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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
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7
8 HARTFORD CASUALTY INSURANCE
9 COMPANY,

10 Plaintiff,

11 v.

12 AMERICAN DAIRY AND FOOD
13 CONSULTING LABORATORIES, INC.,

14 Defendants.

1:09-cv-0914-OWW-SKO

MEMORANDUM DECISION REGARDING
PLAINTIFF'S MOTION FOR
RECONSIDERATION (Doc. 75)

15 I. INTRODUCTION.

16 Plaintiff Hartford Casualty Insurance Company ("Plaintiff")
17 proceeds with an action for declaratory judgment against American
18 Dairy and Food Consulting Laboratories, Inc., ("Defendant").

19 On December 11, 2009, Plaintiff filed a motion to disqualify
20 Defendant's counsel, James Wilkins ("Wilkins"), on the grounds that
21 Wilkins previously represented Plaintiff and is therefor prohibited
22 by California's Rules of Professional Conduct from representing
23 Defendant. (Doc. 21).

24 Defendant filed opposition to Plaintiff's motion to disqualify
25 Wilkins on February 19, 2010. (Doc. 30). Plaintiff filed a reply
26 on April 12, 2010. (Doc. 46).

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1 The Magistrate Judge conducted a hearing on Plaintiff's motion
2 to disqualify on June 4, 2010. (Doc. 57). On June 17, 2010, the
3 parties were served with the Magistrate Judge's order denying
4 Plaintiff's motion. (Doc. 60).

5 Plaintiff filed the instant motion for reconsideration of the
6 Magistrate Judge's order on June 1, 2010. (Doc. 75). Defendant
7 filed opposition to Plaintiff's motion for reconsideration on July
8 12, 2010. (Doc. 80). Plaintiff filed a reply to Defendant's
9 opposition on September 13, 2010. (Doc. 82).

10 **II. FACTUAL BACKGROUND**

11 **A. Plaintiff's Claim for Declaratory Relief**

12 In March 2007, Defendant acquired properties located at 240
13 State Highway 140 and 220 Third Street in Gustine, California
14 ("Property"). (Complaint at 2). Defendant applied for a policy of
15 insurance with Plaintiff on or about May, 2007. (Complaint at 2).
16 Effective May 23, 2007 through May 23, 2008, Defendant was the
17 named insured on a policy ("Policy") issued by Plaintiff.
18 (Complaint at 2). The Policy insured Defendants for direct
19 physical loss to the Property, subject to various terms,
20 conditions, limitations, and exclusions. (Complaint at 2). At the
21 time Plaintiff issued the Policy to Defendant, Plaintiff was
22 informed and believed, based on express and implied representations
23 made by Defendant, that the Property was actively used by Defendant
24 for the manufacturing and processing of dairy products. (Complaint
25 at 2).

26 On or about May 28, 2009, Defendant filed a claim with
27 Plaintiff for a vandalism and theft loss that occurred at the
28 Property on May 14, 2008 ("Claim"). (Complaint at 2). Plaintiff

1 conducted an investigation of the Claim under a full reservation of
2 rights. (Complaint at 2).

3 According to the complaint, after taking the depositions of
4 several of Defendant's officers, Plaintiff learned that the
5 Property was never operated or otherwise occupied by Defendant.
6 (Complaint at 3). Plaintiff denied coverage for the loss that
7 occurred on May 14, 2008 based on a vacancy provision within the
8 Policy (Complaint at 4-5).

9 The complaint seeks a declaration that (1) the Policy does not
10 cover Defendant's claim due to the vacancy exclusion provided in
11 the Policy; and (2) Plaintiff may rescind the policy based on
12 material misrepresentations Defendant made intentionally in the
13 application for the policy and in presenting the Claim.

