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12
13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15 PHASE II CHIN, LLC and
16 LOVE & MONEY LLC
(formerly dba O.P.M.L.V., LLC),
17 Plaintiffs,
18
19 and
20 FORUM SHOPS, LLC, FORUM
DEVELOPERS LIMITED
21 PARTNERSHIP, SIMON
PROPERTY GROUP LIMITED
22 PARTNERSHIP, SIMON
PROPERTY GROUP, INC.,
23 CAESARS PALACE CORP., and
24 CAESARS PALACE REALTY
CORP.
25
26 Defendants

) Case No. 2:08-cv-00162-JCM-GWF
) **PLAINTIFF PHASE II CHIN LLC'S**
) **OBJECTIONS TO THE MAGISTRATE**
) **JUDGE'S ORDER DENYING PLAINTIFF'S**
) **MOTION TO DISQUALIFY COUNSEL FOR**
) **THE CAESARS DEFENDANTS ATTORNEY**
) **STEVE MORRIS AND THE LAW FIRM OF**
) **MORRIS PETERSON; AND SUPPORTING**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**

) **DATE: To Be Determined**
) **TIME: To Be Determined**
) **CTR: Hon. James C. Mahan**

) **[Request for Oral Argument]**

1 **PLEASE TAKE NOTICE THAT**, pursuant to 28 U.S.C. § 636(b)(1)(A)
2 and Nevada District Court Local Rule 1B 3-1(a), Plaintiff Phase II Chin LLC
3 (Chinois) hereby objects to the Honorable George Foley, Jr. United States
4 Magistrate Judge's Order, dated February 19, 2009, denying Plaintiff Chinois'
5 Motion To Disqualify Attorney Steve Morris and the Law Firm of Morris
6 Peterson¹.

7 As detailed in Chinois accompanying Memorandum of Points and
8 Authorities, the Magistrate Judge adopted a standard which was clearly erroneous
9 and contrary to law when he required Chinois to disclose the contents of
10 confidential information communicated to Mr. Morris in order to establish that
11 confidential information had been disclosed to him. In addition, the Magistrate
12 Judge ignored relevant case authority which set forth the appropriate standard
13 requiring the Court to consider the context pursuant to which the communications
14 were made and the likelihood confidences were disclosed. Finally, the Magistrate
15 Judge failed to address the appearance of impropriety which resulted from the
16 abandonment of ethical principles when, for the sake of expediency, Mr. Morris
17 who previously had removed himself from this case, substituted in for his wife
18 and partner upon her election to the Bench.

19
20
21 ¹ Plaintiff requests that the Court hear and resolve this Disqualification
22 Motion prior to hearing Defendants' Motions to Dismiss currently scheduled for
23 March 12, 2009. *See Fierro v. Gallucci* 2007 U. S. Dist. LEXIS 89296*22 (E.D.
24 N. Y. 2007):

25 Defendants argue that the motion to disqualify should be held in
26 abeyance until after the defendants' motion to dismiss is
27 decided. However, the Court believes such an approach under
28 the circumstances presented here is ill-advised. Although that
motion to dismiss is fully briefed, the Court is going to hear oral
argument on that motion and believes that this disqualification
issue should be resolved prior to having oral argument and
addressing the motion to dismiss.

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Upon review, Plaintiff request an opportunity for oral argument due to the importance of the relief requested and seeks a ruling from this Court reversing the Magistrate Judge's Order and granting Plaintiff's Motion to Disqualify.

Dated: February 24, 2009

FAGELBAUM & HELLER LLP

By: 
Jerold Fagelbaum
2049 Century Park East, Suite 4250
Los Angeles, CA 90067-3254

and

Dated: February 24, 2009

HUNTERTON & ASSOCIATES


By: 
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Phase II Chin, LLC ("Chinois") submits this Memorandum of
4 Points and Authorities in support of its Objections to the Honorable George Foley,
5 Jr. United States Magistrate/Judge's Order, dated February 19, 2009, denying
6 Chinois' Motion to Disqualify attorney Steve Morris and his law firm Morris
7 Peterson from further participation in his case on behalf of Defendants Caesars
8 Palace Corp., and Caesars Palace Realty Corp. ("Caesars").

9 While Chinois has identified below several objections to the Magistrate
10 Judge's Order, at root is the Magistrate Judge's error in applying an erroneous
11 standard and setting the bar too high. In essence, the Magistrate Judge concluded
12 that in order to establish that confidences were disclosed to Mr. Morris that could
13 be significantly harmful to Chinois, the substance of those confidences had to be
14 revealed. However, that is not the test and other courts have held that disclosure
15 of confidences to protect confidences is neither necessary, nor appropriate.
16 Instead, context is king, and as detailed herein, Chinois has established that an
17 implied attorney client relationship was created between Mr. Morris and Chinois,
18 and at a minimum, confidences were likely to have been disclosed which would be
19 harmful to Chinois in this matter if Mr. Morris continued to represent the Caesars
20 Defendants in this case.

