PRELIMINARY STATEMENT

This appeal involves a client's discharge for cause of a personal injury firm on the eve of trial with an offer to settle the underlying matter for over one million dollars. The motivation of such discharge, however, stems not from an aggrieved client's attempt at redress. Rather, the discharge for cause is an attempt by a former client *and* successor counsel to maximize their own personal pecuniary interests under the guise of unethical conduct. The client, suffering from the Buyer's Remorse of obtaining significant litigation loans with high interest rates, and her new counsel, seeking the benefit of a guaranteed six figure legal fee, assert a series of self-serving and contrived allegations in a transparent attempt to support a violation of an ethical rule where one does not exist.

STATEMENT OF FACTS

Petitioner-respondent Sacco & Fillas, LLP ("S&F"),[1] and respondent-appellant David J. Broderick, P.C. ("Broderick"), are law firms located in Queens County, New York. This appeal involves Broderick's succession of S&F as counsel to Mariela Salguero ("Salguero") in a personal injury action styled *Salguero v. Fernandez*, Index No. 24991/2012, pending in New York State Supreme, County of Queens ("underlying action"). Facts germane to this appeal follow a discussion of the underlying action.

I. THE UNDERLYING PERSONAL INJURY ACTION

On 16 June 2008 Salguero, a passenger in a vehicle driven by Gregorio Salas ("Salas"), was rear-ended by a vehicle operated by Mitchell A. Fernandez and owned by A.J. McNulty &

[1] Though not relevant to the underlying merits, Broderick incorrectly states that S&F is proceeding *pro se*. Though a corporate entity cannot represent itself in a judicial proceeding, *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993), "[a] professional corporation of attorneys can appear by its member lawyers." *Toren v. Anderson, Kill & Olick, P.C.*, 185 Misc.2d 23, 26, 710 N.Y.S.2d 799, 801 (N.Y. Sup. Ct. [N.Y. Co.] June 8, 2000); *see also* 1 N.Y. Jur. 2d *Actions* § 82 (2013).

Co., Inc. (collectively "Fernandez"). (Record on Appeal ("R.") 136-37). Two days after the accident, Salguero and Salas arrived to S&F's office in Whitestone, New York, for a consultation with partner Elias N. Fillas ("Fillas") and paralegal-interpreter Alvaro E. Fortich ("Fortich"). (*Id.* 232, 236).

During this two hour meeting, Salguero and Salas informed Fillas that their stopped vehicle had been rear-ended.[2] (*Id.* 232, 237). Without the benefit of a police accident report, Fillas inquired into the two most common defenses to a rear-end accident: a short stop and lane change. (*Id.*). Salguero and Salas unequivocally denied the veracity of either defense and corroborated their uniform accident descriptions with a photograph demonstrating damage to the center of the rear bumper. (*Id.*). (No other defenses were discussed given the description provided.)

After informing Salguero and Salas that a law firm's representation of a driver and passenger could create a conflict because a passenger will have no liability whereas the host vehicle may, Salguero told Fillas that she had no desire to bring an action against Salas, her then-boyfriend and current husband. (*Id.* 232). And that she did not believe Salas was responsible for the accident. (*Id.* 232-33). Fillas thereafter discussed the benefits (implication of New York's presumption of liability against the other vehicle) and disadvantages (Salguero's inability to sue Salas) of joint representation. (*Id.*). After Salguero *reiterated* her desire to not sue Salas, a retainer and form entitled *Driver-Passenger Waiver of Potential Conflict of Interest* ("conflict waiver") was executed by Salguero and Salas after Fortich interpreted its contents. (*Id.* 233, 237, 247-48).

[2] Given that Salguero and Salas claim that S&F violated ethical rules (and to establish its fee), S&F can properly disclose otherwise confidential communications between S&F and its former clients under the self-defense exception of the current and former disciplinary rules. *See* N.Y. Rules of Professional Conduct R. 1.6(b)(5)(i-ii) and N.Y. Code of Professional Responsibility DR 4-101(C)(4).

Before commencing suit Fillas obtained the police accident report. (*Id.* 136-37, 233). The police report revealed, for the first time, Fernandez's contrived and self-serving defense that Salas *reversed* into his vehicle. (*Id.* 136). Because the police report provided a description contradictory to the uniform versions provided by Salas and Salguero, Fillas convened a second meeting to specifically discuss this contention with his clients. And approximately one month before filing the summons and complaint, Salguero, Salas, Fillas, and Fortich (as interpreter) met to discuss Fernandez's contention in the police report. (*Id.* 233-34, 237-38). Salguero and Salas denied—without equivocation—the veracity of Fernandez's self-serving and uncorroborated assertion that Salas had reversed his vehicle. (*Id.* 234, 237). Fillas advised Salguero that if Fernandez's version of the accident were accepted liability could lie with Salas. (*Id.* 233, 237-38). And despite being presented with an alternate theory on liability, Salguero—consistent with her prior statements—denied the host vehicle travelled in reverse and reconfirmed her desire to *not* assert a claim against Salas. (*Id.* 234, 238).

