orbon consults with the firm in a narrow, discrete manner entirely unrelated to this case. In contrast to the sworn facts in those Affirmations (of which she was aware before filing this Motion), Ganieva offers nothing in response. Accordingly, under settled law, and as Green similarly concludes (Green¶¶28-30), Illuzzi-Orbon is not "associated with" PG, and her alleged conflict is not imputed to PG.

B. Perry Guha's Screen Prevents Information Flow

1. Perry Guha Has Implemented a Compliant Screen

From the moment Illuzzi-Orbon stated that she did not wish to discuss Black (without providing any substance as to why), PG instituted strict protocols that prevent the flow of any information regarding Black or any of the allegations in the pleadings. Thus, even if Illuzzi-Orbon were somehow deemed to be "associated with" PG for purposes of Rule 1.11, PG's effective screen is more than sufficient to rebut any presumption of shared confidences and any finding of imputation.

Not only is there no information flow, but PG's screen combines several practices that courts have found to be sufficient. First and foremost, because she works only remotely, Illuzzi-Orbon is physically separate from PG attorneys and any documents relating to Black. "This physical separation is an important distinction because it substantially reduces the chances of inadvertent disclosure and strengthens the physical aspects of the screen." *Reilly*, 423 F. Supp. 2d at 11 (denying disqualification of small law firm under facts on all fours with those here); *see also Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 827 F. Supp. 2d 341, 347 (S.D.N.Y. 2011) (emphasizing physical separation). Because Illuzzi-Orbon does not share office space with any of PG's attorneys

or employees, the risk that anyone might inadvertently share information concerning Black or any related activities undertaken by DANY is nonexistent. *See Reilly*, 423 F. Supp. 2d at 11. Furthermore, Illuzzi-Orbon is "electronically separated from the case" because she does not have access to its files. *Am. Int'l Grp.*, 827 F. Supp. 2d at 347. As set forth above, this is precisely that situation where "the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter," and imputed disqualification is inappropriate. Rule 1.11, cmt. 7. (*See also* Green¶35.)

Lacking any fact-based argument, Ganieva contends that PG is simply too small to implement an effective screen. (*See* Mot.¶¶79-82.) But as she acknowledges, there is no *per se* rule precluding screening at small firms. (*Id.*¶56.) Indeed, such a rule would all but prohibit small firms from hiring most government attorneys. And, in fact, screening measures have been held to be effective in cases involving small firms, particularly where, as here, the attorney is physically separated and does not share office space. *See, e.g.*, *Reilly*, 423 F. Supp. 2d at 11. Cases where screens have been found ineffective in small firms—including the cases on which Ganieva relies[4]—involved factors not present here, such as physical proximity, *see, e.g.*, *Crudele v. New York City Police Dep't*, 2001 WL 1033539, at *4 (S.D.N.Y. Sept. 7, 2001), or belated implementation of screening measures, *see, e.g.*, *Marshall v. State of N.Y. Div. of State Police*, 952 F. Supp. 103, 111 (N.D.N.Y. 1997).[5] And *none of these cases involved a part-time independent*

[4] The other case on which Ganieva relies, *Filippi v. Elmont Union Free Sch. Dist. Bd. Of Educ.*, 722 F. Supp. 2d 295 (E.D.N.Y. 2010), involved an entirely different type of conflict: an associate at the plaintiff's law firm was *currently* serving as Vice President of the defendant Board of Education—and therefore owed it fiduciary duties—and was on the Board at the time of the events at issue in the lawsuit, including responding to the plaintiff's complaint and demand letter. *Id.* at 298.

[5] Moreover, all three of the cases Ganieva cites relied on *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), which the Second Circuit has acknowledged is not binding precedent. *Hempstead Video*, 409 F.3d at 138 n.5.

consultant—an important distinction Ganieva ignores entirely.

2. DANY Has Blessed Perry Guha's Screening Measures

Moreover—and critically—DANY has made clear, in writing, that it is comfortable that appropriate screening procedures were implemented in this case.[6] Under the Rules, this is dispositive: "[Rule 1.11] seemingly permits an official to participate in a matter without personal disqualification, firm disqualification or the need to screen *when the government agency gives consent as long as the official neither uses nor reveals confidential information*." *Essex*, 29 Misc.3d at 372 n.1 (emphasis added) (citing Rules 1.9(c) and 1.11(a)). Because there is no factual dispute, and the relevant governmental agency has approved the screening protocols in this case, Ganieva's motion to disqualify PG should be denied.

