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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

KABINS FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	2:09-cv-1125-GMN-RJJ
	)	
vs.	)	
	)	<b><u>ORDER</u></b>
CHAIN CONSORTIUM, a Nevada general partnership, <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

This matter was referred to the undersigned Magistrate Judge on Plaintiff Kabins Family Limited Partnership’s Motion To Disqualify Counsel (#280). The Court has considered Plaintiff’s Motion (#280); Plaintiffs’ Opposition (#290); Defendant’s Reply (#294) and the argument and representations of the parties at a hearing held on the motion

**BACKGROUND**

On June 23, 2009, Plaintiff Kabins Family Limited Partnership *et al.*, (Kabins entities) filed a Complaint against Defendants, Chain Consortium *et al.*, alleging misrepresentation and fraud. Kabins’ entities claimed 46 causes of action arising under both federal and state law, against 35 separate corporate and individual defendants. The parties were allegedly involved in a series of seven separate commercial real estate developments. The Kabins entities assert that Defendants were part of a fraudulent scheme, violated fiduciary duties and as a result caused financial harm to the Kabins entities. Kabins entities requested \$11 million in damages.

On December 2, 2009, several Defendants, represented by Albert D. Massi, filed their Answer. The Answer asserted numerous counterclaims including: civil conspiracy, breach of fiduciary duty, and unjust enrichment. Both parties have commenced and participated in extensive



1 advantage. *In-N-Out Burger* (citing *Optyl Eyewear Fashion Int'l Corp. v. Sytle Cos., Ltd.*, 760 F.2d  
2 1045, 1050 (9th Cir. 1985)). The moving party bears the burden of establishing an ethical violation  
3 or other factual predicate upon which the motion depends. See *United States v. Walker River Irr.*  
4 *Dist.*, 2006 WL 618823 (D. Nev.) (citing *Colyer v. Smith*, 50 F.Supp.2d 966, 967 (C.D. Cal. 1999).

### 5 **1. Standing**

6 Kabins entities argue that Massi, and his firm, should be disqualified because of a conflict  
7 of interest arising under Nevada Rules of Professional Conduct 1.7, 1.8, and 1.9. Defendants assert  
8 however that Kabins entities have no standing to bring a disqualification motion because Kabins  
9 entities are neither clients, nor former clients of Massi.

10 The party seeking disqualification bears the burden of establishing that it has standing to do  
11 so. *Walker River Irr. Dist.*, 2006 WL 618823 \*4. “Neither the United States Supreme Court, nor the  
12 Ninth Circuit has addressed the particular question of whether the standing doctrine bars a nonclient  
13 party from moving to disqualify the opposing party’s counsel on the grounds of a conflict of  
14 interest.” *FMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156 (W. D. Wash. 2006).  
15 Nevertheless, the majority view is that “only a current or former client of an attorney has standing  
16 to complain of that attorney’s representation of interests adverse to that current or former client.”  
17 *Colyer v. Smith*, 50 F. Supp. 2d 966, 969 (C.D. Cal. 1999).

18 However, a nonclient party may have standing to bring a motion to disqualify “where an  
19 ethical breach so infects the litigation ... that it impacts the moving party’s interest in a just and  
20 lawful determination of [the moving party’s] claims.” *FMC Technologies, Inc.*, 420 F. Supp. 2d at  
21 1156 (citing *Colyer*, 50 F. Supp. 2d at 971-72). “In such a case, the prudential barrier to litigating  
22 the rights and claims of third parties ... [is] ... overcome by the court’s inherent obligation to manage  
23 the conduct of attorneys who appear before it and to ensure the fair administration of justice.” *Id.*

24 In the motion as well as at the hearing, Kabins entities claimed to be former clients of Massi.  
25 Kabins entities assert that because Massi frequently provided Dr. Kabins legal advise and Massi  
26 claimed to be counsel in the “Landers Case,” Kabins entities are essentially Massi’s former clients.  
27 Kabins entities lack documentation or actual examples of the legal advise Massi provided to Dr.  
28 Kabins. Additionally, Kabins entities have not produced a retainer agreement to show Massi was

1 counsel in the “Landers Case.” Kabins entities only evidence that Massi was counsel in the “Landers  
2 Case” is an alleged phone conversation between Massi and another attorney, who was not present  
3 at the hearing. There is no reliable evidence that Massi was ever counsel for Kabins entities. The  
4 Court concludes that Kabins entities are neither clients, nor former clients of Massi.

