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United States District Court, C.D. California.

Christopher A. BALLEW, Plaintiff,
v.
CITY OF PASADENA, et al., Defendants.

Case No. CV 18-0712 FMO (ASx)
|
Signed 04/13/2020

Attorneys and Law Firms

Matthew Sahak, John C. Burton, John Burton Law Offices, Pasadena, CA, for Plaintiff.

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ORDER Re: PENDING MOTION

Fernando M. Olguin, United States District Judge

***1** Having reviewed and considered all the briefing filed with respect to plaintiff's Motion to Disqualify Defense Counsel and Order Issue Preclusion, (Dkt. 127, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND [1]

1 Because the parties are familiar with the facts of this case, the court will discuss them only as necessary.

Plaintiff's Third Amended Complaint, (Dkt. 126, "TAC"), the operative complaint, asserts federal and state civil rights claims under 42 U.S.C. § 1983 and California Civil Code §§ 51.7 and 52.1, and state law claims for battery and false imprisonment against the City of Pasadena ("City"), the Pasadena Police Department ("PPD") (the City and PPD are hereinafter referred to as the "entity defendants"), Chief of Police Phillip A. Sanchez ("Sanchez"), Sergeant Timothy Bundy ("Bundy"), and Officers Lerry Esparza ("Esparza") and Zachary Lujan ("Lujan") (collectively, Sanchez, Bundy, Esparza, and Lujan are hereinafter referred to as the "individual defendants" and collectively with the entity defendants as "defendants"). (See Dkt. 126, TAC ¶¶ 70-96). All defendants are represented by the law firm of Carpenter, Rothans & Dumont, LLP (the "Firm") and Michele Beal Bagneris, Pasadena's City Attorney ("City Attorney"). (Dkt. 130, Declaration of Justin Reade Sarno ("Sarno Decl.") ¶ 4).

Plaintiff seeks to disqualify the Firm from representing any of the defendants and to disqualify the City Attorney from representing Esparza and Lujan pursuant to California Rule of Professional Conduct 1.7, [2] which restricts an attorney's ability to represent a client when the attorney has a conflict of interest. [3] (See Dkt. 127, Motion at 1-2, 6-8). According to plaintiff, by representing both the entity and the individual defendants, the Firm and the City Attorney created a conflict of interest that is interfering with the orderly administration of justice and the progress of this case. (See id.).

2 Unless otherwise indicated, all "Rule" references are to the California Rules of Professional Conduct.

3 Plaintiff takes issue with defense counsel's concurrent representation of the entity defendants and officers Esparza and Lujan. (See Dkt. 127, Motion at 1). However, plaintiff is also suing Sanchez and Bundy in their individual capacities for their participation in the alleged deprivation of plaintiff's civil rights. (See Dkt. 126, TAC ¶¶ 4-5; Dkt. 125, Court's Order of March 29, 2019, at 4-5, 12, 17). The court sees no reason why the same or similar potential conflicts between the entity defendants and the individual defendants could not also arise with Sanchez and Bundy. Cf. Larez v. City of L.A., 946 F.2d 630, 646 (9th Cir. 1991) ("Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, ... for his acquiescence in the constitutional deprivations of which the complaint is made, ... or for conduct that showed a reckless or callous indifference to the rights of others.") (citations and internal quotation marks omitted). Thus, the discussion in this Order

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also applies to Sanchez and Bundy, even though the court will focus, as the parties did, on Esparza and Lujan.

LEGAL STANDARD

***2** "A trial court's authority to disqualify an attorney derives from the power inherent in every court [t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." Kennedy v. Eldridge, 201 Cal.App.4th 1197, 1204 (2011) (alterations in original; internal quotation marks omitted). Although "disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility[,]" People ex rel Dep't Of Corps. v. SpeeDee Oil Change Sys., Inc., 20 Cal.4th 1135, 1145 (1999), "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." Id. In other words, "[t]he important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." Id.

