At an CTRP Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of April, 2024.

PRESENT:

HON. KENNETH SHERMAN,
Justice.

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YOUSELINE TELSAINT,
Plaintiff,
-against-

Index No.: 525895/18

THE CITY OF NEW YORK and NYPD OFFICER DANIEL SANDBERG,
Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	136-137, 151
Opposing Affidavits (Affirmations)	152-153
Affidavits/ Affirmations in Reply	154

Upon the foregoing papers, defendants the City of New York and NYPD Officer Daniel Sandberg move for an order disqualifying Sivin, Miller & Roche LLP from continuing to serve as counsel for plaintiff Youseline Telsaint (motion sequence number 5).

Defendants' motion (motion sequence number 5) is granted only to the extent that Duane Blackman is disqualified from serving as counsel for plaintiff. Defendants' motion is otherwise denied.

BACKGROUND

In this action, plaintiff has pleaded causes of action for assault and battery and a 42 USC § 1983 claim of excessive force based on her arrest on May 16, 2018, by Officer Sandberg and other New York City police officers.[1] Sivin, Miller & Roche LLP (Sivin Firm)[2] has been plaintiff's counsel from the time plaintiff commenced the action in December of 2018. In June of 2023, the court scheduled this case for trial on September 18, 2023. Apparently because of a scheduling conflict, the Sivin Firm reached out to Duane Blackman, an attorney currently employed as a senior counsel with Caleb Andonian PLLC (Caleb Andonian),[3] to act as trial counsel for plaintiff, and, in August 2023, the Sivin Firm informed defendants' counsel that Blackman, who had formerly worked for the New York City Law Department (Law Department), would be acting as trial counsel for plaintiff.

Shortly thereafter, Karen M. Griffin, the Law Department's Chief of the Ethics & Compliance Division, sent Blackman a letter, dated August 28, 2023, informing Blackman that the Law Department's records showed that Blackman, while serving as a the Deputy of Trials in the Law Department's Tort Division, State Law Enforcement Defense Unit, had, within the meaning of rule 1.11 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), "participated personally and substantially" in the

[1] In an order dated November 22, 2022, the court (Mallafre Melendez, J.) granted summary judgment dismissing the action as against defendant Takdir-2 Inc. and dismissing all causes of action against the City of New York and NYPD Officer Daniel Sandberg except for the excessive force and assault and battery claims.
[2] The firm was known as Sivin & Miller, LLP at the time the action was commenced. Roche was added as a partner at some point thereafter.
[3] Caleb Andonian's letterhead used by Blackman lists its address as 1100 H Street, N.W., Sute 315, Washington, D.C.

representation of the City in this action, and that, as such, he and the Sivin Firm were prohibited from representing plaintiff in this matter. The next day, Blackman sent a letter to Griffin stating that he had no independent recollection of having worked on the case and asked if she could share the specific information that led her to conclude that he had worked on this matter. Griffin, in a letter dated August 29, 2023, responded by stating that, although she could not share all the details of the communications because of the attorney/client privilege, Blackman's involvement included: (1) a February 11, 2020 email that Blackman had received from the City trial attorney that included a confidential report detailing the Law Department's analysis of the case that was, in part, based on attorney/client communications with Officer Sandberg; (2) a series of email correspondence on April 22, 2020 between Blackman and the trial attorney in which Blackman inquired about additional evidence and the viability of a potential summary judgment motion and the trial attorney responded to said inquiries with work-product protected information; and (3) a discussion about the merits of the case at a April 22, 2020 meeting arranged by Blackman.

In a letter dated August 31, 2023, Blackman responded to Griffin by stating that, based on the representations in the letter, he would no longer appear as trial counsel or otherwise work on the instant action. However, after being informed of the City's position that the Sivin Firm was also precluded from representing plaintiff in view of Blackman's involvement in plaintiff's case while he worked for the Law Department, Edward Sivin, in a letter dated September 11, 2023, informed the Law Department that: (1) Blackman had assured the Sivin Firm that he had no recollection of previously

participating in this case; Blackman had not conveyed any information about the case that he might have gleaned from his employment with the Law Department; and (3) the Law Department had failed to demonstrate that Blackman's participation in this case while employed by the Law Department was "substantial" within the meaning of rule 1.11 (a) (2) of the Rules of Professional Conduct (22 NYCRR 1200.0).