3. The Court Should Not Countenance This Litigation Tactic

The Affirmations all provide sworn testimony confirming that no improper (or indeed any) information regarding Black was ever exchanged between PG and Illuzzi-Orbon. The Court should credit this undisputed testimony from three experienced former prosecutors. *See, e.g.*, *Hempstead Video*, 409 F.3d at 137 (relying on "uncontroverted affidavits"); *Am. Int'l Grp.*, 827 F. Supp. 2d at 346 ("such affidavits are reliable proof that confidences have not been shared") (collecting cases); *Reilly*, 423 F. Supp. 2d at 11-12; Green¶30. These Affirmations are uncontroverted and incontrovertible. Ganieva offers no reason to disregard or even question their representations. Indeed, courts have "shown considerable reluctance" to disqualify attorneys, even in situations—

[6] Ganieva repeatedly suggests that the timing of PG's letter to DANY was somehow inappropriate. This contention is flatly wrong. As is clear from the attached Affirmations, PG had no reason to know of any alleged conflict until Ganieva's attorneys flagged it. Immediately thereafter, PG provided prompt and reasonable notice to DANY. In any event, as a matter of logic, it matters not at all to the Court's analysis *when* DANY approved of the screening protocols that PG always has used and will continue to use; *the only relevant fact is that it has approved them* and there is no reason to override that judgment.

completely unlike this—where they might have had "misgivings" about counsel's conduct. *Reilly*, 423 F. Supp. 2d at 9 (citation omitted). There is thus certainly no basis for the "drastic measure" of disqualifying PG. *Id.* at 8.

The sworn testimony of these three former public servants—along with the fact of DANY's blessing—make clear that the claimed concern about improper information-sharing is in fact no real concern. Indeed, courts "have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused[.]" *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 310 (1983). This Court should share that concern: Ganieva was well aware before filing her Motion that no relevant information has been shared. She also was aware before the Opposition was filed that DANY had blessed PG's screening protocols. This Motion is a pure litigation tactic that should not be countenanced. Disqualification under these circumstances would be devastating to Black's defense and to Illuzzi-Orbon's ability to consult with any law firms in the future. Disqualification would unnecessarily and unfairly damage the reputations of the former public servants whose ethics are being questioned, would reward Ganieva and her counsel for their gamesmanship, and could effectively change the rules for public sector attorneys. (Green¶21.)

C. No "Appearance of Impropriety" Flows from Illuzzi-Orbon's Limited Relationship with Perry Guha

1. Appearance of Impropriety Alone Is Insufficient

Ganieva's effort to elevate the purported "appearance of impropriety" over all else—even absent any improper exchange of information—should be rejected. Numerous New York state and federal courts have held "that if the representation does not violate another ethical or disciplinary rule, there can be no appearance of impropriety; that the mere appearance of impropriety alone is insufficient to warrant disqualification; and that the appearance of impropriety must be balanced

against a party's right to the counsel of its choice as well as the possibility that the motion for disqualification may be motivated purely by tactical considerations." *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 31 A.D.3d 144, 153 (1st Dep't 2006) (citations omitted). (*See also* Green¶¶37-40.) [7]

Ultimately, Ganieva's argument relies primarily on a case in which, she contends, "the court held that the appearance of impropriety was enough to warrant disqualification of the law firm representing the plaintiff." (Mot.¶¶64-66;85 (citing *Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, 722 F. Supp. 2d 295, 304 (E.D.N.Y. 2010).) *Filippi* did not apply "appearance of impropriety" as a standalone ground for disqualification, but rather applied Rules 1.7 and 1.11. (Green¶40.) Although it used the phrase "appearance of impropriety," its analysis concerned the effectiveness of screening measures where the tainted attorney—who was *currently* a fiduciary of the plaintiff, and who had participated in the plaintiff's pre-suit deliberations regarding the complaint—was an associate at defendant's counsel's firm and worked in the same office. 722 F. Supp. 2d at 308. Ganieva also relies on *Heyliger v. Collins*, (Mot.¶92), but *Heyliger* involved radically different facts—defendants' counsel personally investigated and prosecuted the plaintiff *multiple times* as an ADA, and his three-member firm never instituted *any* screening measures. 2014 WL 910324, at *3 (N.D.N.Y. Mar. 10, 2014). Furthermore, its reasoning—in dicta—based