S&F commenced the underlying action on behalf of Salas and Salguero by summons and complaint 30 October 2008. (*Id.* 250-57). Fernandez and AJ interposed an answer with a counter-claim against Salas on 8 January 2009.[3,4] (*Id.* 149-57).

And on 18 August 2009 and 5 November 2009 Salguero and Salas were deposed respectively. (*Id.* 259-393 (Salguero), 395-484 (Salas)). Consistent with the statements during intake—and every other instance—Salguero and Salas proffered uniform testimony concerning liability: their vehicle was stopped for a red light for many seconds before being struck in the

[3] Salas was insured by the Long Island Insurance Company ("LIIC") with a bodily injury policy limit of $25,000/$50,000. The LIIC entered liquidation in October 2010 and Salas was assigned defense counsel by the New York Liquidation Bureau. (R. 162).

[4] Fernandez and AJ had $3,000,000 in available insurance coverage: an initial layer of $1,000,000 administered by Crum & Forster and an excess layer of $2,000,000 from Colony Specialty.

rear. (*Compare id.* 289, 291 (Salguero) *with id.* 443). And perhaps more importantly, the Salas vehicle *never* travelled in reverse as Fernandez suggested. (*Id.* 291 (Salguero), 443 (Salas)). Following depositions, Salas—who asserted a claim for non-operatively treated tears to the shoulder and knee—settled for $47,500 on or about 14 December 2011. And Salguero—who asserted injuries requiring multiple surgeries—received an offer for $1,002,500.00 with an 8 January 2013 final trial date. (*Id.* 102).

II. SALGUERO'S DISCHARGE OF S&F

On 16 November 2012 Broderick served S&F with a cease-and-desist letter from counsel, a stipulation consenting to change attorney, and termination letter from Salguero.[5] (*Id.* 95-98). After an exchange of correspondence between Broderick and S&F concerning the propriety of a charging lien and disbursements (*id.* 102-13), S&F commenced this special proceeding by emergency order to show cause ("OSC") on 18 December 2012 in New York State Supreme Court, County of Queens (*id.* 16-115). The OSC was assigned to the Honorable Denis J. Butler, J.S.C., and sought a constructive trust for attorney's fees. (*Id.* 18). Broderick cross moved for summary judgment on 28 December 2012 on the issue of S&F's discharge for cause. (*Id.* 116-17). S&F opposed the motion and after multiple conferences before Justice Butler, the cross motion for summary judgment on discharge for cause was denied. Broderick appealed.

[5] Salguero's signed termination letter appears to be a form document that, however, contains *handwritten corrections in English by Salguero*. The significance of this is discussed later. *See infra* Part III.

ARGUMENT

I. STANDARD OF REVIEW

A) Appellate Review

An abuse of discretion standard applies to appellate review of orders concerning the disqualification of counsel for cause. *Matter of Estate of Stevens*, 252 A.D.2d 654, 656, 675 N.Y.S.2d 182, 184 (3d Dep't 1998). There are three instances of such abuse: (1) a ruling predicated on an erroneous interpretation of the law, (2) a ruling predicated on an erroneous assessment of the evidence, or (3) a decision outside the scope of permissible outcomes. *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009). Notwithstanding the deferential standard, this court can review both questions of law and fact. C.P.L.R. § 5501(c).

B) Summary Judgment

In order to obtain summary judgment, a movant must "tender[] sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). The initial burden of showing that there is no material issue of fact lies with the movant. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 321, 908 N.E.2d 869, 872 (2009). Once a movant meets its burden, it shifts to the non-movant to provide evidence showing an issue of fact. *Id.* at 321, 908 N.E.2d at 872.

A fact is material when it can "'affect the outcome of the suit under the governing law.'" *People v. Grasso*, 50 A.D.3d 535, 545, 858 N.Y.S.2d 23, 32 (1st Dep't 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248, 106 S. Ct. 2505 (1986)). Because summary judgment is outcome determinative, the evidence—and all inferences—are viewed in the light most *favorable* to the non-movant. *Sheryll v. L & J Hairstylists of Plainview*, 272 A.D.2d 603, 604, 709 N.Y.S.2d 429, 430 (2d Dep't 2000). "[I]ssue-finding, rather than issue-determination," is the

genesis of this exercise. *Matter of Corfian Enters., Ltd.*, 52 A.D.3d 828, 829, 861 N.Y.S.2d 392, 393 (2d Dep't 2008).

