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

----------x

TRUMPS MARKS LLC,

Plaintiff,

- against -

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC

Defendants

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Index No. 08/601372

AFFIRMATION OF RICHARD D. EMERY IN SUPPORT OF MOTION TO STRIKE

RICHARD D. EMERY, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms under penalty of perjury, the following:

1. I am a partner at the firm of Emery Celli Brinckerhoff & Abady LLP ("Emery Celli"), attorneys for Defendant Crescent Heights Diamond, LLC ("Crescent"). I submit this affirmation in support of Crescent's motion to strike.

2. Plaintiff has moved to disqualify Emery Celli. Its disqualification motion includes an affirmation from Bernard Diamond, Trump's executive vice president and general counsel, attaching a proposed settlement agreement in this case. *See* Affirmation of Bernard Diamond dated July 8, 2008, Ex. B. A copy of the Diamond Affirmation and its exhibits is attached to this as Exhibit A to this Affirmation.

3. This particular document, which Diamond states was drafted by Crescent, Diamond Aff. ¶ 9, states "FOR SETTLEMENT PURPOSES ONLY; NOT ADMISSIBLE AS EVIDENCE IN ANY COURT PROCEEDINGS" on the top of each page.

4. Plaintiff's Memorandum of Law in Support of Its Disqualification Motion, dated July 8, 2008, also contains references to Ex. B. to the Diamond Affirmation. *See* Ex. B to this Affirmation, at 3. Trump's counsel admitted that he submitted the settlement document specifically to demonstrate to the Court that Crescent conceded liability, which is exactly what CPLR 4547 prohibits. *Id.*

5. "Evidence of (a) furnishing, or offering or promising to furnish . . . shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible." CPLR 4547.

6. The submission of the settlement document plainly violates CPLR 4547. The Court should grant Crescent's motion to strike Ex. B. to the Diamond Affirmation, as well as any references to the settlement document or to the topic of settlement, either in Plaintiff's Memorandum of Law in Support of Its Disqualification Motion, or in any affirmations in support of that motion.

7. I declare under penalty of perjury that the foregoing is true and correct.

RICHARD D. EMERY

Dated July 15, 2008

EXHIBIT A

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

----------X

TRUMP MARKS LLC,

Plaintiff,

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

Index No.: 601372/08

AFFIRMATION OF BERNARD DIAMOND

BERNARD DIAMOND, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. My name is Bernard Diamond. I am an attorney duly licensed to practice law in New York. Since March 1995, I have been Executive Vice President and General Counsel to the Trump Organization. I am fully familiar with the facts and circumstances set forth herein.

2. I make this affirmation in support of Plaintiff Trump Mark LLC's motion for an order (a) pursuant to Judiciary Law Sections 1200.20 and 1200.27, disqualifying Morrison Cohen from representing defendants Sonny Kahn, Russell Galbut and Bruce A. Menin (collectively, the "Individual Defendants") and Emery Celli Brinckerhoff & Abady LLP ("Emery Celli") from representing defendant Crescent Heights Diamond LLC ("Defendant Crescent Heights"); (b) holding an evidentiary hearing with respect to Plaintiff's instant disqualification motion; and (c) for such other and further relief as the Court deems just and proper.

3. In my capacity as General Counsel, one of my responsibilities is to prepare and negotiate licensing agreements whereby Mr. Trump or companies he controls license the Trump name and trademark. In that connection, over the years I have been involved in the process of developing and improving our form of licensing agreement.

4. I prepared and negotiated the License Agreement dated May 23, 2006 between Trump Marks LLC and Crescent Heights Diamond LLC at issue in this action.

5. During the period David Scharf of Morrison Cohen represented Mr. Trump and his companies (approximately 2001-2006), I acted as a frequent point of contact at the Trump Organization for Mr. Scharf.

6. In that capacity, I spoke to and consulted with Mr. Scharf on occasions to numerous to mention, and on one occasion we went out for drinks together.

7. During my conversations with Mr. Scharf, I discussed with him, as one lawyer to another might, on issues which were then before me. Given the length of time involved, I cannot specifically recall the many conversations I had with Mr. Scharf. However, it is very likely that I discussed issues concerning licensing transactions, since documenting such transactions was one of my primary areas of responsibility, and since I would have fully expected any Trump matters I discussed with Mr. Scharf to remain confidential as he was then an attorney and trusted advisor to Mr. Trump.

8. Attached hereto as **Exhibit A** is a true and correct copy of my August 2, 2007 letter I sent to Defendants warning them that a sale of the Project Site would result in their defaulting under the License Agreement, for which they would be held accountable.

9. Attached hereto as **Exhibit B** is a true and correct copy of the proposed amendment to the License Agreement that Defendants drafted and submitted to Plaintiff, after I

sent Defendants my August 2, 2007 letter. The proposed amendment was rejected by Mr. Trump.

Dated: New York, New York
July 8, 2008

BERNARD DIAMOND

A

Trump Marks LLC

c/o The Trump Organization
725 Fifth Avenue
New York, New York 10022

Bernard R. Diamond
Executive Vice President
& General Counsel
Direct dial (212) 715-7288
Direct fax (212) 317-0037
bdiamond@trumporg.com

Via Certified Mail, RRR, Facsimile
and Federal Express

August 2, 2007

Crescent Heights Diamond, LLC
2930 Biscayne Boulevard
Miami, FL 33137
Attention: Sharon Christenbury, Esq.
Fax:: 305-573-2315

Holland & Knight LLP
131 South Dearborn
Chicago, IL 60603
Attention: Grant McCorkhill, Esq.
Fax: (312) 578-6666

Re: License Agreement ("License Agreement") dated May 23, 2006 between Trump Marks LLC, as Licensor and Crescent Heights Diamond, LLC, as Licensee

Dear Ms. Christenbury:

Reference is made to the License Agreement.

The capitalized terms used, but not defined herein, shall have the meanings ascribed to them in the License Agreement.

As I am sure you are well aware, since the inception of the License Agreement, the well-publicized association of the "Trump" name with the anticipated "Tower Property" (as defined in the License Agreement) has generated intense interest among potential purchasers, investors, lenders and the general public, which, in turn, has led to a dramatic appreciation in the value of the Land.

It has come to the Licensor's attention that the Licensee has either sold the Land or is entertaining competing offers for the sale of the Land. By its actions the Licensee obviously seeks to profit handsomely from the association of the "Trump" name with the Land. Notably, in several recent conversations between senior representatives of the Licensee and the Licensor, the Licensee failed to disclose to the Licensor its aforesaid actions.

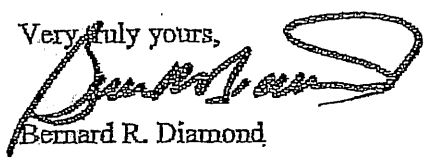
I remind you that among the numerous obligations of the Licensee under the License Agreement (and the inducement for the Licensor to execute and deliver the License Agreement to the Licensee) is the Licensee's covenant and agreement, among others, "...to design, develop, construct, market, sell, equip, operate, repair and maintain the Tower Property" under the Trump brand.

Please be advised that any sale or other disposition of the Land by the Licensee, without the consent of the Licensor, will thwart the intent and purpose of the License Agreement to the Licensor's financial detriment, denying the Licensor the right to receive many millions of dollars in "Royalties", in violation of the License Agreement.