DISCUSSION

I. STANDING.

Defendants assert that plaintiff lacks standing to seek disqualification of defense counsel because plaintiff's Motion "is largely devoid of assertions regarding his own legal rights and interests." (Dkt. 130, Defendants' Opposition to Plaintiff's Notice of Motion to Disqualify Defense Counsel and Order Issue Preclusion ("Opp.") at 7). Courts are split on whether the moving party on a motion to disqualify counsel must have standing in order for the court to consider a disqualification motion. On the one hand, there is the view "that only a current or former client of an attorney has standing to complain of that attorney's representation of interests adverse to that current or former client." Colyer v. Smith, 50 F.Supp.2d 966, 969 (C.D. Cal. 1999). However, under this view, there is an exception to the rule where the ethical breach "so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims." Id. at 971-72.

On the other hand, there is the view that because the court, as part of its obligation to monitor the conduct of attorneys who appear before it, has the inherent power to disqualify an attorney, it is irrelevant how the disqualification issue comes to the court's attention. For example, in Greenfield MHP Associates, L.P. v. Ametek, Inc., 2018 WL 538961 (S.D. Cal. 2018), the court refused to apply standing requirements to a motion to disqualify counsel. Id. at *3. The court reasoned that because it "has the power to disqualify attorneys before it as the result of an ethical violation, it is irrelevant – for purposes of subject-matter jurisdiction – who brings the ethical violation to the Court's attention." Id. at *4. In reaching this conclusion, the Greenfield court carefully examined the purpose underlying the standing limitations and addressed contrary case law, including Colyer. See id. at *3-*4. The court noted that applying standing doctrine to disqualification motions would generate illogical results. For example, a court could disqualify an attorney sua sponte for an ethical violation, but would not be able to grant a motion seeking disqualification of the same attorney for the same ethical violation simply because the violation was brought to the court's attention via a motion. See id. at *3.

The court finds the Greenfield court's analysis more persuasive. Adopting the reasoning in Greenfield, the court need not decide whether plaintiff has standing to move for disqualification because the court "possesses the power to consider and decide the motion for disqualification by virtue of its inherent power to preserve the integrity of the adversary process." Id. at *2; see Erickson v Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996) ("Federal courts have inherent powers to manage their own proceedings and to control the conduct of those who appear before them[, and] an arsenal of sanctions they can impose for unethical behavior ... [including] disqualification of counsel.") (citations omitted); United States v. Prevezon Holdings Ltd., 839 F.3d 227, 241 (2d Cir. 2016) ("The authority of federal courts to disqualify attorneys derives from their inherent power to preserve the integrity of the adversary process.") (internal quotation marks omitted). The court's authority to manage the conduct of attorneys who appear before it and its obligation to ensure the fair administration of justice may be invoked sua sponte. See Greenfield, 2018 WL 538961, at *3 ("The fact that the Court possesses an inherent power to disqualify Plaintiffs' Counsel sua sponte requires the conclusion that Article III has conferred that power regardless of how the ethical violation comes to the Court's attention."). Thus, even assuming plaintiff did not have standing to

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seek disqualification, the court's obligation to manage the conduct of attorneys who appear before it and to ensure the fair administration of justice require the court to evaluate "the disqualification issue on its own when it found out about the conflict[.]" State Comp. Ins. Fund v. Drobot, 192 F.Supp.3d 1080, 1090 (C.D. Cal. 2016) (holding that even if movant lacked standing to move for disqualification, the "Court would [honor its obligation to manage the conduct of attorneys] by raising the disqualification issue on its own when it found out about the conflict"); see Exp. Dev. Can. v. Ese Elecs. Inc., 2017 WL 3122157, *2 (C.D. Cal. 2017) ("A district court has inherent authority – either of its own accord or in response to a motion to disqualify counsel – to disqualify an attorney or firm as counsel for violating [ethical] standards."); Brumfield v. City of Seattle, 2011 WL 13127184, *2 (W.D. Wash. 2011) ("Notwithstanding the fact that Plaintiff raises a conflict-of-interest question as a nonclient party, the issue of disqualification is properly before the Court due to its inherent power to manage attorney conduct and to protect the integrity of its processes.") (internal quotation marks and alteration omitted).