II. SIMULATANEOUS REPRESENTATION OF SALGUERO AND SALAS DID NOT VIOLATE THE CONFLICT OF INTEREST PROVISION OF THE DISCIPLINARY RULES

Under the Rules of Professional Conduct, "[a] lawyer shall decline proffered employment . . . if it would be likely to involve the lawyer in representing *differing interests*." N.Y. Code of Professional Responsibility DR 5-105(A) (emphasis added).[6] The focus of DR 5-105 is to "prevent a lawyer's loyalty to one client from impinging on the lawyer's loyalty to another client." Roy D. Simon, *Simon's Code of Professional Responsibility*, DR 5-105(A) Commentary p. 800 (2008). Conflict analysis "must be carefully examined on a case-by-case basis, taking into account *all of the facts and circumstances*." *Id.* p. 801 (emphasis added). S&F did not violate the conflict of interest provision of the disciplinary rules in its simultaneous representation of Salguero and Salas for two disjunctive reasons. Each is addressed in turn.

A) Salguero's Version Of The Accident Eliminated A Colorable Negligence Claim Against Salas Establishing The Lack Of Differing Interests

The requirements of DR 5-105 are triggered if there is evidence of differing interests in the simultaneous representation of Salguero and Salas. *See* 6A N.Y. Jur. 2d *Attorneys at Law* § 105. Differing interests "include every interest that *will adversely affect* either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." N.Y. Code of Professional Responsibility, *Definitions* ¶ 1 (emphasis added). In other words, there is no conflict unless there is a showing that the lawyer's representation "will be" adversely affected—speculative and unsubstantiated possibilities do no constitute actual

[6] As S&F's retention (and any alleged violation) by Salguero and Salas occurred in June 2008, the former N.Y. Code of Professional Responsibility applies to this dispute because the current N.Y. Rules of Professional Conduct took effect on 1 April 2009. Broderick concedes this by citing the former rules throughout its brief.

"differing interests." Under the specific facts attendant to this accident, the interests of Salguero and Salas never differed. Their interests were, in fact, aligned.

The hallmark of consistency is present in the accident descriptions proffered by Salguero and Salas throughout the suit. For example, it is undisputed that in the initial meeting with S&F, shortly after the accident, Salguero and Salas stated their vehicle was rear-ended. (R. 232 (Fillas Aff.), 237 (Fortich Aff.), 242, 245; *accord id.* 504 (Salguero Aff.), 510 (Salas Aff.)). And in their second (pre-suit) meeting—following Fillas's receipt of the police report—Salguero and Salas confirmed their initial version of the accident and unequivocally refuted Fernandez's contention their vehicle traveled in reverse. This chronology is, of course, undisputed by the record. (*Compare id.* 233-34 (Fillas Aff.), 237 (Fortich Aff.) *with id.* 504-06 (Salguero *failing* to refute a second meeting), 512 (Salas averring "I was told . . . that the other driver claimed I backed into him and I told that person that it was absolutely not true.")); *accord* Broderick Br. 26.

And true to their history Salguero and Salas—under oath at their respective depositions—proffered unified testimony on liability. In relevant part Salguero testified:

> Q How would you characterize the stop [of the host vehicle]? Was it a gradual stop, a sudden stop, or something else?
>
> A Slow.
>
> Q How did you first become aware that the car you were in was involved in an accident?
>
> A Because of the heavy impact in the rear.
>
> . . .
>
> Q For how long was the vehicle at a stop before you felt the impact?
>
> A About eight seconds.

> Q *Any time prior to that impact, did you feel your car travel in reverse?*
>
> A *No.*

(*Id.* 289, 291 (emphasis added)). And in relevant part Salas testified:

> Q For how long was your vehicle stopped before you felt an impact?
>
> A A few seconds. Just seconds.
>
> Q Less than three seconds?
>
> A Three seconds. Maybe eight seconds.
>
> . . .
>
> Q *At any time prior to feeling the impact, did you place your vehicle in reverse?*
>
> A *No.*

(*Id.* 443 (emphasis added)). Against this backdrop, Broderick's contention that Fernandez's counterclaim created divergent interests greatly exalts form over substance. This is because Salguero's testimony corroborates Salas's version while concomitantly refuting Fernandez's contrived theory. Indeed, Salguero has never identified a fact or the ignorance of fact sufficient to support her own direct claim against Salas.[7] *See* 22 N.Y.C.R.R. § 130-1.1(c)(1) (frivolity standard).

Though a criminal matter, *People v. Reape*, 162 A.D.2d 634, 557 N.Y.S.2d 94 (2d Dep't 1990), provides an instructful foundation for analysis of differing interests. In *Reape*, the police stopped a vehicle for running a red light and a search of that vehicle yielded firearms. *Id.* at 634,

[7] The following hypothetical illustrates this point: assuming, for our purposes, that the accident occurred exactly as Salguero and Salas testified except Fernandez's vehicle fled the scene and its identity could not be established (*i.e.*, hit-and-run). Under the facts, Salguero would still not be able to sustain a direct claim against the host vehicle. But Salguero would have a valid UM claim because her testimony would establish a contact with an uninsured vehicle and the lack of fault to the host vehicle. *Progressive Specialty Ins. Co. v. Lubeck*, 111 A.D.3d 947, 947-48, 976 N.Y.S.2d 153, 154 (2d Dep't 2013); N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2.3.