Any effort by the Licensee to assign the License Agreement to a purchaser of the Land, without the Licensor's consent, will constitute a separate material default by the Licensee under the License Agreement. In addition, the disassociation of the Trump name from the Tower Property as a result of any such unapproved sale, after the public acclaim that has resulted by reason of such association, will substantially damage the Trump name and reputation on a world-wide basis, for which the Licensor will hold the Licensee fully responsible.

I trust you will be guided accordingly.

Very truly yours,



Bernard R. Diamond

BRD: mgs

cc: Donald J. Trump
Donald J. Trump, Jr.
Ivanka Trump
Eric Trump
Jay Goldberg, Esq. – not sent.

B

FOR SETTLEMENT PURPOSES ONLY
NOT ADMISSIBLE AS EVIDENCE IN ANY COURT PROCEEDINGS

Crescent Heights Version

SECOND AMENDMENT TO LICENSE AGREEMENT

This SECOND AMENDMENT TO LICENSE AGREEMENT ("**Amendment**") is made and entered into effective as of the ____ day of April, 2008 by and between TRUMP MARKS LLC, a Delaware limited liability company ("**Licensor**") and CRESCENT HEIGHTS DIAMOND, LLC, a Delaware limited liability company ("**Licensee**").

RECITALS:

A. Licensor and Licensee entered into that certain License Agreement dated as of May 23, 2006, which License Agreement was amended by that certain First Amendment to License Agreement dated May 23, 2006 (the License Agreement, as amended the "Agreement"). All capitalized terms used herein not otherwise define shall have the meaning set forth therefor in the License Agreement.

B. Pursuant to the terms and conditions of the Agreement, Licensor licensed to Licensee the right to use the trademark "Trump Tower" or "Trump Plaza" as the New Trump Mark for use in association with the Tower Property in Ramat Gan, Israel (the "Property"), pursuant to the terms and conditions of the Agreement.

C. As a result of Licensor being unable to obtain the necessary entitlements to develop the Property as originally contemplated as residential towers, Licensor sold the Property on January 31, 2008.

D. In order to settle any purported claims Licensor may have as a result of the sale of the Property, and without agreeing that such claims are valid, Licensee has agreed to pay to Licensor the sum of One Million Seven Hundred Thousand Dollars and Licensor has agreed to accept such payment in full and complete satisfaction of any claims it may have for compensation as a result of the sale or pursuant to the terms of the Agreement.

E. Licensor and Licensee have further agreed to amend the Agreement to reflect their agreements with respect to the use of the name "Trump" in connection with a future project.

NOW THEREFORE, for and in consideration of $1.00 and the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Licensor and Licensee agree to amend the Agreement as follows:

1. Licensor and Licensee hereby agree that if at any time prior to the 42nd month after the execution of the License Agreement (November 23, 2009), Licensee (or an affiliate of Licensee) identifies a property in Tel Aviv, Israel that it or one of its affiliates intends to develop into a first-class residential property ("Replacement Property") and desires to brand such Replacement Property as a "Trump" property, it shall notify Licensor in writing. Upon such notification to Licensor the Replacement Property shall be substituted for the Ramat Gan Tower Property under the Agreement and the Agreement, as amended hereby, shall govern the terms and conditions upon which Licensee shall be entitled to use the Trump

name in association with such property. If requested by Licensee, Licensor shall execute an amendment to the Agreement setting forth a description of the Replacement Property and if owned by an affiliate of Licensee, the name of the Licensee and any other matter to which the parties mutually agree.

2. The parties hereby agree that the provisions of Section 1(g)A of the Agreement remain in full force and effect.

3. Upon execution and delivery this Amendment by Licensor, Licensee shall deliver to Licensor a payment of $1,700,000 by wire transfer to an account designated by Licensor.

4. Licensor releases and discharges Licensee and each of its directors, officers, employees, agents and affiliates (collectively "Releasee"), Releasee's successors and assigns from all actions, causes of action, suits, debts, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, claims and demands whatsoever, in law, admiralty or equity, which against Releasee, Releasor and its successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this Amendment, except for the obligations of Licensee under this Amendment and, if a Replacement Property is substituted for the Ramat Gan Tower Property pursuant to paragraph 1 hereof, the Agreement, as amended hereby.

5. Miscellaneous.

(a) Choice of Law. This Amendment shall be governed, both as to interpretation and enforcement, by the laws of the State of New York and, as necessary, in the courts in that State, without regard to any principles of conflicts of law. Any suit, action or proceeding to enforce any provision of, or based on any matter arising out of or in connection with, this Amendment or the transactions contemplated hereby shall be brought in the federal court or state court located in the County of New York in the State of New York, and each of the parties hereby consents to the exclusive jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or thereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding brought in any such court has been brought in an inconvenient form. Process in any such suit, action or proceeding may be served on any party anywhere in the world, whether within or without the jurisdiction of any such court. The parties acknowledge that the courts of the State of New York are a convenient forum for a resolution of any disputes hereunder.

(b) Ratification. Except as herein specifically modified and amended by this Amendment, all of the terms, covenants and conditions of the Agreement are hereby ratified and confirmed and shall remain in full force and effect.

(c) Agreement. Except insofar as reference to the contrary is made in any such instrument, all references to the "Agreement" in any future correspondence or notice between the parties shall be deemed to refer to the Agreement as modified by this Amendment.

(d) Binding Effect. Each person executing this Amendment personally represents and warrants to the other parties hereto that he/she is legally authorized to execute this Amendment as the binding obligation of such person.

(e) Counterpart Signatures. This Amendment may be executed in multiple counterparts, each of which shall constitute an original but when taken together shall constitute one and the same instrument.

(f) Recitals Incorporated. The Recitals to this Amendment set forth above are incorporated herein as if set forth in full.

[SIGNATURE PAGES TO FOLLOW]

FOR SETTLEMENT PURPOSES ONLY
NOT ADMISSIBLE AS EVIDENCE IN ANY COURT PROCEEDINGS

IN WITNESS WHEREOF, the parties hereto have respectively executed this Amendment as of the day and year first above written.

LICENSOR:

TRUMP MARKS LLC,
a Delaware limited liability company

By:_____
Donald J. Trump, President

LICENSEE:

CRESCENT HEIGHTS DIAMOND, LLC,
a Delaware limited liability company

By: Crescent Heights Diamond Holdings, LLC
a Delaware limited liability company,
its managing Member

By: _____
Name: Sharon Christenbury
Title: Vice President

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

----------X

TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

AFFIRMATION OF BERNARD DIAMOND

MEISTER SEELIG & FEIN LLP

Attorney(s) for *Plaintiff*

2 Grand Central Tower
140 East 45th, 19th Floor
NEW YORK, NEW YORK 10017
(212) 655-3500

To

Service of a copy of the within is hereby admitted.

Dated:.....

Attorney(s) for .....

Check Applicable Box

☐ Certification By Attorney

certify that the within

has been compared by me with the original and found to be a true and complete copy.

☐ Attorney's Affirmation

state that I am

the attorney(s) of record for

in the within action; I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.:

I,

being duly sworn, depose and say: I am

Check Applicable Box

☐ Individual Verification

the

in the within action: I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

Check Applicable Box

☐ Corporate Verification

the of

a corporation and a party in the within action; I have read the foregoing and know the contents thereof: and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.: (If both boxes are checked—indicate after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years of age and reside at

On I served the within

Check Applicable Box

☐ Service By Mail

by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed to each of the following persons at the last known address set forth after each name:

☐ Personal Service on Individual

by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein:*

Sworn to before me on

.....
The name signed must be printed beneath

EXHIBIT B

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

----------X

TRUMP MARKS LLC,

Plaintiff,

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

Index No.: 601372/08

(Cahn, J.)