In support of the motion to disqualify the Sivin Firm, defendants' counsel submits copies of the correspondence outlined above, and repeats, without providing any additional detail, the assertions regarding Blackman's involvement in this matter as set forth by Griffin in her August 29, 2023 letter.

In opposition, plaintiff submits an affirmation from Blackman, who states that he was employed in the Law Department as Deputy Unit Chief in Charge of Trials from May 2019 to June 2020. Blackman avers that while in that role he was exposed, on a monthly basis, to hundreds of cases involving allegations of law enforcement misconduct throughout the City, that the majority of these cases were not under his direct supervision, and that his exposure to a vast majority of these cases was cursory, as opposed to "substantial." Blackman further states that after leaving the Law Department, he worked as a senior trial attorney in the Equity Section of the Washington D.C. Office of the Attorney General and, in December 2021, went into private practice and joined Caleb Andonian, his current employer.

Blackman further avers that after the Sivin Firm requested that he act as trial counsel in June of 2023, it forwarded to him copies of the documents and other material generated in this action, including pleadings, photographs, video tapes, deposition

transcripts and other papers exchanged during discovery. As he represented in his initial letter to Griffin, Blackman reiterated that he had no recollection of having participated in this case while working for the City, and, even after he received Griffin's letter in which she outlined the general subject matter of the emails documenting Blackman's participation in the case, he still had no recollection of his participation.

The decision made by Blackman and the Sivin Firm that he would not act as trial counsel was based on their desire to avoid even the appearance of impropriety rather than any result of his having a recollection of previously participating in defendants' representation while employed by the Law Department. Blackman represents that he was never retained by plaintiff, has never met with or spoken to her, has not filed a notice of appearance, has not consented to electronic case filing on NYSCEF, and has not received, and will not be receiving, any fee or other compensation from this case. Blackman further represents that, since he has no recollection of having previously participated in the case while at the Law Department, he never shared or communicated any facts or information regarding this case to plaintiff or the Sivin Firm.

Edward Sivin, in his own affirmation in opposition, asserts that Blackman did not convey any case information that he acquired from his employment in the Law Department to him or his firm. Sivin further asserts that the Sivin Firm's staff has been advised that Blackman is prohibited from representing plaintiff in this action, that Blackman will receive no part of the attorneys' fee collected from this action, and that the Law Department has been informed of these measures.

DISCUSSION

"The disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Delaney v Roman*, 175 AD3d 648, 649 [2d Dept 2019] [internal quotation marks omitted]). "Although 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, such right will not supersede a clear showing that disqualification is warranted" (*Matter of Marvin Q.*, 45 AD3d 852, 853 [2d Dept 2007] [internal quotation marks omitted], *lv dismissed* 10 NY3d 927 [2008]; *see Scopin v Goolsby*, 88 AD3d 782, 784 [2d Dept 2011]). "A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish (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" (*Gjoni v Swan Club, Inc.*, 134 AD3d 896, 897 [2d Dept 2015] [internal quotation marks omitted]). Any "doubts as to the existence of a conflict of interest are resolved in favor of disqualification in order to avoid even the appearance of impropriety" (*Janczewski v Janczewski*, 169 AD3d 773, 774 [2d Dept 2019]; *see Moray v UFS Indus., Inc.*, 156 AD3d 781, 784 [2d Dept 2017]).

Where one attorney is disqualified due to a conflict of interest, "there is a rebuttable presumption that the entirety of the attorney's current firm must be disqualified" (*Moray*, 156 AD3d at 783; *see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 617 [1999]). "That presumption may be rebutted by proof that any

information acquired by the disqualified lawyer is unlikely to be significant or material in the [subject] litigation" and that "the law firm properly screened the disqualified lawyer from dissemination and receipt of information subject to the attorney-client privilege" (*Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 551 [2d Dept 2013]; *see Kassis*, 93 NY2d at 617-618).