[7] As Green explains, cases appearing to hold otherwise, including a case on which Ganieva relies, *Flushing v. Ahearn*, 96 A.D.2d 826 (2d Dep't 1983), were principally decided under the earlier Code of Professional Responsibility, which included a Canon providing: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." However, the current New York Rules of Professional Conduct did not carry over the "appearance of impropriety" standard as an independent ground for disqualification. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 925 (2012). That is because the drafters believed, and the state judiciary evidently agreed, that the standard is too vague and subjective and potentially too restrictive. (Green¶38.)

on now-displaced Canon 9 does not justify disqualification here. (Green¶39.)[8] The only other case on which Ganieva relies, *Flushing v. Ahearn*, is, as Green explains, entirely inapplicable because it too was decided under a Canon that was displaced in the 2009 Rules. (Green¶38)

2. There Is No Appearance of Impropriety Here

Ganieva's main contention appears to be that PG should be disqualified because of how she and Jane Doe perceive the situation. (Mot.¶¶4-5;16-17;32-34;39-42;95.) Ganieva cites no law for this novel proposition, and indeed, the "appearance of impropriety" is assessed from the objective point of view of the general public, not the parties' subjective perception. *See Solow*, 83 N.Y.2d at 311; *In re Jalicia G.*, 41 Misc.3d 931, 942 (Fam. Ct. Bronx County 2013), *aff'd*, 130 A.D.3d 402 (1st Dep't 2015) ("there is no reason to suggest that Ms. G.'s personal views of the propriety or lack thereof of LAS's actions matter to the outcome of her motion. Counsel provides no citation for the proposition that the appearance analysis ought to be a subjective, as opposed to an objective, assessment of how the lay public would view the situation.").

Moreover, Ganieva's contention that Illuzzi-Orbon's work with PG will "chill" other survivors is illogical and indeed perverse. Any substance of Illuzzi-Orbon's work with DANY relating to Ganieva or Jane Doe was unknown to PG, let alone the public, given that DANY has never disclosed publicly whether or not an investigation has even taken place—and certainly, by all appearances, none has (*see* Green¶22). Ganieva claims that she will be harmed "[s]hould news that Ms. Illuzzi-Orbon works at Perry Guha surface, and it will" (Mot.¶68)—while ignoring that she herself is the very person who "surface[d]" this specious allegation.

Importantly, the information Ganieva claims to have voluntarily disclosed to DANY is not

[8] Moreover, *Heyliger*'s reliance on the now-displaced Canon 9 has been criticized. *Great Divide Wind Farm 2 LLC v. Aguilar*, 426 F. Supp. 3d 949, 973 (D.N.M. 2019); *see* Green¶39.

"confidential government information"—it was not obtained under governmental authority, such as by subpoena. Rule 1.11(c); Green¶32-33&n.3. At most, it is protected by Illuzzi-Orbon's duty of confidentiality to her former employer—DANY—not by any duty to Ganieva. *See* Rule 1.6; Green¶31-33. Even if Ganieva had standing to protect DANY's confidences, there is no allegation here that any information will be used "to the government's disadvantage," Rule 1.11, cmt. 4A, and indeed DANY has expressed no objections. Likewise, there is no suggestion that this concern is implicated in any way by Illuzzi-Orbon's consulting arrangement with PG. It would be implausible to suggest that any of her supervisory work eight months prior might have been influenced by later entering into a consulting arrangement with PG that was first contemplated many months *after* Illuzzi-Orbon left her government role. (Green¶16n.1.)

For all of these reasons, there is no appearance of impropriety here, let alone anything that would warrant disqualification. *Nyquist*, 590 F.2d at 1247 ("[W]hen there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases. This is particularly true where, as in this case, the appearance of impropriety is not very clear.").