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF ITS DISQUALIFICATION MOTION

Meister Seelig & Fein LLP
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Counsel for Plaintiff

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS DISQUALIFICATION MOTION

Plaintiff Trump Marks LLC, by its attorneys, Meister Seelig & Fein LLP, submit this memorandum of law in support of its motion for an order (a) pursuant to Judiciary Law Sections 1200.20 and 1200.27, disqualifying Morrison Cohen from representing defendants Sonny Kahn, Russell Galbut and Bruce A. Menin (collectively, the "Individual Defendants") and Emery Celli Brinckerhoff & Abady LLP ("Emery Celli") from representing defendant Crescent Heights Diamond LLC ("Defendant Crescent Heights"); (b) holding an evidentiary hearing with respect to Plaintiff's instant disqualification motion; and (c) for such other and further relief as the Court deems just and proper.

I. FACTUAL BACKGROUND

A. The License Agreement

The principal of Plaintiff, Donald J. Trump, enjoys a reputation as a world-renowned and pre-eminent builder and developer of luxury residential real estate, among other things. Mr. Trump has trademarked his name in the United States and in many countries throughout the world. Such trademarks are held or licensed to Trump Marks, LLC, the Plaintiff herein, which is engaged in the business of licensing such trademarks. The transaction at issue in this action concerns a licensing agreement dated May 23, 2006 between Plaintiff, as licensor, and Defendant Crescent Heights, as licensee (the "License Agreement"),[1] whereby Plaintiff licensed to Defendant Crescent Heights, the right to name and brand as "Trump Tower" or "Trump Plaza," a 70 story luxury condominium building to be built by Defendants, in Tel Aviv, Israel, on a site (the "Project Site") Defendant Crescent Heights had assembled and acquired in Ramat Gan, on the outskirts of Tel Aviv.

[1] See Exhibit A to the Affirmation of Stephen B. Meister dated July 8, 2008 submitted in support of Plaintiff's motion ("Meister Aff.").

However, Defendant Crescent Heights sold the Project Site to another developer, Azorim Development and Construction Ltd. ("Azorim"), without ever seeking to develop it into a condominium project, in violation of the plain terms of the Licensing Agreement, for $80.2 million in January 2008. This sale was effected by Defendants after Plaintiff had fulfilled its promise to file and perfect a trademark application in Israel for the Trump name, and after Donald J. Trump had aggressively promoted his association with the project in the worldwide media, including a conference in December 2006, televised via satellite feed, which had been organized by Israel's leading business newspaper, "The Globe." See Meister Aff. at ¶5. Mr. Trump agreed to appear as a Keynote Speaker in the prestigious Globe conference, alongside fellow Keynote Speaker, former United States Federal Reserve Chairman Alan Greenspan, at the specific request of Bruce Menin, a principal of Defendant Crescent Heights. Id. The sale by Defendants of the Project Site to Azorim netted Defendant Crescent Heights a profit of $36 million given Defendant's purchase of the site only nine months earlier for $44 million.

The sale of the site to a competing developer so quickly at the staggering price of $80.2 Million, was made possible solely by virtue of Mr. Trump's promotion of and association with the project, which created a worldwide perception of robust health for the Tel Aviv condominium market in general and of the value of the Project Site within that market in particular, as an ideal luxury condominium development site. Thus, following the Globes conference in December of 2006, a series of articles appeared in leading financial and other newspapers throughout the world, including, to cite just one example, an article appearing in the Jerusalem Post entitled "Trump's Upbeat on Israel's Economy." See Meister Aff., Ex. C.

Defendants' failure to develop the Project Site into a condominium project, not only did enormous damage to Mr. Trump's reputation, but violated the express terms of the License Agreement, which in lieu of requiring a minimum up front royalty payment, reflected, in clear

simple language, the bargain of the parties—mutual unconditional covenants, one on the part of Defendant Crescent Heights to develop the Project Site into a condominium project and sell condominium units therein (thereby enabling Plaintiff to realize licensing royalties)[2] and the other on the part of Plaintiff, to ensure that no other developer would be allowed to use the famous Trump brand for a residential condominium anywhere in Tel Aviv until "the first to occur of (i) the date that is forty-two (42) months from execution of this Agreement; and (ii) the date upon which at least (90%) percent of the Units available for sale to the public are subject to binding contracts of sale..."[3]

On August 2, 2007, having heard rumors that Defendants had abandoned the project and were trying to cash in on the Trump-caused "buzz" surrounding the Tel Aviv market in general and the Project Site in particular, Plaintiff's in house counsel, Bernard Diamond, sent a default letter to Defendants warning them that a sale of the Project Site would result in their defaulting under the License Agreement, for which they would be held accountable. See Exhibit A to Affirmation of Bernard Diamond (the "Diamond Aff."). Instead of disputing this claim of default, as they now disingenuously do, Defendants never once took exception to the Diamond default letter, and to the contrary, admitted that the License Agreement plainly required Defendants to proceed with the development and sale of condominium units at the Project Site, by preparing and submitting to Plaintiff a proposed amendment to the License Agreement which would have exonerated the Defendants from liability for the sale to Azorim, upon payment to Plaintiff of substantial cash sum. However, Plaintiff refused to sign this proposed amendment. See Diamond Aff., Ex. B.

[2] See Meister Aff., Ex. C at Articles 2, 3.
[3] See Meister Aff., Ex. C at Article 1(g)(A).

B. Plaintiff's Complaint

Plaintiffs' Complaint makes out claims sounding in breach of contract and implied covenant of good faith and fair dealing,[4] based on Defendants' failure to develop the Project Site into a condominium building and to sell condominium units therein, in violation of the express terms of the License Agreement,[5] and alternatively unjust enrichment,[6] based on the $36 million profit Defendants earned due to Plaintiff's efforts and name. Because no condominium sale proceeds will be realized by Defendant Crescent Heights, it seeks to avoid entirely the substantial royalty payments it would have owed and paid to Plaintiff under the License Agreement, absent its default, notwithstanding its $36 million profit on the sale of the Project Site achieved after just nine months of ownership. Given that the $80.2 million sale was consummated by Defendant Crescent Heights in January 2008, and given Defendant Crescent Height's status as a single purpose entity whose sole (former)[7] asset was the Project Site it sold, Plaintiff also sued the Individual Defendants—Sonny Kahn, Russell Galbut and Bruce Menin—the principals of Defendant Crescent Heights,[8] asserting various statutory fraudulent conveyances under Section 272 et seq. of the New York General Business Law, for the distributions of net sale proceeds Plaintiff believes Defendant Crescent Heights made (directly or indirectly) to the Individual Defendants for no consideration, after being advised by Plaintiff in

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[4] See Meister Aff., Ex. D, First and Second Causes of Action.
[5] See Meister Aff., Ex. A at Article 3.
[6] See Meister Aff., Ex. D, Fourth Cause of Action. The Complaint also makes out an indemnification cause of action against Defendant Crescent Heights (Third Cause of Action), various fraudulent conveyance causes of action against all the Defendants (Fifth and Sixth Causes of Action), an attorneys' fees claim under the New York Debtor and Creditor Law against all Defendants (Seventh Cause of Action) and a wrongful distributions claim (Eighth Cause of Action).
[7] Plaintiff believes that Crescent Height's sole asset was the project site. See Meister Aff., Ex. D at ¶63.
[8] See Meister Aff., Ex. A at §8(g).

writing[9] that a sale of the Project Site would force Defendant Crescent Heights into default under the License Agreement.