21 Also, in addition to violations of the Rules of Professional Conduct, the
22 appearance of impropriety sparked by Caesars' counsels' conduct implicates the
23 Court's duty to maintain the public confidence in the integrity of the bar and
24 further justifies disqualification.

25 For these reasons, and for all the other reasons set forth below, the
26 Magistrate Judge's Order should be reversed and Chinois' Motion to Disqualify
27 should be granted in its entirety.
28

1 **II. THE RECORD BELOW**

2 The record below attached hereto for the Court's convenience and
3 incorporated by reference herein consists of Chinois' Motion to Disqualify
4 supported by a Memorandum of Points and Authorities and the declarations of
5 Philip Heller and Jerold Fagelbaum (Ex. A); Caesars' Opposition Memorandum
6 and declarations of Steve Morris and Michael Kostrinsky (Ex. B), and Chinois'
7 Reply Memorandum and Supplemented declaration of Philip Heller (Ex. C). In
8 addition, there is a transcript of the proceedings before the Magistrate Judge on
9 February 12, 2009 (Ex. D)² and the Magistrate Judge's Order, dated February 19,
10 2009 (Ex. E).

11 **III. THE STANDARD OF REVIEW**

12 A motion to disqualify is a non-dispositive motion:

13 A district court may overturn a magistrate judge's order on a
14 non-dispositive issue where it has been shown that the
15 magistrate's order is clearly erroneous or contrary to law. 28
16 U.S.C. §636(b)(1)(A). *See also*, Fed. R. Civ. P. 72; *Peretz v.*
17 *United States*, 501 U.S. 923, 944, 111 S. Ct. 2661, 115 L. Ed 2d
18 808 (1991); *NLRB v. Frazer*, 966 F.2d 812, 816 (3rd Cir. 1992)

18 *Municipal Reserve Services, Inc. v. Xspand, Inc.* 537 F. Supp. 2d 740, 743 (M.D.
19 Pa. 2008). *See also*, Nevada District Court, Local Rule 1B 3-1(a).

20 A finding is "clearly erroneous" when although there is evidence to support
21 it, the reviewing court on the entire evidence is left with the definite and firm
22 conviction that a mistake has been committed. *United States v. United States*
23 *Gypsum Co.* 333 U.S. 364,395, 68 S. Ct. 525, 92 L.Ed. 746 (1948) An order is
24 contrary to law when it fails to apply or misapplies relevant statutes, case law or
25 rules of procedure. *Dubin v. E.F. Hutton Group Inc.*, 125 F.R.D. 372, 373-374
26 (S.D.N.Y.1989) To that end, a magistrate's legal conclusion is freely reviewable
27

28

29 ² All references in the Transcript to "Chin Hua" should read "Chinois".

1 by the district court applying a *de novo* standard. *Smith v. Smith* 154 F.R.D. 661,
2 665 (N.D. Tex 1994).

3 **IV. HOW THE MAGISTRATE JUDGE FRAMED THE ISSUE BELOW**

4 The Magistrate Judge correctly recognized the differences between Nevada
5 Rules of Professional Conduct 1.9 (re duties to former clients) and 1.18 (duties to
6 prospective clients) and framed the key issue to be determined as follows:

7 There is no question that Mr. Heller communicated with Mr.
8 Morris about representing Chinois in the lawsuit it was planning
9 to file in Nevada and that Mr. Morris's partner, Ms. Pickering,
10 and their law firm were subsequently retained to represent the
11 Defendant Caesars in that action. The disputed issue is whether
12 an implied attorney-client relationship was formed during the
13 telephone conversation between Mr. Morris and Mr. Heller, or
14 alternatively, whether Mr. Morris received confidential
15 information from Mr. Heller that disqualifies him from
16 representing Defendant Caesars in this action.

17 Order at 8 (Ex. E)

18 In order to establish that an implied attorney client relationship was formed
19 or that confidential information was disclosed to Mr. Morris, the Magistrate Judge
20 concluded that disclosure of confidential information must be proved rather than
21 assumed:

22 In contrast to cases in which there was an explicit attorney-client
23 relationship which gives rise to a presumption that confidences
24 were divulged, the question of whether confidential information
25 passed between the prospective client and the attorney is crucial
26 in determining whether an implied attorney client relationship
27 existed, and therefore must be proved rather than assumed.