5 In anticipation that the Court would find Kabins entities to be nonclients, Kabins entities also  
6 argue to be at least “privies” of Defendants. In order to have standing as nonclients, Kabins entities  
7 must show an ethical breach which so infects the litigation, that it impacts Kabins entities interest  
8 in a “just and lawful determination” of the claims. *See FMC Technologies, Inc*, 420 F. Supp. 2d at  
9 1156. Kabins entities assert that Massi’s alleged ethical breaches impact Kabins entities’ interest  
10 as members of the Massi Equity Defendants because Kabins entities will bear the economic burden  
11 of Massi’s attorney fees inflicted on the Massi Equity Defendants. Additionally, Kabins entities  
12 assert that because Massi is an investor with the Massi Equity Defendants, Massi has an incentive  
13 to unnecessarily increase the cost of litigation to compensate for any personal loses he might suffer  
14 as a result of losing the case. Kabins entities arguments are entirely centered on the potential  
15 expense of litigation. Kabins entities have not alleged any ethical breach which would undermine  
16 a “just and lawful determination” of the claims. Kabins entities therefore have not met their burden  
17 of proof as nonclients. Given the general rule that only former or current clients have the necessary  
18 personal stake in a conflict of interest dispute, the Court finds that Kabins entities do not have  
19 standing. Furthermore, even if the Court assumes standing, Kabins entities have failed to prove a  
20 conflict of interest.

## 21 **2. No Conflict of Interest Under NRPC 1.7**

22 Under NRPC 1.7, Kabins entities argue that Massi’s representation of Dana Corbo,  
23 individually, conflicts with Massi’s representation of Cipriani and Gila Bend. NRPC 1.7 states:

24 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the  
25 representation involves a concurrent conflict of interest. A concurrent conflict of  
interest exists if:

- 26 (1) the representation of one client will be directly adverse to another client; or  
27 (2) There is a significant risk that the representation of one or more clients will be  
materially limited by the lawyers responsibilities to another client, a former client,  
or a third person or by a personal interest of the lawyer.

28 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph

1 (a), a lawyer may represent a client if:

- 2 (1) the lawyer reasonably believes that the lawyer will be able to provide  
3 competent and diligent representation to the client;  
4 (2) The representation is not prohibited by law;  
5 (3) The representation does not involve the assertion of a claim by one client  
6 against another client represented in the same litigation or other proceedings  
7 before a tribunal; and  
8 (4) Each affected client gives informed consent, confirmed in writing.

9 To establish a concurrent conflict of interest, Kabins entities must show: (1) Massi's representation  
10 of Corbo, Cipriani, and Gila Bend are directly adverse to one another, or (2) that Massi's  
11 representation of all three clients will materially limit his responsibilities to each individually.

12 In regards to Corbo and Gila Bend, Kabins entities argue that because Corbo is the sole  
13 manager of Gila Bend, there is a clear concurrent conflict of interest in representing both Corbo and  
14 Gila bend. The Court disagrees. Kabins entities have failed to show how representing Corbo is  
15 directly adverse to Gila Bend (or visa vera), or how Massi's responsibilities to either client will be  
16 limited by representing the other. Kabins entities skip to the paragraph (b) analysis of NRPC 1.7 and  
17 assert that Corbo could not possibly consent to Massi representing Corbo individually and Gila  
18 Bend. The analysis falls short and the Court cannot speculate on how representing Corbo is adverse  
19 to or materially limits representing Gila Bend. Therefore, there is no apparent concurrent conflict of  
20 interest between representing Corbo and representing a company, Gila Bend, Corbo manages.