II. Ganieva Has Not Established that Illuzzi-Orbon Has a Conflict

As shown above, there is no basis to disqualify PG, even if Illuzzi-Orbon were personally conflicted. But Ganieva has not even met her burden to establish that Illuzzi-Orbon would have a conflict, let alone one that could be imputed to PG. Although Illuzzi-Orbon has nothing to do with Black's representation, it is important to note that Rule 1.11 does not even apply to her unless she previously participated "personally and substantially" in the same matter, or possesses confidential government information within the meaning of the Rule. In Green's expert opinion, none of Ganieva's allegations, even taken as true, are sufficient to establish the applicability of Rule 1.11

to Illuzzi-Orbon. (Green¶¶22-24;31-34.)

A. Ganieva Has Not Established Rule 1.11's "Same Matter" Requirement

Rule 1.11 places the burden on Ganieva to establish that Illuzzi-Orbon participated in the "same" matter at DANY (not a "substantially related" matter as required under Rule 1.9). (*Green*¶¶15-17,22,24.) Based on her allegations and the relevant law, Green concludes that she has failed to do so. (*Id.*.)

B. Ganieva Has Not Established Rule 1.11's "Personally and Substantially" Involved Requirement

The ABA's ethics committee has explained that "being the chief official in some vast office or organization does not *ipso facto* give that government official or employee the 'substantial responsibility' contemplated by the rule in regard to all the minutiae of facts lodged within that office." (Green¶23.) Ganieva has not alleged specific facts sufficient to establish that Illuzzi-Orbon's participation "directly affect[ed] the merits" of the claimed "investigation," as required under state and federal precedent. (*Id.*¶¶18,23.) Green concludes that Illuzzi-Orbon's supervisory responsibility in the matter as alleged does not establish "substantial" participation. (*Id.*¶23.)

C. Ganieva Has Not Established That Any Information She Provided to DANY is "Confidential" Under the Rules

Ganieva's non-specific references throughout the Motion to her "confidential information" are red herrings. Rule 1.11 refers to "confidential" information in two different ways, neither of which covers the information Ganieva claims to have disclosed to DANY.

First, Rule 1.11(a)(1) addresses *clients'* confidential information. Ganieva is not a former or prospective client of Illuzzi-Orbon—the people of the State of New York are the client. (Green¶¶31-32.) Although Ganieva refers to the information she volunteered to DANY—and tweeted about, spoke with the press about, and publicly filed in a civil complaint—as "personal"

or "sensitive," that does not make it "confidential" under Rule 1.11(a). *(Id*.)

Second, and in contrast, Rule 1.11(c) protects "confidential *government* information." Ganieva's motion does not explicitly allege that Illuzzi-Orbon has confidential government information, but it implicitly suggests that she might. By its terms, Rule 1.11(c) is not implicated here: "'confidential government information' means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public." Rule 1.11(c). Ganieva's allegations cover only information she volunteered (Green¶¶31-33&n.3); she does not allege that DANY obtained information under government authority. And DANY was free to use it as it chose—for example, if the complaint had progressed to an interview of Black, it goes without saying that DANY could have questioned him about information Ganieva provided. (Green¶32.)

Third, all of the information Ganieva claims is "confidential" is now otherwise available and therefore cannot be confidential government information. Any allegations about Black that Ganieva has made in her tweets, complaints, briefs, and comments to the press are now public and not "confidential government information." *See Martley v City of Basehor, Kansas*, 2019 WL 6340132, at *10-11 (D. Kan. Nov. 27, 2019). Likewise, Ganieva made public the fact that she and her attorneys met with DANY and her allegation that an investigation was initiated. Additionally, anything Ganieva disclosed to DANY (and the circumstances of her interactions with DANY) is discoverable in this case and therefore cannot be "confidential government information." *Davis v. S. Bell Tel. & Tel. Co*., 149 F.R.D. 666, 676 (S.D. Fla. 1993). (Green¶34.)

In sum, Ganieva's effort to frame the inquiry as whether *she* considered the information she volunteered to DANY to be "confidential" completely ignores what the Rule actually protects.