28 Order at 10 (Ex. E)

Where the Magistrate Judge erred, however, was by requiring the actual
disclosure of the communicated confidences in order to establish there were
confidences disclosed. Nevertheless, authority within this Circuit provides that it

1 is not necessary (nor proper) to disclose the actual content of confidences, but
2 rather, it is sufficient to disclose the nature of the relevant information or the
3 general topics discussed. *The Laryngeal Mask Company Ltd. v. Ambus A/S* 2008
4 U.S. Dist. LEXIS 15320 *18-*19 (S.D. Ca. 2008)

5 To establish that confidential information had been communicated to Mr.
6 Morris by Mr. Heller, Chinois submitted the Declaration of Mr. Heller which
7 stated in part that:

8 After introducing myself to Mr. Morris, I explained the
9 purpose of my call. I disclosed to Mr. Morris that I represented
10 Chinois in an action it had with Forum Shops LLC pending in
11 Delaware State Court. Mr. Morris did not invoke any conflict
12 avoidance measures (such as asking me to limit my discussion
13 to information necessary to conduct a conflict check).
14 Accordingly, I revealed to him Chinois' confidential plan to file
15 an action of its own in Las Vegas, Nevada. We discussed the
16 pros and cons of filing in state versus federal court in Nevada,
17 potential causes of action (the action in Delaware was limited to
18 Declaratory Relief, the proposed action in Nevada would
19 contain eight causes of action for damages and injunctive relief),
20 possible defendants, litigation strategy, prospects for settlement,
21 other counsel expected to be included in the case and potential
22 state and federal judges. In response, Mr. Morris provided legal
23 and other advice on all these subjects and his personal and
24 professional views on counsel and judges.

25 Heller Decl. at ¶ 4 (Ex. A at 23-24)

26 In response Mr. Morris conceded that confidential information was
27 disclosed to him, but contends that it all became public when the Complaint was
28 filed. However, due to Mr. Morris' selective and demonstrably faulty memory³, at

29 ³ Mr. Morris contends his prior consultation with Mr. Heller occurred in or
30 about October 2007. (Ex. B, Morris Decl. ¶2) In his e-mail to Mr. Heller on
31 February 14, 2008 (Ex. A, to Heller Decl.) Mr. Morris states "I am unable to
32 recall anything from our conversation several weeks or months ago . . ." Mr.

1 most, all he did was establish that *some* of the confidential information imparted
2 to him was subsequently disclosed in the Complaint. Although Mr. Morris could
3 not recall the rest, Mr. Heller did and therefore so testified uncontested. While the
4 facts that the Caesars Defendants were added as defendants and eight causes of
5 action were pled, but disclosed upon filing, the strategy behind the adding of these
6 defendants and the selection of specific causes of action and the effect it would
7 have upon the possible settlement of this case were not. Similarly, legal advice
8 concerning this case was provided by Mr. Morris regarding the parties, proposed
9 parties, venue, claims, and selection and assessment of counsel and judges which
10 was not disclosed by the filing of the Complaint:

11 Paragraph 9: While Mr. Morris contends he “cannot recall” any
12 other confidences shared by me with him during the telephone
13 call, he does not say there were none. In fact, there were others
14 which I clearly remember. Without actually disclosing the
15 confidences Chinois is now trying to protect, these confidences
16 included, among other things, my thoughts on litigation strategy
17 and settlement especially in light of Caesars, potentially being
18 added as a defendant, Mr. Morris views on these subjects, and
19 legal advice from Mr. Morris regarding venue, possible claims,
20 counsel and judges.

21 Suppl. Heller Decl. at ¶ 3 (Ex. C at 18.)

22 At this point Mr. Heller could go no further without revealing the
23 confidences Chinois is seeking to maintain. However, as the following authorities
24 attest Mr. Heller had gone far enough and established that confidences had been

25 Heller testified the call “occurred later than October 2007, shortly before local
26 counsel Stan Hunterton was consulted in December 2007 and subsequently
27 retained”. (Ex. C at 16 Supp. Heller Decl. at ¶3). At the hearing before the
28 Magistrate Judge, counsel for Chinois reported that a telephone bill had been
located pinning down the date of the Morris/Heller call to December 26, 2007.
(Ex. D, Transcript at 28)

1 disclosed to Mr. Morris and an implied-in-fact attorney/client relationship had
2 been created.

3 **V. IN ESTABLISHING CONFIDENCES WERE**
4 **COMMUNICATED TO MR. MORRIS, THE COURT SHOULD**
5 **NOT, AND CANNOT, REQUIRE THAT THE CONFIDENCES**
6 **SOUGHT TO BE PROTECTED BE REVEALED**

7 **A. The Magistrate Judge Applied The Wrong Standard**

8 In resolving disputed issues of fact in disqualification cases, courts have
9 held that the client is not required to reveal the details of the privileged
10 communications they seek to protect and that doubts are resolved in favor of
11 disqualification:

12 . . . Plaintiffs are not required to remind Defendants of
13 specific statements that constitute confidences in order to
14 meet their burden of proof on the disqualification motion. *It is*
15 *sufficient for the moving party to substantiate its claim by*
16 *describing the nature of the relevant information or the*
17 *general topics of discussion.*

18 * * *

19 *Moreover, the Court will not require the moving party to*
20 *disclose the actual content of those confidences to outside*
21 *counsel or attorneys behind an ethical screen. Though the*
22 *Finnegan attorney's do not presently recall the details of the*
23 *confidences, courts have wisely avoided even the "prospect of*
24 *a swearing contest" between the client and attorney. (Internal*
25 *citations omitted.) (Emphasis added.)*

26 *Laryngeal Mask, supra, at*18-*19.*

27 Instead, context and the likelihood that confidences were disclosed are
28 determinative:

In proving that a prior representation is substantially related
to present litigation, however, the moving party is not
required to divulge the confidences actually communicated,
nor should a court inquire into whether an attorney actually
acquired confidential information in the prior representation

1 which is related to the current representation.

