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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 PHASE II CHIN, LLC and LOVE &) CASE NO. 2:08-cv-162-JCM-GWF
11 MONEY, LLC, (formerly dba)
O.P.M.L.V., LLC,)
12) [CORRECTED] OPPOSITION
Plaintiffs,) TO PLAINTIFF PHASE II
13) CHIN, LLC'S MOTION TO
14 vs.) DISQUALIFY ATTORNEY
FORUM SHOPS, LLC, FORUM) STEVE MORRIS AND THE
15 DEVELOPERS LIMITED) LAW FIRM OF MORRIS
16 PARTNERSHIP, SIMON PROPERTY) PICKERING & PETERSON
GROUP LIMITED PARTNERSHIP,) (NOW MORRIS PETERSON)
17 SIMON PROPERTY GROUP, INC.,)
CAESARS PALACE CORP., and)
18 CAESARS PALACE REALTY CORP.,)
19 Defendants.)
20 _____)

21 Defendants Caesars Palace Corp. and Caesars Palace Realty Corp.
22 ("Caesars") hereby oppose plaintiff Phase II Chin, LLC's ("Chinois") motion to
23 disqualify Steve Morris and the law firm of Morris, Pickering & Peterson (now
24 Morris Peterson). This opposition is based on the following memorandum of
25 points and authorities, the Declarations of Steve Morris and Michael Kostrinsky,
26 and the papers and pleadings on file, including Chinois's motion and the exhibits
27 thereto.

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1 POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This motion to disqualify is based on a single and brief telephone call
4 in October 2007 for which there is neither a record nor an estimate of duration by
5 Chinois counsel. The call did not result in an attorney-client relationship of any
6 nature or duration between Steve Morris or his law firm and Chinois or any
7 person or entity associated with this plaintiff. No documents or pleadings were
8 sent to or received by Morris to obtain legal advice or an opinion from him with
9 respect to litigation then pending in Delaware against Chinois by the Forum Shops
10 or contemplated by Chinois against the Forum Shops and/or Simon Property
11 Group in Las Vegas.

12 During the October telephone call, Morris told Heller that Morris
13 Peterson (then Morris Pickering & Peterson) represented Harrah's, Caesars parent,
14 and could not represent Chinois in a dispute in which Caesar's would be an
15 adverse party. Steve Morris Declaration ¶6, attached hereto ("Morris Decl.").
16 Heller describes this bar to representation of Chinois merely as something that
17 "might present a problem." Phillip Heller Declaration ¶5 ("Heller Decl."). In doing
18 so, he omits the fact that during their single conversation Morris recommended
19 Stan Hunterton as a "very capable and experienced litigator," whom Heller was
20 also considering and who might be able to advise and represent Chinois in Las
21 Vegas. Exhibit A to Motion to Disqualify at 2. There was no discussion or
22 communication with Morris thereafter, as Heller implies, in which "it was . . .
23 decided that in order not to place Mr. Morris or Chinois in the middle of a
24 potential conflict Chinois would select other attorneys (Hunterton & Associates) as
25 local counsel." Heller Declaration ¶5, attached to the Motion to Disqualify as page
26 24. The decision to consult and "select other attorneys" was made when Heller
27 identified Caesars as a potential defendant in the telephone discussion.

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1 Against these facts Chinois claims Heller and Morris discussed,
2 among other things, not merely litigation but "potential causes of action" in
3 Nevada and "eight causes of action for damages and injunctive relief, possible
4 defendants, litigation strategy, [and] prospects for settlement . . . ", Heller Decl. at
5 24, ¶4, without a scintilla of evidence to confirm these conclusory allegations. Not
6 only is it improbable that such a discussion took place, Chinois has not
7 demonstrated that an attorney-client relationship was established in a ten minute
8 telephone call that would confer "former client" status on Chinois under Nevada
9 Model Rule 1.9 sufficient to support disqualification of Morris and his firm.¹

10 More to the point, however, Chinois, as a "prospective client" in
11 October 2007, must establish that it disclosed confidential information under
12 Nevada Model Rule 1.18 (Duties to Prospective Client) to qualify it to invoke
13 Model Rule 1.9. Without demonstrating that Phillip Heller disclosed information
14 from Chinois to Morris "that could be significantly harmful to that person in the
15 matter," Model Rule 1.18(c), Rule 1.9 is irrelevant *in this lawsuit*. No such
16 demonstration of disclosure harmful to Chinois is made in the pending motion,
17 nor is Model Rule 1.18 even acknowledged in the motion. This failure of evidence
18 and authority to support disqualification is not overcome by the conclusory