C. Trump's Former Counsel, Y. David Scharf, Suddenly Appears As Counsel For The Individual Defendants

Initially, Richard Emery of Emery Celli Brinckerhoff & Abady LLP appeared on behalf of all Defendants. However, on June 30, 2008, Plaintiff was simultaneously served with two dispositive motions, each brought by order to show cause, one by Mr. Emery on behalf of Defendant Crescent Heights, and the other by Y. David Scharf and Mary Flynn of Morrison Cohen, on behalf of the Individual Defendants.[10]

Morrison Cohen's sudden appearance on behalf of the Individual Defendants came as a shock to Mr. Trump. For the half decade long period running from approximately 2001 to 2006, Scharf and the law firm of Morrison Cohen, acted as Mr. Trump's attorneys representing his interests in various matters. Scharf's representation of Mr. Trump and his interests involved unfettered access to Mr. Trump's confidential business records. During the course of Scharf's representation of Mr. Trump's interests over the years, Mr. Trump or various companies under his control, were billed by and paid millions of dollars to Morrison Cohen. See Affidavit of Donald J. Trump ("Trump Aff.") at ¶6.

For example, Scharf and his colleague, Flynn, acted as Mr. Trump's counsel, representing his company, Trump Briarcliff Manor Development LLC, in an action entitled Trump Briarcliff Manor Development LLC v. Columbus Construction Corp., et. al., Index No. 12562/2001, which went to trial in 2005 before Justice Rudolph in the New York State Supreme Court in Westchester County (the "Trump Briarcliff Action"). Attached to the Trump

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[9] See Meister Aff., Ex. D at ¶22.

[10] On July 3, 2008, the parties entered into a stipulation setting forth a briefing schedule regarding the motions to dismiss, allowing time for a resolution of the instant disqualification motion before the motions to dismiss are fully briefed.

Affirmation as Exhibit A is an affirmation by Scharf filed in the Trump Briarcliff Action, in which Scharf, in support of a fee application, states that he reviewed dozens of boxes of records, examined tens of thousands of documents, and conducted nine (9) depositions over fourteen (14) days. See Exhibit A at ¶¶20, 26. Attached to the Trump Affirmation as Exhibit B are redacted time records produced by Morrison Cohen in the Trump Briarcliff Action, indicating that Scharf participated in personal meetings with Mr. Trump and other personnel at the Trumps' various companies for extended periods of time. Although these meetings were primarily focused on the Trump Briarcliff Action, the discussions had were in no way limited to just that action. Trump Aff. at ¶9.

Further, in connection with the discovery phase of the Trump Briarcliff Action, Scharf, Flynn, and others at Morrison Cohen, were given free and unfettered access to Mr. Trump's various companies' confidential business records. In addition, Scharf represented Mr. Trump in an action entitled Donald J. Trump v. Conseco, Inc., Supreme Court, New York County, Index No. 102660/2002 (Moskowitz, K., J.S.C.) regarding Mr. Trump's attempt to purchase Conseco's interest in the General Motors Building.

Unfortunately, due to excessive and unreasonable bills for legal services, Mr. Trump's relationship with Scharf came to an end over billing disputes in 2008, culminating in a suit Mr. Trump instituted against him and Morrison Cohen for such overcharges captioned Trump Briarcliff Manor Development LLC v. Morrison Cohen LLP, Supreme Court, Westchester County, Index No. 07670/2007 (Rudolph, K., J.S.C.) (the "Legal Fee Case"). The Legal Fee Case is presently active, with court ordered mediation scheduled on July 17, 2008 before retired Judge Robert J. Friedman. Trump Aff. at ¶12.

During the approximately five year period Scharf represented Mr. Trump's interests, Mr. Trump discussed and consulted with him on many matters, including a licensing matter.

Specifically, Scharf consulted with Mr. Trump on a proposed licensing transaction with some recording artists. Trump Aff. at ¶13. Additionally during the course of the two litigations Scharf handled, as is typical in commercial litigations, there was voluminous discovery including tens of thousands of pages of Mr. Trump's confidential business records, including electronic and other written communications. Given his previous representation of Mr. Trump, and his companies in various litigations, Mr. Trump knows Morrison and Cohen to be in possession of confidential information as a result of the intense and wide ranging discovery processes involved in said commercial litigations. See Trump Aff. at ¶20.

In consequence, Scharf is intimately familiar with Mr. Trump's business interests and activities, including confidential information he was privy to in his capacity as Mr. Trump's then trusted counsel. Included within the confidential information to which Scharf had access, were Mr. Trump's practices and policies with respect to licensing matters such as the one at issue here.

D. Scharf's Public Media Campaign Exploiting His Association With Trump

Scharf himself has widely publicized his (former) close association with Mr. Trump and in fact brazenly traded on his name. For example, Scharf was quoted in Crains New York Business in 2004 as saying that he "may be the only person in the country to have gotten free wake up calls from Donald Trump" and that "Mr. Trump frequently called him at 5 a.m. during his 16 month court battle over the fate of the General Motors Building." See Crains Article attached to Trump Aff. as Exhibit C. Other examples of Scharf's previously having publicized his association with Mr. Trump include:

- 2004 Chaptzem Blog attached to the Trump Aff. as Exhibit D;
- 2007 New York Sun Article attached to the Trump Aff. as Exhibit E;
- 2005 CNN Money Article attached to the Trump Aff. as Exhibit F;
- 2005 IE SEEDBUN Article attached to the Trump Aff. as Exhibit G;

As a result of Scharf's unauthorized use of Mr. Trump's world famous name for advertising purposes, Mr. Trump has prepared and submitted to Scharf's counsel a further complaint alleging various violations of the New York Civil Rights Act. See draft complaint attached to Meister Aff. as Exhibit E. While Mr. Trump's counsel has endeavored in good faith to refrain from bringing such additional suit, its institution now appears inevitable. See Meister Aff. at ¶8.

Further, the website for Scharf's law firm, Morrison Cohen (www.morrisoncohen.com), to this day, still boasts a news article concerning one of the cases they handled for Mr. Trump, and as well references a television appearance on Fox News in which Scharf brags that he is Mr. Trump's lawyer. See Exhibit H attached to the Trump Aff. Attached the Trump Aff. as Exhibit I is a photograph published on "New York Supersonic" in which Scharf is depicted holding the edge of shirt bearing the legend "You're Fired" from Mr. Trump's hit television show, The Apprentice. In the caption of the photo Scharf describes himself as "Donald Trump's Advisor and Attorney."

In short, given Scharf's (and Flynn's) prior representation of Mr. Trump on various matters, including a licensing matter, they are in possession of confidential information they acquired during the course of such representation. At the time Mr. Trump, his in house counsel and others employed by Mr. Trump divulged such confidential information to Scharf and other lawyers at Morrison Cohen, Mr. Trump fully expected those confidences to be kept, and insists that such confidences be kept now.

Shortly after this suit was filed, the NY Post ("Page Six") ran a story on Mr. Trump having sued the Defendants herein. Given Scharf's history of aggressive trading on Mr. Trump's name to get new clients, it would appear that Scharf saw the Post story and then sold himself to

the Individual Defendants here based on his very ability to disclose to them the confidential information he acquired while in Mr. Trump's employ. See Exhibit J attached to the Trump Aff.