2 * * *

3 The court should instead undertake a realistic appraisal of
4 whether confidences might have been disclosed in the prior
5 matter that will be harmful to the client in the later matter.
(Internal citations omitted.)

6 *Robbins v. Gillock* (1993) 109 Nev. 1015, 1118. See also, *Laryngeal Mask*,
7 *supra*, at *16 (“although the participants offer credible but divergent recollections
8 of the contents of the . . . meeting, the context suggest that an attorney-client
9 relationship may have arisen on these facts for the purposes of a disqualification
10 motion”).) (Emphasis added.) Moreover, as stated in *In-n-Out Burger v. In & Out*
11 *Tire Auto, Inc.* 2008 U.S. Dist. LEXIS 63883*7 (D. Nev. 2008) “close cases are
12 resolved in favor of disqualification”.

13 Notwithstanding these principles, the Magistrate/Judge concluded that
14 confidential information was not communicated because Chinois had not provided
15 sufficient detail about the confidential disclosures that were made:

16 Other than generalities, Plaintiff has not indicated what if any
17 additional information was conveyed about the eight causes of
18 action that would be harmful to Plaintiff if Mr. Morris
19 represented Defendant Caesars. See *Polyagro and ADP, supra*.
20 Plaintiff has also failed to show that specific confidential
21 information about its settlement position was disclosed to Mr.
Morris that could be harmful to its position in this case.

22 Order at 14 (Ex. E)

23 However, the Magistrate/Judge could not properly ask Chinois to disclose
24 what it seeks to protect. Instead, the Magistrate should have examined the context
25 in which the statements were made and whether it was likely that within such a
26 context confidences would likely have been disclosed. A party moving to
27 disqualify opposing counsel is not required to prove that [opposing counsel] had
28

1 access to confidential information while representing the [moving party] but only
2 that he was likely to have had such access." *Fierro v. Gallucci*, *supra*, at *20,
3 *See also, Bays v. Therean* 418 Mass. 685, 693, 639 N.E. 2d 720, 725 (1994):

4 At the ... evidentiary hearing, *the judge inquired as to the*
5 *nature, topics, and extent of the communications between*
6 *Lane and Errico, but instructed Lane not to discuss specifics*
7 *so as not to compromise any privilege he might have.* Our
8 review of the hearing transcript indicates that, given the
9 description of the communications, the court reasonably could
10 infer that confidential information was transmitted and that in
11 camera hearings concerning the details of Lane and Errico's
12 unrecorded oral communications would not have been helpful.
13 (Emphasis added.)

11 **B. The Cases Relied Upon By The Magistrate Judge Are** 12 **Distinguishable**

13 Here we had counsel for Chinois contacting Mr. Morris to determine if he
14 would agree to act as local counsel. Mr. Heller drove right to the point and
15 provided Mr. Morris with an insider's perspective on Chinois' litigation and
16 settlement strategy. That was, and remains, confidential. Moreover, the fact that
17 other information, such as the specific eight causes of action in the complaint and
18 the naming of Caesars as a defendant, was subsequently disclosed in the complaint
19 only enhances the likelihood that confidential information was communicated to
20 Mr. Morris. From the information published in the complaint (which undisputedly
21 was discussed with Mr. Morris) it is clear that the subject matter of the telephone
22 call involved litigation strategy. This contrasts with *Polyagro Plastics Inc. v.*
23 *Cincinnati Mailacron Inc.* 903 F. Supp. 253 (D.P.R. 1995) cited by the
24 Magistrate. In *Polyagro*, *all* the information deemed confidential was
25 subsequently disclosed in the complaint or was otherwise known to defendant.
26 Here, Chinois submitted evidence that, in addition to information subsequently
27 disclosed, other confidential information communicated to Mr. Morris was not.
28

1 Similarly, the Magistrate concludes that the telephone conversation
2 involved “fairly general matters” such as local courts, judges and other attorneys
3 who might serve as local counsel. Order at 13. However, to the extent the matters
4 are “general”, it is because Chinois could not provide details without
5 compromising their confidentiality. It would be different if Chinois contended the
6 “general” topics were all that was discussed. However, as Mr. Heller’s
7 Declaration establish those “general” topics only provided the framework for more
8 substantial confidences regarding litigation and settlement strategy. The topics Mr.
9 Morris concedes were discussed are sufficient to establish that the telephone call
10 was substantive and that it was likely that confidences were disclosed.

