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

10
11 SHAWARMA STACKZ LLC,
12 Plaintiff,
13 v.
14 JAY JWAD, *et al.*,
15 Defendants.

Case No. 21-cv-01263-BAS-BGS

**ORDER DENYING DEFENDANTS’
MOTION TO DISQUALIFY
PLAINTIFF’S COUNSEL (ECF No. 5)**

16
17 **I. BACKGROUND**

18 Plaintiff Shawarma Stackz LLC (“SSL”) filed the instant action on July 14, 2021.
19 (Compl., ECF No. 1.) On July 26, 2021, counsel for Defendants, Jesse Gessin, emailed
20 Plaintiff’s counsel, Jake Freed, requesting an extension of time to respond to the
21 Complaint. (ECF No. 5-3.) On July 27, 2021, Freed replied, stating in relevant part:

22 Maybe we should find time to talk about potential paths to resolution here? A
23 court is going to shut [Defendants] down at some point, and it’s going to be a
24 question of how much they owe in damages when that happens. The attorney
25 fees and delay are mounting, and we’re just getting more dug in on our side
26 as a result. We also believe they defrauded the United States in connection
27 with [the Paycheck Protection Program (PPP)] and [Restaurant Revitalization
28 Fund (RRF)]—we know they got roughly \$1 million for a restaurant that
opened during the pandemic, and under the rules for those programs they
could not have conceivably qualified for the amount they got without
perjuring themselves. We’re strongly considering qui tam litigation against

1 them, so that DOJ has the opportunity to get involved and take a hard look at
2 this, including the likely criminal aspects of their conduct. The U.S. Trustee's
3 Office just sued Mr. Jwad's brother for bankruptcy fraud in connection with
4 this restaurant; the facts are bad enough here that the government has already
5 shown a willingness to get involved. These guys have a lot of potential
6 jeopardy and their legal problems aren't going away until they stop abusing
7 our brand and give us some compensation.

8 (ECF No. 5-4.)

9 Gessin proposed to settle the case with a cash payment of \$30,000, which Freed
10 denied. (ECF Nos. 5-5, 5-6.) In an email dated August 6, 2021, Freed declined the
11 settlement offer and wrote:

12 Jay may "see things differently," but Jay also does not appear to be a stable
13 person. He brags about likely federal crimes, his automatic weapons, and
14 shooting people on social media. He's going to need to do much better than
15 \$30k if he wants this to go away, particularly if he wants to keep the
16 restaurant. If he doesn't want to have a serious negotiation, we move to shut
17 down the restaurant ASAP, pull the trigger on a qui tam complaint, and do our
18 best to get DOJ to start looking into every aspect of his life. As I mentioned,
19 DOJ has already sued Sam Jawad for fraud in connection with this restaurant.
20 These guys are so publicly and transparently crooked, it's not hard to imagine
21 a prosecutor taking a serious look at this, and the qui tam will create that
22 opportunity. Jay should want to get us out of his life, and under a gag
23 agreement at the earliest possibility. The clock is ticking on the qui tam, and
24 once that's filed DOJ is necessarily involved. You might think it's unlikely
25 that DOJ takes an interest, but does Jay really want to run that risk?

26 If you think further negotiations are possible, let me know. If not, we'll keep
27 working down our list and we'll shut these guys down eventually.

28 (ECF No. 5-6.)

29 Gessin wrote back, stating that Freed's email violated California Rule of
30 Professional Conduct 3.10. (ECF No. 5-7.) Gessin asked Freed to withdraw from the case
31 or give Gessin contact information of a partner of the firm to speak about the breach. (*Id.*)
32 Freed replied and wrote that his August 6 email did not constitute an ethical violation.
33 (ECF No. 5-8.) Freed's email stated that Comment 2 to California Rule of Professional

1 conduct 3.10 makes the rule inapplicable “to a threat to bring a civil action,” and Freed’s
2 threat to bring a civil *qui tam* action does not violate the rule. (ECF No. 5-8.) Freed opined
3 that a litigation of this issue in federal court would be frivolous. (*Id.*)

4 Defendants move to disqualify Freed as SSL’s counsel. (ECF No. 5.) Freed and his
5 law firm, Davis Wright Tremaine LLP (“DWT”), oppose the motion. (ECF No. 12.)
6 Defendants filed a reply. (ECF No. 17.) The Court held an oral argument on the motion
7 on November 22, 2021. (ECF No. 20.)

