

1 action, the Court finds that the disqualification motion should be denied in its
2 entirety.

3 Background

4 This action is one of several related lawsuits that have arisen from the
5 disputed sale of 5,075 acres of land known as the Petrified Forest Ranch in
6 Apache County (“the property”). PFR, LLC, (“PFR”), the seller of the property,
7 entered into a brokerage agreement in December, 2003 with real estate broker
8 Millard “Mickey” Oksner, operating as Rensko, Inc. (collectively “Oksner”), to sell
9 the property. In October, 2004, Oksner signed a letter agreement with the
10 Karlsson Group, through its president, Anders Karlsson (collectively “Karlsson”),
11 regarding Karlsson’s purchase of the property. Meir Westreich was Karlsson’s
12 counsel during the negotiations with PFR. When the parties could not thereafter
13 agree on the terms of a formal contract, Karlsson, through Westreich, asserted
14 that the letter agreement was a valid contract while PFR, through its lead counsel
15 Richard Keyt, asserted that it was not because Oksner lacked the authority to
16 enter into a binding agreement and because PFR’s membership had not
17 approved the transaction.

18 Meanwhile, in November, 2004, PFR entered into a contract to sell the
19 property to ACRES4U Land & Development, LLC (“ACRES4U”), which was
20 operating on behalf of Langley Farm Investments, LLC (“Langley”). Given PFR’s
21 dispute with Karlsson, PFR’s contract with ACRES 4U contained a provision,
22 known as paragraph 20, that made the sale to ACRES4U conditional on PFR not
23 being obligated to sell the property to anyone else and no other party claiming

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25 time concerning the propriety of Albert E. Van Wagner, Jr.’s dual role as both a
26 named defendant and counsel for his co-defendants in this action.

1 that PFR was obligated to sell the property to anyone else.

2 On January 11, 2005, Karlsson, through Westreich, filed a diversity of
3 citizenship-based lawsuit in the U.S. District Court for the Central District of
4 California, Karlsson v. Petrified Forest Ranch, LLC, 2:05-cv-00238-R-RC
5 (“Karlsson I”), against PFR, two individuals associated with PFR, and Oksner.
6 The complaint, which alleged that the defendants had breached the letter
7 agreement signed by Oksner, sought specific performance of the letter
8 agreement and to enjoin PFR from selling the property to anyone else. The
9 complaint also alleged that Oksner was estopped from denying his agency
10 authority from PFR and, to the extent that he lacked the authority to enter into the
11 letter agreement on PFR’s behalf, that he had defrauded Karlsson; it further
12 alleged that PFR and Oksner had conspired to stop Karlsson from buying the
13 property.

14 In February, 2005, PFR notified ACRES4U that it was cancelling their
15 contract pursuant to paragraph 20. ACRES4U refused to accept the cancellation,
16 and thereafter assigned its interest in the contract to Langley. On February 28,
17 2005, an ACRES4U representative telephoned PFR’s attorney Richard Keyt and
18 threatened litigation if PFR did not sell the property to it or its assignee Langley.

19 Karlsson, through Westreich, and PFR, then represented in part by
20 Norman Keyt (“Keyt”)², Karlsson’s current co-counsel, entered into a stipulated
21 settlement of Karlsson I and the California district court entered an order on
22 March 18, 2005 that dismissed the entire action with prejudice pursuant to
23 Fed.R.Civ.P. 41.

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26 Norman Keyt is the brother of PFR’s lead counsel, Richard Keyt. The brothers have separate law practices.

1 Pursuant to the settlement agreement, PFR agreed to sell the property to
2 Karlsson and Karlsson agreed to indemnify PFR against litigation by ACRES4U
3 and Langley; the settlement agreement also provided that any indemnified claims
4 would be assigned to Karlsson. PFR conveyed the property to Karlsson on
5 March 3, 2005 and the deed was recorded in Apache County on March 10, 2005.