14 **B. Defendant's Counter-Claim**

15 Defendant asserts a counter-claim alleging breach of contract,
16 breach of the implied covenant of good faith and fair dealing,
17 negligent misrepresentation, fraud, and reformation. Defendant
18 contends it relied on the expertise of Plaintiff's authorized and
19 appointed agents Renaissance Insurance Group, LLC ("Renaissance")
20 and J. Helzer ("Helzer") in obtaining the Policy. (Doc. 23 at 2).
21 Defendant alleges that Helzer and Renaissance understood the nature
22 and extent of Defendant's operations at the Property. (Doc. 23 at
23 3). Defendant states that Helzer assured Defendant that the policy
24 he was procuring would provide immediate, full, and complete
25 coverage of the Property notwithstanding the fact that actual
26 operations at the Property would be delayed for a period of months
27 pending efforts to obtain necessary permits and completion of
28 renovation efforts. (Doc. 23 at 3). Defendant also contends that

1 on April 9, 2009, Plaintiff conducted an inspection of the Property
2 and raised no potential coverage problems based on the condition of
3 the Property. (Doc. 23 at 6). Defendant alleges that it expected
4 and relied on Plaintiff to raise any coverage concerns based on the
5 April 9 inspection. (Doc. 23 at 6.).

6 On April 21, 2008, Plaintiff gave Defendant notice that a
7 renewal policy would be canceled effective July 12, 2008 due to the
8 fact that the Property was vacant. (Doc. 23 at 7). The notice did
9 not suggest that the vacancy issue would in any way impair or
10 impact the coverage that would be in effect on the Property through
11 July 12, 2008. (Doc. 23 at 7). Helzer assured Defendant that the
12 Property would be fully insured through July 12, 2008.

13 **C. Wilkins' Past Representation of Plaintiff**

14 From 1985 to 1995, while employed at the law firm McCormick,
15 Barstow, Sheppard, Wayte, & Carruth LLP ("McCormick"), Wilkins
16 provided legal services to Plaintiff. By 1988, Wilkins was
17 directly involved in handling legal matters for Plaintiff and
18 directly communicated with Plaintiff's personnel. (Shingleton Dec.
19 at 18). Wilkins provided legal services to Plaintiff in
20 approximately twenty cases.

21 Plaintiff's motion to disqualify Wilkins identifies four cases
22 which Plaintiff contends are substantially similar to the instant
23 action between Plaintiff and Defendant. In connection with a claim
24 referenced by Plaintiff as the "'087" claim, Wilkins provided an
25 opinion to Plaintiff regarding Plaintiff's liability under an
26 insurance policy for acts of theft and/or vandalism to an insured's
27 agricultural equipment. Wilkins reviewed Plaintiff's file, spoke
28 with the adjuster assigned to the '087 claim regarding witness

1 statements, and spoke with the insurance agent regarding the
2 insurance contract. Plaintiff avers that Wilkins was actively
3 involved in Plaintiff's investigation into the '087 claim.

4 Wilkins provided advice concerning an insured's claim for
5 vandalism perpetrated on a radio tower in a claim referenced by
6 Plaintiff as the "'435 claim". "At issue in the '435 claim was
7 whether payment should have been made to the named insured, who
8 leased the damaged equipment, or the lessor, who was named as a
9 loss payee." (Motion to Disqualify at 6).

10 Wilkins defended Plaintiff in an action referred to by
11 Plaintiff as "the Brown and Bryant Action" ("Brown Action"). At
12 issue in the Brown Action was an insured's claim that Plaintiff
13 misrepresented pertinent policy provisions, unreasonably delayed
14 action on the insured's claim, and conducted an improper
15 investigation of the claim. Wilkins also defended Plaintiff in an
16 action referred to by Plaintiff as the "Duarte Action," which
17 entailed an insured's claim that Plaintiff failed to provide a
18 reasonable explanation of the basis of its actions. Plaintiff
19 contends that both the Brown and Duarte Actions involved claims of
20 bad faith.

21 **III. LEGAL STANDARD**

22 A party may object to a magistrate judge's order within
23 fourteen days of being served with a copy of the order. Fed. R.
24 Civ. P. 72(a); E.D. Cal. Local R. 303(b) (stating that a magistrate
25 judge's order becomes final fourteen days after issuance). A
26 district court reviews a motion to reconsider a magistrate judge's
27 ruling under the "clearly erroneous or contrary to law" standard
28 set forth in 28 U.S.C. § 636(b)(1)(A) and Federal Rule of Civil

1 Procedure 72(a). Under this standard of review, a magistrate's
2 order is clearly erroneous if, after considering all of the
3 evidence, the district court is left with the definite and firm
4 conviction that a mistake has been committed, and the order is
5 contrary to law when it fails to apply or misapplies relevant
6 statutes, case law or rules of procedure. *R.B., ex. rel. F.B. v.*
7 *Napa Valley Unif. Sch. Dist.*, 496 F.3d 932, 943 (9th Cir. 2007).
8 "The reviewing court may not simply substitute its judgment for
9 that of the deciding court." *Grimes v. City & County of S.F.*, 951
10 F.2d 236, 241 (9th Cir. 1991).