Further, given the close collaboration between Scharf and Emery, as evidenced by their own motion papers,[11] it is clear that Emery as well is now in possession of confidential information. Emery's brief involves an interpretation of the section of the Licensing Agreement at issue here, headed "The Trump Standard," and, while wholly incorrect, should not be advanced by a lawyer with access to the confidential information Scharf possesses.

As stated above, there is an ongoing litigation by Mr. Trump against Morrison Cohen and Scharf for legal fee overcharges and an additional suit is imminently about to be filed for violations by Scharf of the New York Civil Rights Act. Morrison Cohen has counterclaimed in the Legal Fee Case for legal fees they claim Mr. Trump's company owes them. That case is going to court-ordered mediation imminently. Should either the Legal Fee Case or the New York Civil Rights Act case settle, like many settlements, it is possible the parties would expect or at least desire a comprehensive resolution to all disputes, including this one. Thus, if Mr. Trump were to offer to pay Morrison Cohen some part of the legal fees they are claiming, or offer to accept a specified sum in settlement of the New York Civil Rights action, in either case, conditioned upon this case settling for some sum paid by Defendants here, how could Scharf effectively continue to represent the Individual Defendants?

In response to a letter from Mr. Trump's counsel apprising the Court of Scharf's conflict and of the need for a disqualification motion, Scharf wrote a letter to the Court[12] indicating that

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[11]The memorandum of law in support of the Defendant Crescent Heights's motion to dismiss the Plaintiff's Complaint, attached as Exhibit F to the Meister Aff., at page 25, states: "Crescent adopts all of the arguments as to claims five through eight asserted by counsel for the individual defendants in their brief, which is hereby incorporated by reference." The memorandum of law in support of the Individual Defendants' motion to dismiss the Plaintiff's Complaint, attached as Exhibit G to the accompanying Meister Aff., at pages 1, 7, "adopts and incorporates by reference" the facts recitation and arguments asserted by co-Defendant Crescent Heights.

[12] See Meister Aff., Ex. H.

"with Mr. Trump's knowledge and without his objection," Morrison Cohen previously represented a party adverse to Mr. Trump in a licensing dispute. However, Mr. Trump has no idea what Scharf is talking about, and is not aware of Morrison Cohen having ever represented a party adverse to him on a licensing dispute. Trump Aff. at ¶31. Scharf does not in his letter state the name of this adverse party, nor does he say that he got Mr. Trump's consent, only that Mr. Trump did not object. Naturally Mr. Trump would not have objected to Morrison Cohen representing an adverse party if he had no knowledge of such representation.

E. Emery Is The Only True Counsel Of Defendants' Choosing, And He Has Been Tainted By Defendants' Improper Attempts To Access Trump's Confidences

Defendants should not be heard to complain about the disqualification of their counsel, especially at this early stage of the litigation. Defendants' own improper tactics resulted in the tainting of the true counsel of their choosing, Richard Emery, who otherwise would not have been subject to disqualification, as Defendants intentionally chose to get the "added value" of bringing on Scharf to their team, an attorney who previously represented Mr. Trump, solely for the purpose of gaining access to Mr. Trump's confidential information. Given Mr. Trump's status as a well known celebrity, and Scharf's endlessly having publicized their former relationship, there is little chance Defendants did not know Scharf was Mr. Trump's former counsel.

In this connection, it is worth noting that the Morrison Cohen website, which posts a client list (which up until Mr. Trump recently objected,[13] listed him as a client), does not list any of the Individual Defendants, or Defendant Crescent Heights, as Morrison Cohen clients. And a search of the Morrison Cohen website for the Defendants does not yield any results. Meister Aff., Ex. J; Trump Aff. at ¶27. Thus, it appears that the Individual Defendants are being represented by Scharf (and Morrison Cohen) for the first time in this action, which leads to the inference that

[13] See Meister Aff., Ex. I.

Scharf promoted himself to Defendants by "marketing" his access to Mr. Trump's confidences. Further, there is no reason for the Individual Defendants, on the one hand, and Defendant Crescent Heights, on the other, to be separately represented, other than of course as an excuse to hire Scharf in addition to Emery, and thereby obtain access to Mr. Trump's confidential information. For Scharf, and by extension, Emery, to trade on the basis of Scharf's previous access to Mr. Trump's confidential records is a disgrace to the legal profession and should not be countenanced by this Court.

Given the absence of conflict between Defendant Crescent Heights and the Individual Defendants, and Morrison Cohen's not having represented the Defendants previously, it is clear that Defendants wanted to be represented by Mr. Emery, but with the added benefit of access to Mr. Trump's confidences—something which could only be provided by Scharf.

II. ARGUMENT

A. MORRISON COHEN MUST BE DISQUALIFIED

1. Plaintiff Need Only Show That Morrison Cohen Was In A Position To Acquire Confidences From Plaintiff During Its Prior Representation Of Plaintiff, Which Likely Will Be Disclosed In The Course Of This Action

Section 1200.27(a) of the Judiciary Law prohibits an attorney from representing a party adverse to a former client of such attorney in two (2) distinct situations:

"Except as provided in section 1200.45(b) of this Part with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

> (1) 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 the former client.

(2) Use any confidences or secrets of the former client except as permitted by section 1200.19(c)[14] of this Part, or when the confidence or secret has become generally known."

The proscription against an attorney representing a party adverse to a former client of that attorney, where the attorney has acquired the confidences of such former client, stems from the conflict between an attorney's "continuing duty of loyalty to a former client"[15] and the performance of the duty of loyalty the attorney has to his new client. The ban against divulging a former client's confidences while representing a party adverse to a former client, was delineated by the Court of Appeals in Greene v. Greene, wherein the Court refused to allow an attorney to undertake a representation adverse to the interests of a former client:

> "[i]t is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been **strictly forbidden** from placing themselves in a position where they must advance, **or even appear to advance**, conflicting interests (see, e. g., Cardinale v. Golinello, 43 N.Y.2d 288, 296, 401 N.Y.S.2d 191, 195, 372 N.E.2d 26, 30; Eisemann v. Hazard, 218 N.Y. 155, 159, 112 N.E. 722, 723; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the **duty of loyalty owed the client**, but also against abuse of the adversary system and resulting harm to the public at large.
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[14] Section 1200.19(c) of the Judiciary Law provides for certain exceptions to a lawyer's absolute duty to preserve the confidences and secrets of his client, as follows:

(c) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under disciplinary rules or required by law or court order.

(3) The intention of a client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

(5) Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

[15] Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355 (1979).

> An attorney traditionally has been prohibited from representing a party in a lawsuit where an opposing party is the lawyer's former client (e.g., Hatch v. Fogerty, 40 How. Prac. 492, 503). Underlying this rule is the notion that an attorney, as part of his fiduciary obligation, owes **a continuing duty to a former client** broader in scope than the attorney-client evidentiary privilege not to reveal confidences learned in the course of the professional relationship (see Watson v. Watson, 171 Misc. 175, 176, 11 N.Y.S.2d 537, 538). **To obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice** (see Sheffield v. State Bar of California, 22 Cal.2d 627, 140 P.2d 376; Galbraith v. State Bar of California, 218 Cal. 329, 23 P.2d 291)." (emphasis added).