9 **II. LEGAL STANDARD**

10 **A. Motion to Disqualify Counsel**

11 Federal law governs the ethical standards of attorney conduct in federal court.
12 *Quatama Park Townhomes Owners Ass’n v. RBC Real Est. Fin., Inc.*, 365 F. Supp. 3d
13 1129, 1136 (D. Or. 2019) (citing *In re Snyder*, 472 U.S. 634, 645 n.6 (1985)). “The right
14 to disqualify counsel is a discretionary exercise of the trial court’s inherent powers.” *Id.*
15 (quoting *Certain Underwriters at Lloyd’s, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d
16 914, 918 (N.D. Cal. 2003)).

17 Federal courts have the authority to “prescribe rules for the conduct of their
18 business.” 28 U.S.C. § 2071(a). “Many district courts have adopted the standards and
19 rules governing the professional conduct of lawyers that apply in the jurisdiction in which
20 the court sits.” *Quatama Park Townhomes Owners Ass’n*, 365 F. Supp. 3d at 1136 (citing
21 Restatement (Third) of The Law Governing Lawyers § 1 cmt. b (2000)). In this circuit,
22 district courts that have adopted by local rule the state’s ethical code governing lawyers
23 “must follow the reasoned view of the state supreme court when it has spoken on the issue.”
24 *See Radcliffe v. Hernandez*, 818 F.3d 537, 543 (9th Cir. 2016) (quoting *In re Cnty. of Los*
25 *Angeles*, 223 F.3d 990, 995 (9th Cir. 2000)). “If the state supreme court has not spoken on
26 the issue, [federal courts] look to intermediate [state] appellate courts for guidance,
27 although [the courts] are not bound by them if [the courts] believe that the state supreme
28 court would decide otherwise.” *Id.* “If, however, a district court has not adopted its forum

1 state's code of professional conduct, the question of choice of law is less clear, at least in
2 the Ninth Circuit.” *Quatama Park Townhomes Owners Ass’n*, 365 F. Supp. 3d at 1137
3 (citing *Unified Sewerage Agency of Wash. Cnty. v. Jelco, Inc.*, 646 F.2d 1339, 1342 n.1
4 (9th Cir. 1981)).

5 This district's local rules require that attorneys adhere to this district's own Code of
6 Conduct that “establishes the principles of civility and professionalism that will govern the
7 conduct of all participants in cases and proceedings pending in this Court.” Civ. L.R. 2.1.a,
8 83.3.c(1)(c). Because this district's local rules do not formally adopt the California Rules
9 of Professional Conduct (“CRPC”), the Court considers the California rules as guideposts
10 only. *See Quatama Park Townhomes Owners Ass’n*, 365 F. Supp. 3d at 1137.

11 12 **B. Heightened Judicial Scrutiny**

13 “Because a motion to disqualify is often tactically motivated and can be disruptive
14 to the litigation process, disqualification is considered to be a drastic measure that is
15 generally disfavored and imposed only when absolutely necessary.” *Brighton Collectibles,*
16 *Inc. v. Coldwater Creek Inc.*, No. 08-CV-2307-H (WVG), 2009 WL 10671353, at *2 (S.D.
17 Cal. Dec. 8, 2009); *accord Certain Underwriters at Lloyd's London*, 264 F. Supp. 2d at
18 918. “The party seeking disqualification bears a ‘heavy burden.’” *Dimenco v. Serv. Emps.*
19 *Int’l Union*, No. C 10-03112 SBA, 2011 WL 89999, at *3 (N.D. Cal. Jan. 10, 2011)
20 (quoting *City and Cnty. of San Francisco v. Cobra Sols., Inc.*, 38 Cal. 4th 839, 851 (2006)).

21 In determining whether to disqualify counsel, courts consider:

22 the combined effect of a party's right to counsel of choice, an attorney's
23 interest in representing a client, the financial burden on a client of replacing
24 disqualified counsel[,] and any tactical abuse underlying a disqualification
25 proceeding against the fundamental principle that the fair resolution of
26 disputes within our adversary system requires vigorous representation of
parties by independent counsel unencumbered by conflicts of interest.

27 *Certain Underwriters at Lloyd's London*, 264 F. Supp. 2d at 918 (quoting *Allen v. Acad.*
28 *Games Leagues of Am.*, 831 F. Supp. 785, 789 (C.D. Cal. 1993)). “Because punishment

1 for violations of the rules of professional conduct is the purview of the state bar, the court’s
2 goal is not to impose a penalty against an attorney, rather the goal is to fashion a remedy
3 for whatever improper effect the attorney’s misconduct has had in the case.” *Lopez v.*
4 *Banuelos*, No. 1:11-CV-466 AWI JLT, 2013 WL 4815699, at *4 (E.D. Cal. Sept. 6, 2013).

6 **III. ANALYSIS**

7 **A. Defendants’ Motion to Disqualify Counsel**

8 Defendants move to disqualify Freed and DWT as SSL’s counsel, citing violations
9 of this district’s local rules, Rule 3.10 of the CRPC, and criminal extortion.

10 The Court finds that Freed’s July 27, 2021 and August 6, 2021 emails explicitly and
11 implicitly communicated to defense counsel that unless Defendants pay a satisfactory
12 settlement amount, he would expose Defendant Jay Jwad to criminal investigation. In
13 connection with the settlement negotiations, Freed brought up his belief that Jay
14 “defrauded the United States” in connection with PPP and RRF programs by obtaining
15 \$1 million in loans that the restaurant could not qualify for without committing perjury.
16 (*Id.*) Freed wrote that he was “strongly considering qui tam litigation against [Jay], so that
17 DOJ has the opportunity to get involved and take a hard look . . . , including the likely
18 criminal aspects of [Jay’s] conduct.” (*Id.*) Freed concluded the July 27 email by stating
19 that Jay had “a lot of potential jeopardy and [his] legal problems are[] [not] going away
20 until [he] stop[s] abusing [the SSL] brand and give[s] [SSL] some compensation.” (*Id.*)
21 When Defendants proposed a settlement for \$30,000, Freed wrote back that Jay “brags
22 about likely federal crimes, his automatic weapons, and shooting people on social media”
23 and that Jay had to “do much better than \$30k.” (ECF No. 5-6.) Freed stated that absent
24 a better settlement proposal, he will, among other items, “pull the trigger on a qui tam
25 complaint, and do [his] best to get DOJ to start looking into every aspect of [Jay’s] life.”
26 (*Id.*)

27 Freed and his law firm, DWT, argue that Freed’s threat was limited to filing a civil
28 complaint or, to the extent the threat to bring a qui tam action implicated threat of criminal

1 investigation, that the threat was limited to events related to the present litigation. Freed
2 and DWT further argue that defense counsel’s present motion constitutes “tactical abuse.”
3 The Court disagrees with both arguments. Freed’s emails communicated to Defendants
4 that their options were to settle the action or else face a criminal investigation by the DOJ.
5 Freed’s conduct implicates serious ethical questions, including whether Freed violated
6 CRPC and/or engaged in criminal extortion, and Defendants’ motion cannot be brushed
7 aside as tactical abuse.

8 That said, applying the heightened judicial scrutiny to Defendants’ motion for
9 disqualification of counsel, *Certain Underwriters at Lloyd’s London*, 264 F. Supp. 2d at
10 918, the Court finds that a lesser remedy can address the harm alleged by Defendants. The
11 harm at issue is Jay’s fear and anxiety of defending his action at the risk of exposing himself
12 to criminal investigation by the DOJ. That harm can be mitigated by this Court’s express
13 order prohibiting Freed and DWT from engaging in any further threats to expose
14 Defendants to criminal investigation to obtain an advantage in this litigation.

15 This approach was taken by another district court in this circuit. In *Lopez*, a plaintiff
16 filed a federal civil rights law suit against California Highway Patrol officers. *Lopez*, 2013
17 WL 4815699. At issue was whether the defense counsel for the state should be disqualified
18 for threatening the plaintiff with arrest. The defense counsel had written an email to the
19 plaintiff’s counsel, stating that “there [was] a very real chance” that the plaintiff will be
20 arrested if he were to go to trial and that “both federal and state law enforcement [would
21 be] present during the trial.” *Id.* at *7. Because these lines “immediately follow[ed] a
22 requested dismissal [of the plaintiff’s action] and the payment of \$10,000,” the *Lopez* court
23 found that defense counsel’s e-mail constituted a threat for the plaintiff to drop the civil
24 rights action or else face detention in California. *Id.* The *Lopez* court found it unnecessary
25 to determine whether defense counsel violated CRPC, concluding that the court could
26 alleviate any harm to the plaintiff from defense counsel’s threat by issuing a prohibitive
27 order. *Id.* at *4, 8 (“[T]he court’s goal is not to impose a penalty against an attorney, rather
28 the goal is to fashion a remedy for whatever improper effect the attorney’s misconduct has

1 had in the case.”). Namely, the *Lopez* court found that the harm caused by the threat
2 included the plaintiff’s anxiety about attending trial at the risk of facing arrest, which can
3 be alleviated by an order prohibiting the defense counsel from causing criminal
4 proceedings to be brought against the plaintiff in connection with the plaintiff’s civil rights
5 action. *Id.*

6 The Court finds that the approach taken in *Lopez* is applicable to this case.
7 Accordingly, the Court **ORDERS** Freed not to engage in any further threats to expose
8 Defendants to criminal investigation to obtain an advantage in this litigation. Because this
9 Court-ordered remedy can remedy the asserted harm, the Court finds it unnecessary to
10 determine whether Freed’s conduct violated this district’s local rules or CRPC, or whether
11 Freed engaged in criminal extortion. *See Lopez*, 2013 WL 4815699, at *4 (“[P]unishment
12 for violations of the rules of professional conduct is the purview of the state bar[.]”).
13 Defendants are free to seek additional remedy from the state bar, which is far better
14 equipped to make ethical rulings on attorney conduct.

15 Therefore, the Court **DENIES** Defendants’ motion to disqualify Freed and DWT as
16 SSL’s counsel.

17
18 **B. Freed and DWT’s Request for Attorney’s Fees**

19 Freed and DWT request that the Court award them costs and fees under 28 U.S.C.
20 § 1927, arguing that Defendants moved to disqualify Freed as Plaintiff’s counsel as a mere
21 “tactical maneuver.” (Opp’n at 24, ECF No. 12.) While the Court denies Defendants’
22 motion to disqualify counsel, the Court does not find that Defendants’ motion was merely
23 a “tactical maneuver” or made in bad faith. *Cf. Optyl Eyewear Fashion Int’l Corp. v. Style*
24 *Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985) (affirming an award of attorney’s fees and costs
25 against a party who brought a “disqualification motion [that] was meritless, . . . brought
26 solely for tactical reasons, and . . . in bad faith”). Accordingly, the Court **DENIES** Freed
27 and DWT’s request for attorney’s fees.


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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **DENIES** Defendants' motion to disqualify
3 counsel. (ECF No. 5.) It is further **ORDERED** that Freed and DWT shall not engage in
4 any further threats to expose Defendants to criminal investigation to gain an advantage in
5 this litigation. The Court **DENIES** Freed and DWT's request for attorney's fees. (ECF
6 No. 12.)

7 **IT IS SO ORDERED.**

8
9 **DATED: December 8, 2021**


Hon. Cynthia Bashant
United States District Judge