11 **IV. DISCUSSION**

12 **A. Governing Law**

13 Rule 3-310 (E) of the Rules of Professional Conduct of the
14 State Bar of California prohibits the successive representation of
15 clients in certain circumstances without the informed written
16 consent of the current client and former client. The rule
17 provides:

18 A member shall not, without the informed written consent
19 of the client or former client, accept employment adverse
20 to the client or former client where, by reason of the
21 representation of the client or former client, the member
22 has obtained confidential information material to the
23 employment.

24 Pursuant to Rule 3-310(E), "[w]here an attorney successively
25 represents clients with adverse interests, and where the subjects
26 of the two representations are substantially related, the need to
27 protect the first client's confidential information requires that
28 the attorney be disqualified from the second representation." *E.g.*
People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc., 20
Cal. 4th 1135, 1145 (1999).

1 Whether an attorney should be disqualified in a successive
2 representation case turns on two variables: (1) the relationship
3 between the legal problem involved in the former representation and
4 the legal problem involved in the current representation, and (2)
5 the relationship between the attorney and the former client with
6 respect to the legal problem involved in the former representation.
7 *Jessen v. Hartford Casualty Ins. Co.*, 111 Cal. App. 4th 698, 709
8 (Cal. Ct. App. 2003). Where the relationship between the attorney
9 and the former client was direct, it is presumed that confidential
10 information has passed to the attorney.¹ *Id.* A reviewing court
11 may not delve into the specifics of the communications between the
12 attorney and the former client in an effort to show that the
13 attorney did or did not receive confidential information during the
14 course of that relationship. *Id.*

15 Disqualification depends upon the strength of the similarities
16 between the legal problem involved in the former representation and
17 the legal problem involved in the current representation. *Id.* The
18 governing test requires that the party moving for disqualification
19 demonstrate a "substantial relationship" between the subjects of
20 the antecedent and current representations. *E.g. Faughn v. Perez*,
21 145 Cal. App. 4th 592, 604 (Cal. Ct. App. 2006). Successive
22 representations are "substantially related" when the evidence
23 before the trial court supports a rational conclusion that
24 information material to the evaluation, prosecution, settlement or
25 accomplishment of the former representation given its factual and
26

27 ¹ There is no dispute that the relationship between Wilkins and Plaintiff was
28 direct.

1 legal issues is also material to the evaluation, prosecution,
2 settlement or accomplishment of the current representation given
3 its factual and legal issues. *Id.* (quoting *Jessen*, 111 Cal. App.
4 4th at 713). California's definition of "substantially related"
5 is essentially the same as the formulation found in section 132 of
6 the Restatement Third of the Law Governing Lawyers, which provides
7 that the present representation will be considered "substantially
8 related" to the prior representation if there is a substantial risk
9 that the present representation will involve the use of
10 confidential information acquired in the course of the prior
11 representation. *Id.* at 605 (citation omitted).

12 The burden is on the party seeking the disqualification to
13 establish by a preponderance of the evidence that a substantial
14 relationship exists. See *H.F. Ahmanson & Co. v. Salomon Bros.*, 229
15 Cal. App. 3d 1445, 1452 (9th Cir. 1991); see also *In re Charlisse*
16 *C.*, 45 Cal. 4th 145, 166 n.11 (2008). Although a moving party need
17 not disclose confidential information in order to satisfy its
18 burden, evidence that "could be disclosed without defeating the
19 purpose of protecting confidential information" must be presented
20 where it is required to permit the court to determine the existence
21 of a substantial relationship between past representation and the
22 litigation before the court. See *Faughn*, 145 Cal. App. 4th at
23 607.

