



1 policies of Perfect Day. Plaintiffs argue that it is unlikely that Wang obtained any confidential  
2 information from Ma and that Wang should not be disqualified from this litigation.

3 Plaintiffs in this putative class action are current and former workers for Perfect Day, which  
4 owns and operates or has owned and operated spas in Fremont, Santa Clara, and Millbrae,  
5 California. Among other things, Plaintiffs allege that Perfect Day has misclassified them as  
6 independent contractors rather than employees. As a result of this misclassification, Plaintiffs  
7 allege that Perfect Day improperly failed to pay them and other putative class members minimum  
8 wages and overtime, wrongly subtracted materials costs from Plaintiffs' wages, wrongly took  
9 Plaintiffs' tips, and in so doing violated both the Fair Labor Standards Act (FLSA, 29 U.S.C. §§  
10 201-19) and California wage and hour laws. Perfect Day denies any unlawful conduct.

11 An evidentiary hearing on this motion<sup>1</sup> was held on August 19, 2011. For the reasons set  
12 forth below, Defendants' Motion to Disqualify is GRANTED, in part, and DENIED, in part.

13 **I. FACTUAL FINDINGS**

14 Jun Ma, a manager with Perfect Day, became the Human Resources Director of the  
15 Fremont branch in the beginning of 2006. At that time he began consulting with an Oakland  
16 attorney, regarding labor and employment issues that arose with Perfect Day.

17 Sometime in early 2006, the Oakland attorney drafted the independent contractor  
18 agreements that are still used by Perfect Day. After the Oakland attorney drafted the ICA, he  
19 informed Ma that he intended to retire from the practice of law and that Perfect Day would need to  
20 find a new attorney to replace him. Around the same time, in May 2006, Perfect Day began  
21 preparations for opening its Santa Clara branch. Perfect Day had an attorney named Alex Myers,  
22 specializing in general business law, and a broker named Tom Smith, assisting the company with  
23 the lease for the new branch.

24 Given these developments, Ma began looking for a new attorney. Ma specifically sought  
25 an attorney that had an office near the Santa Clara branch of Perfect Day, spoke Chinese, and had  
26 labor and employment experience. The Oakland attorney referred Ma to Adam Wang, an attorney

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28 <sup>1</sup> Also heard at that time was Plaintiffs' Motions to Compel and for Sanctions. An Order regarding  
that motion was filed separately.

1 that met Ma's requirements. Wang had an office in the area, he spoke Chinese, and he practiced  
2 labor and employment law. In June of 2006, Ma contacted Wang to set up a meeting to discuss  
3 Perfect Day's legal issues. During this conversation, Ma described the company and staff to Wang,  
4 and asked questions regarding labor and employment law.

5 Ma and Wang met in person at Perfect Day's Santa Clara facility in June 2006. Although  
6 the facility was not yet open to the public, Ma had set up an office so that he could recruit potential  
7 employees. At the meeting, which lasted somewhere between a half an hour and an hour and a  
8 half, Ma and Wang discussed labor and employment issues that arose in the course of Perfect  
9 Day's business. Specifically, Wang provided advice to Ma regarding an H-1B visa -- a visa for  
10 temporary employees in specialty occupations -- for a Perfect Day worker. Wang claims the H-1B  
11 visa was for an IT worker; Ma disputes this.

12 Although the primary purpose of the meeting was to discuss the H-1B visa issue, Wang and  
13 Ma also discussed other aspects of Perfect Day's business and the labor and employment issues  
14 that arose as a result of its business model, including the classification and compensation of its  
15 work force and the policies and procedures that it employed with respect to its work force. As a  
16 part of this meeting, Wang and Ma reviewed and discussed confidential company documents that  
17 were pertinent to both the H-1B visa issue, and were related to other aspects of Perfect Day's  
18 employment needs.

19 On June 13, 2006, Wang sent Ma an email with a proposed retainer agreement. The  
20 agreement was never signed, and after the June 13, 2006 e-mail, Ma and Wang had no further  
21 contact until October 12, 2010 when Wang deposed Ma in this case. During the deposition on  
22 October 12, Wang, relying on information he obtained from Ma during their June 2006 meeting,  
23 questioned Ma about Perfect Day employees with H-1B visas. In addition to the October 12, 2010  
24 deposition, Ma was deposed again by other Plaintiffs' attorneys, on November 19, 2010, before the  
25 prior consultation was uncovered during Ma's July 12, 2011 deposition.

26 Unfortunately, there is evidence that both Wang and Ma were not entirely truthful regarding  
27 what they discussed at the June 2006 meeting. Wang filed a declaration in support of Plaintiffs'  
28 Opposition to Defendant's Motion to Disqualify stating that the June 2006 meeting was solely

1 related to Perfect Day’s general business law needs. Wang stated that Perfect Day was not seeking  
2 labor and employment advice and that he was not practicing labor and employment law at the time  
3 of the June 2006 meeting. Wang stated that he “did not give any legal advise [sic] to Mr. [sic]  
4 about any issue including any employment or labor issues.” Wang Decl. ¶ 3, ECF No. 233.

5 The Court does not credit Wang’s declaration regarding the June 2006 meeting. Despite  
6 the statements made in Wang’s declaration, he admitted during the hearing that he was, in fact,  
7 practicing labor and employment law at the time of the June 2006 meeting. Moreover, Wang  
8 admitted at the hearing that he was involved in at least 15 lawsuits alleging federal wage and hour  
9 violations in 2005 and that he and Ma discussed an H-1B visa – an employment related visa – in  
10 the June 2006 meeting. At the hearing Wang further admitted that he used the H-1B information  
11 that he gained from Jun Ma at the June 2006 meeting during the deposition of Ma on October 12,  
12 2010. Based on these facts, and the fact that Perfect Day had both a broker and another general  
13 business attorney assisting them with the opening of the Santa Clara facility, it is not credible that  
14 the only topics discussed at the June 2006 meeting were the general business needs of Perfect Day.  
15 Instead, based on Wang’s admissions at the hearing, the Court finds that Ma and Wang necessarily  
16 discussed Perfect Day’s labor and employment issues at their preliminary consultation.

17 The Court is also dubious that Jun Ma was entirely truthful in his testimony regarding the  
18 June 2006 meeting. Aspects of Ma’s testimony regarding the June 2006 meeting are not credible.  
19 To the extent that Ma testified that he sought out Wang solely to obtain a second opinion about the  
20 ICA after the Oakland attorney had already drafted the document and advised Ma about its  
21 application to the massage therapists and after Ma had already started using the document, the  
22 Court does not credit Ma’s testimony. It is not credible that a highly cost-sensitive client such as  
23 Perfect Day would seek out a second opinion on issues that it had already resolved with the  
24 Oakland attorney and acted upon with its workers. Nor is it credible that Ma would seek additional  
25 advice from Wang regarding an ICA that Ma admitted had not changed since Perfect Day began  
26 using it in early 2006 – before the consultation between Ma and Wang occurred. Although the  
27 Court does not credit Ma’s testimony regarding the *impetus* for consulting with Adam Wang, the  
28 Court does credit Ma’s testimony that he and Wang discussed Perfect Day’s workers and their

1 employment status, and that he and Wang discussed documents and policies that applied to the  
2 workers. Although the impetus of the meeting was to discuss the visa issue, Ma and Wang also  
3 likely discussed other issues relating to Perfect Day’s hiring of workers as independent contractors;  
4 reviewed company documents relating to these workers; and Wang likely offered opinions on the  
5 status and benefits of these workers.

6 **II. LEGAL STANDARD AND ANALYSIS**

7 “The right to disqualify counsel is a discretionary exercise of the trial court’s inherent  
8 powers.” *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 914, 918  
9 (N.D. Cal. 2003). Under Civ. L.R. 11-4(a)(1), all attorneys who practice in this Court must comply  
10 with the standards of professional conduct required of members of the State Bar of California.  
11 This Court, therefore, applies state law in determining matters of disqualification. *In re County of*  
12 *Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000).

13 Rule 3-310 (E) of the Rules of Professional Conduct of the State Bar of California prohibits  
14 the successive representation of clients in certain circumstances without the informed written  
15 consent of the current client and former client. The rule provides: “A member shall not, without the  
16 informed written consent of the client or former client, accept employment adverse to the client or  
17 former client where, by reason of the representation of the client or former client, the member has  
18 obtained confidential information material to the employment.”

19 The California Supreme Court has held, in interpreting Rule 3-310(E), that, “[w]here an  
20 attorney successively represents clients with adverse interests, and where the subjects of the two  
21 representations are substantially related, the need to protect the first client’s confidential  
22 information requires that the attorney be disqualified from the second representation.” *People ex*  
23 *rel. Dep’t of Corps. v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1146 (1999). The burden  
24 is on the party seeking the disqualification to establish by a preponderance of the evidence that a  
25 substantial relationship exists. *See H.F. Ahmanson & Co. v. Salomon Bros.*, 229 Cal. App. 3d  
26 1445, 1452 (1991). When the attorney had a direct relationship with the client in the first  
27 representation, whether the two representations are substantially related “centers precisely upon the  
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1 factual and legal similarities of the two representations.” *Farris v. Fireman’s Fund Ins. Co.*, 119  
2 Cal. App. 4th 671, 679 (2004).

3 When the previous contact between the attorney and the party seeking disqualification is a  
4 “preliminary conversation that did not result in professional employment or services,” in addition  
5 to establishing a substantial relationship between the representations, the party seeking  
6 disqualification must show, “directly or by reasonable inference, that the attorney acquired  
7 confidential information in the conversation.” *Med-Trans Corp. v. City of California City*, 156  
8 Cal. App. 4th 655, 668 (2008). Because Perfect Day only consulted with, but never retained,  
9 Adam Wang, the Court applies this additional requirement to the factual scenario.

10 **A. Adam Wang Is Disqualified**

11 Based on the findings of fact stated above, it is clear that the matters discussed in Adam  
12 Wang’s prior preliminary conversation with June Ma were substantially related to the current  
13 litigation between Plaintiffs and Perfect Day. Ma consulted with Wang regarding labor and  
14 employment issues, including the classification and compensation of Perfect Day’s workers. Thus,  
15 some of the topics discussed in the June 2006 meeting are also central legal issues that must be  
16 resolved in this case. In addition, Ma showed Wang several Perfect Day documents that are  
17 pertinent to the present litigation. It is clear, therefore, that the matter on which Wang was  
18 consulted in June 2006, is substantially related to the issues raised in this case.

19 Defendant must also establish that the nature of the relationship between Perfect Day and  
20 Wang was such that “confidential information material to the current dispute ‘would normally have  
21 been imparted to the attorney.’” *Zimmerman v. Zimmerman*, 16 Cal. App. 4th 556, 564 (1993).  
22 The Court should consider “the time spent by the attorney on the earlier cases, the type of work  
23 performed, and the attorney’s possible exposure to formulation of policy or strategy.” *Id.*

24 Although Wang’s consultation with Perfect Day was brief, it consisted of several phone  
25 calls and an in person consultation, this Court finds that confidential information would normally  
26 have been imparted to Wang from these contacts. The evidence shows that Wang was exposed to  
27 Perfect Day’s employment policies and strategies at issue in this litigation, including company  
28 documents related to this litigation. This presents an untenable position in which Wang is now

1 required to challenge the documents and policies and procedures about which he obtained non-  
2 public information from Perfect Day in June 2006. Therefore, this Court finds that the consultation  
3 between Wang and Perfect Day was such that confidential information normally would have been  
4 imparted to the attorney. *Id.*

5 Even more disturbing is the evidence on the record of Wang's willingness to use  
6 confidential information he gained from the preliminary consultation with Perfect Day to Plaintiffs'  
7 advantage in this litigation. At the October 12, 2010 deposition, Wang questioned Ma about  
8 Perfect Day's H-1B employee. At the evidentiary hearing on the disqualification motion, Wang  
9 admitted that he used information that he gathered from the June 2006 meeting with Ma when  
10 taking Ma's deposition in October 2010. Wang's attempt to use information he obtained in his  
11 consultation with Perfect Day is further evidence supporting disqualification in this case.

12 Plaintiffs argue that *Zimmerman v. Zimmerman*, 16 Cal. App. 4th 556 (1993), provides  
13 support for the conclusion that Attorney Wang should not be disqualified here. In *Zimmerman*, the  
14 wife sought to disqualify her husband's attorney based on a telephone call that she had with a  
15 partner in her husband's attorney's firm. 16 Cal. App. 14th at 560. The record before the trial  
16 court showed "the most minimal involvement" by the law firm attorney with the wife's case. The  
17 attorney and wife had a twenty-minute phone conversation in which she "outlined" her case. There  
18 was no evidence that confidential information passed between the wife and the attorney. *Id.* at 565.  
19 The trial court found, and the appellate court affirmed, that the wife failed to establish a  
20 relationship "from which it would be reasonable to infer disclosure of confidential information,"  
21 and refused to disqualify the husband's attorney's firm. *Id.* at 565.

22 The likelihood that confidential information was disclosed to Wang in the June 2006  
23 meeting is significantly higher than the scenario presented in *Zimmerman*. Here, Ma presented  
24 Wang with details regarding Perfect Day's business, employees, and policies. Ma showed Wang  
25 documents that are directly related to the pending case. In short, Ma did much more than merely  
26 "outline" a case over the phone. Additionally, *Zimmerman* is distinguishable on two grounds.  
27 First, in *Zimmerman* the wife did not consult directly with her husband's attorney. Instead, she  
28 consulted with another attorney that happened to work at the same firm as her husband's attorney.

1 *See id.* at 565. In comparison, the attorney here advised both sides of this litigation -- a scenario  
2 that more directly implicates concerns about misuse of confidential information that inform the  
3 conflicts rules. Second, unlike here, there was no evidence in *Zimmerman* that the attorney used  
4 confidential information obtained from a previous consultation against the party with whom he had  
5 a prior relationship to the benefit of his current client. For these reasons, *Zimmerman* does not  
6 persuade the Court that disqualification is improper here.

7 Plaintiffs also argue that Perfect Day knew about the potential conflict at least as far back as  
8 October 2010 when Jun Ma recognized Wang at the deposition. Plaintiffs argue that Perfect Day's  
9 delay in bringing this motion is evidence that it is trying to use the motion to disqualify as a  
10 litigation tactic to impose delay. Opp'n. to Def.'s Mot. to Disqualify at 5, August 11, 2011, ECF.  
11 No. 222. Perfect Day, on the other hand, argues that the onus was on Wang, as an experienced  
12 attorney, to identify the potential conflict and seek to clarify or remedy it, at least at the point when  
13 Wang was sitting face-to-face with Ma at the October 2010 deposition. Reply to Def.'s Mot. to  
14 Disqualify at 3, August 12, 2011, ECF No. 239.

15 There is a narrow exception to the disqualification doctrine when a former client  
16 inexcusably postpones a motion to disqualify. *River West Inc. v. Nickel*, 188 Cal. App.3d 1297,  
17 1309 (1987). If the non-moving party can offer prima facie evidence of an unreasonable delay in  
18 bringing the motion and resulting prejudice, then the burden shifts back to the party seeking  
19 disqualification to justify the delay. *Id.* The unreasonable delay and resulting prejudice must be  
20 extreme. *Western Continental Operating Co. v. Natural Gas Corp. of Cal.*, 212 Cal. App.3d 753,  
21 763-64 (1989).

22 The Court finds that the delay in bringing the motion was not unreasonable given the  
23 circumstances. As soon as the issue came to light in the July 2011 deposition, Perfect Day  
24 promptly raised the issue with opposing counsel and filed a motion to disqualify shortly thereafter.  
25 The delay between the filing of the complaint in March 2010 and the filing of the motion to  
26 disqualify on August 5, 2011 is sufficiently explained by Jun Ma's representation that as a layman  
27 without legal experience he did not know that there was a potential conflict, and so did not raise the  
28 issue sooner. *See id.* at 764 (holding that one year delay between potential notice of conflict and

1 filing of motion to disqualify was not extreme where the delay was adequately explained by the  
2 moving party). Plaintiffs have also failed to explain how the delay would result in extreme  
3 prejudice. Plaintiffs, as explained below, may continue to be represented by co-counsel for the  
4 remainder of this litigation, as they have done since August 5, 2011, pursuant to the Court's August  
5 3, 2011 Court Order. The Court declines to apply the narrow exception to the disqualification  
6 doctrine here. For these reasons, therefore, Defendant's motion to disqualify attorney Adam Wang  
7 is GRANTED.<sup>2</sup>

8 **B. Co-Counsel Is Not Disqualified**

9 Defendant also argues that in addition to Adam Wang, *all* of Plaintiffs' counsel, including  
10 co-counsel, must be disqualified from this litigation. Def.s' Mot. to Disqualify Counsel at 5,  
11 August 5, 2011, ECF No. 222. Unlike the rules regarding automatic disqualification of lawyers  
12 within the same firm, "disqualification of one firm does not automatically compel disqualification  
13 of the firm's co-counsel. Rather, the particular facts of each case must be considered in order to  
14 determine whether disqualification is warranted." *In re Airport Car Rental Antitrust Litigation*,  
15 470 F. Supp. 495, 502 (N.D. Cal. 1979). For example, in *In re Airport Car Rental*, the court  
16 discussed several factors that weighed against disqualifying counsel, and refused to disqualify co-  
17 counsel because (1) the initial contact between counsel and client was very limited; (2) there was  
18 no evidence that the attorney shared any of the client's confidential information with co-counsel;  
19 and (3) there was no evidence that co-counsel associated with the disqualified counsel because of  
20 the disqualified counsel's prior relationship with the client. *Id.* at 502.

21 Given the facts of this case, Adam Wang's co-counsel at the Sturdevant Law Firm and  
22 Duckworth Peters Lebowitz Olivier need not be disqualified. First, as explained above, the initial  
23 contact between Wang and Perfect Day was limited to several phone calls, an initial consultation,  
24 and a follow-up e-mail. Wang was never retained and Perfect Day concedes that no formal retainer  
25 agreement ever came of this consultation. Second, Monique Olivier, Wang's co-counsel, has

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27 <sup>2</sup> In light of the fact that Adam Wang is disqualified from this litigation, the Court need not reach  
28 Defendants' additional argument that Plaintiffs' violations of this Court's August 3, 2011  
scheduling order is an independent reason for disqualification. Reply to Def.'s Mot. to Disqualify  
at 1, August 12, 2011, ECF No. 239.

1 submitted a declaration stating that prior to the July 12 deposition of Ma, she had no knowledge of  
2 Wang and Ma's prior contact, nor has she received any confidential information from Wang  
3 regarding Perfect Day. Olivier Decl. at ¶¶ 15 and 16, August 10, 2011, ECF No. 230; Wang Decl.  
4 ¶ 7, August 11, 2011, ECF No. 233. Finally, there is no evidence that co-counsel associated with  
5 Wang because of his prior relationship with Perfect Day. In short, there is no evidence that Wang  
6 shared any confidential information with Ms. Olivier or any other co-counsel. Defendants argue  
7 that "[i]t is to be expected that all counsel have shared information regarding this case," but fail to  
8 specify or offer evidence as to what particular confidential information may have been improperly  
9 shared between co-counsel. Def.s' Mot. to Disqualify at 6, August 5, 2011, ECF No. 222. Mere  
10 speculation and argument is insufficient to require that Wang's co-counsel also be disqualified  
11 from this matter.

12 **III. CONCLUSION**

13 Defendants' motion to disqualify Plaintiffs' attorney Adam Wang is GRANTED.  
14 However, to the extent Defendants seek to disqualify Wang's co-counsel, including attorneys with  
15 The Sturdevant Law Firm or the firm of Duckworth Peters Lebowitz Olivier, Defendants' motion  
16 is DENIED.

17 Dated: October 4, 2011



LUCY H. KOH  
United States District Judge