Thus, a party seeking to disqualify an attorney or a law firm, must establish either (1) the existence of a prior attorney-client relationship and that the former and current representations are both adverse and substantially related or that in the prior representation the attorney received confidential information which may be relevant to the present litigation. See Lightning Park, Inc. v. Wise Lerman & Katz, P.C., 197 A.D.2d 52, 55, 609 N.Y.S.2d 904, 908 (1st Dep't 1994). (emphasis added).

Here, there is no dispute that Morrison Cohen actively and intensely represented the principal of Plaintiff herein, Donald J. Trump and companies he controls, for a half decade long period, which only recently came to an end. Trump Aff. at ¶5. Nor can it be argued that such representation was minor or trivial, involving as it did thousands of attorney hours and the payment of millions of dollars of fees by Mr. Trump or his companies to Morrison Cohen. Trump Aff. at ¶¶5-6. Morrison Cohen, and in particular, its attorneys Y. David Scharf and Mary E. Flynn, represented Mr. Trump and his company in an action entitled Trump Briarcliff Manor Development LLC v. Columbus Construction Corp., et. al., Index No. 12562/2001. See Trump Aff., Ex. A. From this it cannot credibly be disputed that there existed a prior attorney-client relationship between Mr. Trump and Morrison Cohen.

Scharf also represented Mr. Trump's interests in another major litigation, Donald Trump, v. Conseco, Inc., Supreme Court, New York County, Index. No. 102660/2002 (Moskowitz, K., J.S.C.), alone involving well over a million dollars in fees. Because Morrison Cohen represented Mr. Trump's interests in previous litigations, and is now representing the Individual Defendants in this action, there can be no question that Morrison Cohen is currently advocating interests directly adverse to that of its former client, Mr. Trump.

During the course of these representations, and others, Scharf and Flynn (and other Morrison Cohen attorneys) reviewed thousands of confidential business records belonging to Mr. Trump and companies he controlled, including written communications (i.e., emails and letters), conducted numerous depositions, and had frequent personal meetings with Mr. Trump and his personnel, including Mr. Trump's in house counsel, in which Mr. Trump's business practices and policies were discussed and Trump's confidences were freely divulged. See Trump Aff. at ¶¶8-11, 13-15, 20. In fact, as a result of Morrison Cohen's representation of Mr. Trump in the Trump Briarcliff Action, Scharf submitted an affidavit stating that he reviewed dozens of boxes of records, examined tens of thousands of documents, and conducted nine (9) depositions over fourteen (14) days. See Trump Aff. at ¶8; Ex. A. Further, attached as Exhibit B to the Trump Aff., are redacted time records produced by Morrison Cohen which indicate that Scharf and Flynn participated in personal meetings with Mr. Trump and other personnel at Mr. Trump's various companies for extended periods of time, during which the litigation then at hand was discussed, as well as other matters. See Trump Aff. at ¶9; Ex. B.

No one can credibly dispute that emails and letters frequently involve overlapping subject matters, especially when the parties to such communications are involved in more than one matter, deal or dispute. Thus, emails and letters responsive to the document demands in either the Trump Briarcliff Action or the Conseco Suit, almost certainly involved other subject

matters. These other subject matters almost certainly included licensing matters given that licensing the Trump name is a major component of Mr. Trump's business.

Additionally, during the five year period Scharf and Morrison Cohen represented Mr. Trump's interests, Mr. Trump discussed and consulted with Scharf on many matters, including a licensing matter. See Trump Aff. at ¶13. Specifically, Scharf consulted with Trump on a proposed licensing transaction with some recording artists. Id.

Further, during Scharf's half decade long tenure as Mr. Trump's trusted attorney and advisor, Scharf's day to day point of contact at the Trump Organization, was Attorney Bernard Diamond, the in house counsel at the Trump Organization who has the responsibility of preparing and negotiating licensing agreements. See Diamond Aff. at ¶3. As is averred in Plaintiff's complaint, one of Mr. Trump's principal lines of business is licensing his well known and trademarked name. See Meister Aff., Ex. D, Compl. at ¶2. During the course of developing this line of business, Attorney Diamond has been involved in the process of developing and improving Mr. Trump's form of licensing agreement. See Diamond Aff. at ¶3.

As Attorney Diamond attests in his affirmation, during Scharf's long tenure as a trusted Trump advisor, he consulted with Scharf on occasions "too numerous to mention." As a result of these frequent conversations, which took place over a half decade long period, it is very likely that Attorney Diamond and Scharf discussed issues concerning licensing transactions, since documenting such transactions was one of Attorney Diamond's primary areas of responsibility. Diamond Aff. at ¶7. Attorney Diamond was the very attorney who represented Plaintiff in the preparation and negotiation of the Licensing Agreement at issue in this action. Diamond Aff. at ¶4. As a result of this prior representation, there can be no question that Scharf in his capacity as trusted counsel to Mr. Trump became privy to confidential information which Mr. Trump would never have revealed other than to a trusted counsel.

Mr. Trump is entitled to be free of fear that these confidences now will not be divulged to his adversaries, Scharf's new clients. See Cardinale v. Golinello, 43 N.Y.2d 288, 294, 401 N.Y.S.2d 191, 194 (1977) (discussing the balance between the interests of a client's desire to retain a particular attorney against the interests of the opposing litigant to be free from the risk of opposition by their former counsel who was one privy to their confidences); see also Solow v. W.R. Grace & Company, 83 N.Y.2d 303, 309, 610 N.Y.S.2d 128, 131 (1994)("[Section 1200.27(a) of the Judiciary Law] is designed to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation").

Nor is it Plaintiff's burden to prove up the specific confidences revealed to Scharf over his half decade long tenure as Mr. Trump's trusted advisor, as "[n]o client should ever be concerned with the **possible** use against him in future ligation of what he **may** have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense." T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 269 (S.D.N.Y. 1953). (emphasis supplied).

In sum, by virtue of Scharf's prior long standing representation of Mr. Trump's interests, which involved Scharf, by his own admission, reviewing tens of thousands of Mr. Trump's documents including emails and letters which undoubtedly were not limited in scope to the matters at issue in the underlying actions, as well as consulting with Mr. Trump personally on another licensing matter, and frequent privileged and confidential attorney-to-attorney discussions with Mr. Trump's lead lawyer for licensing matters, in house counsel Diamond, occurring over a half decade long period, Plaintiff has demonstrated that confidential information relating to Mr. Trump's licensing agreements and policies very likely have been revealed to Scharf. Clearly, such confidential licensing related information likely may come

into play in the current litigation. Defendant Crescent Heights's current motion to dismiss is predicated on the alleged import of the so-called "Trump Standard,"[16] an issue which should not be addressed by an adversary with access to Mr. Trump's confidential information relating to licensing matters. Plaintiff ought not, and in New York does not, bear the burden of pouring over tens of thousands of pages of documents in order to prove the specific licensing related confidences divulged to Scharf. That he had such abundant opportunities to acquire such information over so long a period should be and is enough. The Court ought not make Mr. Trump fear the use of these confidences against him by his former trusted advisor.

2. The Likelihood Of Trump's Cross Examination By Scharf And The Resultant "Appearance of Impropriety," Especially In The Case Of A Worldwide Celebrity Like Trump, Independently Precludes Scharf From Continuing As Counsel To The Individual Defendants

Courts have been loathe to put a lawyer in the position of cross-examining his own former client. See U.S. v. James, 708 F.2d 40 (2nd Cir. 1983); see also Clemens v. McNamee, 2008 WL 618563 at *1 (U.S.D.C. S.D. Texas 2008); U.S. v. Esposito, 816 F. 2d 674 (4th Cir. 1987). Given that this case turns on the interpretation of the License Agreement, Mr. Trump is an obvious witness. It would be a disgrace to the legal profession and give rise to an obvious and highly publicized "appearance of impropriety"[17] to have Mr. Trump cross examined by his former trusted advisor for a half decade long period, Scharf. Beyond being able to cross examine Mr. Trump based on confidential information Scharf acquired while Mr. Trump's attorney, and the inevitable resulting appearance of impropriety, there is conversely the question whether

[16] Defendant Crescent Heights seeks to get away from the plain meaning of Article 3 of the License Agreement—in which Defendant Crescent Heights covenanted and agreed to construct the Tower Property—by arguing that such covenant appears in a Section entitled "Trump Standard" relating among other things to the quality of construction work performed. In its memorandum of law, Defendant Crescent Heights argues that Plaintiff intended only to say that IF the Tower Property was built, Defendant was to build it to the Trump Standard. It is also quite clear, that Scharf and Defendant Crescent Heights have collaborated closely. Scharf should not be allowed to divulge the confidences of his former client, Mr. Trump, with impunity, by funneling them through attorney Emery.

[17] See ACP 140 West End Ave. Associates, LP. v. Kelleher, 1 Misc.3d 909(A), 781 N.Y.S.2d 622 (N.Y. Civ. Ct. 2003).

Scharf could zealously represent the Individual Defendants as his current duty, in performing the unseemly task of cross examining Mr. Trump. See U.S. v. James, 708 F.2d at 40; Cmt. 6 to Rule 1.7 of the ABA Model Rules, I.

And, as for the appearance of impropriety issue, an important matter for the Court to carefully consider in this particular case is the acute damage to the legal profession brought about by an adverse public perception. See Greene v. Greene, 47 N.Y.2d 447, 452, 418 N.Y.S.2d 379 (1st Dep't 2004)(an attorney must not advance or appear to advance conflicting interests, "[p]articularly [where] the public interest is implicated"). In this regard, given Mr. Trump's worldwide fame and undeniable celebrity status, the Court would be well advised to be especially vigilant here in not allowing even a minor "appearance of impropriety," let alone the enormous one present here. Scharf's continuing representation of Mr. Trump here, especially given the ongoing disputes between Mr. Trump and Scharf, will inevitably become a media circus and do irreparable damage to the legal profession due to heightened public awareness of the Court's allowing Mr. Trump's former attorney to proceed with the representation of an adverse party. The day Scharf cross examines Mr. Trump, the Part 49 courtroom at 60 Centre Street undoubtedly will be packed with drooling reporters eager to report juicy details.

3. Scharf Should Not Be Allowed To Divulge The Confidences Of His Former Client By Funneling Them Through Defendant Crescent Heights's Separate Counsel

While Defendants have taken some care to place "window dressing" on Scharf's exploitation of the confidential information he acquired from Mr. Trump while his trusted advisor, such a thinly veiled attempt to conceal the obvious impropriety of such tactics should not be countenanced. Though Defendant Crescent Heights is represented by the separate firm of Emery Celli Brinckerhoff & Abady LLP, it is clear that there is a close collaboration between

Emery Celli and Scharf. As described below, the two firms have moved simultaneously and cross-referenced and adopted the other's arguments in what can only be described as a closely coordinated and collaborative effort. See Point C below. Scharf should thus not be allowed to exploit Mr. Trump's confidential information by funneling such information through Emery Celli.

4. The Constellation Of Circumstances Present Here Gives Rise To The Inference That Scharf Solicited His Representation Of the Individual Defendants Based On His Ability to Enable His Current Clients To Exploit The Confidential Information He Acquired From Trump

Included in the exhibits attached to the accompanying Trump Aff. are numerous examples of Scharf's hyper-aggressive media campaign promoting himself as Mr. Trump's attorney and trusted advisor. Attached as Exhibit C to the Trump Aff. is an article from the Crain's publication wherein Scharf markets himself as "the only person in the country to have gotten free wake-up calls from Donald Trump," and advertises that he spends most of his time "crafting legal strateg[ies]" for clients such as Trump. Attached as Exhibit G to the Trump Aff. is a direct quote from Scharf characterizing Trump's litigation strategies: "[i]f you get caught with your in hand in Mr. Trump's cookie jar you're going to get slapped and slapped hard." Attached as Exhibit I to the Trump Aff. is a photograph published in "New York Supersonic" in which Scharf is depicted holding the edge of shirt bearing the legend "You're Fired" from Mr. Trump's hit television show, The Apprentice. In the caption of the photo Scharf describes himself as "Donald Trump's Advisor and Attorney."

Scharf's brazen marketing campaign establishes his previous and unchecked willingness and ability to promote himself to prospective new clients by trading on Mr. Trump's name and reputation. It is not a far stretch to infer that an attorney who, while in Mr. Trump's good graces, would trade on his being "Trump's advisor," would likewise seek to exploit the "edge"

he could bring to a Trump adversary—through the improper disclosure of Mr. Trump's confidential information—once he fell out of Mr. Trump's good graces.

This inference is supported by numerous other facts. For example, the Morrison Cohen website, which posts Morrison Cohen's client list, does not identify any of the Defendants as pre-existing Morrison Cohen clients. See Meister Aff. at Ex. J. Thus, it appears that the Defendants were not represented by Morrison Cohen prior to this lawsuit. In that connection, it should also be noted that up until the Individual Defendants' motion to dismiss Plaintiff's Complaint was recently filed, all of the Defendants were represented by Emery Celli. This is so, despite the fact that Plaintiff's Complaint was filed in mid May 2008. Moreover, Morrison Cohen's subsequent retention by the Individual Defendants on this case is suspicious in light of the May 18, 2008 New York Post article that ran on "Page Six" announcing that Mr. Trump had sued Crescent Heights and its principals. See Trump Aff., Ex. J. It would thus appear, that having read the Page Six posting, Scharf "made his move." Finally, it is noteworthy that there is absolutely no conflict between Emery Celli simultaneously representing Crescent Heights and the Individual Defendants (as they initially had when this action was commenced), thereby obviating the "need" for Morrison Cohen to be co-counsel. Clearly, the use of two firms to represent the various Defendants here, was orchestrated to create the appearance of a separation between Scharf and the exploitation by the Emery firm on behalf of Crescent Heights of the licensing related confidences Scharf acquired while in Mr. Trump's employ (and divulged to his co-counsel, Emery Celli).

5. Morrison Cohen Is Separately Conflicted Out By Virtue Of The Current Lawsuits Between Scharf and Trump

Section 1200.20(a) of the Judiciary Law states:

> "A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be **or reasonably may be** affected by the **lawyer's own financial, business, property, or personal interests**, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest." (emphasis added).