20 ¹ The motion to disqualify relies largely on the assumption that in
21 speaking to Morris for several minutes about a contemplated lawsuit in Las
22 Vegas and whether to file it in state or federal court, Heller necessarily disclosed
23 significantly harmful confidential information to Morris about this lawsuit. This
24 assumption distinguishes most of the case authority relied on by Chinois to
25 invoke Model Rule 1.9, which applies to communications with *former clients* and
26 depends on evidence of disqualifying confidences disclosed by the client and/or
27 legal advice given in response thereto. *See, e.g., Trone v. Smith*, 621 F.2d 994, 998
28 (9th Cir. 1980) (involving Mr. Fagelbaum's prior law firm under several
provisions of the Model Code that are not found in the Model Rules applicable
here. The confidences in question in *Trone* came from admitted former
representation and were shown to be ones that could be used against the firm's
former client); *Green v. Montgomery County*, 784 F. Supp. 841, 845 (M.D. Ala. 1992)
(lawyer consulted by former client heard his story and advised client not to sue
and then appeared for the defendant when client went elsewhere for
representation. *Evidence* established that Green was an actual former client and
his belief that he was consulting his former attorney about a new case).

1 declarations of either Phillip Heller or Jerold Fagelbaum, and for this reason the
2 motion to disqualify should be denied.

3 **II. RELEVANT FACTS**

4 At some time in or about October 2007, on a date not recorded by
5 either party, Morris Decl. ¶2; Heller Decl. ¶¶3-4, Morris received a telephone call
6 from Heller to discuss a lawsuit he was contemplating against the Forum Shops
7 and the Simon parties on behalf of Chinois, a lessee at the Forum Shops. Morris
8 Decl. ¶2. The content of this single conversation is the issue in this case.

9 Heller said he represented Chinois in some sort of dispute with
10 Simon, Chinois's lessor, or another tenant or subtenant involving a nightclub.
11 Morris Decl. ¶¶2-3. Morris told Heller that Simon was the operator/ground lessor
12 of the Forum Shops. Morris Decl. ¶2. Morris did not make a record or notes of the
13 call or speak to anyone in his law firm about the call. Morris Decl. ¶10(4). He
14 estimates that it was ten to fifteen minutes in duration. *Id.*

15 During the course of this brief but cordial telephone conversation,
16 Morris was asked about and discussed his experience as a litigator in Las Vegas
17 and of his familiarity with the local and state federal district courts and their
18 calendars, Morris Decl. ¶4, which he freely discussed. *Id.* Heller told Morris that
19 Chinois had been sued in Delaware by the Forum Shops/Simon and that Chinois
20 had hired Heller to represent this Las Vegas lessee, and he was considering a
21 counter-suit here against Simon for various reasons. Morris Decl. ¶¶3-4; Heller
22 Decl. ¶4.²

23 In the course of their discussion about the "pros and cons of state
24 versus federal court," Heller Decl. ¶4, Heller mentioned Caesars as a possible
25 additional defendant in the action he was considering, and Morris informed him

26
27 ² It is incredible that Heller could have discussed "eight causes of action"
28 with Morris in October 2007. Heller Decl. ¶4. That discussion must have
occurred with Stan Hunterton, who filed Chinois's 8-count complaint in January
2008, three months after Heller spoke to Morris.

1 that Caesars/Harrah's were clients of his firm and recommended he speak to
2 another Las Vegas attorney about acting as local counsel, in particular Stan
3 Hunterton and Harold Gewerter. Morris Decl. ¶¶6, 7; Heller Decl. ¶5. The call
4 then concluded. Morris Decl. ¶8.

5 In January 2008, Chinois sued the defendants in this lawsuit,
6 including Caesars, with Stan Hunterton as local counsel. Caesars requested
7 Kristina Pickering to represent it in the lawsuit, and she removed the case to this
8 Court. Michael Kostrinsky Declaration ¶3 ("Kostrinsky Decl."), attached hereto;
9 Morris Decl. ¶8. Heller thereafter called Morris to complain of the firm's
10 representation of Caesars. Morris Decl. ¶8; Ex. A to Motion to Disqualify. Morris
11 told Heller he had no knowledge of the lawsuit and had very little recollection of
12 their telephone conversation the preceding October and no record of it. Morris
13 Decl. ¶8; Ex. A, at 2-3, email 2/14/08 Morris to Heller.

14 This was the last contact between Morris and Heller. When
15 Ms. Pickering was elected to the Nevada Supreme Court, she began transferring
16 her pending cases to others in December. Caesars requested that this case be
17 transferred to Morris. Kostrinsky Decl. ¶4. Ms. Pickering so informed
18 Mr. Fagelbaum and Mr. Heller and other counsel in the case on December 19. On
19 December 23, Heller objected to Morris replacing Pickering. Exs. G and C to
20 Motion to Disqualify. This motion to disqualify was filed on January 5, 2009.

21 Morris Peterson has consistently maintained that no disabling
22 confidential information was received by Morris during his call with Heller in
23 October 2007. Morris Decl. ¶9. The record, such as it is, does not support that in
24 speaking to Heller 15 months ago for 10 to 15 minutes, Morris was acting as
25 Chinois's attorney and delivering legal advice to this litigant through Heller.

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1 **III. STANDARD OF REVIEW FOR THIS MOTION**

2 Federal courts apply state law in determining whether attorney
3 disqualification is warranted. *In-N-Out Burger v. In & Out Tire & Auto, Inc.*, 2008
4 WL 2937294 at *2 (D. Nev. 2008), *citing In re County of Los Angeles*, 223 F.3d 990, 995
5 (9th Cir. 2000) ("because we apply state law in determining matters of
6 disqualification, we must follow the reasoned view of the state supreme court
7 when it has spoken on the issue."). Exhibit 1 hereto. Therefore Nevada Rules of
8 Professional Conduct ("NRPC") are directly applicable to this case. *See also* Local
9 Rule IA 10-7(a) ("Model Rules of Prof. Conduct, as adopted and amended . . . by
10 the Supreme Court of Nevada" govern lawyers practicing in this federal District
11 Court).

12 Counsel for Chinois correctly points out that NRPC 1.9(a) says "A
13 lawyer who has formerly represented a client in a matter shall not thereafter
14 represent another person in the same or a substantially related matter in which
15 that person's interests are materially adverse to the interests of the former client
16 unless the former client gives informed consent, confirmed in writing." Rule 1.9,
17 however, is inapplicable in this case *unless* Chinois was formerly Morris
18 Pickering's client, which it was not. Chinois was merely a "prospective client"
19 when Morris and Heller spoke in October 2007. Thus NRPC 1.18 (Duties to
20 Prospective Clients) governs the application of NRPC 1.9 in respect this
21 proceeding. Rule 1.18(c) requires the party moving for disqualification to
22 demonstrate that the target lawyer (Morris) received "information from the
23 prospective client that could be significantly harmful to that person in the matter."

24 The receipt by Morris of such disqualifying information is not
25 presumed, nor has the receipt of such information been shown or otherwise
26 established by Phillip Heller's conclusory declaration. Motions to disqualify are
27 not favored: "To overcome the court's disfavor of motions to disqualify, the
28 moving part must proffer compelling evidence that significantly harmful

1 information was disclosed. *ADP, Inc. v. PMJ Enterprises*, 207 WL 836658 at *5
2 (D.N.J., Hedges, M.J.) (depositions that elicited testimony that a lawyer disclosed
3 "specific background information" in a conversation that the target lawyer "had
4 difficulty recalling," including settlement discussions and claims the lawyer *did*
5 recall, did not establish receipt of "significantly harmful" under Mode Rule 1.18(c).
6 *Id.* at *1, 5). Exhibit 2 hereto.

7 "In addressing a motion to disqualify, the threshold question is
8 whether there existed an attorney-client relationship that subjects a lawyer to the
9 ethical obligation of preserving confidential communications." *Nelson v. Green*
10 *Builders*, 823 F.Supp. 1439, 1445 (E.D. Wisc. 1993) (citing *Westinghouse Elec. Corp. v.*
11 *Kerr McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978)). To determine whether Morris is
12 Chinois's former attorney, it is first necessary to determine if he "formerly
13 represented" Chinois as a consequence of the October call between Morris and
14 Heller. The fact that one lawyer who represents a client speaks to another lawyer
15 about the client's affairs does not make the second lawyer co-counsel with the first.

16 "The burden of establishing an attorney-client relationship rests on
17 the claimant of the privilege" *United States v. Gartner*, 474 F.2d 297, 298 (9th
18 Cir. 1973). Here, there is no agreement to establish that Morris was Chinois's
19 attorney for any reason at any time, nor do the declarations of Heller and
20 Fagelbaum say that there was. They do not say, either, that they or Chinois
21 believed Morris was acting as counsel to Chinois when Heller spoke to him.

22 Courts also consider that "opposing one party's interest in preserving
23 confidential communications is another party's interest in being represented by the
24 counsel of his choice." *Nelson v. Green Builders*, 823 F.Supp. 1439, 1445 (E.D. Wisc.
25 1993) citing *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1993). Kostrinsky Decl.
26 ¶5. Moreover, "motions to disqualify counsel . . . should be resolved with extreme
27 caution because they may be used abusively as a litigation tactic, when, for
28 example, a movant is facing a formidable opponent." *Nelson v. Green Builders*, 823

1 F.Supp. 1439, 1444 (E.D. Wisc. 1993) (*citing Freeman v. Chicago Musical Instrument*
2 *Co.*, 689 F.2d 715, 721 (7th Cir. 1982)). "Because of the potential for abuse,
3 disqualification motions should be subjected to "particularly strict scrutiny." *Optyl*
4 *Eyewear Fashion Int'l Corp. v. Style Co., LTD.*, 760 F.2d 1045, 1050 (9th Cir. 1985); *see*
5 *ADP, Inc. v. PMJ Enterprises*, 2007 WL836658 (D.N.J.). This means a party's right to
6 counsel of its choice must be balanced against another party's right to disqualify
7 that counsel because of contact with the moving party. *Polyargo Plastics, Inc., v.*
8 *Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 258 (D. P.R. 1995)(*citing Kevlik v.*
9 *Goldstein*, 724 F.2d 844, 850 (1st Cir. 1984)). Disqualification is not accomplished
10 merely by requesting it.

11 **IV. NO ATTORNEY-CLIENT RELATIONSHIP WAS CREATED BETWEEN**
12 **MORRIS PETERSON AND CHINIOS**

13 **A. *Morris Did Not Receive Confidential Information from Chinois that***
14 ***Chinois Did Not Publish by Filing This Lawsuit.***

15 The unspecified information alleged in the Motion to Disqualify does
16 not rise to the level of confidential client information that warrants denying
17 Caesars its counsel of choice. From the description of the information Chinois
18 alleges as confidential, most if not all of it has been disclosed in the complaint that
19 was filed on January 8, 2008. Information that is public cannot be, by definition,
20 confidential, much less can public information – such as facts alleged, claims made
21 in a complaint – be "significantly harmful" to Chinois if also "disclosed" by Morris
22 or any member of Morris Peterson.

23 **1. *No Confidential Client Information Was Disclosed***

24 In addition to Model Rule 1.18, courts say that " 'confidential
25 information' for the purposes of a disqualification motion is information that if
26 revealed could put the plaintiff at a disadvantage or the other party at an
27 advantage." *Polyargo Plastics, Inc., v. Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 258
28 (D. P.R. 1995). What could that be here? Chinois has not established that Morris
Peterson obtained any confidential fact from Chinois that could put Caesars at an

1 advantage in this lawsuit or disadvantage Chinois. To confirm this conclusion,
2 "the court should . . . undertake a realistic appraisal of whether confidences might
3 have been disclosed in the prior matter that will be harmful to the client in the
4 later matter." *Robbins v. Gillock*, 109 Nev. at 1018, 862 P.2d at 1197 (1993).

5 When undertaking this appraisal, the Court should consider that
6 "unless there is evidence to the contrary . . . [it] must assume that an attorney will
7 observe his responsibilities to the legal system, as well as to his client." *United*
8 *States v. Walker River Irrigation*, Dist. 2006 WL 618823 at *5 (D. Nev. 2006, McQuaid,
9 M.J.) (citing *Geders v. United States*, 425 U.S. 80, 93 (1976)(internal quotations
10 omitted). Exhibit 3 hereto. This Court and others also say, that in assessing
11 disqualification for conflict of interests that "a party is presumptively entitled to
12 the counsel of his choice, [and] that right may be overridden only if compelling
13 reasons exist." *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (internal
14 quotations omitted); accord, *United States v. Walker River Irrigation Dist.*, 2006 WL
15 618823 at *3 (D. Nev.) ("disqualification is a 'drastic measure which courts should
16 hesitate to impose except when absolutely necessary' ").

17 It is not "absolutely necessary" to disqualify Morris Peterson and/or
18 Morris for Morris speaking to Heller in October 2007 for a few minutes about
19 litigation for Chinois in Las Vegas until Morris elicited a potential conflict from
20 Heller. See 1 Restatement of the Law Governing Lawyers (Third) § 15, comment c,
21 at 140 (personal disqualification for dealing with a prospective client "occurs only
22 when the subsequent matter presents the opportunity to use information obtained
23 from the former prospective client that would be 'significantly harmful' "). Heller's
24 declaration does not support the "drastic measure" of disqualification.

25 2. *The Case Law Relied on by Chinois*

26 Chinois cites *In Re Rossana*, 359 B.R. 697, 706 (D. Nev. 2008) for the
27 proposition that it may be implied under Nevada law that a lawyer received
28 confidential information during a previous representation. However, in *Rossana*,

1 the prior representation was actual motion practice and obtaining a judgment in
2 Rossana's favor by the targeted lawyer. These facts of *real* representation by the
3 lawyer in *Rossana* distinguish it from the phone conversation in this case.
4 Moreover, this Court has observed that the burden of proof falls on the movant for
5 disqualification, which means " 'that party must have evidence to buttress the
6 claim that a conflict exists' "). *In-N-Out-Burger v. In & Out Tire & Auto, Inc.*, 2008
7 WL 2937294 at *4 (D. Nev. Leavitt, M.J.) (citing *Robbins v. Gillock*, 109 Nev. 1015,
8 1017). Ex. 1 hereto. This means here and in California, where Chinois counsel
9 originated the call to Morris, that "a motion to disqualify should be accompanied
10 by declarations and admissible evidence sufficient to establish the factual
11 predicate on which the motion depends." *U.S. v. Walker River Irrigation District*,
12 *supra*, at *3. This evidence is missing in the pending motion.

13 Similarly, in *Laryngeal Mask v. Ambu*, 2008 WL 558561 (S.D. Cal. 2008),
14 Exhibit 4 hereto, and *The people ex rel Dept. Of Corps. v. Speedy Oil Change Systems*,
15 20 Cal. 4th 1135 (1999), cited by plaintiffs for the proposition that even the briefest
16 of client meetings can result in an attorney-client relationship, are inapposite here.
17 First, these cases do not reflect application or consideration of Model Rule 1.18 that
18 is an integral part of the Nevada Rules that address attorney-client relationships in
19 this Nevada federal court. More importantly, however, these two California cases
20 involved an extended face-to-face meeting and a *series* of telephone calls
21 concerning the subject lawsuits, which are absent here.

22 The matters alleged to have been disclosed in *Speedy Oil* included "the
23 background of the case, Mobil's theories in the case, Mobil's discovery strategy
24 and an analysis of the procedural and substantive issues which had arisen to date,
25 and [were] likely to arise in the future the state of the case, experts, and
26 consultants, and specific factual issues." This is significantly more information
27 than Chinois alleges was disclosed to Morris in one telephone call of short
28 duration. Furthermore, Chinois has not met its burden to show that confidential

1 information was in fact passed between Heller and Morris. Absent evidence to
2 support the conclusory and self-serving affidavits of Heller and Faglebaum, *see In*
3 *re Marriage of Zimmerman*, 16 Cal. App. 4th 556, 565 (1993), the instant motion to
4 disqualify must be denied. *See Robbins v. Gillock*, 109 Nev. at 1017 ("party must
5 have evidence to buttress the claim that a conflict exists"); *Colyer v. Smith*, 50 F.
6 Supp. 2d 966, 967 (C.D. Cal. 1999).

7 3. *Even If the Court Believes the Information Conferred by Heller Was*
8 *Confidential, it Has Now Been Publicly Disclosed and Is No Longer*
9 *Privileged*

10 Even if Heller discussed the facts of this case and his claims for relief,
11 these facts were made public in the complaint he and Stan Hunterton filed on
12 January 8, 2008. A similar situation was before the court in *Leathem v. City of*
13 *Laprote, Indiana*, 2008 WL 1804150 (N.D. Ind. 2008), attached as Exhibit 5 hereto,
14 where plaintiff Leathem alleged that in telephone conversation with attorney
15 Friedman he disclosed numerous facts about his cause of action. Representation
16 did not result. Thereafter, Leathem filed a motion to disqualify attorney Friedman
17 from representing one of the defendants sued by Leathem through another
18 lawyer. In denying Laethem's motion to disqualify attorney Friedman the court
19 said the "facts of this case have been disclosed in Leathem's complaint and various
20 other filings by Leathem. Leathem's recitation of facts cannot reasonably be
21 construed as confidential information." *Id.* at *2.

22 The same is true here. We are not dealing with "confidential" facts
23 that Morris could disclose that would be harmful to Chinois. These "facts," even if
24 disclosed by Morris, would not be significantly harmful to Chinois because they
25 are not "confidential facts." *ADP, Inc. v. PMJ Enterprises*, 2007 WL 836658 at *5
26 (D.N.J.) (discussion of plaintiff's business, the history of its dispute with the
27 defendant, and the factual basis of anticipated counterclaim is not significantly
28 harmful information under Mode Rule 1.18). Ex. 2 hereto.

1 The opinion in *Polyagro Plastics, Inc. v. Cincinnati Milacron, Inc.*, 903
2 F.Supp 253 (D. P.R. 1995), is also instructive here: at the hearing on plaintiffs'
3 motion to disqualify counsel based on a single 10-minute phone conversation, the
4 court asked the plaintiffs what information disclosed to the targeted attorney
5 would actually prejudice them in the present case. The plaintiff testified, "that the
6 confidential information that would prejudice plaintiffs entailed the disclosure
7 that there was an engineer who had been monitoring the problem, the identity of
8 the father and son who own Polyargo, the reasons for the defects in the machinery,
9 the theories for damages and the financial situation of Polyargo." *Id.* at 255. In
10 denying Polyagro's motion to disqualify, the court relied on the fact that "most of
11 the information was revealed in the complaint prior to [the attorney's]
12 representation of defendants in this case." *Id.* at 258. The same is true here. It
13 would be unfair and contrary to sound judicial policy to grant the pending motion
14 to disqualify Morris and his firm for allegations made in Chinois complaint.

15 ***B. It Was And Is Not Reasonable for Chinois to Believe Morris Was Its***
16 ***Attorney for Ten Minutes in October 2007.***

17 An attorney-client relationship cannot be established absent facts to
18 support a reasonable belief that the targeted lawyer was acting as the moving
19 party's attorney: "Before a duty arises on the party [sic] of an attorney based upon
20 implied or inferred attorney-client relationship or upon foreseeable reliance by one
21 other than the actual client, more is required than an individual's subjective
22 unspoken belief that the attorney is his attorney." 2001 WL 1699685 (Bkrtcy.
23 M.D.N.C. May 30, 2001) (*quoting Sheinkopf v. Stone*, 927 F.2d 1259, 1265 (1st Cir.
24 1991))(internal quotations omitted). "The test for determining the existence of [an
25 attorney-client] relationship is a subjective one and "hinges on the client's belief
26 that he is consulting a lawyer in that capacity and his manifested intention is to
27 seek professional legal advice." *Green v. Montgomery County Alabama*, 784 F.Supp.
28 841, 845-46 (M.D. Ala. 1992)(*citing Westinghouse Electric Corp.*, 580 F.2d at 1319).

1 This subjective belief must, however, be reasonable. If the evidence reflects the
2 prospective client should have known that the relationship with the attorney had
3 not developed to a point at which it could be deemed representation, there is no
4 attorney-client relationship, notwithstanding the prospective client's subjective
5 belief. The evidence here of an attorney-client relationship between Morris and
6 Chinois is not equivocal – it is non-existent.

7 1. *It Was Not Reasonable for Heller, a Seasoned Attorney, to Believe*
8 *That an Attorney-Client Relationship Had Been Created, and He*
9 *Does Not Say Otherwise in His Declaration.*

10 Nearly all the cases cited by Chinios to support the allegation that an
11 attorney-client relationship was established with Morris are based on the fact that
12 a lay person, without experience with the law or knowledge of the Rules of
13 Professional Conduct to which lawyers are subject, provided information to an
14 attorney with the expectation the attorney would become the lay person's
15 attorney. *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997) (lay land purchasers
16 sought to disqualify opposing counsel based on prior consultation); *Bays v. Theron*,
17 418 Mass. 685 (1994)(*pro se* condominium owners motion to disqualify counsel
18 previously consulted about the case); *Burton v. Burton*, 139 A.D.2d 554 (1988)
19 (divorce action appealing grant of motion to disqualify wife's attorney); *Kearns v.*
20 *Fred Lavery Porsche Audi Co.*, 745 F.2d 600 (1985) (upholding disqualification of a
21 lay patent holder's attorney based on a prior consultation). These cases are simply
22 inapposite here. Heller was an experienced counsel for Chinois, and he knew
23 when he spoke to Morris that a conflict with an existing client of Morris would
24 prevent establishing an attorney-client relationship with him. Heller does not say
25 otherwise in his declaration.

26 *Guerrero v. Bluebeard's Castle Inc.*, 982 F.Supp. 343 (D. V.I. 1997), is in
27 point for this discussion. There, the plaintiff sought to disqualify defendant's
28 counsel based on a telephone conversation between plaintiff's counsel and
defendant's counsel before defense counsel was retained by defendants. During

1 this call plaintiff's counsel sought assistance from defendant's counsel with
2 plaintiff's case. Plaintiff argued that an attorney-client relationship was formed
3 during that call, as Chinois contends here. In finding that no confidential
4 information had passed between the participants in the call, the court said "the
5 participants to this conversation were both sophisticated counsel well trained in
6 the law. ...[This was not] an untrained layperson approaching a member of the bar
7 for help in time of need." *Id.* at 347. Clearly in the instant case, both parties were
8 aware of their obligations under the Nevada Model Rules. Chinois, through
9 Heller, was informed that there was a disabling conflict once he disclosed Caesars
10 as a potential party to the contemplated lawsuit. When the conversation
11 concluded between Heller and Morris, both Heller and Fagelbaum treated the
12 conflict as a bar to further discussions with Morris. It is disingenuous and
13 unprofessional for them to now suggest that they turned to other Las Vegas
14 lawyers for assistance "in an effort not to place Mr. Morris or Chinois in the middle
15 of a potential conflict. . . ." Fagelbaum Decl. ¶4, Motion to Disqualify at 27.

16 The only case that Chinois tenders to the court that involves attorney-
17 to-attorney contact, *The People ex rel. Dept. of Corps. v. Speedee Oil Change Sys., Inc.*,
18 20 Cal. 4th 1135 (1999) is altogether dissimilar to this case because the attorneys in
19 *Speedee Oil* engaged in several telephone conversations to discuss the
20 representation and then met in person for an extended two hour face-to-face
21 discussion of the case. At that meeting, the attorneys discussed "the background
22 of the case, Mobile's theories in the case, Mobile's discovery strategy and an
23 analysis of the procedural and substantive issues which had arisen to date and
24 [were] likely to arise in the future, the state of the case, experts, and consultants,
25 and specific factual issues." *Id.* at 1141.

26 The telephone call of several minutes between Heller and Morris does
27 not invoke *Speedee Oil*. The discussion here between two experienced attorneys

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1 did not go into "discovery strategy" the "state of the case," "experts, consultants,
2 and specific factual issues."

3 2. *Chinois Was Put on Notice That No Attorney-Client Relationship*
4 *Could Be Established with Morris.*

5 Chinois acknowledges that Morris immediately indicated a potential
6 conflict in response to Heller mentioning Caesars. Heller Aff. ¶5. NRPC 1.18(f)
7 allows an attorney "to condition conversations with a prospective client on the
8 person's informed consent that no information disclosed during the consultation
9 will prohibit the lawyer from representing a different client in the matter." Under
10 to NRPC 1.0(e), informed consent is defined as "the agreement by a person to a
11 proposed course of conduct after the lawyer has communicated adequate
12 information and explanation about the material risks of and reasonably available
13 alternatives to a proposed course of conduct." Once Morris advised Heller that a
14 conflict would be presented by including Caesars as a party, any information
15 divulged thereafter by Heller makes it unreasonable for Heller or Chinois to
16 believe that Morris Peterson was speaking as Chinois's lawyer.