21 In regards to Corbo and Cipriani, Kabins entities argue that because Corbo is an investor in  
22 Cipriani and due to new proposed amendments to the Cipriani Operating Agreement, there is a  
23 concurrent conflict of interest in representing both Corbo and Cipriani. The proposed amendment,  
24 if approved, would allegedly benefit Corbo, as well as Massi, at the expense of Cipriani. Kabins  
25 entities argue that Massi's attorney/client duties to Corbo demand that Massi increase Corbo's  
26 compensation, backdate such compensation, and to cover indemnification, which "does not appear  
27 to be in Cipriani's best interest." However, as far as the Court understands, Massi represents neither  
28 Corbo nor Cipriani in the matter regarding the proposed amendment. Therefore it is unclear how  
such an unrelated matter will adversely affect or materially limit Massi's duties to either Corbo or  
Cipriani. The Court will not speculate and finds no concurrent conflict of interest between  
representing Corbo and representing Cipriani.

1 **2. No Conflict of Interest Under NRPC 1.8**

2 Under NRPC 1.8, Kabins entities argue that Massi’s self-interest in Benessere, Cipriani, Gila  
3 Bend, and Buckeye 80, conflicts with Massi’s representation of Defendants. Massi’s has  
4 investments of approximately \$3 million with these defendants. Kabins entities argue that Massi may  
5 start, and possibly already is, creating unnecessary legal expenses to compensate for any losses he  
6 might incur in his investments. NRPC 1.8 states:

7 (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an  
8 ownership, possessory, security or other pecuniary interest adverse to a client unless:

9 (1) The transaction and terms on which the lawyer acquires the interest are fair and  
10 reasonable to the client and are fully disclosed and transmitted in writing in a manner  
11 that can be reasonably understood by the client;

12 (2) The client is advised in writing of the desirability of seeking and is given a  
13 reasonable opportunity to seek the advice of independent legal counsel on the  
14 transaction; and

15 (3) The client gives informed consent, in a writing signed by the client, to the essential  
16 terms of the transaction and the lawyer’s role in the transaction, including whether the  
17 lawyer is representing the client in the transaction.

18 First, there is no indication that Massi represented the Defendants in the investment  
19 transaction and therefore NRPC does not apply. Both parties agree that Massi’s role in the  
20 transaction was simply that he invested money with the Defendants. Second, Kabins entities cite *In*  
21 *re Singer*, 109 Nev. 1117, 1120-1121(1993), for the notion that when an attorney has a personal  
22 financial interest in any transaction with a client, there is a presumption of impropriety which can  
23 only be overcome with clear and convincing evidence. However, this is an overstatement of the  
24 holding in *In re Singer*. “Any” business transaction is not meant to include the transaction in which  
25 a party retains an attorney as counsel. Attorneys always have a personal financial interest in being  
26 retained as counsel. Furthermore, NRPC 1.8 refers to business transactions or “other pecuniary  
27 interest[s] adverse to a client.” Here, Massi invested money with the Defendants prior to the claim  
28 by Kabins entities. The Court does not see nor will it speculate how investing money with a  
company is adverse to that company.

29 Additionally, Kabins entities use Massi’s investor status to claim he will unnecessarily  
30 increase legal fees. However, Kabins entities use their own investor status to claim they will have  
31 to pay Defendants’ attorney fees. Under this logic, Massi has an incentive to keep his attorney fees  
32 low, because he, at least in part, will be paying the fees. The Court finds Kabins entities’ reasoning

1 circular and unsubstantiated.

2 **ORDER**

3 Based on the foregoing, and good cause appearing therefore,

4 IT IS HEREBY ORDERED that Plaintiffs Motion to Disqualify Counsel (#280) is **DENIED**.

5 IT IS SO ORDERED.

6 DATED this 31st day of March, 2011.

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ROBERT J. JOHNSTON  
United States Magistrate Judge

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