557 N.Y.S.2d at 95. The police arrested passengers Elenor Reape ("Reape") and Gary Brown and driver Clyde Nelson ("Nelson") and charged them with criminal possession of a weapon. *Id.* at 634, 557 N.Y.S.2d at 95. Reape and Nelson, represented by the same counsel, ultimately pled guilty. *Id.* at 634-35, 557 N.Y.S.2d at 95.

On appeal Reape challenged the propriety of her plea by arguing defense counsel's simultaneous representation of her and Nelson created a conflict of interest. *Id.* at 635, 557 N.Y.S.2d at 95. This court, in rejecting Reape's contention, found neither an actual conflict nor significant possibility of a conflict of interest. *Id.* at 635, 557 N.Y.S.2d at 96. And in reaching its decision, the court observed "[Reape] and Nelson . . . disclaimed ownership of the firearms recovered from the vehicle and *sought to shift the blame* to codefendant Brown. . . . Thus, [Reape] has *failed to demonstrate that conflicting theories or defenses* existed so that the potential conflict of interest actually operated." *Id.* at 635, 557 N.Y.S.2d at 96 (emphasis added); *see also Johnston v. Spoto*, No. 24937/2006, 2007 WL 5528003 (N.Y. Sup. Ct. [Queens Co.] June 4, 2007) (Taylor, J.) (finding *no* conflict of interest exists where driver and passenger "contend that [defendant] was fully responsible for the accident."); *Straubinger v. Schmitt*, 792 A.2d 481,485 (N.J. Super. Ct. App. Div. 2002) (applying New Jersey law and finding "[o]ne attorney may represent both the driver and a passenger as plaintiffs in a motor vehicle case provided it is clear that the other driver was completely responsible for the accident.").

Reape's rationale strongly militates against Broderick's largely conclusory claim of a conflict of interest. Here, as in *Reape*, the simultaneously represented parties jointly disclaimed wrongdoing while absolving the other *and* shifting fault, entirely, to a third party (*i.e.*, Fernandez). This tactic effectively refutes any claim that S&F exercised professional judgment in favor of one plaintiff to the detriment of the other or that S&F exercised professional judgment in

a manner to keep the interests unified. The absence of both factors strongly suggests S&F maintained the highest level of loyalty to Salguero and Salas during the pendency of their respective actions. *See* Simon, *supra*, pp. 800, 802 (establishing the duty of loyalty as the crux of DR 5-105 and the attorney's use of professional judgment as the matrix for analysis).

i. Simultaneous Representation Did Not Impinge S&F's Loyalty To Salguero Or Salas

Broderick's differing interest argument has two focuses: S&F's failure to move for summary judgment against *both* drivers and the disparate financial interests created by Fernandez's "single limit" insurance policy. Neither contention is entitled to any weight.

First, S&F's failure to move for summary judgment on behalf of Salguero against Salas *and* Fernandez did not constitute a colorable unutilized litigation strategy. This is because Salguero, despite her testimony negating liability against Salas, could only obtain summary judgment against *both drivers*—with diametric versions of the accident—by relying on the doctrine of alternative liability. And in order to be successful under alternative liability, a plaintiff must satisfy a four part conjunctive test: "that all possible tortfeasors are before the court; that all have breached a duty toward the plaintiff; that the conduct of one of the defendants has caused his injuries; and that the defendants, as a group, have better access to information concerning the incident than does the plaintiff." *New York Tel. Co. v. AAER Sprayed Insulations*, 250 A.D.2d 49, 52, 679 N.Y.S.2d 21, 24 (1st Dep't 1998). Such a motion would have failed on three of the four elements. Salguero's testimony neither supports the breach or causation elements against Salas. Merely being a passenger in the host vehicle supports no inference on liability. *See id.* at 52, 679 N.Y.S.2d at 24 (holding "plaintiff must normally prove that the conduct of a specific defendant was the proximate cause."); *accord Fowler v. Sammut*, 259

A.D.2d 516, 516-17, 686 N.Y.S.2d 109, 110 (2d Dep't 1999). The parties also have equal access to information concerning the incident negating the final element.

Second, Fernandez's single limit insurance policy did not create disparate interests between Salguero and Salas because of the practical facts underlying the applicable coverage. For example, Fernandez's insurance policies, though single limit, afforded $3,000,000 in total coverage (excess and primary). While Broderick correctly argues that Salas's recovery reduced the amount of insurance available, Broderick fails to acknowledge that the remaining available coverage was $2,952,500 (or 98% of the original policy limit). Perhaps more importantly there is *no evidence or claim* by Broderick that this sum would be *insufficient to satisfy* any sustainable recovery by Salguero individually. Likewise, the total policy limit would be reduced against Salas's recovery regardless of S&F's simultaneous representation—and there is no scenario where the full, unadulterated, $3,000,000 insurance policy would be available to Salguero (unless Salas discontinued his action).