6 On March 11, 2005, Langley, through its counsel and current defendant
7 Albert Van Wagner, Jr., filed a action against PFR in the Apache County Superior
8 Court wherein it alleged claims for specific performance of the November, 2004
9 land sale agreement, breach of contract, breach of implied duty of good faith, and
10 consumer fraud; Langley recorded a notice of lis pendens on the property in
11 Apache County on March 15, 2005. The superior court subsequently entered
12 summary judgment for PFR, finding that paragraph 20 of the contract permitted
13 PFR to cancel the contract given Karlsson's contention that it had the priority
14 claim to the property. The Arizona Court of Appeals affirmed the summary
15 judgment to PFR on December 31, 2007. Langley released the notice of lis
16 pendens on February 7, 2008.

17 On April 4, 2005, Karlsson, through Westreich, filed a second action in the
18 U.S. District Court for the District of California against Langley, ACRES4U, and
19 Oksner arising from ACRES4U and Langley's attempt to purchase the property
20 from PFR. The complaint alleged claims for interference with contract and/or
21 business opportunity, extortion, abuse of process, interference with quiet
22 enjoyment of property, and conspiracy. The action was dismissed by the
23 California district court on October 3, 2005 for lack of prosecution.

24 Langley, through Van Wagner, filed a second suit on February 28, 2007 in
25 Apache County Superior Court, alleging claims against Karlsson and his attorney
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1 Westreich for intentional interference with contract and to quiet title to the
2 property. Langley voluntarily dismissed the action after the Arizona Court of
3 Appeals decided in favor of PFR in Langley's earlier state court action.

4 Karlsson, through Westreich and Keyt, commenced the instant action on
5 February 28, 2007 against Langley, Van Wagner, and ACRES4U and various
6 related companies and individuals, and Oksner. As a result of stipulations, all of
7 Karlsson's claims against the Oksner-related defendants and the ACRES4U-
8 related defendants have been dismissed with prejudice. The Langley and Van
9 Wagner-related defendants (collectively "Langley") are the sole remaining
10 defendants.³

11 In an opinion entered on September 8, 2008 (doc. #106), the Court in part
12 dismissed Karlsson's First Amended Complaint against Langley with the
13 exception of Claim No. 1 (Interference with Contracts and/or Business
14 Opportunities). According to Karlsson, this claim, as it applies to Langley, asserts
15 Karlsson's personal claims against Langley for interfering with Karlsson's
16 contract/business opportunities with PFR commencing on February 28, 2005.
17 The gist of the claim is that ACRES4U's threat to PFR, made on behalf of
18 Langley, to sue PFR if PFR did not sell the property to it substantially increased
19 the price of Karlsson's purchase of the property and its legal expenses because
20 PFR conditioned the sale to Karlsson in part on Karlsson's agreement to
21 indemnify it against any ACRES4U/Langley lawsuit, and that Langley's
22 subsequent suit against PFR in state court and its filing of the lis pendens further

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24 The remaining defendants are Langley Farm Investments, LLC, Langley
25 Petrified Forest Ranch, LLC, Langley Land, LLC, Largo Ventures, LLC, Steven G.
26 Rees, Stacy J. Brimhall, Parshelle S. Brimhall, Albert E. Van Wagner, Jr., P.C.,
and Albert E. Van Wagner.

1 increased Karlsson's costs related to the property and interfered with its
2 economic exploitation of the property.

3 Discussion

4 The disqualification motion filed by the Langley is predicated solely upon
5 Ethical Rule 3.7(a) of the Arizona Rules of Professional Conduct, which is
6 applicable to attorneys appearing before this Court pursuant to LRCiv 83.2(e).⁴

7 Langley has informed Karlsson that it intends to call Karlsson's attorneys
8 Meir Westreich and Norman Keyt as witnesses regarding the events leading up to
9 and during the events underlying this action; Karlsson states that it intends to
10 present its case without relying on the testimony of either attorney.

11 In order to avoid the misuse of the advocate-witness rule for improper
12 tactical reasons, Arizona law mandates that "[o]nly in extreme circumstances
13 should a party to a lawsuit be allowed to interfere with the attorney-client
14 relationship of his opponent." Alexander v. Superior Court, 685 P.2d 1309, 1313
15 (Ariz.1984). As the Ninth Circuit has noted, disqualification motions should be
16 subjected to "particularly strict scrutiny" because of their potential for abuse. Optyl
17 Eyewear Fashion International Corp. v. Style Companies, Ltd., 760 F.2d 1045,
18 1050 (9th Cir.1985); *cf.* Gomez v. Superior Court, 717 P.2d 902, 905 (Ariz.1986)

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21 ER 3.7, entitled "Lawyer as Witness" states in relevant part:

22 (a) A lawyer shall not act as advocate at a trial in which the lawyer is
likely to be a necessary witness unless:

- 23 (1) the testimony relates to an uncontested issue;
24 (2) the testimony relates to the nature and value of legal
services rendered in the case; or
25 (3) disqualification of the lawyer would work substantial
26 hardship on the client.

1 (Court stated that it “view[s] with suspicion” motions to disqualify opposing
2 counsel based on conflict of interest or appearance of impropriety.) As the
3 moving party, Langley has the burden of sufficiently showing why the Court
4 should not uphold the presumption against disqualifying opposing counsel.
5 Alexander, 685 P.2d at 1313. In order to meet that high burden, Langley must
6 establish, individually as to Westreich and Keyt, (1) that the attorney will give
7 evidence material to the determination of the issues being litigated, (2) that such
8 evidence is unobtainable elsewhere, and (3) that the testimony is or may be
9 prejudicial to the testifying attorney’s client. Cottonwood Estates, Inc. v. Paradise
10 Builders, Inc., 624 P.2d 296, 302 (Ariz.1981) (discussing DR 5-102, the
11 predecessor to ER 3.7).

12 A. Meir Westreich

13 As to the first element, the attorneys’ expected testimony must be relevant
14 and material to one or more of the five elements of the only relevant remaining
15 claim against Langley, which is Karlsson’s claim for intentional interference with
16 contract or business expectancy.⁵ Langley supports its contention that
17 Westreich’s testimony is necessary by listing numerous activities that Westreich
18 engaged in during the underlying events in his allegedly pervasive role as
19 Karlsson’s attorney and agent; it elaborates to some extent regarding Westreich’s

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22 The elements of a claim of intentional interference with contract or
23 business expectancy against Langley are (1) the existence of a valid contractual
24 relationship or business expectancy on Karlsson’s part, (2) Langley’s knowledge
25 of the relationship or expectancy, (3) intentional interference by Langley inducing
26 or causing a breach or termination of the relationship or expectancy, (4) resultant
damage to Karlsson caused by the disruption of its relationship or expectancy,
and (5) that Langley acted improperly. Snow v. Western Savings & Loan Ass’n,
730 P.2d 204, 211 (Ariz.1986); Dube v. Likins, 167 P.3d 93, 98 (Ariz.App.2007).

1 expected testimony by stating, for example, that it wants to cross-examine him
2 concerning such matters as Karlsson’s claimed damages, including the
3 reasonableness of Westreich’s attorney’s fees from the underlying litigation and
4 his communications with the defendants concerning the plaintiffs’ damages, and
5 his knowledge regarding the timing of the indemnification clause contained in
6 Karlsson’s settlement agreement with PFR. While Westreich undoubtedly has
7 relevant knowledge of the underlying events, the Court is not persuaded by
8 Langley’s arguments because Langley has made little effort to explain how any
9 testimony by Westreich concerning the activities it has specified is material to the
10 issues relevant to the intentional interference claim. As Karlsson points out in a
11 detailed response to the noted activities, many of these activities involve
12 undisputed issues, legal issues, and issues unrelated to the remaining claim.⁶