24 **B. Plaintiff's Claims of Error**

25 **1. The Magistrate Judge's Factual Determination Regarding**
26 **Whether the '087 Claim Entailed a Recision Issue**

27 Plaintiff contends that the Magistrate Judge erroneously
28 concluded that recision was not at issue in the '087 claim. The

1 motion for reconsideration avers:

2 [T]he Magistrate Judge erroneously concluded that
3 [rescission] was not "at issue in . . . the '087
4 Claim[.]" The Magistrate Judge's conclusion is clearly
5 erroneous. Undisputed evidence in Hartford Casualty's
6 papers showed that one of the issues in the '087 Claim
7 was whether Hartford could rescind the policy. Motion to
8 Disqualify, at pp. 5:26-28, 17:11-13, 31:7-9; Reply to
9 Motion to Disqualify, at p. 5:15-16. *Hartford Casualty
did not use the term "rescind" because it characterized
the issue as whether Hartford Casualty would be "bound"
(i.e., unable to rescind) by an insurance agent's factual
misrepresentations in an insurance application. Id.*
Accordingly, Hartford established that rescission based
on misrepresentations in an application was at issue in
the '087 Claim.

10 (Motion to Reconsider at 3) (emphasis added).

11 Plaintiff concedes that it did not identify rescission as an
12 issue in the '087 in the motion to disqualify. (Id.). Contrary to
13 Plaintiff's assertion, the issue of whether an insurer is "bound"
14 by the representations of an insurance agent is not necessarily the
15 same as the issue of whether the insurer is entitled to rescission.
16 For example, an insurer would not be "bound" by the representations
17 of an insurance agent who lacked actual or apparent authority; in
18 such an instance, no contract is formed with the principal insurer,
19 and the legal concept of rescission is irrelevant. *See, e.g.,*
20 *California Indemnity Ins. Premium Finance Co. v. Fireman's Fund*
21 *Ins. Co.*, 40 Cal. App. 4th 1633, 1638 (Cal. Ct. App. 1995) ("a
22 signature on behalf of another person would require authorization
23 by the party who is purportedly being bound, in order to create a
24 valid legal obligation"). In light of Plaintiff's failure to
25 identify rescission as an issue in the '087 claim in its motion to
26 disqualify, the Magistrate Judge's finding that rescission was not at
27 issue in the '087 claim is not clearly erroneous.

28 ///

1 Further, because California law provides for rescission in a
2 wide range of circumstances, simply stating that rescission was at
3 issue in the '087 claim is not sufficient to establish substantial
4 similarity between the '087 claim and the instant action in any
5 event. See CAL. CIV. CODE § 1689 (setting forth grounds for rescission
6 for wide range of issues including failure of consideration, fraud,
7 unlawfulness, and public interest). In addition to failing to
8 specifically identify rescission as an issue in the '087 action,
9 Plaintiff also failed to provide sufficient factual information to
10 establish that the purported rescission claim at issue in the '087
11 claim was substantially related to the rescission claim at issue
12 between Plaintiff and Defendant. Accordingly, the Magistrate Judge
13 did not err in making the factual determination that the '087
14 action did not implicate the type of rescission issue raised in this
15 case. Plaintiff failed to meet its burden of presenting evidence
16 from which the Magistrate Judge could infer that, due to the
17 similarities between '087 claim and this case, Wilkins should be
18 presumed to have received confidential information related to the
19 instant action.

20 **2. The Magistrate Judge's Alleged Failure to Consider**
21 **Similarities between the '087 Claim and the Instant Action**

22 Plaintiff contends that the Magistrate Judge failed to
23 consider the following alleged similarities between the '087 claim
24 and the instant action: whether an insurance agent's knowledge is
25 imputed to Hartford Casualty; whether Hartford Casualty is bound by
26 an insurance agent's alleged misrepresentation regarding the scope
27 of coverage; whether Hartford Casualty's prior conduct that
28 allegedly is inconsistent with the policy's terms prevents Hartford

1 Casualty from relying on the written terms of the policy; and
2 whether the insured may reform the policy based upon the insured's
3 unilateral mistake. (Motion for Reconsideration at 4). Plaintiff
4 contends that "[t]he Magistrate Judge's failure to consider these
5 additional legal issues is contrary to law." (Id. at 5).² These
6 are garden variety issues of fact and law raised by any rescission
7 claim based on unilateral mistake and do not implicate any special
8 knowledge.