11 Moreover, Chinois states that in addition to confidences being disclosed,
12 legal advice was given by Mr. Morris. The Magistrate Judge avoids any discussion
13 of the significance of legal advice having been given and how it relates to the
14 formation of an implied attorney-client relationship. Cases relied on by the
15 Magistrate such as *ADP Inc. v. PMJ Enterprises, LLC* 2007 WL 836658
16 (D.N.J. 2007) do not contend that legal advice was given and therefore are not
17 dispositive here.

18 **C. Based Upon All The Evidence, It Is Clear That The Magistrate**
19 **Judge’s Order Was Clearly Erroneous And Contrary to Law**

20 **1. The Magistrate Judge Overlooked The Key**
21 **Distinction Between The Respective Authorities Cited By**
22 **Caesars And Chinois**

23 In disputed fact situations, the Magistrate Judge indicated he had to rely on
24 other factors to determine whether confidences were communicated. For example,
25 the Magistrate places undue emphasis on the fact that Mr. Morris cannot recall
26 much of the details provided by Mr. Heller. He views it as a tie. It is not, nor could
27 it be, or every disqualification motion would be defeated by the attorney receiving
28 the confidential information contending: “I don’t remember that being disclosed.”

1 See *Fierro v. Gallucci*, *supra*, at *21 (“Although Mr. Dollinger states that he has
2 no recollection of any conversation with Mr. Fierro or Mr. Arnold, his failure to
3 recall the conversation did not change the analysis”). See also, *Laryngeal Mask*,
4 *supra*, at *19 (“Though the Finnegan attorneys do not presently recall the details
5 of the confidences, courts have wisely avoided even the prospect of a swearing
6 contest between the client and attorney.”)

7 The Magistrate Judge also relied on such extrinsic facts as the telephone
8 communication was at most 20 minutes long, it was not face to face as in *People*
9 *ex rel Dept. of Corrections v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.
10 4th 1035 (*Speedee Oil*) and *Laryngeal Mask*, and no documents were given to
11 Mr. Morris. Order at 13. However, in *Doucette v. Dlugolecki* 2006 Conn. Super.
12 LEXIS 2825 (Super. Ct. Conn. New Britain Jud, Dist.,2006) the potential client
13 and attorney never met face to face, no documents were provided to the attorney
14 and the one telephone call between them lasted only 15 minutes. However, like
15 here, legal advice was given by the attorney to the prospective client. As a result, a
16 motion to disqualify was granted.

17 **2. The Magistrate Judge Was Mistaken In Concluding That**
18 **Mr. Morris’ Own Conduct Did Not Belie His Argument**
19 **That No Implied Attorney-Client Relationship Was Formed.**

20 The Magistrate Judge also concluded that no admission of having received
21 confidential information arose by Mr. Morris’ conduct after Chinois initially
22 objected to his involvement in this case in February 2008. However, that
23 conclusion is directly contradicted by the evidence.

24 The Magistrate Judge states that Ms. Pickering was unaware of Mr. Morris’
25 telephone conversation with Mr. Heller when she was first retained by Caesars.
26 Similarly, the Magistrate Judge points out that Mr. Morris was unaware that
27 Caesars had retained his wife, Ms. Pickering, prior to Mr. Heller’s February 13,
28 2008 call to object. Accordingly, the Magistrate contends no ethical barrier had

1 been constructed. With due respect, the Magistrate Judge missed the point.

2 It was *after* the February 13, 2008 call that the ethical barrier was erected. It
3 was as a result of Mr. Heller's call and the subsequent exchange of e-mails that
4 Mr. Morris agreed (after confirming he had not previously disclosed the contents
5 of his conversation with anyone) not to be involved in the case in any respect and
6 Ms. Pickering further agreed that she would "keep this work separate from him."
7 That is an ethical screen. Moreover, if Mr. Morris or Ms. Pickering believed that
8 there was no justification for any limitations on Mr. Morris' future involvement
9 then why did they both agree to impose such limitations? Neither the Magistrate
10 Judge in his Order, nor Mr. Morris during the hearing before the Magistrate Judge,
11 had an answer to that question. In fact, such representations by Mr. Morris and
12 Ms. Pickering, agreeing to exclude Mr. Morris' involvement in this case, are
13 consistent with an understanding that an implied attorney client relationship had
14 been formed and Mr. Morris was subject to the dual obligations of duty of loyalty
15 and duty to preserve client confidences.

16 Chinois relied on these assurances and did not file a motion to disqualify
17 Mr. Morris in February 2008 (after all he agreed not to participate in the case).
18 Mr. Morris should now be estopped from taking the position that after 10 months
19 of staying out of this case he now can come in because his wife no longer can
20 represent Caesars in this case.