But the inquiry is academic because, even if Rule 1.11(a) or (c) were implicated, it would merely require screening procedures under Rule 1.11(b)—which DANY already has approved.

III. Perry Guha's Disqualification Would Substantially Prejudice Black

New York courts repeatedly have emphasized that "[a] party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized." *Mayers*, 126 A.D.3d at 6 (quotation omitted); *see also Dream Weaver Realty*, 70 A.D.3d at 943. Given the importance of this right, courts must be vigilant of the potential for gamesmanship and closely examine whether a motion to disqualify "is made for tactical purposes." *Mayers*, 126 A.D.3d at 6; *see also Develop*, 31 A.D.3d at 153 (court should consider "the possibility that the motion for disqualification may be motivated purely by tactical considerations").

Disqualification of PG would plainly restrict Black's important right to counsel of his own choosing. Ganieva herself recognizes that PG has been lead counsel from the outset and remains lead counsel to this day. (Mot.¶77.) The prejudice to Black of losing this institutional knowledge, let alone his highly skilled and trusted advisors in Perry and PG, is obvious and substantial.

Ganieva contends that any doubts should be resolved in favor of disqualification, citing cases from other Departments. (Mot.¶88.) These decisions do not displace the clear and binding First Department precedent under which Ganieva bears the "heavy burden" of proving that disqualification is required. *Ullmann-Schneider*, 110 A.D.3d at 470. Nor do they displace the well-settled principle that appearance of impropriety alone is insufficient to warrant disqualification, *Develop Don't Destroy Brooklyn*, 31 A.D.3d at 153. Ganieva also ignores that, as set forth above, the current New York Rules of Professional Conduct did not carry over the "appearance of impropriety" standard from the earlier Code of Professional Responsibility as an independent ground for disqualification. (Green¶¶37-38.) Moreover, her cases are factually distinguishable to

the point of irrelevance, as each involved the prior or simultaneous representation of *an adversary*, none involved former government lawyers or independent contractors, and in none of them were any screening measures implemented. *See Moray v. UFS Indus., Inc.*, 156 A.D.3d 781, 784 (2d Dep't 2017) ("No such screening measures were put in place here."); *Tartakoff v. New York State Educ. Dep't*, 130 A.D.3d 1331, 1333 (3d Dep't 2015) (simultaneous representation); *Gjoni v. Swan Club, Inc.*, 134 A.D.3d 896, 897 (2d Dep't 2015).

There simply is no precedent or cause to disqualify under these circumstances: among the other things set forth above, PG is not "associated" with Illuzzi-Orbon, but implemented and adhered to rigorous screening measures nevertheless; those measures have been blessed by the relevant government agency; and there would be massive prejudice to Black should his lead counsel be disqualified, but none to Ganieva should PG remain in the case. Disqualification would not only be drastic and senseless, it would be unprecedented.

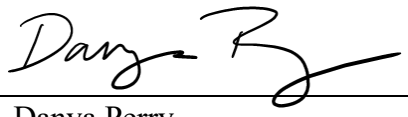
CONCLUSION

For all of these reasons, Black respectfully requests that the Court deny Ganieva's motion to disqualify his counsel.

Dated: November 14, 2022
New York, New York

Respectfully submitted,

PERRY GUHA LLP



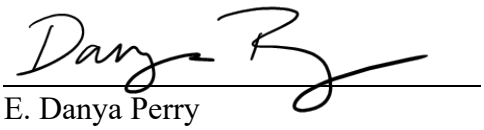
E. Danya Perry
Peter A. Gwynne
Alexander K. Parachini
1740 Broadway, 15th floor
New York, NY 10019
dperry@perryguha.com
pgwynne@perryguha.com
aparachini@perryguha.com
Telephone: (212) 399-8330
Facsimile: (212) 399-8331

Attorneys for Defendant Leon Black

ATTORNEY CERTIFICATION PURSUANT TO 22 NYCRR 202.8

I, E. Danya Perry, an attorney duly admitted to practice law before the courts of the State of New York, hereby certifies that this document, Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Disqualify, complies with the word count limit set forth in 22 NYCRR 202.8-b because it contains 6,922 words, excluding the parts of the memorandum exempted by the rule. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: November 14, 2022
New York, New York



E. Danya Perry