9 A review of the Magistrate Judge's order reveals that she
10 considered the legal similarities between the '087 claim and the
11 instant action:

12 Hartford explains that the similarities between the '087
13 and '435 claims (with loss dates in 1989) and this case
14 include the fact that those claims arose from events
15 relating to "property damage caused by theft/vandalism."
16 (Pl.'s Mot. at 17, 20.)...Hartford asserts that the prior
17 matters and the present matter involved an analysis of
18 issues relating to imputation of the agent's knowledge to
19 the insurance company, the insurer's potential liability
20 for the agent's misrepresentations, estoppel and waiver
21 issues arising from an insurer's allegedly inconsistent
22 conduct, and issues relating to reformation based on the
23 insured's unilateral mistake.

19 (Order Denying Plaintiff's Motion at 6). Plaintiff concedes that
20 the Magistrate Judge's decision recognized alleged similarities of
21 fact and law between the '087 claim and the instant action but
22 complains that "the June 17, 2010 Order includes no analysis of
23 these legal issues in the context of the substantial relationship
24 test." (Motion to Reconsider at 4). Plaintiff is incorrect. The
25 Magistrate Judge's analysis acknowledged general similarities
26

27 ² Although Plaintiff advances this argument under the section of its brief
28 pertaining to the Magistrate Judge's alleged erroneous factual determinations,
Plaintiff's argument in this section is in fact a claim of legal error.

1 between the '087 action and the instant case:

2 [W]hile the prior coverage opinion work Mr. Wilkins
3 performed in relation to the '087 and '435 matters and
4 the work performed in the current litigation may involve
5 general issues related to the insurer's liability, that
6 does not make the former and the current representations
7 legally similar. Although the '087 and '435 coverage
8 matters involved claims for property damage due to
9 theft/vandalism, the issues in the present case involve
10 determinations whether the vacancy limitation applies to
11 preclude coverage, which was not at issue in either the
12 '087 or '435 claims, and whether Hartford is entitled to
13 rescind the policy on the basis of its insured's alleged
14 misrepresentations at the time of the purchase of the
15 policy, which does not appear to have been at issue in
16 either the '087 or '435 matters...

17 General legal issues about the scope of coverage and the
18 mutual understanding of the parties regarding the terms
19 of the policy will be at issue in virtually every
20 insurance claim dispute. In fact, such issues will be
21 encountered in nearly every contract dispute. That
22 generality does not, ipso facto, mean all insurance
23 coverage cases are substantially related. Given the
24 factual and legal differences between the '087 and '435
25 matters and the present.

26 (Order Denying Plaintiff's Motion at 7-8). Although the Magistrate
27 Judge's order does not include detailed analysis of each of the
28 alleged similarities between the '087 claim and the instant action,
29 the order does contain reasoned analysis of the critical
30 differences between the '087 claim and the Plaintiff's claims
31 against Defendant. It is clear that the Magistrate Judge fully
32 considered the general similarities identified by Plaintiff.
33 Accordingly, Plaintiff's contention that the Magistrate Judge
34 committed legal error by failing to consider the similarities
35 between the '087 claim and the instant action lacks merit.

36 **3. The Magistrate Judge's Conclusion that Plaintiff's
37 Policies and Procedure's have changed**

38 Plaintiff contends that the Magistrate Judge's analysis is

1 contrary to California law because the Magistrate Judge "denied
2 Hartford Casualty's Motion to Disqualify because Hartford Casualty
3 did not compare its present policies and procedures to the policies
4 and procedures that were in place while Mr. Wilkins represented
5 Hartford Casualty." (Motion to Reconsider at 6-7). Plaintiff notes
6 that "when adjudicating motions to disqualify, courts should not
7 consider the confidential information obtained by counsel during
8 prior representation." (Id. at 6) (citations omitted).

9 Plaintiff's argument reflects a misunderstanding of both the
10 Magistrate Judge's analysis and of California law. The Magistrate
11 Judge did not deny Plaintiff's motion because Plaintiff failed to
12 "delve into the specifics of the communications between the
13 attorney and the former client." (Motion to Reconsider at 8)
14 (citation omitted). Rather, the Magistrate Judge found that
15 Plaintiff failed to meet its burden under the substantial
16 relationship test, a burden that does not require a client to
17 disclose confidential information. (See Order Denying Motion to
18 Disqualify at 6). In explaining the evidentiary deficiencies of
19 Plaintiff's motion, the Magistrate Judge correctly noted that
20 "there is no evidence that Hartford's practices and procedures from
21 1985 to 1992, or even 1995, were in place when Hartford denied
22 American Dairy's claim in 2009." (Id. at 12). Contrary to
23 Plaintiff's assertion, determining whether or not Plaintiff's
24 policies and practices have changed does not require comparison of
25 the substance of any Plaintiff's past policies to its current
26 policies; a competent declaration containing general statements may
27 suffice. See *Faughn*, 145 Cal. App. 4th at 607-09 (discussing types
28 of evidence which could be presented without divulging confidential