***3** While the court is cognizant that motions to disqualify are disfavored because of their potential for abuse, see Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050 (9th Cir. 1985), the California Supreme Court has made clear that "[t]he important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." SpeeDee Oil, 20 Cal.4th at 1145. And this court "must follow the reasoned view of the state supreme court when it has spoken on the issue." Radcliffe v. Hernandez, 818 F.3d 537, 543 (9th Cir. 2016) (internal quotation marks omitted).

II. DISQUALIFICATION.

Having concluded that standing does not prevent the court from ruling on the instant Motion, the court considers whether disqualification is appropriate under the circumstances here.

A. Conflict of Interest.

"California law governs questions of conflicts of interest and disqualification." Radcliffe, 818 F.3d at 541. The Central District has adopted California's Rules of Professional Conduct, which govern attorney conflicts of interest. See Local Rule 83-3.1.2.

Rule 1.7 states, in relevant part:

> (a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
>
> (b) A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or the lawyer's own interest.
>
> ...
>
> (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law; and
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Cal. R. Prof. Conduct 1.7(a), (b), & (d) (State Bar of Cal. 2018).[4] If the client is a private, public, or governmental organization, then

> [a] lawyer representing [the] organization may also represent any of its constituents, subject to the provisions of rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

Id. at R. 1.13(g).

4 In May, 2018, the California Supreme Court approved comprehensive amendments to the Rules of Professional Conduct, which went into effect on November 1, 2018. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg., 6 Cal.5th 59, 86 n. 7 (2018). "Paragraph (a) of ... Rule 1.7 incorporates the concept of direct adversity of interests of two current clients. This carries forward the concept in [former] rule 3-310(C)(2) and (3), and [the American Bar Association Model Rules of Professional Conduct ("Model Rules")] 1.7(a)(1). [¶] Paragraph (b) incorporates the concept of material limitations on a lawyer's representation of a client because of duties owed another current or former client, or because a relationship with a client or other person. The paragraph borrows the language of Model Rule 1.7(a)(2) in carrying forward the concepts found in [former] rule 3-310(B) and (C)(1)." (Commission for the Revision of the Rules of Professional Conduct, Executive Summary to Rule 1.7). Because Rule 1.7 carries forward the concepts set forth in former rule 3-310(B) & (C), the court will, where appropriate in interpreting Rule 1.7, rely on case law discussing and interpreting former rule 3-310(B) & (C).

***4** California law distinguishes between two types of conflicts of interest. See Radcliffe, 818 F.3d at 541-42. "Where the potential conflict is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality." Id. at 542 (quoting Flatt v. Super. Ct., 9 Cal.4th 275, 283 (1994)). However, where, as here, the alleged conflict is "simultaneous" representation, the conflict "do[es] not primarily implicate the duty of confidentiality but rather the attorney's duty – and the client's legitimate expectation – of loyalty." Id. (internal quotation marks omitted). "[A] concurrent or simultaneous conflict of interest under California Rule of Professional Conduct [1.7] generally leads to automatic disqualification." Id. at 541.

The California Supreme Court has stated that "[a]ttorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process.... The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel." SpeeDee Oil, 20 Cal.4th at 1146 (citations omitted). Indeed, "[t]he most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation.... Such patently improper dual representation suggests to the clients – and to the public at large – that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences." Id. at 1147 (citation omitted); see Unified Sewerage Agency of Wash. Cty., Or. v. Jelco Inc., 646 F.2d 1339, 1345 (9th Cir. 1981) (discussing concurrent representation under prior ABA Code of Responsibility and stating that "representation adverse to a present client must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients").

