

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ERIK B. CHERDAK,

Plaintiff,

v.

KOKO FITCLUB, LLC and KOKO
FITNESS, INC.,

Defendants.

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Civil Action No. 14-cv-10371-IT

MEMORANDUM & ORDER

June 3, 2015

TALWANI, D.J.

Before the court are several pending motions filed by Plaintiff Cherdak that are based on his contention that Defendants' counsel, Cooley LLP ("Cooley")¹, is conflicted under the Massachusetts Rules of Professional Conduct. See Pl.'s Renewed Mot. Disqualification Cooley, LLP & Brief Stay [#127]; Pl.'s Mot. Order Koko Defs. & Def. Counsel Cooley LLP Show Cause Why They Should Not Be Held Contempt [#129]; Pl.'s Emergency Mot. Stay All Proceedings [#134]. Cherdak argues that Cooley should be disqualified as a result of these conflicts and Cooley's alleged use and disclosure of confidential information that it obtained in a prior action involving Cherdak and Cooley's client Core Industries, LLC ("Core"), where such information was subject to a Settlement Confidentiality Agreement (the "Core Agreement"). See Mem. & Order [#86] (describing Cherdak and Cooley's prior history and the Core Agreement). Cherdak bases his motions on Massachusetts Rules of Professional Conduct 1.6(a), 1.7(a), 1.7(b), 1.8(b), 1.9(b), and 1.10(a) and argues that circumstances have changed since this court's denials of

¹ For purposes of this order, reference to Cooley LLP shall include the firm's attorneys, including Attorneys Graves and Crenshaw.

Cherdak's previous requests for Cooley to be disqualified, see Mem. & Order [#86]; Mem. & Order [#92].

In arguing that circumstances have changed, Cherdak first accuses Cooley of using confidential information from the Core Agreement to leverage settlement positions to the advantage of its current clients, Defendants Koko FitClub, LLC, Koko Fitness, Inc., (together, "Koko"). To support this claim, Cherdak points to an e-mail that Attorney Graves sent to Cherdak informing him that much of the language in Cooley's proposed draft settlement agreement for the present matter came from the Core Agreement, while reiterating to Cherdak that the Core Agreement has not been shared with Koko. Cherdak also relies on Cooley's inclusion of Exhibit A in Cooley's proposed draft settlement agreement, which contains a listing of titles to certain abandoned patent applications that was also part of the Core Agreement. Finally, Cherdak argues that Cooley's use of an issued U.S. Patent in its preliminary invalidity disclosures was foreclosed because Attorneys Graves and Crenshaw had brought this piece of potential prior art to Cherdak's attention during the parties previous confidential discussions governed by the Core Agreement.

As an initial matter, whether Cooley has breached the Core Agreement is not obvious. First, as concerns Cooley's use of a public issued U.S. Patent in its preliminary invalidity disclosures, the Core Agreement provides that "to the extent that certain Settlement Confidential Information may be otherwise discoverable information or admissible as evidence, its disclosure pursuant to this Agreement shall not render it non-discoverable or inadmissible," Mot. Disqualify Ex. 1 ¶ 5 [#57-1]. Moreover, in light of Cherdak's admission that such information had been brought to his attention by Cooley, it is altogether unclear how Cherdak can now claim that such information is his to protect. Second, while Cooley informed Cherdak that it had used language

from the Core Agreement in its proposed draft settlement agreement, it is not apparent that this statement to Cherdak violated Cooley's non-disclosure obligation, and as to any further disclosure, Cooley simultaneously emphasized that the Core Agreement had not been disclosed to Koko. Finally, with regard to Cooley's inclusion of Exhibit A in its proposed draft settlement agreement in this matter, the court notes that Cherdak himself attached that same exhibit in his own proposed draft settlement agreement that he sent to Cooley and Koko for review.

Even, however, if Cherdak could establish that Cooley breached the Core Agreement, the Massachusetts Rules of Professional Conduct that Cherdak cites do not require Cooley's disqualification from this action. The reasoning in the court's July 25, 2015 Memorandum & Order [#86] applies with equal force to Cherdak's recent motions. Here, again, Cherdak's arguments focus on the alleged unfairness resulting from Cooley's alleged use and disclosure of confidential information, which, he asserts, violates the Core Agreement. But whether Cooley may have violated the Core Agreement—a question that may be relevant to a breach of contract claim based on the Core Agreement—is an altogether different question from whether Cooley's obligations to Koko and Core are or will be impaired to such a degree that their informed consent may not alleviate any such conflict. Only the latter question is relevant to whether Koko and Core's choice of counsel should be disturbed by disqualifying Cooley from this action.²

In light of Cooley's representation that it has obtained informed consent in the form of waivers of conflict from Koko and Core, see Def.'s Opp'n Cherdak's Renewed Mot.

Disqualification 7-8 [#141], and Cherdak's failure to establish that Cooley's obligations to these

² Apart from arguing that Cooley's representation of Koko in this matter will and/or has resulted in a breach of the Core Agreement, Cherdak also argues that Cooley's participation in the present action negatively affects Core because Core seeks to enjoy certain rights associated with Patent No. 8,118,709, which Cooley here seeks to invalidate. This assertion does not overcome Koko's choice of counsel in this case where Core has been informed of this potential conflict and has provided Cooley with a waiver of any such conflict.

clients are or will be impaired to such a degree that their informed consent would not alleviate any such conflict, Cherdak's arguments that Massachusetts Rules of Professional Conduct 1.6(a), 1.7(a), 1.7(b), 1.8(b), 1.9(b), and 1.10(a) necessitates that the court interfere with Defendants' choice of counsel must fail. Accordingly, Plaintiff's Renewed Motion for Disqualification of Cooley, LLP Based on Changes in Circumstances and for an Order of a Brief Stay to Allow the Koko Defendants to Retain New Defense Counsel [#127]; Plaintiff's Motion for Order for the Koko Defendants and Defense Counsel Cooley LLP to Show Cause Why They Should Not Be Held in Contempt of this Court's Order at ECF 86 [#129]; and Plaintiff's Emergency Motion for a Stay of All Proceedings in this Action Pending the Court's Review and Consideration of Plaintiff's Renewed Motion for Disqualification and Plaintiff's Motion to Show Cause [#134] are hereby DENIED.

IT IS SO ORDERED.

Date: June 3, 2015

/s/ Indira Talwani
United States District Judge