The disqualification determination here is also guided by rule 1.11 of the Rules of Professional Conduct (22 NYCRR 1200.0) (*see Matter of Coleman*, 69 AD3d 846, 848-849 [2d Dept 2010]; *see also Kassis*, 93 NY2d at 617; *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 444-445 [1987]). That section, which addresses representation by attorneys formerly employed by the government, and requires the disqualification of such attorneys (a) in connection with matters in which they "participated personally and substantially" during their governmental employment (Rules of Prof Conduct rule 1.11 [a] [2])[4], and (b) where their interests are adverse to those of persons for whom they have acquired confidential information during their governmental employment (Rules of Prof Conduct rule 1.11 [c]).[5] In addition, rule 1.11

[4] As is relevant here, rule 1.11 (a) of the Rules of Professional Conduct provides that:
"(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government: . . . (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. . . ."

[5] Rule 1.11 (c) of the Rules of Professional Conduct provides that: "Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term '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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b)."

(b) of the Rules of Professional Conduct provides guidance for determining whether the firm with which the disqualified former governmental attorney is currently associated may continue its representation in the matter at issue.[6] While these rules provide guidance for disqualification determinations, the Court of Appeals has emphasized that the rules should not be mechanically applied in making those determinations (*see Kassis*, 93 NY2d at 617; *S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 444-445).

Under the Rules of Professional Conduct, the presumptive disqualification rule applies to a firm with which the disqualified lawyer is currently "associated" (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.10 [a]; 1.1.11 [b], [c]). Courts have found that the rule applies not just to partners and associates employed at the firm, but also generally extends to attorneys who have an "of counsel" relationship with the firm (*see Kelly v Paulsen*, 145 AD3d 1398, 1398-1399 [3d Dept 2016]; *see also Cardinale v Golinello*, 43 NY2d 288, 294-295 [1977]; *Nemet v Nemet*, 112 AD2d 359, 360 [2d Dept 1985], *lv dismissed* 66 NY2d 759 [1985]; *cf. Hempstead Video, Inc.*, 409 F3d 127, 134-136 [2d Cir 2005] [label "of counsel" did not warrant finding attorneys "associated" under facts before court]). Not every connection between an attorney and a firm,

[6] Rule 1.11 (b) of the Rules of Professional Conduct provides that:
"(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
(1) the firm acts promptly and reasonably to:
(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and
(2) there are no other circumstances in the particular representation that create an appearance of impropriety."

however, is sufficient to consider an attorney and firm "associated" for purposes of the disqualification rules and courts have held that attorneys who merely act as co-counsel on a case are not associated for purposes of the rule (*see Kelly*, 145 AD3d at 1399; *Dietrich v Dietrich*, 136 AD3d 461, 463 [1st Dept 2016]; *see also Hempstead Video, Inc.*, 409 F3d at 134-136). In determining whether a conflicted attorney and a firm are associated for purposes of the presumptive disqualification rule, courts look to whether the firm and conflicted attorney had a "close, regular and personal type of relationship" (*see Kelly*, 145 AD3d at 1400; *Dietrich*, 136 AD3d at 463).

In opposing defendants' motion, plaintiff does not challenge the accuracy of Griffin's characterization of Blackman's emails or otherwise argue that Blackman, during his employment at the Law Department did not "personally and substantially" participate in the defense of defendants or that he did not acquire confidential information relating to defendants within the meaning of rule 1.11 (a) (2), (c) of the Rules of Professional Conduct (22 NYCRR 1200.0). Moreover, the fact that Blackman had no recollection of his involvement in the Law Department's representation of defendants would not be a basis for avoiding disqualification of Blackman (*see Gjoni*, 134 AD3d at 897-898).

Plaintiff, however, asserts that defendants have failed to demonstrate that Blackman ever represented plaintiff in this matter within the meaning of that rule since he was never retained by plaintiff, never filed a notice of appearance and never agreed to the filing of papers on New York State Courts Electronic Filing System. It is undisputed that, by the time the Law Department had reached out to Blackman to inform him of his past involvement in this action, Blackman had agreed to act as trial counsel for the Sivin

Firm, the Sivin Firm had forwarded him material relating to this action in order for him to prepare for trial, and the Sivin Firm had informed defendants' counsel that Blackman would be trying the action on behalf of the Sivin Firm. Under these circumstances, although Blackman had not formally appeared in the action and had not been directly retained by plaintiff, Blackman was sufficiently involved in plaintiff's representation on behalf of the Sivin Firm for this court to find that he represented plaintiff within the meaning of Rule 1.11 (a) (2) and that he is subject to disqualification under its provisions.