17 **V. CHINOIS'S MOTION TO DISQUALIFY IS TACTICALLY MOTIVATED**

18 This Court has previously observed that "Tactical considerations often
19 motivate such motions," *In-n-Out Burger v. In & Out Tire & Auto*, 2008 WL 2937294
20 at *3 (D. Nev. July 24, 2008), and went on to say, "courts must prevent parties from
21 misusing motions for disqualification as instruments of harassment or delay.
22 Courts therefore approach the issue of whether to disqualify opposing counsel as a
23 drastic measure which courts should hesitate to impose except when absolutely
24 necessary." *Id.* (Internal quotations and cites omitted.) When the spare facts of
25 this case are evaluated, they simply do not support Chinois's allegations that
26 Morris was its former attorney and received "significantly harmful information
27 during [his] . . . one telephone conversation with [Heller]." *ADP v. PMJ Enterprises,*
28 *supra.* The facts suggest that this motion is tactically motivated.

1 Chinois alleges that Heller called Morris and disclosed to him "the
2 strategy behind the litigation, venue, possible defendants (including Caesars) and
3 the selection and assessment of co-counsel to represent Chinois," Motion at 5,
4 without first telling him that Caesars, which is not a lessor to the plaintiff or the
5 developer and operator of the Forum Shops, would be a defendant in the lawsuit
6 Heller was considering in retaliation for Simon's suit against Chinois in Delaware.
7 An experienced lawyer, like Heller, could be expected to say who he was
8 contemplating suing in addition to Simon in Las Vegas before discussing the
9 proposed lawsuit with Las Vegas counsel. But he did not disclose that fact at the
10 same time he disclosed Simon as his proposed defendant. Motion at 10.

11 Chinois also claims that Morris was given an overview of the existing
12 Delaware litigation and the anticipated Las Vegas litigation including, "the
13 addition of new parties and potential claims, litigation strategy and prospects for
14 settlement, and Morris provided legal advice on these subjects as well as on other
15 topics including current and possible counsel and judges." Motion at 13. What
16 Heller does not say is that in disclosing "possible defendants" he disclosed
17 Caesars. He *does* say that *after* he disclosed Caesars, "Morris revealed that his firm
18 had represented Caesars." Heller Decl. ¶5; Motion at 5. It is preposterous and
19 altogether disingenuous for Heller to suggest that Morris continued to provide
20 "legal and other advice," against his own client, once Caesars had been disclosed,
21 Heller Decl. ¶4, Motion at 24. It is also contradicted by Heller's response to
22 Morris's 2/14/08 email in which Heller does not contest Morris's statement that
23 "we would not represent tenants at the Forum Shops because of the relationship
24 between the Forum and Caesars." Ex. A to Motion at 2 (page 56 of Motion papers).
25 And Heller agreed with Morris's statement of referral to Stan Hunterton: "you
26 recall correctly making some very favorable comments to me about Stan (all of
27 which have proven to be true)." *Id.*

28

1 These facts suggest that Chinois's assertion that Morris should have
2 invoked "conflicts avoidance procedures" is misleading at best and a deliberate
3 distortion at worst. Mr. Heller, an experienced attorney, knew Morris Peterson
4 could not be involved in his lawsuit with Caesars as a party. If he continued his
5 conversation with Morris after that disclosure and received legal advice, which
6 Morris denies, it could only have been for the purpose of providing support for
7 this motion. This is an inappropriate basis on which to seek Morris's
8 disqualification.

9 **V. CONCLUSION**

10 Chinois has not met its burden to establish that confidential
11 information was disclosed to Morris in the brief telephone conversation initiated
12 by Heller in October 2007. Even if the information – whatever it was – could be
13 considered confidential, Chinois has not established that the information was not
14 made public in the complaint if filed herein in January 2008. Nor has Chinois
15 established that Nevada Model Rule of Professional Conduct 1.18(c) should not
16 apply to and bar this motion because the alleged information in question, which
17 Morris does not have or know, has not been shown to be information "that could
18 be significantly harmful" to Chinois if disclosed in this lawsuit.

19 For these reasons the motion to disqualify Steve Morris and his law
20 firm should be denied.

21 MORRIS PETERSON

22
23 By: 

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of Morris Peterson, and that the following documents were served via electronic service:

**[CORRECTED] OPPOSITION TO PLAINTIFF PHASE II CHIN, LLC'S
MOTION TO DISQUALIFY ATTORNEY STEVE MORRIS AND THE LAW
FIRM OF MORRIS PICKERING & PETERSON (NOW MORRIS PETERSON)**

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DATED this 27th day of January, 2009.

By: 