1 information).³

2 Plaintiff could have presented evidence within its control
3 "without defeating the purpose of protecting confidential
4 information" in order to satisfy the evidentiary burden identified
5 by the Magistrate Judge to show substantive similarities of alleged
6 confidential information about policies and practices. See *Faughn*,
7 145 Cal. App. 4th at 607. Although Plaintiff did not have to
8 reveal the substance of any of Plaintiff's policies, practices, or
9 communications during Wilkin's representation, Plaintiff could
10 have, at a minimum, provided a declaration describing how
11 Plaintiff's current policies and practices are similar in material
12 respects to the policies to which Wilkins was privy during his
13 representation and could have disclosed *in camera* the confidential
14 information which remains unidentified. See *id.* at 608 (failure of
15 moving party to submit declarations containing general allegations
16 that policies relevant to attorney's previous representation of
17 client would be relevant and material to current adverse
18 representation rendered motion deficient). The Court of Appeal's
19 analysis in *Faugh* is instructive:

20
21 The declarations submitted do not state that the "Defense
22 Counsel Procedures" referenced in the Hale and VanKoll
23 letters are the procedures that will be applied to
24 plaintiffs' case. Thus, we have no direct evidence
25 helpful in determining if the procedures and practices
used in the prior matters involving Attorney Silberberg
overlap (in whole or in part) with the procedures and
practices that will be used in plaintiffs' case. Further,
even assuming that the same "Defense Counsel Procedures"
referenced in VanKoll's letter will be used, the record

26
27 ³ Depending on the facts contained in such a declaration, a conclusory assertion
28 of material similarity may not be sufficient. In *Faugh*, the Court of Appeal
noted the propriety of conducting an *in camera* review of confidential
information. *Id.* at 602.

1 does not show that the information contained in that
2 document is material to the present litigation in a way
3 that gives plaintiffs an advantage. The document may
4 refer only to matters that are obvious or mundane.
5 Indeed, Bakersfield Memorial Hospital has not
6 specifically argued that the documents are material to
7 the present litigation.

8 *Id.* at 608-609. The *Faugh* Court's analysis also reveals that
9 merely alleging similarity between legal issues implicated in past
10 and present cases is insufficient to satisfy a moving party's
11 burden:

12 Bakersfield Memorial Hospital also contends that
13 plaintiffs' action is substantially related to the prior
14 representations because the prior matters [like the
15 current action, also] involved claims of negligence in
16 connection with the delivery of an infant and the prior
17 cases concerned allegations of nursing negligence...

18 This contention is not supported with evidence
19 establishing that the training, practices, or procedures
20 relevant to the care given at the facilities sued in the
21 prior cases is the same as or similar to the training,
22 practices, or procedures relevant to the care given by
23 Bakersfield Memorial Hospital. Again, without evidence on
24 this point, any finding by this court that the
25 relationship exists would have to be based on inference.
26 Without evidence to connect the care given at Bakersfield
27 Memorial Hospital to that involved in the prior cases, we
28 are unwilling to infer it exists, particularly because
evidence establishing that connection would not have been
difficult for Bakersfield Memorial Hospital to present
and would not have disclosed confidential information.

Id. at 609. Here, Plaintiff failed to produce any evidence which
indicates that the insurance policies Wilkins advised Plaintiff on
are similar to the insurance policy at issue in this action;⁴ such
evidence could have been produced without revealing any

⁴ In fact, the only evidence on the record regarding this point is to the
contrary. (See Order Denying Plaintiff's Motion to Disqualify at 10-
11)(discussing Plaintiff's concession that insurance policies are based on
existing statutory and decisional law in place at the time the policy is
rendered).

1 confidential attorney-client information.