Despite California's "automatic disqualification" rule, which is "regularly applie[d] ... to lawsuits involving individual clients," Radcliffe, 818 F.3d at 543, the California Rules of Professional Conduct do allow concurrent representation of clients with adverse interests in limited situations if both clients provided informed written consent. See Cal. R. Prof. Conduct 1.7(d) & 1.13(g). However, not all conflicts are waivable, as "[t]here are some matters in which the conflicts are such that written consent may not suffice[.]" Id. at 1.7, cmt. 8.

With these considerations in mind, the court will now turn to whether there is an adverse concurrent representation conflict between defendants and their counsel. As an initial matter, the court notes that "[a]n inherent conflict of interest arises in a § 1983 action when co-defendants in a suit are a local government and police officers ..., as differing theories of liability and differing defenses are applicable to each defendant." Manganella v. Keyes, 613 F.Supp. 795, 797 (D. Conn. 1985). The Second Circuit summarized this conflict well in Dunton v. Suffolk County, State of N. Y., 729 F.2d 903 (2d Cir. 1984):

> A municipality may avoid liability by showing that the employee was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The employee, by

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> contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties. If he can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality. If he is successful in asserting a good faith immunity defense, the municipality may be wholly liable because it cannot assert the good faith immunity of its employees as a defense to a section 1983 action.

***5** Id. at 907. Moreover, there is the risk of sharing confidences that may be harmful to one party but beneficial to the other. See Miller, 138 F.Supp.2d at 1257 ("[C]ontrary to their fiduciary duty of loyalty to [the officers] but by reason of a similar obligation of loyalty to the City [counsel] may use such shared confidences to [the officers'] detriment but to the benefit of the City.").

Here, plaintiff raises two examples that he claims demonstrate the existence of a conflict of interest that interferes with the court's ability to ensure the orderly administration of justice and the progress of this case. First, plaintiff asserts that "Defense counsel's conflict of interest warrants disqualification because the attorneys representing the entity defendants contend that no determination has been made whether the officers' actions violated policy and merit discipline, while those same attorneys, while also representing the officers, contend that the officers did noting wrong." (Dkt. 131, Reply at 3). According to plaintiff, "defense counsel defending the entities against the Monell claim[ ] are asserting in their proposed summary judgment motion that Plaintiff has no evidence that Officers Esparza and Lujan acted pursuant to PPD policies during their encounter with Mr. Ballew." (Dkt. 127, Motion at 7-8). Second, plaintiff argues that the settlement conference revealed that defense counsel had conflicting duties of loyalty in terms of what positions the various defendants took during the conference. (See id. at 2 & 4). In response to both arguments, defendants deny that a conflict exists and argue that even if it does, all defendants have executed conflict waivers. (See Dkt. 130, Opp. at 10-14).

Plaintiff, relying on In re Jaeger, 213 B.R. 578 (C.D. Cal. 1997), distinguishes between "actual" and "potential" conflicts of interest. (See Dkt. 127, Motion at 6); see also former California Rule of Professional Conduct 3-310(C)(1) & (2) (prohibiting representation of more than one client in a matter in which the interests of the clients potentially or actually conflict). Although the new Rule 1.7 foregoes those terms, it appears to still rely on that distinction by prohibiting joint representation where the clients' interests are "directly adverse" or where there is a "significant risk" that "the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to ... another client[.]" See Cal. R. Prof. Conduct 1.7(a), (b); supra at note 4. Thus, under Rule 1.7, a conflict of interest is potential if there is a significant risk that "a lawyer's obligations to two or more clients in the same matter ... may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients." Id. at R. 1.7, cmt. 4. A directly adverse conflict, i.e., an "actual" conflict, exists when, for example, "a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict[.]" Id. at R. 1.7, cmt. 1. Attorneys must discuss both types of conflicts with their clients and obtain written informed consent for both. See id. at R. 1.7(a), (b) & (d). If a potential conflict develops into an actual conflict, attorneys must obtain further informed written consent. See id. at R. 1.7, cmt. 2.

