

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

NATOMAS GARDENS INVESTMENT
GROUP LLC, a California limited
liability company, ORCHARD PARK
DEVELOPMENT LLC, a California
limited liability company,

Plaintiffs,

v.

JOHN G. SINADINOS, STANLEY J.
FOONDOS, STEPHEN FOONDOS, et
al.,

Defendants.

NO. CIV. S-08-2308 FCD/KJM

MEMORANDUM AND ORDER

-----oo0oo-----

BACKGROUND

On June 1, 2009, defendant Larry Deane ("Deane") filed a counterclaim against plaintiff/counter-defendant Natomas Gardens Investment Group, LLC ("Natomas") and third-party claim against third-party defendant Eric Solorio ("Solorio"), the majority shareholder of Natomas. Therein, Deane, also a shareholder in Natomas, alleged individual claims for express indemnity, breach of contract, implied indemnity, and equitable indemnity against

1 Natomas and Solorio, as well as shareholder derivative claims on
2 behalf of Natomas against Solorio for breach of fiduciary duty,
3 breach of contract and the implied covenant of good faith and
4 fair dealing and intentional interference with prospective
5 economic advantage. (Docket #125.)

6 On July 24, 2009, Deane moved to disqualify the law firm of
7 Barth, Tozer & Timm ("Barth") from further representing Natomas
8 in this action; Deane also sought a ruling precluding Barth from
9 representing Solorio in this action and in a related state court
10 action. On September 14, 2009, this court issued its order,
11 disqualifying Barth from further representation of Natomas and
12 directing Natomas to find "independent counsel having no prior
13 relationship with the company or the individual defendants in
14 this action." (Mem. & Order [Docket #178] at 20-21 ["Sept. 14
15 Order"].) The court, however, permitted Barth to continue to
16 represent Solorio in the related state court proceedings, and it
17 indicated that Barth could substitute in as Solorio's counsel in
18 this action, if Solorio so wished (presently Solorio appears *pro*
19 *se* in this action). (Id. at 17-20, 21.)

20 This matter is now before the court on plaintiff Orchard
21 Park Development LLC's ("Orchard") motion for clarification or
22 reconsideration of the court's September 14 Order. Deane and co-
23 defendants John G. Sinadinos and Stanley J. Foondos oppose the
24 motion (collectively, "defendants"),¹ arguing it is both
25 procedurally and substantively without merit.

26
27
28 ¹ Other defendants in the action filed joinders in these
defendants' oppositions. (Docket #s 194, 195.)

1 of an order or judgment).

2 Absent "highly unusual circumstances," reconsideration of a
3 final order or judgment is appropriate only where (1) the court
4 is presented with newly-discovered evidence, (2) the court
5 committed "clear error or the initial decision was manifestly
6 unjust," or (3) there is an intervening change in the controlling
7 law. School Dist. No. 1J, Multnomah County, 5 F.3d at 1263.
8 However, here, where the court's order is more akin to a non-
9 final, interlocutory order, the court has "inherent jurisdiction
10 to modify, alter or revoke it." United States v. Martin, 226
11 F.3d 1042, 1048-49 (9th Cir. 2000); see also Bowen Investment,
12 Inc. v. Carneiro Donuts, Inc., 490 F.3d 27, 29 (1st Cir. 2007)
13 (recognizing that a motion under Rule 60 is appropriate where an
14 order failed to reflect the court's intentions).

15 **1. Retaining New Counsel for Natomas**

16 As for the substantive issues raised by the motion, Barth
17 requests, in the first instance, clarification regarding the
18 logistics of selecting new counsel for Natomas. Following the
19 issuance of the court's order, Deane's counsel objected to Barth
20 or Solorio's participation in selecting new counsel for Natomas,
21 arguing that their involvement would further violate ethical
22 rules as well as the court's order. (Barth Decl., filed Oct. 13,
23 2009, ¶ 2, Ex. A.) In opposing the instant motion, defendants
24 argue similarly; defendants suggest that the court direct co-
25 counsel for Natomas, Patrick Waltz, to either serve as Natomas'
26 counsel or find substitute, independent counsel.