2 As *Faugh* makes clear, Plaintiff's constrained view of its
3 evidentiary burden is erroneous. The Magistrate Judge correctly
4 applied California law, which requires the moving party to present
5 competent evidence in support of a motion to disqualify counsel.
6 *See id.*

7 Plaintiff also contends that the evidence does not support the
8 Magistrate Judge's finding that Plaintiff's policies and procedures
9 substantially changed in relevant part after Wilkins'
10 representation of Plaintiff ceased. (Motion to Reconsider at 8).

11 Plaintiff complains that:

12 The only evidence before the Magistrate Judge regarding
13 Hartford Casualty's confidential information was in the
14 form of a declaration provided by Mr. Wilkins....Notably,
15 Mr. Wilkins did not state in his declaration that the
16 1997 "'Best Practices' claims manual" reflected policies
and procedures substantially different than those in
place when he represented Hartford Casualty. See Wilkins
Decl.

17 (Id. at 8-9). Plaintiff's contention fails for at least two
18 reasons. First, the Magistrate Judge's conclusion that Plaintiff's
19 policies and procedures have substantially changed since Wilkins
20 last represented Plaintiff in 1995 is based on reasonable
21 inferences drawn from the record. (See Order Denying Plaintiff's
22 Motion to Disqualify at 10-11) (discussing Plaintiff's concession
23 that insurance policies are based on existing statutory and
24 decisional law in place at the time the policy is rendered). More
25 importantly, even if the record did not contain sufficient evidence
26 to support the notion that Plaintiff's policies and procedures are
27 substantially different now than they were during the 1980's and
28 1990's, the record is also devoid of evidence that Plaintiff's

1 current policies and procedures are substantially similar to
2 policies and procedures Wilkins was privy to. In fact, each of the
3 declarations Plaintiff submitted in support of its motion are dated
4 either 2002 or 2003 and thus cannot possibly bear any relevance to
5 the critical issue of whether Plaintiff's current policies and
6 procedures (2008-2010) are similar to those in place during
7 Wilkins' representation. Because Plaintiff failed to carry its
8 threshold burden under the substantial relationship test, the
9 Magistrate Judge did not err in drawing the inference that
10 Plaintiff's practices, policies, and procedures have changed
11 substantially over time. See *Faugh*, 145 Cal. App. 4th at 607
12 (court may draw inferences from conspicuous absence of supporting
13 evidence that could have been provided without revealing
14 confidential information).

15 **4. Magistrate Judges Assessment of the Significance of the**
16 **Passage of Time**

17 Plaintiff represents that "the Magistrate Judge erroneously
18 concluded, contrary to California law, the passage of time may
19 eliminate a prior substantial relationship." (Motion for
20 Reconsideration at 9) (quotation omitted). Plaintiff's contention
21 is directly contrary to the Magistrate Judge's express analysis.
22 (See Order Denying Motion to Disqualify at 10) ("Although time does
23 not overcome or rebut a substantial relationship once it arises,
24 *Brand* does not preclude the passage of time from factoring into the
25 determination whether a substantial relationship exists in the
26 first place") (citing *Brand v. 20th Century Insurance Co./21st*
27 *Century Insurance Co.*, 124 Cal. App. 4th 594 (2004)). Accordingly,
28 Plaintiff's argument lacks merit as it misrepresents the Magistrate

1 Judge's finding.

2 **5. Relationship Between Coverage Disputes and Bad Faith**
3 **Litigation**

4 Plaintiff's final contention does not clearly identify any
5 specific error committed by the Magistrate Judge. Instead,
6 Plaintiff merely restates arguments presented in its motion to
7 disqualify concerning the relationship between coverage disputes
8 and bad faith litigation. (Motion for Reconsideration at 10-11).
9 It is hard to conceive that any California insurance coverage
10 attorney practicing in California since 1990 would not encounter a
11 bad faith claim in a wrongful denial of coverage case. As
12 discussed above, Plaintiff failed to carry its burden under the
13 substantial relationship test because there is no evidence on the
14 record linking Plaintiff's current policies, practices, and
15 procedures with those in place during Wilkins' representation of
16 Plaintiff.

17 **ORDER**

18 For the reasons stated, Plaintiff's motion for reconsideration
19 is DENIED.

20 IT IS SO ORDERED.

21 **Dated: September 27, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE