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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

BAY CLUB FAIRBANKS RANCH, LLC
d/b/a FAIRBANKS RANCH COUNTRY
CLUB, INC.,

Defendants.

Case No.: 18-cv-1853 W (BLM)

**ORDER GRANTING PLAINTIFF’S
MOTION TO DISQUALIFY
COUNSEL [DOC. 40]**

Pending before the Court is Plaintiff U.S. Equal Employment Opportunity Commission’s (“EEOC”) motion to disqualify one of Defendant Bay Club Fairbanks Ranch, LLC d/b/a Fairbanks Ranch Country Club’s (“Bay Club”) attorneys. Bay Club opposes. The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** the motion [Doc. 40].

1 **I. INTRODUCTION**

2 Defendant Bay Club is represented in this lawsuit by attorneys from Buchalter
3 APC, and attorney Mark Kooreny of the Kooreny Law Group. Kooreny has served as
4 Bay Club’s general counsel since 2009. (*Kooreny Decl.* [Doc. 49-2] ¶ 2.)

5 In its motion, Plaintiff EEOC seeks to disqualify Kooreny under California Rule
6 of Professional Conduct 3.7(a), which restricts an attorney’s ability to act as an advocate
7 in a case where the attorney will also be a witness. (*P&A* [Doc. 40-1] 1:7–9.) Bay Club
8 opposes the motion on the basis that (1) the EEOC unreasonably delayed in filing the
9 motion, (2) Bay Club will suffer substantial prejudice, (3) it is unclear whether Kooreny
10 will testify at trial, and (4) it has consented to Kooreny’s dual role as attorney and
11 witness. For the reasons that follow, the Court will grant the EEOC’s motion.

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13 **II. LEGAL STANDARD**

14 “A trial court’s authority to disqualify an attorney derives from the power inherent
15 in every court ‘[t]o control in furtherance of justice, the conduct of its ministerial officers,
16 and of all other persons in any manner connected with a judicial proceeding before it, in
17 every matter pertaining thereto.’ *Kennedy v. Eldridge*, 201 Cal.App.4th 1197, 1204
18 (2011) (alterations in original). “[D]isqualification motions involve a conflict between the
19 clients’ right to counsel of their choice and the need to maintain ethical standards of
20 professional responsibility.” *Id.* “The paramount concern must be to preserve public trust
21 in the scrupulous administration of justice and the integrity of the bar.” *Id.* “The
22 important right to counsel of one’s choice must yield to ethical considerations that affect
23 the fundamental principles of our judicial process.” *Id.*

24
25 **III. ANALYSIS**

26 The EEOC moves to disqualify Kooreny under California Rule of Professional
27 Conduct 3.7(a), which provides:
28

1 A lawyer shall not act as an advocate in a trial in which the lawyer is likely
2 to be a witness unless: (1) The lawyer’s testimony relates to an uncontested
3 issue or matter; (2) The lawyer’s testimony relates to the nature and value of
4 legal services rendered in the case; or (3) The lawyer has obtained informed
written consent from the client

5 Although the rule allows continued representation where the client consents to the
6 attorney’s dual role, a trial court has discretion to disqualify counsel. Lyle v. Superior
7 Court, 122 Cal. App. 3d 470, 482 (1981). However, “in exercising that discretion, the
8 court must weigh the competing interests of the parties against potential adverse effects
9 on the integrity of the proceeding before it and ‘should resolve the close case in favor of
10 the client’s right to representation by an attorney of his or her choice’” Smith, Smith
11 & Kring v. Superior Court, 60 Cal.App.4th 573, 580 (1997) (quoting Lyle, 122
12 Cal.App.3d at 482).

13 In Smith, 60 Cal.App.4th 573, the California Court of Appeal explained that in
14 evaluating a motion to disqualify under Rule 3.7(a), courts should consider three factors.
15 First, “the combined effects of the strong interest parties have in representation by
16 counsel of their choice, and in avoiding the duplicate expense and time-consuming effort
17 involved in replacing counsel already familiar with the case.” Smith, 60 Cal.App.4th at
18 581. “[I]t must be kept in mind that disqualification usually imposes a substantial
19 hardship on the disqualified attorney’s innocent client, who must bear the monetary and
20 other costs of finding a replacement.” Id. (quoting Gregori v. Bank of America, 207
21 Cal.App.3d 291, 300 (1989)).

22 Second, ““whenever an adversary declares his intent to call opposing counsel as a
23 witness, prior to ordering disqualification of counsel, the court should determine whether
24 counsel’s testimony is, in fact, genuinely needed.” Smith, 60 Cal.App.3d at 581 (quoting
25 Reynolds v. Superior Court, 177 Cal.App.3d 1021, 1027 (1976) (citation omitted)). “In
26 determining the necessity of counsel’s testimony, the court should consider ‘the
27 significance of the matters to which he might testify, the weight his testimony might have
28 in resolving such matters, and the availability of other witnesses or documentary

1 evidence by which these matters may be independently established.” Id. (quoting
2 Comden v. Superior Court, 20 Cal.3d 906, 913 (1978)).

3 Third, courts should consider the possibility the moving party is using the motion
4 to disqualify for purely tactical reasons. Smith, at 581 (quoting Comden v. Superior
5 Court, 20 Cal.3d at 915). This consideration is important because if counsel was “able to
6 disqualify opposing counsel simply by calling them as witnesses, it would ‘pose the very
7 threat to the integrity of the judicial process that [motions to disqualify] purport to
8 prevent.” Id. (citation omitted).

9 Here, the record does not support a finding that Bay Club would suffer the “usual”
10 hardship imposed on clients by disqualification. To begin, there is no evidence indicating
11 that Kooreny’s disqualification would result in the duplication of litigation expenses or
12 effort. While Bay Club relies on Kooreny’s “decade long” role as its lawyer “who is
13 familiar with its employment practices, procedures, investigations, employees, litigation
14 as well as resolutions of cases” (*Opp’n* [Doc. 49] 10:12–15), Bay Club provides no
15 information regarding the extent to which Kooreny has been involved in this lawsuit.
16 Although Kooreny is listed as “co-counsel” on Bay Club’s filings, all of its pleadings
17 and briefs, as well as joint motions with the EEOC, have been signed by Buchalter
18 attorneys, and all of Bay Club’s filings are on Buchalter pleading paper. (*See e.g. Notice*
19 *of MTD*. [Doc. 7]; *P&A* [Doc. 7-1]; *Corp. Disclosure State*. [Doc. 8]; *Reply to MTD*
20 [Doc. 10]; *Answer* [Doc. 16]; *Notice of Related Case* [Doc. 28]; *Opp’n to Mot. to Compel*
21 [Doc. 47]; *Notice of Mot. to Compel* [Doc. 56-1], *Mot. to Compel* [Doc. 56]; *Opp’n to*
22 *Mot. to Disqualify* [Doc. 49]; *Jt. Mot. Re. ENE* [Doc. 26]; *Jt. Stip. Re. Protective Order*
23 [Doc. 53]; *Jt. Disc. Plan* [Doc. 29].) Similarly, Buchalter attorneys prepared all
24 declarations concerning discovery issues, appeared in discovery proceedings before
25 Magistrate Judge Schopler, and are involved in the communications with the EEOC and
26 co-defendant Fairbanks Ranch Country Club, Inc. (“FRCCI”) regarding this litigation.
27 (*See e.g. Crosby Reply Decl.* [Doc. 52-1], *Ex. A* [Doc. 52-1] p. 1, *Ex. B* [Doc. 52-1] p. 1,
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1 *Ex. C.* [Doc. 52-1] *Ex. D.* [Doc. 52-1]; *Boulton Reply Decl.* [Doc. 52-3], *Ex. A* [Doc. 52-
2 3], *Ex. B* [Doc. 52-3].)

3 In contrast, the only document signed by Koorennny is his declaration filed in
4 support of Buchalter’s opposition to the present motion. In that declaration, Koorennny
5 simply repeats that he has served as Bay Club’s general counsel since 2009, well before
6 the lawsuit was filed. (*Koorennny Decl.* ¶ 2.) Nowhere does Koorennny provide any
7 indication regarding the amount of work or type of work he has performed in this
8 litigation. (*See Id.*) Also significant is Koorennny’s appearance at the Early Neutral
9 Evaluation (“ENE”) conference as the client representative, not litigation counsel.

10 In short, the current record strongly suggests Koorennny has had an extremely
11 limited role as an attorney in this litigation and, therefore, Bay Club would not incur the
12 duplicative costs and time-consuming effort that clients usually incur when counsel is
13 disqualified. Additionally, as the EEOC points out, because Koorennny is being
14 disqualified under the attorney-witness rule, he may continue to consult with the
15 Buchalter attorneys and Bay Club regarding the litigation, further ameliorating any
16 potential harm to Bay Club. Accordingly, the Court finds Bay Club would not suffer
17 significant hardship if Koorennny is disqualified.

18 The record also supports a finding that Koorennny’s testimony is needed. Bay Club
19 acknowledges that during the ENE, Koorennny “represented to the Court and counsel for
20 all parties that . . . he would likely be a witness in this case.” (*Opp’n* 4:22–24; *Warren*
21 *Decl.* ¶ 4.) In his declaration, Koorennny admits his “involvement as investigator,” during
22 which he met with Shant Karian, the alleged harasser. (*Id.* ¶ 8.) In correspondence with
23 the EEOC before the lawsuit was filed, Koorennny also represented that he talked to other
24 staff regarding Claimant’s allegations. (*Crosy Decl.* ¶ 6, *Ex. C* [Doc. 40-3] p. 2.)
25 Koorennny also admits he is familiar with Bay Club’s personnel, policies and procedures
26 (*Koorennny Decl.* ¶ 2), which are also potentially relevant. See *Star v. West*, 227 F.3d
27 1036 (9th Cir. 2001) (“Once an employer knows or should of [coworker] harassment, a
28 remedial obligation kicks in. [Citation omitted.]”); *Hardage v. CBS Broadcasting, Inc.*,

1 427 F.3d 1177 (9th Cir. 2005) (explaining relevance of an employer’s adoption of anti-
2 harassment ‘policy and its efforts to disseminate the policy to its employees....’ [Citation
3 omitted.]”). Based on these facts, the Court is satisfied that Kooreny’s testimony is
4 necessary in this case.

5 The next consideration is whether there is any indication the EEOC filed the
6 motion to disqualify as a litigation tactic. As an initial matter, the above findings—
7 Kooreny’s limited role in this lawsuit and the need for his testimony—suggests that the
8 EEOC’s motion is based on legitimate concerns and is not a litigation tactic. Bay Club,
9 however, argues the EEOC’s “unreasonable” delay in filing the motion is proof that it is a
10 litigation tactic. In support of this argument, Bay Club relies on River West, Inc. v.
11 Nickel, 188 Cal.App.3d 1297 (1987). (*Opp’n* [Doc. 49] 10:8–10.)

12 But the delay and prejudice present in River West was significantly greater than
13 exists here. In River West the defendant waited 47 months from the filing of the lawsuit
14 to seek disqualification. By then, plaintiff’s attorney had spent 3000 hours in the case
15 and plaintiff had incurred \$387,000 in legal fees. In contrast, here, the EEOC “delayed”
16 12 months from the filing of the complaint.¹ And as discussed above, the record
17 demonstrates Kooreny has spent a limited amount of time litigating this case.
18 Additionally, unlike River West, Bay Club is represented by another law firm that is not
19 the subject of the disqualification motion and that firm appears to have taken the leading
20 ore in this case.

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24 ¹ The Court rejects Bay Club’s contention that the EEOC delayed two and a half years. Bay
25 Club’s argument is based on the date the EEOC first communicated with Kooreny regarding the
26 Charge of Discrimination, December 5, 2016. (*Opp’n* 9:22–24.) But this lawsuit was not filed until
27 August 2018. (*Compl.* [Doc. 1].) Until the lawsuit was filed, the EEOC could not file a motion to
28 disqualify. Moreover, the ENE took place on May 16, 2019. (*Minute Entry* [Doc. 30].) The EEOC’s
motion was filed less than three months after the ENE. See Liberty National Enterprises, L.P. v. Chicago
Title Ins. Co., 194 Cal.App.4th 839, 846 (2011) (The stage of the litigation is a consideration in
evaluating reasonableness of delay).

1 Bay Club also asserts the motion may not yet be ripe because “there is no trial at
2 issue, no testimony at trial by Kooreny or any risk of confusing a jury.” (*Opp’n* 13:6–
3 7.) In other words, Bay Club seems to be suggesting that Kooreny’s disqualification can
4 be delayed until the parties are closer to trial. The Court is not persuaded for at least two
5 reasons. First, delaying Kooreny’s disqualification would potentially increase the
6 amount of harm Bay Club would suffer to the extent Kooreny would become active in
7 the case. This argument is also at odds with Bay Club’s early argument that the EEOC
8 waited too long to file the motion. (*Opp’n*10:8–10.)

9 Second, the Court is concerned that Kooreny’s different roles in this case, and
10 confusion concerning which role he is in at any point in the litigation, adversely effects
11 the integrity of these proceedings. For example, while listed as co-counsel on pleadings
12 and identified as a potential witness, Kooreny attended the ENE before Judge Schopler
13 as the client representative. After attending the ENE, Kooreny / Bay Club then
14 disputed—both in the opposition to this motion and apparently in discovery hearings
15 before Judge Schopler—that Kooreny attended the ENE as a client representative. This
16 “confusion” was cleared up by Judge Schopler: “[A]t the ENE, Mr. Kooreny signed in
17 as a party representative, and he represented himself to me as a client representative. It
18 was something that I clarified.” (*Crosby Reply Decl., Ex. B* at 23:8–10.)

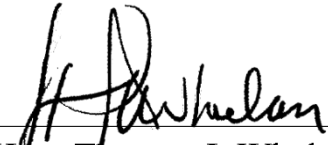
19 The Court is at a loss as to how Kooreny could “forget” that he attended the ENE
20 as the client representative. This is particularly true given the order scheduling the ENE
21 required the personal appearance of the parties. (*ENE Order* [Doc. 17] ¶ 2.) The incident
22 lends support to the EEOC’s contention that Bay Club has been using the confusion
23 regarding Kooreny’s true role in this case as a litigation tactic, particularly during
24 discovery. Regardless, the Court agrees that Kooreny’s continued roles as counsel,
25 client representative and witness create the appearance of impropriety and threaten the
26 integrity of these proceedings.

1 **IV. CONCLUSION & ORDER**

2 For the reasons set forth above, the Court **GRANTS** the EEOC's motion to
3 disqualify Kooreny [Doc. 40].

4 **IT IS SO ORDERED.**

5 Dated: November 6, 2019

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7 _____
8 Hon. Thomas J. Whelan
9 United States District Judge

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