Furthermore, Broderick's contention that Fernandez's single limit policy justified a claim by Salguero against Salas (even absent a factual basis to support her claim) is meritless. And the failure to assert such a claim did not prejudice Salguero. A claim for "negligence" by Salguero against Salas would have triggered a $25,000 policy with a carrier in liquidation. Perhaps more importantly, such a claim would have negated Salguero's corroborative value thereby degrading her case in two ways: minimizing the benefit of *no* joint and several liability by increasing the likelihood of Salas being found one hundred percent responsible for the accident.[8] C.P.L.R. § 1602(6) (negating C.P.L.R. § 1601(1)).

[8] Because C.P.L.R. § 1601(1) does not apply, Salguero would be able to collect her damages award against Fernandez's insurance policy with a showing of *one percent* liability or greater.

If Salas were found to be solely responsible for the accident, Salguero would be limited to collecting her damages award against a minimum policy. Assuming this result at trial, Salguero—under the facts of this case—would sustain no demonstrable economic damage. This is because Salguero obtained approximately $75,000 in loans secured *only* against her recovery (if any) in this case. (R. 506).[9] Salguero has, therefore, economically benefited three times in excess of any insurance-based recovery she could have obtained against Salas.

B) <u>Salguero And Salas Properly Waived Any Conflict By Executing The Conflict Waiver Following Oral Advice By S&F</u>

i. Broderick Improperly Submitted Evidence Supporting Its Cross Motion For The First Time In Reply

In opposition to Broderick's motion for summary judgment, S&F annexed conflict waivers executed by Salguero and Salas during their intake. (R. 247-48; *see id.* 233, 237). Salguero and Salas, however, disputed the provenance of their signatures on the conflict waivers in affidavits submitted for the first time in Broderick's reply. (*Id.* 505 (Salguero averring "I did not sign that piece of paper.") 511 (Salas averring "I did not sign that piece of paper."); *see also id.* 226 n.4 (S&F noting in its opposition that Broderick *failed* to submit affidavits from Salguero or Salas in support of its cross motion)). Broderick's use of evidence submitted for first time in reply was improper and the affidavits of Salguero and Salas are entitled to no weight here. *Matell Contract. Co., Inc. v. Fleetwood Park Dev., LLC*, 111 A.D.3d 681, 683, 974 N.Y.S.2d 573, 575 (2d Dep't 2013). Any contention by Broderick that it neither possessed the conflict waivers nor anticipated S&F's argument in its cross motion is irrelevant. *See id.* at 683, 974 N.Y.S.2d at 575

[9] While Salguero disputes knowledge of the interest rates charged on her loans (or the economic consequence), she acknowledges receipt of the principal. (R. 506).

(rejecting the submission of evidence submitted for the first time on reply to rebut an argument in the opposition not addressed in the principal motion).[10]

ii. Any Conflict Here Was Consentable And Properly Waived In Writing By Salguero And Salas

Assuming *arguendo* there has been an actual conflict,[11] under DR 5-105(C) "a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." N.Y. Code of Professional Responsibility DR 5-105(C).

1. Any Conflict Here Is Consentable

A conflict is unconsentable "[i]f a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent." *Id.* EC 5-16. Though Broderick suggests otherwise, this department has never specifically held that the simultaneous representation of driver and passenger is a per se *unwaivable* conflict.

In *Pessoni v. Rabkin*, 220 A.D.2d 732, 732, 633 N.Y.S.2d 338, 338-39 (2d Dep't 1995), this court held that an attorney's representation of both driver and passengers of an automobile involved in a collision violated DR 5-105(A), where the attorney had "clearly anticipated that a

[10] If the court were to consider the affidavits of Salguero and Salas, the dispute concerning the provenance of the underlying signatures, in the context of the motion for summary judgment, should be resolved in favor of S&F the non-movant. *Negri v. Stop & Shop*, *Inc.*, 65 N.Y.2d 625, 626, 491 N.Y.S.2d 151, 152 (1985) (holding that inferences are resolved in favor of the non-movant). The signatures of Salguero and Salas on their respective conflict waivers appear to otherwise be identical to their signatures on non-disputed documents. (*Compare* R. 247-48 *with id.* 256-57).

[11] A leading scholar on the issue identified three levels of conflicts: immaterial (those that are remote), non-consentable (those that are incurable), and consentable (material but consentable). *See* Roy D. Simon, *Simon's Code of Professional Responsibility*, DR 5-105(A) Commentary p. 802 (2008).