21 Nevertheless, the Magistrate Judge is critical of Chinois' counsel accepting
22 Mr. Morris at his word that his recollection of the contents of the original
23 telephone call had waned and that he had not, and would not, discuss it with
24 anyone including his wife. (The Magistrate Judge fails to mention that Mr. Morris
25 had worked with Chinois' counsel in the past and was well-respected by Chinois'
26 counsel.) By contrast, the Magistrate Judge willingly accepts at face value Mr.
27 Morris' current version of events. If the Magistrate is willing to give credence to
28

1 Mr. Morris' statements, why was Mr. Heller not entitled to rely on Mr. Morris'
2 representation in February 2008? Similarly, the Magistrate Judge expresses
3 surprise that Chinois' counsel would accept Ms. Pickering's assurances that Mr.
4 Morris' call with Mr. Heller would not be discussed. Is the Magistrate Judge
5 suggesting it also was wrong to accept the word of a lawyer who recently was
6 elected to the Nevada Supreme Court? On the one hand the Magistrate Judge
7 concludes that keeping Mr. Morris out of the case in February 2008 "appears to
8 have been a reasonable resolution of the issue at the time" (Ex. E, Order at 14), yet
9 on the other, speculates that: "Regardless of Mr. Pickering's and Mr. Morris'
10 assurances that they would not discuss the case with each other, it seems doubtful
11 that Mr. Heller would have so readily agreed to Ms. Pickering's continued
12 representation if he had, in fact, disclosed significant confidential information to
13 her partner/husband Mr. Morris." (Ex. D, Order at 14-15). The Magistrate Judge's
14 benign interpretation of Mr. Morris' absence from the case for 10 months is not
15 supported by the evidence.

16 Finally, the Magistrate Judge erroneously concludes that whatever
17 confidential information was disclosed in the prior consultation was rendered
18 moot by Chinois' agreement to allow Ms. Pickering to defend Caesars. The
19 Magistrate Judge contends that had there been confidential communication
20 regarding forum preferences they were rendered moot by Chinois agreeing to
21 allow Ms. Pickering to defend Caesars after the case was removed to Federal
22 Court. However, those were not the confidences that Chinois contends may still
23 be used to harm it. Rather, those discussions were probative of the broader
24 litigation strategy discussions which were held in the prior consultation and not
25 disclosed (*i.e.* it helped provide context that substantive matters were being
26 discussed, including the likelihood of confidential communications as a predicate
27 to receiving legal advice from Mr. Morris.):

28 Client confidences are not so inert as to limit their usefulness to

1 defined legal disciplines or practice areas. They are fungible,
2 and once disclosed can be applied by an experienced lawyer in
3 ways too numerous to anticipate at this stage of the proceedings.
4 As the Second Circuit observed, “[t]he dynamics of litigation
5 are far too subtle, the attorney’s role in that process is far too
6 critical, and the public’s interest in the outcome is far too great
7 to leave room for even the slightest doubt concerning the ethical
8 propriety of a lawyer’s representation in a given case.”

9 *Fierro v. Gallucci*, *supra*, at *22-*23.

10 Based upon the reason for the prior consultation, the information both sides
11 agree was discussed, the guidance provided by the information which, by
12 necessity, was disclosed in the complaint, the remaining confidential information
13 to which Mr. Heller testified, but Mr. Morris “cannot recall”, and the conduct of
14 Mr. Morris and Ms. Pickering over a ten month span (consistent with a
15 recognition that confidences had been disclosed to Mr. Morris), Chinois has
16 provided sufficient evidence that confidences had been disclosed to Mr. Morris
17 which could be harmful to Chinois in this case. Upon that showing,
18 disqualification should have been ordered.

19 **VI. THE MAGISTRATE JUDGE IGNORED THE APPEARANCE OF
20 IMPROPRIETY WHICH RESULTS FROM THE ABANDONMENT
21 OF EITHICAL PRINCIPLES FOR THE SAKE OF EXPEDIENCY**

22 Mr. Heller called Mr. Morris and objected to his firm’s representation of
23 Caesars in the very matter upon which he previously had been consulted provided
24 with confidential information and in return offered legal advice. Mr. Morris
25 responded by stating that, although he recalled initially speaking to Mr. Heller,
26 Mr. Morris only had the faintest recollection of the call. However, he said he took
27 no notes and did not speak with anyone in the firm about the call. He further stated
28 he had no involvement in the case. The following day he memorialized his
comments in an e-mail to Mr. Heller. (Ex. A to Heller Decl.)