13 As to the second element, Langley conclusorily asserts that it wants to be
14 able to present “the evidence from the beginning to the end, and Westreich is the
15 only person who can testify as to what and why certain actions were taken by the
16 Karlsson Parties.” But the only significant elaboration Langley provides as to why
17 the content of Westreich’s testimony is unobtainable from other sources is limited
18 to Anders Karlsson, and it only contends as to Karlsson that cross-examining him
19 “would only lead to his inability to testify as to those events in which he did not
20 participate, privilege objections as to what his attorney told him, and lack of any

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22 Langley argues in its reply that the Court should at the very least strike
23 Karlsson’s separate “objections and proffers” memorandum, if not both it and
24 Karlsson’s response, for impermissibly exceeding the allowable page limits set
25 forth in LRCiv 7.2(e). While the much preferable course of action would have
26 been for Karlsson to have sought the Court’s permission to file what is in effect an
oversize brief, the Court will not strike either of the documents because they add
to the Court’s ability to resolve the pending motion on its merits.

1 understanding as to legal claims and maneuvers made by Westreich.” Not only
2 does Langley fail to explain what material events Karlsson could not testify about,
3 it also fails to explain how any attorney-client privilege issues applicable to
4 Karlsson, Westreich’s client, would also not be applicable to Westreich, see ER
5 1.6(a), nor does it persuasively discount the existence of all other potential
6 witnesses, including possible expert witnesses, or existing documentary evidence
7 relevant to the remaining claim. For example, while Langley states that
8 Westreich is the only real witness who can testify as to the reasonableness of his
9 attorney’s fees in the underlying litigation that Karlsson is attempting to recoup as
10 damages, it makes no effort to explain why such evidence cannot be obtained
11 from documentary evidence in the form of Westreich’s time sheets and expert
12 testimony analyzing those time sheets.

13 As to the third element, Langley merely states that it will seek admissions
14 from Westreich which may be detrimental to Karlsson. The only elaboration that
15 it provides is that it wants Westreich to agree that “attorneys generally plead
16 broader complaints for two basic reasons: 1) by a broader pleading, a party
17 seeking discovery will be less likely to confront a relevance objection, and 2) it is
18 far easier to dismiss a cause of action than to add one which is especially true the
19 longer the suit has been around.” Langley does not, however, made any real
20 effort to discuss how this admission is detrimental to Karlsson - although it is not
21 entirely clear to the Court, apparently the purpose of the noted admission is to
22 counter Karlsson’s allegations in the pending complaint in this action that
23 Langley’s inclusion of breach of duty of good faith and consumer fraud claims in
24 its state court lawsuit against PFR was frivolous and added a substantial amount
25 to Karlsson’s litigation expenses in that action. The Court is unpersuaded by this
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1 argument because even if Westreich were in effect to act as an expert witness for
2 Langley and make such an admission, it is simply not sufficiently detrimental to
3 Karlsson to be a reason for disqualifying Westreich.

4 B. Norman Keyt

5 As to the first element, Langley's cursory explanation as to why Keyt's
6 testimony is relevant and material to the remaining claim is unpersuasive.
7 Langley has listed a number of actions that Keyt undertook, or allegedly should
8 have undertaken, regarding the underlying events, and it has somewhat
9 elaborated upon what it wants Keyt to testify about by stating that it wants to hear
10 what he has to say about his prior role as one of PFR's counsel during the
11 negotiations concerning the sale of the property, including why he opined that
12 Karlsson's letter of intent regarding the purchase of the property was a valid
13 contract and why he gave contradictory statements regarding when the Karlsson-
14 PFR indemnification provision was added to their settlement agreement, and
15 what he has to say about his subsequent responsibilities as Westreich's local
16 counsel after the indemnification provision went into effect, including what advice
17 he gave Westreich in the state court action as to preserving of the issue of
18 attorney's fees and seeking to quash the lis pendens. The Court concludes that
19 these arguments are insufficient to meet the defendants' substantial burden
20 regarding Keyt's disqualification inasmuch as Langley neither discusses how
21 Keyt's noted activities are material and relevant to the intentional interference
22 claim, nor sufficiently explains how Keyt would be able to testify about many of
23 the listed matters given attorney-client privilege and work product issues, and his
24 apparently limited role in PFR's negotiations with Karlsson.