cross claim would be interposed against [the plaintiff-driver] by the owner and operator of the vehicle that struck his automobile."[12] The *Pessoni* court did not discuss whether the conflict created by the simultaneous representation was consentable. Nor have four subsequent decisions by this court citing *Pessoni* in evaluating a conflict arising from the simultaneous representation of driver and passenger. *See Quinn v. Walsh*, 18 A.D.3d 638, 638, 795 N.Y.S.2d 647, 648 (2d Dep't 2005) (finding attorney violated DR 5-105(A) by representing driver and passenger without reference to actual or potential counterclaims or cross-claims); *Alcantara v. Mendez*, 303 A.D.2d 337, 338, 756 N.Y.S.2d 90, 92 (2d Dep't 2002) (holding where driver of vehicle was also the guardian of children among the passengers at the time of the accident, an attorney could not continue to represent another passenger and driver-guardian after driver-guardian became the subject of a counterclaim in the personal injury action because, in light of the counterclaim, the attorney's clients had adverse pecuniary interests); *Boyd v. Trent*, 287 A.D.2d 475, 476, 731 N.Y.S.2d 209, 210-11 (2d Dep't 2001) (holding that a father, who was owner of vehicle involved in a collision, had differing interests from children who were passengers in the vehicle driven by their mother at the time of the collision, attorney who represented the father in his individual capacity was disqualified from also representing the father in his capacity as guardian for the children); *Sidor v. Zuhoski*, 261 A.D.2d 529, 530-31, 690 N.Y.S.2d 637, 638-39 (2d Dep't 1999) (holding attorney who represented both the estate of the driver of a vehicle involved in a collision, and the children of the driver who were passengers at the time of the collision, was disqualified from continuing to represent the driver's estate; the court noted that, "[u]nder New

[12] While there is no dispute that Fernandez asserted a *counterclaim* against Salas, Broderick incorrectly suggests that cross claims and counterclaims are synonyms. (Broderick Br. 26 ("Here, it is evident that [Fernandez has] a viable counterclaim or cross claim for negligence on Mr. Salas' part, even though Mr. Salas and Ms. Salguero [deny their vehicle travelled in reverse]."). Under C.P.L.R. § 3109(a) a counterclaim is defined as a cause of action asserted by a defendant against a plaintiff whereas C.P.L.R. § 3109(b) defines a cross claim as a cause of action by one defendant against another defendant.

York law, because a child may properly bring an action against his or her parents, it is improper for an attorney to represent both the parents and the child in an automobile accident action brought against the owner and driver of the other vehicle."). To be clear, this court's decisions in *Quinn*, *Alcantara*, *Boyd*, and *Sidor* did *not* discuss the possibility of a conflict waiver. Nor did these decisions address the issue of whether there was sufficient insurance coverage for claims by the multiple clients—two key issues present here.

Instructively, in reaching their determinations *Alcantara* and *Boyd* cited a trial court's decision in *Shaikh v. Waiters*, 185 Misc.2d 52, 710 N.Y.S.2d 873 (N.Y. Sup. Ct. [Nassau Co.] July 10, 2000) (Palmieri, J.), that found a driver-passenger conflict was unwaivable where: (1) an infant-passenger could not have waived the conflict as a matter of law, and (2) the parties failed to develop a sufficient record for the court to determine whether there had been a proper waiver. *Shaikh*, 185 Misc.2d at 56, 710 N.Y.S.2d at 876-77. Notwithstanding these facts, *Shaikh* noted that "an attorney would withstand disqualification from a dual representation where all concerned have consented to the compromised representation." *Id.* at 55, 710 N.Y.S.2d at 876. *Alcantara's* and *Boyd's* reference to *Shaikh* signals a common-sense approach to waivability, which focuses on whether a lawyer who asserts that a proper waiver has been obtained has presented sufficient evidentiary proof to support the claim.

More recently, the First Department in *In re Ravitch*, 82 A.D.3d 126, 919 N.Y.S.2d 141 (1st Dep't 2011), held that the simultaneous representation of driver and passengers was a waivable conflict after observing that neither *Pessoni* nor DR 5-105(A), "categorically preclude the possibility of a proper [conflict] waiver where there is no viable cross claim against the driver." *Id.* at 131, 919 N.Y.S.2d at 145.

Read together, these cases do not support the conclusion that a counterclaim is synonymous with automatic disqualification. Or that the fact of a counterclaim is mechanically viewed to the disregard of the entire circumstances. Rather, a counterclaim ("viable" or "anticipated") is intended to trigger segregated analysis into whether a passenger has a colorable claim against her driver. This reflects the judicial view that a passenger—by virtue of her status in the host vehicle—may lack sufficient knowledge of her driver's actions or the mechanics of the accident. *See LaRusso v. Katz*, 30 A.D.3d 240, 244, 818 N.Y.S.2d 17 (1st Dep't 2006) (noting that wife-passenger never saw the happening of the accident; no conflict waiver or attorney advice regarding a conflict was given).

Here, as discussed, Salguero's testimony has the following effect: it corroborates Salas's version, it precludes Salguero from asserting her own claim against the host vehicle, and it wholly rebuts Fernandez's version. Interpreting the cross claim rule to warrant per se disqualification deemphasizes whether a passenger can sustain a direct claim against her driver. It also prevents such plaintiffs from the benefit of the "unified defense"[13] rule utilized by defendants that allows for joint representation against facts where defendants could colorably shift blame among themselves but choose not to. *Twin Sec., Inc. v. Advocate & Lichtenstein, LLP*, 97 A.D.3d 500, 501, 948 N.Y.S.2d 616, 617 (1st Dep't 2012); *Ingenito v. Horn*, No. 116201/2008, 2011 WL 2941345 (N.Y. Sup. Ct. [New York County] June 15, 2011) (Lobis, J.) (upholding application of the unified defense rule in a medical malpractice action where defendant-physicians could blame the other).