1 Given those assurances that Mr. Morris had erected a form of "ethical wall"
2 around himself, on February 14, 2008 Mr. Heller responded that he had no
3 problem with Kris Pickering continuing to represent Caesars. (Ex. A, to Heller
4 Decl.) Later the same day, Ms. Pickering confirmed that her husband had not
5 discussed the call with her and she would "keep this work separate from him."
6 (*Id.*)

7 For ten months Mr. Morris made no appearance in this case on behalf of
8 Caesars. Then, on December 19, 2008, in connection with the continuance of a
9 hearing on two Motions to Dismiss filed by Caesars and the remaining
10 Defendants, Ms. Pickering first revealed that as a result of her election to the
11 Nevada Supreme Court she would be leaving the case and that Mr. Morris would
12 be replacing her:

13 Gentlemen,

14 Judge Mahan was not available yesterday afternoon. With
15 Charlie McCrea out from Monday through the 4th, it looks
16 as though there is no workable date before year-end that
17 will allow me to participate. *Since this takes me out, I've*
18 *asked my partner, Steve Morris, to step in (which you on*
19 *the plaintiffs' side will come to regret).* His assistant is
20 patty Ferrugia, whom I'm copying to get a new date that
21 works for him and JP. (Emphasis added)

22 Best wishes for the holidays.

23 Kris

24 E-mail from Kris Pickering 12/19/08 (Ex. B, to Heller Decl.)

25 Reduced to its simplest, Caesars' counsel complied with their ethical
26 obligations, including both their duty of loyalty to a former client and their duty to
27 maintain client confidences, so long as it was convenient to do so. For ten months,
28 Steve Morris and Kris Pickering complied with their promises and ethical
obligations and kept this case away from Mr. Morris. However, when Ms.

1 Pickering was elected to the Nevada Supreme Court, it was no longer convenient
2 or financially advantageous for Mr. Morris to comply with the Rules. Placing his
3 own economic interests ahead of his former client, Mr. Morris did a 180° turn and
4 tried to come aboard this case leaving Ms. Pickering to observe that Plaintiffs will
5 come to regret Mr. Morris' appearance in the case. Given any objective measure,
6 how could this not result in the appearance of impropriety? The Magistrate
7 Judge's error here was that he not only did not resolve this issue, he never
8 addressed it.

9 Chinois argued to the Magistrate Judge how the appearance of impropriety
10 related to a disqualification motion brought pursuant to Nevada Rule of
11 Professional Conduct 1.9:

12 Other courts have held generally that "the mere appearance of
13 impropriety is just as egregious as any actual or real conflict."
14 *American Insurance Association v. Kentucky Bar Association*
15 917 S.W. 2nd 568, 573 (Ky. Sup. Ct. 1996). Still others, pursuant
16 to Model Rule 1.9, have applied that principle to motions to
17 disqualify attorneys based upon a prior consultation:

18 Even though the comment to Rule 1.9 specifically rejects the
19 "appearance of impropriety" standard in favor of a fact-based
20 test applied to determine whether the lawyer's duty of loyalty
21 and confidentiality to a former client will likely to be
22 compromised by the subsequent representation, the appearance
23 of impropriety is still a useful guide for ethical decisions.

24 * * *

25 Lawyers still must avoid the appearance of impropriety because
26 such is an integral component of professional responsibility.
27 *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787
28 S.W. 2d 669(Ar.1990).

Lovell v. Winchester, 941 S.W. 2d 466, 468 (Ky. Sup. Ct. 1997)

(Ex. C, Plaintiff's Reply Brief at 13)

Nevertheless, the Magistrate Judge does not mention a word about how

1 public confidence in the integrity of the bar is challenged when ethical rules are
2 circumvented for the sake of expediency.

3 Contrary to the Magistrate Judge's ultimate conclusion that the competing
4 interests weigh heavily towards Caesars being able to have the counsel of its
5 choice, Order at 15, Caesars' choice is trumped by an attorney's duty to a former
6 client:

7 Although King argues that Appellants cannot demonstrate how
8 his representation of Kidd would harm their case, we believe
9 that the situation creates a perception of betrayal and disloyalty
10 which cannot be condoned. To sanction this professional
11 conduct merely on the claim that he recalls nothing of the prior
12 contact impairs public confidence in the legal system. Further,
13 there is the potential to prejudice clients in the employ of the
14 legal counsel. Maintaining public confidence in the legal system
15 requires that preservation of client confidences should outweigh
16 the interests of individual lawyers and individual clients in
17 freely contracting with each other. Client confidences should
18 prevail among these competing interests.

19 *Lovell v. Winchester, supra*, 941 S.W. 2d at 467-468

20 Leaving aside the disputed facts, even the undisputed facts call into
21 question what is going on here. To *represent* Caesars, Ms. Pickering was willing
22 to "keep this work separate from [Mr. Morris]". To *keep* this business, Mr. Morris
23 was willing to throw that promise under the bus when Ms. Pickering was elected
24 to the Bench. Such conduct transcends the violation of Professional Rules of
25 Conduct and directly implicates the Court's responsibility to maintain public
26 confidence in the system of justice:

27 ...[T]he goal of maintaining public confidence in our system of
28 justice demands that courts prevent even the appearance of
impropriety and thus resolve any and all doubts in favor of
disqualification. In preventing the appearance of impropriety,
the client's perception of events is of paramount importance and
overshadows the details of his attorney's conduct. The conduct
of the attorney need not constitute a violation of Rules of

1 Professional Conduct, and certainly need not rise to the level of
2 professional negligence in order to warrant disqualification. The
3 relevant cases instruct us to refrain from weighing the conduct
4 of counsel with "hairsplitting nicety" in the context of a motion
5 to disqualify. As Judge Goodwin so ably stated in Healthnet,
6 "[a] motion to disqualify counsel . . . is not a referendum on the
7 trustworthiness of the counsel sought to be disqualified. It is,
8 rather, a motion that should succeed or fail on the
9 reasonableness of a client's perception that confidences it once
10 shared with its lawyer are potentially available to its adversary.
11 Where a reasonable client would be concerned by a potential
12 conflict, a court must err on the side of disqualification."
13 (Internal citation omitted.)

14 *Chemcraft Holdings Corp. v. Shayban* 2006 NCBC 13; 2006 NCBC LEXIS 15
15 ** 11- ** 13 (N.C. Super. Ct. 2006)

16 VII. CONCLUSION

17 The decision reached by the Magistrate Judge is demonstrably flawed. It is
18 based upon material factual inconsistencies and errors of law. Upon scrutiny, it
19 cannot withstand objective analysis.

20 The Magistrate Judge faults counsel for Chinois for believing and relying
21 upon the factual assertions of Mr. Morris and Ms. Pickering made in February
22 2008, yet the Magistrate Judge gives full credit to the current hazy recollection of
23 Mr. Morris which has be shown to be inaccurate.

24 The Magistrate Judge relies on case authorities provided by Mr. Morris
25 which are factually distinguishable from this case. Unlike the facts here, the
26 Magistrate Judge relies on cases where there was no contention that legal advice
27 was received or that there were remaining confidences which were not
28 subsequently revealed by the filing of a complaint. On the other hand, the
29 Magistrate Judge fails to reference case authority cited by Chinois which compel
30 disqualification on facts similar to the ones at issue here in this case.

The Magistrate Judge applies an improper standard which is unattainable

1 unless Chinois discloses the confidences it seeks to protect. In so doing, the
2 Magistrate Judge ignores dispositive authority to the contrary.

3 The Magistrate Judge abdicates any responsibility for maintaining the
4 public's confidences in the integrity of the bar. By ignoring the issue, the
5 impression left is that high profile lawyers retained by high profile clients do not
6 have to abide by the same rules other attorneys have to follow and that high
7 profile clients receive special treatment. This may not have been the Magistrate
8 Judge's intent, but that is the perception left with Chinois as Mr. Morris' former
9 client and the public at large.

10 Counsel for Caesars should be faulted for dropping this hot potato into the
11 Court's hands. Mr. Morris knew the right thing to do was to step aside and that is
12 exactly what he did in February 2008. For no good reason, and for a lot of bad
13 ones, Mr. Morris now has changed his mind and wants the Court to bail him out of
14 his ethical dilemma. In so doing, Mr. Morris is oblivious to the taint he brings to
15 this case and the broader stigma he now wants to impose on this Court.

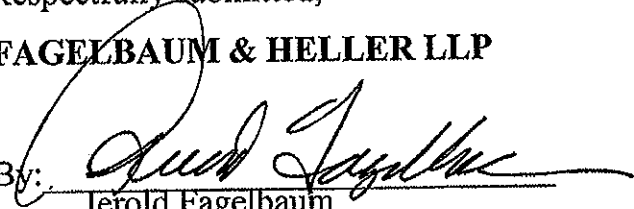
16 The enforcement of Mr. Morris' duty of loyalty to his former client and
17 duty to maintain client confidences, and the protection of the public's confidence
18 in the integrity of the bar, compels the reversal of the Magistrate Judge's Order
19 and the granting of Chinois' Motion to Disqualify Mr. Morris and his firm Morris
20 Peterson from further participation in this case on behalf of the Caesars
21 Defendants.

22 ///
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1 Finally, because of the sensitivity and importance of this Motion, oral
2 argument is requested.
3

4
5 Dated: February 24, 2009
6


Respectfully submitted,
FAGELBAUM & HELLER LLP

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10 and

11 Dated: February 24, 2009

HUNTERTON & ASSOCIATES

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CERTIFICATE OF SERVICE

[US DISTRICT COURT --NEVADA
CASE NO. 2:08-CV-00162 JCM (GWF)]

I hereby certify that on February 25, 2009 I caused a true and correct copy of the foregoing document :

PLAINTIFF PHASE II CHIN LLC'S OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL FOR THE CAESARS DEFENDANTS ATTORNEY STEVE MORRIS AND THE LAW FIRM OF MORRIS PETERSON; AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

to be served on counsel for all parties via electronic filing the Court's ECF System.

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Zoyina Shah-Sohl