25 As to the second element, Langley's argument regarding its inability to
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1 obtain elsewhere the evidence it wants to obtain from Keyt is also too cursory and
2 insufficient to be persuasive. It does not, for example, explain why the members
3 of PFR, who were then Keyt's clients, and/or Mickey Oksner, PFR's real estate
4 agent, cannot testify about the sale of the property and other events underlying
5 the intentional interference claim, or why the documentary evidence of the
6 various versions of the Karlsson-PFR settlement agreement cannot establish the
7 date the indemnification provision was added to the settlement agreement.

8 As to the third element, Langley fails to make any mention in its motion why
9 any expected testimony from Keyt would be detrimental to Karlsson. In its reply,
10 Langley only states that it wants to cross-examine Keyt regarding contrary
11 statements noted in his affidavit submitted with Karlsson's response regarding the
12 timing of the inclusion of the indemnification agreement in the Karlsson-PFR
13 settlement agreement; Langley contends that Keyt's credibility is at issue
14 because Keyt stated in his affidavit that he had mistakenly stated in an August 2,
15 2007 letter that the indemnification agreement was in the settlement agreement
16 version dated February 5, 2005, whereas in fact the indemnification agreement
17 was included in the final March 4, 2005 settlement agreement. Langley asserts,
18 without any elaboration, that Keyt's former version benefits it while his latter
19 version benefits Karlsson. The Court presumes that Langley's implied contention
20 is that some prejudice to Karlsson's intentional interference claim would arise if
21 Keyt were to testify that the indemnification agreement between Karlsson and
22 PFR was actually entered into prior to ACRES4U's litigation threat to PFR made
23 in late February, 2005. Even if such evidence constitutes a sufficient detriment, it
24 is in effect irrelevant in light of Langley's failure to establish that Keyt is a
25 necessary witness.

1 After carefully scrutinizing the record presented to it, the Court concludes
2 that disqualification is not required for either Westreich or Keyt under ER 3.7
3 because Langley has not established the existence of the extreme circumstances
4 necessary for such a disqualification.⁷ Therefore,


5 IT IS ORDERED that the defendants' Motion to Disqualify Plaintiffs'
6 Counsel (doc. #116) is denied.

7 IT IS FURTHER ORDERED that the plaintiffs' Motion Staying
8 Disqualification Motion (part of doc. #124) is denied.

9 IT IS FURTHER ORDERED that the plaintiffs' Motion for Limited Case
10 Management Order Setting Law and Motion Schedule (part of doc. #124) is
11 granted to the extent that the parties' shall file an Amended Joint Case
12 Management Report no later than **October 16, 2009**.⁸

13 IT IS FURTHER ORDERED that a Scheduling Conference shall be held on
14 **Tuesday, November 3, 2009, at 11:30 a.m.** in Courtroom 601 of the Sandra Day
15 O'Connor United States Courthouse, 401 West Washington St., Phoenix, AZ.

16 DATED this 31st day of August, 2009.

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19 Paul G. Rosenblatt
United States District Judge

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22 Because the Court concludes that Westreich and Keyt have not been
23 shown to be necessary witnesses, the Court does not reach the issue of whether
24 the "substantial hardship" exception to ER 3.7 bars the disqualification of either
25 Westreich or Keyt.

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27 The Amended Joint Case Management Report shall be in the format
28 set forth in the Court's Supplemental Order Setting Scheduling Conference (doc.
29 # 107), entered on September 9, 2008.