[13] Plaintiff's use of the unified defense rule would allow two plaintiffs, as here, to argue a single, joint, theory of liability that contradicts the theory offered by defendant.

2. The Conflict Waiver Executed By Salguero And Salas Following Oral Advice By Counsel Is Valid

Simultaneous representation under DR 5-105(C) requires satisfaction of a two part conjunctive test. The first element is whether a "disinterested lawyer would believe that the lawyer can competently represent the interest of each." *Id.* This element is considered objective and requires the disinterested lawyer's agreement for both parties. The function of the disinterested lawyer is "to give the client the best advice possible about whether the client should or should not consent to a conflict." Simon, *supra*, p. 857. Applying these principles here, the disinterested lawyer would advise Salguero and Salas to consent because of the unique facts of this case. Similar to a unified defense, Salguero and Salas offered a uniform, consistent, and believable story on liability. And as a result there was no true risk that S&F would emphasize one client's version to the detriment of the other. Notwithstanding Fernandez's contrarian story, Salguero's best interest—at all times—was to remain aligned with Salas in order to increase the probability that some fault would be found against Fernandez (giving Salguero the full benefit of the exception to joint and several liability here).

The second element requires each client "consent[] to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." N.Y. Code of Professional Responsibility DR 5-105(C). At the initial meeting, Fillas, as to the disadvantages, informed Salguero that if S&F represented both parties, Salguero would forego her right to sue Salas directly. (R. 233). This was true notwithstanding the possibility that Salas could be found responsible for the accident. (*Id.* 232). As to the advantages, Fillas stated that the uniform accident descriptions triggered *prima facie* liability against the other vehicle. (*Id.* 233). After Salguero stated she did not want to sue Salas because he did not cause the accident, Salguero and Salas executed conflict waivers after its contents were interpreted to them

by Fortich. (*Id.* 233-34, 237-38; *but see id.* 505, 511). And during the second pre-suit meeting—after obtaining the police report—Salguero and Salas reiterated their desire to be jointly represented by S&F; and Salguero reiterated her desire to not sue Salas. Broderick advances two arguments against this element.

First, Salguero and Salas rebut this chronology to varying degrees of specificity. They initially attempt to refute the provenance of their signatures on the conflict waivers. (*Id.* 505, 511 (averring "I did not sign that piece of paper that the firm of SACCO & FILLAS is claiming I signed.")). But later subtly militate against this position by averring "[f]urther, *certainly* that is not my writing where it says *print your name* and that is not my writing on the date either." (*Id.* 505, 511 (emphasis added)). And while Salguero and Salas claim they "signed a lot of papers that were not explained to us" they rely on the passive to support their claim of a lack of informed consent: "[w]e were asked many questions and told some things." (*Id.* 504-05, 510-11). Any dispute in these facts, in this procedural context, should properly be resolved in favor of S&F as the non-movant. *Negri v. Stop & Shop*, *Inc.*, 65 N.Y.2d 625, 626, 491 N.Y.S.2d 151, 152 (1985).

Second, Broderick challenges the form of the conflict waiver because it does not specifically identify the "benefits and disadvantages of joint/dual representation." (Broderick Br. 27). This argument is entitled to no weight because DR 5-105 did not require a written waiver "recite the full contents of counsel's oral explanation regarding potential conflicts" in order for it to be valid. *Ravitch*, 82 A.D.3d at 131, 919 N.Y.S.2d at 145-46; *see also* New York State Bar Ass'n Comment 1 to N.Y. Rules of Professional Conduct Rule 1.0's definition of "confirmed in writing" which states "[t]he confirming writing need not recite that the lawyer communicated to the person in order to obtain the person's consent."

III. SALGUERO'S DECISION TO NOT SUE SALAS WAS A LAWFUL OBJECTIVE FOLLOWED BY S&F NEGATING DISCHARGE FOR CAUSE

Under the Code of Professional Responsibility a lawyer shall not "[f]ail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules." N.Y. Code of Professional Responsibility DR 7-101(A)(1). Consistent with this principle, two canons define the division of authority between attorney and client. Under Ethical Canon 7-7 all *dispositive* decisions belong to the client. *Id.* EC 7-7 (finding "[i]n certain areas of legal representation *not affecting the merits* of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client." (emphasis added)). And as a corollary, Ethical Canon 7-8 directs "[i]n the final analysis, however, the lawyer should always remember that *the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer*." *Id.* EC 7-8 (emphasis added); *accord* New York City Bar Ass'n, Formal Opinion 1988-4 (observing "it is for the client alone to make ultimate decisions 'affecting the merits of a cause.'") (internal citations omitted).

Applying these principles here, Salguero's decision to *not* sue Salas (then-boyfriend and current husband), constituted the exercise of authority within the client's exclusive domain. According to Fillas and Fortich, Salguero unequivocally stated that she did not want to sue Salas during the *two* pre-suit meetings following an explanation of her rights. (R. 233-34 (Fillas), 237-38 (Fortich)). Nor was Salguero's decision unreasonable given her intimate relationship with Salas—an obvious example of a "non-legal factor" reserved to the client—and the mechanics of

the accident. To rebut Fillas and Fortich, Broderick proffers Salguero's affidavit to create the inference of client ignorance.[14]

Initially, Salguero does not specifically refute S&F's contention that she repeatedly told Fillas and Fortich that she did not want to sue Salas. Salguero instead relies on the abstract and self-serving: "I assumed that we had to have the same lawyer because we were in the same car." (*Id.* 505). There is no assertion that this assumption was formed in reliance to any statement attributable to S&F. Nor is there any claim that Salguero tried to confirm the veracity of her assumption or that she, in fact, ever wanted to sue Salas before meeting Broderick. Rather, Salguero's consternation flows from dubious legal advice or strategy provided by Broderick (*i.e.*, obtaining summary judgment against *both* drivers and Fernandez's single limit policy). (*Id.*). Advice certainly driven by Broderick's understanding that, if he can demonstrate S&F breached its fiduciary duty, Broderick would not be required to share any legal fee with S&F. *See Louima v. City of New York*, No. 98-CV-5083-SJ, 2004 WL 235994, at *75-78 (E.D.N.Y. Oct. 5, 2004) (holding forfeiture of all or some legal fees appropriate where there is a significant conflict of interest and that a legal fee need not be shared with a law firm guilty of ethical misconduct).

Careful review of the affidavit evidences the disingenuous application of a revisionist perspective: the impetus behind S&F's discharge is Salguero's attempt to undue her own actions that negatively affect her net recovery. For example, during the course of litigation Salguero obtained approximately $75,000 in litigation loans secured against any recovery that matured to approximately $350,000 at the last settlement offer. (*Id.* 506); *see also* N.Y.S. Bar Ass'n Opinion 666 (1994) (finding "a mere referral to the lending institution would not be unethical per se.");

[14] This dispute in facts between Salas and S&F should, in this procedural context, be resolved in favor of S&F as the non-movant.

New York City Bar Ass'n, Formal Opinion 2011-2 (same). The true pathology of this dispute is best reflected in Salguero's affidavit:

> *No one explained the fact that when I took out some loans totaling $75,000, that I may have to pay the loan company back hundreds of thousands of dollars in interest*. . . . The loan was in English so I did not understand it and trusted [S&F] to represent me well.
>
> . . .
>
> I went to a mediation. During the meeting I was told by Mr. Fillas that there was an offer of $940,000. I was told by Mr. Fillas that the money would be divided three hundred thousand dollars '...to us for the loans you took out' and three hundred thousand to us for attorney's fees and three hundred thousand to you, meaning me. *I said no that*.

(*Id.* (emphasis added)). Salguero's claim of obliviousness is, however, belied by the underlying record. For example, Broderick annexes one such loan agreement executed by Salguero that reveals (above the signature block) a monthly *numerical* calculation of the payoff amount. (*Id.* 514 ("04/30/14 64,809.40")). Broderick's claim that Salguero "does not even have a *rudimentary* understanding of [English]" ignores facts supporting the converse conclusion. (*Id.* 128). Sequentially, the record shows that Salguero spoke to the police and ambulance personnel in English on the day of the accident (*id.* 466, 470), testified in English at her deposition prior to translation (*id.* 267), and inserted handwritten English corrections and information to Broderick's form letter terminating S&F (*id.* 98). While Salguero may need an interpreter for intricate conversations, these examples manifest significantly more than a rudimentary understanding of English as Broderick disingenuously suggests.

Furthermore, Salas—who settled approximately one year before substitution—also averred ignorance when his loan consumed a substantial portion of the settlement proceeds. (*Id.* 512 ("I settled my case for $47,500 but I only received $11,000 because I took out a loan. No

one told me that I would have to pay so much in interest.")). Even assuming Salguero had no understanding of the loan documents, Salas's settlement placed Salguero on notice of the potential consequences of a litigation loan. There is, of course, no claim by Salguero that she ever inquired about her loans (given Salas's experience) or that she believed, as now, to having been hoodwinked.

CONCLUSION

For this and the other reasons stated, the decision of Justice Butler denying summary judgment should be sustained. Or alternatively, the decision should be modified on the law to find no discharge for cause against S&F.

Dated: 24 June 2014
Astoria, New York

Respectfully submitted,

SACCO & FILLAS, LLP

By Counsel.

Si Aydiner
General Counsel
Attorney for petitioner-respondent
31-19 Newtown Avenue, 7th Floor
Astoria, New York 11102
(T) 718-269-2207
(F) 718-732-2734
saydiner@saccofillas.com