Mr. Trump recently brought suit against Morrison Cohen and Scharf for their overbilling and fee gouging in an action entitled, Trump Briarcliff Manor Development LLC v. Morrison Cohen, Supreme Court, Westchester County, Index No. 07670/2007 (Rudolph, K., J.S.C.). See Meister Aff., Ex. K; Trump Aff. at ¶12. Court ordered mediation is set to commence in such action on July 17, 2008. Additionally, Mr. Trump is about to commence a separate New York Civil Rights Act suit against Scharf for his unauthorized use of Mr. Trump's world famous name for advertising purposes. See Meister Aff., Ex. E. As is frequently the case when parties have numerous disputes, settlement dialogues are typically comprehensive. Mr. Trump and Scharf may wish to resolve this Action when discussing a settlement of the legal fee dispute or the New York Civil Rights Act case, or conversely may wish to resolve either or both of those disputes when discussing a settlement of this Action. Under such circumstances, it is hard to see how Scharf can continue to represent the Individual Defendants herein without running afoul of Judiciary Law Section 1200.20(a). Clearly, both the legal fee dispute and the New York Civil Rights Act case between Morrison Cohen and Mr. Trump give rise to a "financial interest" of Morrison Cohen which "reasonably may" affect its representation of the Individual Defendants herein.

It may at first blush appear as if Scharf's conflict due to the Legal Fee Case and the New York Civil Rights Act claim is a matter to be considered by Defendants only. But this is not true. First, well established precedent holds that traditional principles of standing do not apply to

issues of legal ethics—rather standing to raise such issues resides in all counsel involved in the case, as they are all officers of the court and have a duty to report any ethical violations committed in the case. See 22 NYCRR 1200.4(b): "a lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges." Second, Plaintiff should not be subject to the risk that at some future point the Defendants will claim that Scharf did not aggressively advocate their interests here in order to bring about a settlement favorable to Morrison Cohen in the Legal Fee Case or the New York Civil Rights act case. Thus, Mr. Trump has no idea how to handle the upcoming mediation in the Legal Fee Case, as he cannot determine whether any offer therein to settle would be thrown back in his face one day by Defendants herein as an attempt by Mr. Trump to bribe Defendants' lawyer, herein, Scharf!

Further, Judiciary Law Section 1200.19(c) provides for certain exceptions to a lawyer's absolute duty to preserve the confidence. Included among the exceptions granted under Section 1200.19(c), a "lawyer may reveal:

(4) Confidences or secrets necessary to establish or collect the lawyer's fee ...."

Thus, by virtue of the Legal Fee Case, Morrison Cohen is expressly permitted under Judiciary Law Section 1200.19(c) to reveal Mr. Trump's confidences in order to collect the legal fees Morrison Cohen alleges Mr. Trump owes. As such, the pendency of the Legal Fee Case alone makes it unethical for Morrison Cohen to continue to represent the Individual Defendants here.

6. The Countervailing Consideration That Parties Should Be Free To Select Counsel Of Their Own Choosing Is Of Minimal Relevance Here

The Court should not hesitate to disqualify Scharf and Emery. Though courts generally should be wary about frustrating a party's choice of counsel, here Defendants' real choice is Emery, who is driving and running the entire defense. But Defendants thought they would be benefitted by enhancing Emery's advocacy through getting him access to Mr. Trump's confidences—an enhancement that could only be accomplished by adding Scharf to their team. Thus, they hatched the scheme of having Defendants true counsel of choice, Emery, represent the principal Defendant, Crescent Heights, while Scharf appeared on behalf of the Individual Defendants, even though there is no conflict between the two. That there is a close collaboration between Defendants' respective counsel cannot be denied. Defendants' volitional decision to add Scharf to their team resulted in Emery becoming irretrievably tainted. Had Defendants not attempted gain access to Trump's confidences through Scharf, they could have proceeded with their chosen counsel, Emery Celli. Thus, Defendants should not be heard to complain about their inability to have counsel of their own choosing now, since it was only due to their own unethical tactics that their choice of counsel was irretrievably tainted.

B. IN ALL EVENTS, PLAINTIFF IS ENTITLED TO AN EVIDENTIARY HEARING

Courts have not hesitated to order that an evidentiary hearing be conducted to determine whether a disqualification is warranted. See Solow, 83 N.Y.2d at 309; Lightning Park, Inc. v. Wise Lerman & Katz, P.C., 197 A.D.2d at 56. In light of the circumstances present here, should the Court not opt to disqualify counsel without more, Plaintiff respectfully requests that an evidentiary hearing be scheduled to determine whether Defendants' counsel should be disqualified.

C. EMERY CELLI BRINCKERHOFF & ABADY LLP MUST BE DISQUALIFIED AS WELL

New York caselaw dictates that Emery Celli should also be disqualified from representing Defendant Crescent Heights. In Cardinale v. Golinello, 43 N.Y.2d 288, 401 N.Y.S.2d 191 (1977), the defendant moved to disqualify a law firm who used an "Of Counsel" to work on plaintiff's case against defendant based on the fact that the Of Counsel had previously represented defendant in a separate prior litigation. The Court of Appeals not only disqualified the Of Counsel, but also disqualified the law firm retained by plaintiff, citing to the "principle of attribution," and stating that while the Of Counsel is associated with the plaintiff's law firm, "his disability extends to the other lawyers in the firm." Id. at 296. The Court of Appeals found that because the Of Counsel and the plaintiff's law firm co-operated in the prosecution of plaintiffs' claims against the defendant, the disqualification "**must be deemed**" to extend to the plaintiff's law firm as well. Id. (Emphasis added). Moreover, the Court of Appeals affirmed the disqualification of the plaintiff's law firm despite the lack of evidence that said firm was the recipient of improper disclosures or breaches of confidence as a result of the Of Counsel's association with the law firm which had previously represented the defendant. Id. at 296-297.

Here, it is clear that Emery Celli and Morrison Cohen have closely collaborated. This is evidenced by their respective motions to dismiss the Plaintiff's Complaint, which were served simultaneously on June 30, 2008 in an obvious and clearly coordinated effort.[18] Attached as Exhibit F to the Meister Affirmation is a copy of the memorandum of law in support of the Defendant Crescent Heights' motion to dismiss the Plaintiff's Complaint, which at page 25 states: "Crescent adopts all of the arguments as to claims five through eight asserted by counsel for the individual defendants in their brief, which is hereby incorporated by reference." Attached

[18] Additionally, Plaintiff received both signed orders to show cause from Mr. Emery's assistant.

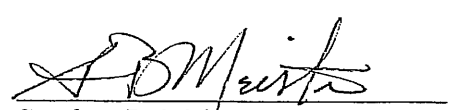
as Exhibit G to the Meister Affirmation is a copy of the memorandum of law in support of the Individual Defendants' motion to dismiss the Plaintiff's Complaint which at pages 1, 7, "adopts and incorporates by reference" the facts recitation and arguments asserted by co-Defendant Crescent Heights. Thus, counsel have admitted that the litigation position and strategy of Defendant Crescent Heights and the Individual Defendants is a joint collaborative effort between Emery Celli and Morrison Cohen. Therefore, this union of Emery Celli and Morrison Cohen results in Emery Celli being irreversibly tainted by Scharf's knowledge of Mr. Trump's confidential business practices and policies. Accordingly, Emery Celli must also be disqualified as counsel to Defendant Crescent Heights.

III. CONCLUSION

Based on the foregoing, it is respectfully requested that Morrison Cohen and Emery Celli be disqualified as counsel to the Defendants herein pursuant to Judiciary Law Sections 1200.20 and 1200.27. In the event that the Court finds that it needs additional information in order to determine whether said counsel should be disqualified, the Plaintiff respectfully requests that an evidentiary hearing be conducted regarding same.

Dated: July 8, 2008
New York, New York

MEISTER SEELIG & FEIN LLP



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