27 Natomas, as a limited liability company, cannot appear in
28 this action *pro per*; it must be represented by counsel. E.D.

1 Cal. L.R. 83-183. While the court previously directed Natomas to
2 find new and independent counsel with no prior ties to the
3 corporation or its shareholders, the order did not describe a
4 method for doing so. (Sept. 14 Order at 20 [recognizing that
5 courts confronting this issue have generally provided only that
6 "the corporation resolve th[e] problem [of retaining new counsel]
7 as it would any other issue as to which the existence of
8 interested directors renders the usual corporate decision-making
9 process unavailable" (citing Messing v. FDI, Inc., 439 F. Supp.
10 776, 784 (D.N.J. 1977))].) However, a dispute has now arisen
11 between the parties, and thus, clarification of the court's
12 intentions is warranted.

13 Natomas is a fictional entity and can act only through its
14 principals. While defendants object to Barth and Solorio's
15 involvement in the selection of new counsel, *only* Barth and
16 Solorio have information necessary to inform any potential new
17 counsel about the status of this case and Natomas' interests in
18 pursuing it. Contrary to defendants' proposal, Mr. Waltz is not
19 the appropriate person to serve as Natomas' counsel, nor obtain
20 new counsel for the company. As set forth in Mr. Waltz'
21 declaration, submitted on the motion, his involvement to date in
22 this case has been limited to only the issues of professional
23 malpractice. He has deferred in all respects to Barth's
24 decisions in litigating the case on behalf of Natomas. Indeed,
25 Mr. Waltz indicates that he can no longer represent Natomas, even
26 in a limited capacity, since Solorio is not paying for his
27 services and he cannot work on a contingency basis. Thus, Mr.
28 Waltz states he will move the court to permit his withdrawal upon

1 the lifting of the stay in the action. (Waltz Decl., filed Nov.
2 5, 2009.)

3 Also, contrary to defendants' suggestions, this court cannot
4 select counsel for Natomas. Courts confronting this issue have
5 wholly rejected the notion that it is the court's responsibility
6 to appoint independent counsel for a corporation and have
7 generally chosen to give little direction to the parties on how
8 new counsel should be selected. See e.g. Messing, 439 F. Supp.
9 at 784, supra; Musheno v. Gensemer, 897 F. Supp. 833, 839 (M.D.
10 Pa. 1995) (appointing ad hoc committee of two non-defendant
11 directors to select counsel).

12 The court acknowledges, however, that due to the facts and
13 circumstances of this case, involving a corporation with just two
14 major shareholders who are embroiled in contentious and
15 protracted litigation, further direction is required by the
16 court. Here, the only practical means for Natomas to obtain new
17 counsel requires direct involvement in that effort by Solorio and
18 Barth. Solorio, in his capacity as manager of Natomas, has
19 investigated and sought redress for alleged wrongdoing against
20 the company; he is the only source of confidential information
21 relating to the role of Natomas as a plaintiff in this action; no
22 one else has been engaged in prosecuting the case on behalf of
23 Natomas, and Deane, in particular, is directly adverse to the
24 interests of Natomas in this capacity. Barth, in turn, has been
25 the only attorney serving as an advocate for plaintiff Natomas in
26 this action. He has received all confidential information
27 pertaining to Natomas from Solorio. Any counsel who may consider
28 undertaking representation of Natomas on a contingency, which is

1 necessary, Solorio reports, since the company has no liquid
2 assets, will necessarily rely in the first instance on
3 information about the facts, circumstances and history of the
4 investigation and prosecution of the case on behalf of Natomas,
5 from Solorio and Barth. Significantly, should counsel be
6 retained through this process, he or she would be free to take
7 whatever action may be appropriate with respect to the
8 litigation, on behalf of and in the best interests of Natomas.
9 But, as Barth correctly argues, "barring [it] and Solorio . . .
10 from undertaking the effort to locate independent counsel
11 preordains the failure of that effort." (Mem. of P. & A., filed
12 Oct. 13, 2009, at 6.) Thus, considering that only Barth and
13 Solorio have the necessary information, including all relevant
14 corporate documents, to impart to new counsel, the court will
15 permit them to select new counsel for Natomas. See Lewis v.
16 Shaffer Stores Co., 218 F. Supp. 238, 240 (S.D.N.Y. 1963)
17 (holding that while not the ideal situation considering the
18 conflicts of interest that necessitated the disqualification,
19 "the fact that the selection of such independent counsel will . .
20 . be made by officers and directors who are defendants does not .
21 . . present any insuperable difficulty"). Said new counsel must
22 be "'independent counsel.'" (Sept. 14 Order at 20.) The court
23 cautions Barth and Solorio that they may only select counsel that
24 has had no previous connection (business or personal) with
25 Natomas, Natomas' individual directors or shareholders, any other
26 party to this case or Barth. (Id.)

27

28

1 **2. Barth's Representation of Solorio**

2 Next, Orchard seeks clarification regarding Barth's ability
3 to substitute in as counsel for Solorio. The parties argue about
4 the propriety of such a substitution in their respective papers.
5 However, the court need not resolve that dispute, since there are
6 no grounds to support reconsideration of this issue, nor is there
7 a need for clarification of the court's order. In Deane's motion
8 to disqualify, he moved for Barth's complete disqualification
9 from this action, disqualifying Barth from representing Natomas
10 and Solorio in this action and precluding Barth from representing
11 Solorio in the related state court action. The court found that
12 complete disqualification was not required. (Sept. 14 Order at
13 17-19.) It held, unambiguously, that permitting Barth to
14 continue representing Solorio is "consistent with federal
15 authority in the precise circumstance of attorney
16 disqualification in shareholder derivative litigation, which
17 holds that while dual representation of a corporation and its
18 directors is impermissible (at least if the directors are charged
19 with fraud), the attorney who formerly represented both clients
20 may continue to represent the individual ones." (Id. at 19
21 [citing Forrest v. Baeza, 58 Cal. App. 4th 65, 81 (1997) and
22 Lewis, 218 F. Supp. at 239].) Therefore, if Solorio wishes to be
23 represented by Barth in this action, Barth may substitute in as
24 his counsel and nothing precludes Barth from continuing to
25 represent Solorio in the state court action.³

26 _____
27 ³ Deane contends that Barth's representation of Solorio
28 in this action, after being disqualified from representing
Natomas and thereby rendering Natomas a "former client," would
violate California Rules of Professional Conduct 3-310(E). The

1 **CONCLUSION**

2 For the foregoing reasons, Orchard's motion for
3 clarification or reconsideration of the court's September 14
4 Order is GRANTED in part and DENIED in part. The court clarifies
5 its order in the respects set forth above regarding Barth and
6 Solorio's involvement in obtaining new counsel for Natomas. The
7 court, however, denies the motion with respect to Barth's
8 potential representation of Solorio in this action.

9 This case shall remain stayed for 60 days from the date of
10 this order to permit Barth and Solorio time to locate new and
11 independent counsel for Natomas with no prior ties to any of the
12 parties involved. Following the lifting of the stay, Mr. Waltz
13 is directed to file a noticed motion, in compliance with the
14 local rules, to withdraw as co-counsel for Natomas. The court
15 hereby continues the hearing on the pending motions to dismiss,
16 motion for judgment on the pleadings and motion to strike (Docket
17 #s 128, 134, 139, 170, 174, 183), currently set for January 15,

18 ///

19 ///

20 ///

21 ///

22 ///

23 _____
24 court need not reach that issue here, as presently, Solorio
25 appears in this action *pro per*. Said argument was not raised on
26 the underlying motion, and to date, it is a moot issue since
27 Solorio is unrepresented in this action. Should that change,
28 Deane may file an appropriate motion challenging Barth's
representation of Solorio. However, Deane is cautioned to review
this court's order and the cases cited therein permitting the
continued representation of individual shareholders in these
circumstances.

1 2010, to March 26, 2010 at 10:00 a.m. in Courtroom 2.

2 IT IS SO ORDERED.

3 DATED: November 24, 2009

A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28