On the other hand, this court finds that Blackman was not "associated" with the Sivin Firm within the meaning of the presumptive disqualification rule for firms associated with a disqualified lawyer. Blackman was employed by Caleb Andonian, a Washington, D.C. firm. Nothing in the motion papers suggests that Blackman shared office space with the Sivin Firm, regularly tried cases on its behalf, consulted with it on a regular or continuing basis, or otherwise had anything approaching an "of counsel" relationship with the Sivin Firm (*see D.B. v M.B.*, 39 Misc3d 1205[A], 2013 NY Slip Op 50502[U], *5-7 [Sup Ct, Westchester County 2013]; *Hempstead Video, Inc.*, 409 F3d at 135; *see also Eason & Echtman, P.C. v Aurnou*, 39 AD3d 251, 253 [1st Dept 2007]). Although this court finds that Blackman had sufficient involvement in this action to conclude that he represented plaintiff for purposes of disqualification, it is evident that his involvement was limited to his beginning the trial preparation process and did not involve any other significant contact with plaintiff or the Sivin Firm. In sum, defendants have failed to show that Blackman and the Sivin Firm had "a close, regular and personal type of relationship" warranting a finding that they were "associated" within the meaning of

the presumptive disqualification rule (*see Kelly*, 145 AD3d at 1400; *Dietrich*, 136 AD3d at 463; *D.B.*, 2013 NY Slip Op 50502[U], *5-7; *see also Hempstead Video, Inc.*, 409 F3d at 135-137).

Absent the presumptive disqualification rule, there is no basis to disqualify the Sivin Firm. Defendants do not show that Blackman passed on any information relating to this case which was acquired during his employment at the Law Department or that this information was material to the case. Griffin's characterization of Blackman's involvement in this action, while he was in the Law Department, suggests that it may have been only slightly more involved than the purely administrative involvement of the Chief Court Attorney at issue in *Matter of Coleman* (69 AD3d 846, 849 [2d Dept 2010]). Blackman was significantly less involved than the representation at issue in *Kassis*, where the attorney at issue had, among other things, conducted five depositions of non-parties, had acted as sole counsel for the plaintiff at two court mediation sessions, and had discussed the case with the plaintiff on numerous occasions (*Kassis*, 93 NY2d at 614). Further, Griffin's characterization of Blackman's involvement and her summary assertions that material he reviewed included material protected by the attorney-client privilege and the attorney-work product privileges provides no basis to judge the materiality of that material, particularly given that depositions have since been held and defendants have since moved for summary judgment (*Matter of Sosa v Serrano*, 130 AD3d 636, 637 [2d Dept 2015]). In addition, while Blackman's inability to recall that he had worked on the matter might not be determinative with respect to his own disqualification (*see Gjoni*, 134 AD3d at 897-898), in view of the fact that this action was

one of hundreds of cases Blackman was exposed to on a monthly basis while he was at the Law Department, his assertion that he did not recall the case and conveyed no information he learned while he was employed there to the Sivin Firm is particularly believable (*see Divito*, 160 AD3d at 1359; *Sharifi-Nistanak*, 119 AD3d at 766; *Cummin v Cummin*, 264 AD2d 637, 639 [1st Dept 1999]). Moreover, there is no suggestion that Blackman retained the emails and reports relating to this action after he left the Law Department and was in a position to pass that information on to the Sivin Firm.

In balancing the factors relevant to this disqualification determination, it is important to note that the Sivin Firm has represented plaintiff from the inception of this action that is now on the trial calendar and that plaintiff would be undoubtedly severely prejudiced by disqualification at this juncture (*see Dominguez v Community Health Plan of Suffolk*, 284 AD2d 294, 295 [2d Dept 2001]; *see also Solow v Grace & Co.*, 83 NY2d 303, 309-310 [1994]).

Accordingly, this court, while finding that there is a sufficient appearance of impropriety to warrant the disqualification of Blackman, finds that disqualification of the Sivin Firm is not required and, thus, that defendants' motion must be denied in that respect.

This constitutes the decision and order of the court.

ENTER

4/10/24

HON. KENNETH P. SHERMAN
SUPREME COURT JUSTICE

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