***6** Here, the court is not convinced that plaintiff has shown the existence of an "actual" conflict of interest, i.e., a directly adverse conflict within the meaning of Rule 1.7. For example, plaintiff has not put forth any information or evidence showing that the entity defendants are asserting that the officers acted improperly, or that the individual defendants are claiming that they received inadequate training from the entity defendants. See, e.g., Miller v. Alagna, 138 F.Supp.2d 1252, 1257 (C.D. Cal. 2000) (outlining the potentially adverse litigation positions that the entity and officer defendants might take). However, part of the reason for this lack of information may be that defendants did not submit declarations addressing the factors noted below, see infra at § II.B., or copies of the conflict waivers with their opposition. (See, generally, Dkt. 130, Opp. & Exhs. A-G). Without such information, the court is not in a position to determine whether defense counsel violated their duty of loyalty and whether defendants gave informed written consent to the waiver of any actual or potential conflicts of interest.

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Nevertheless, the court is persuaded that, under the circumstances here, there is, at minimum, a potential conflict of interest that may undermine the court's ability to ensure the orderly administration of justice and the progress of this case. Defense counsel owe a duty of loyalty to each defendant in this case, regardless of how diametrically opposed a particular defendant's litigation position and strategy may be compared to the other defendants defense counsel represent. On one hand, defense counsel arguably advised the entity defendants that the best way to avoid liability is to show that the officers did not follow procedure and were not acting within the scope of their official duties during their encounter with plaintiff. See Miller, 138 F.Supp.2d at 1257 ("[I]n defending itself against the Monell claims against it, [the City] will assert that [the officers] ... did not follow the City's policies and practices regarding use of force, including lethal force, as they were trained."). On the other hand, defense counsel presumably advised the individual defendants that it is in their best interest to take the position that their actions were consistent with City policy and/or that they received inadequate training to enable them to properly respond to the circumstances at issue in this case. See id. ("[The officers'] defense will apparently be in part that their actions, plans and decisions regarding the subject incident including their use of force was consistent with their training or that the policies, practices and training they received from the City were inadequate to enable them to properly respond to the circumstances which they confronted that night.").

Further, given that the entity and individual defendants "face asymmetrical damages claims," which may affect their "willingness to make or accept an offer of settlement[,]" [5] Brumfield, 2011 WL 13127184, at *2 (internal quotation marks omitted); (see Dkt. 126, TAC ¶ 69 (claiming punitive damages against the defendant officers)), defense counsel's obligations to their entity clients and individual clients "may materially limit [their] ability to recommend or advocate all possible positions that each might take because of the lawyer's duties to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients." Cal. R. Prof. Conduct 1.7, cmt. 4. Finally, there appears to be a potential conflict with respect to the pending internal affairs ("IA") investigation. A municipality often defends its officers after adopting investigative findings that the officers followed procedure. See, e.g., Coggins v. Cty. of Nassau, 615 F.Supp.2d 11, 15-16 (E.D.N.Y. 2009) (recounting municipal process finding that the officer's actions were within the proper discharge of his duties, which entitled him to legal representation and indemnification by the county); Dunklin v. Mallinger, 2013 WL 1501446, *30 (N.D. Cal. 2013) (holding that merely adopting an investigation's findings does not trigger Monell liability). Here, however, the City's IA's investigation is still pending. (See Dkt. 130, Opp. at 1). Once the City restarts its IA investigation, it will presumably switch to a neutral stance with respect to the officers' compliance with City policy. If the City's investigators find wrongdoing, the City may decide to pursue disciplinary action against the individual defendants. It is difficult to reconcile how the City will be able to conduct the IA investigation in an impartial manner and how defense counsel will be able to fulfill their duty of loyalty to all of their clients, especially the individual defendants. See State Comp. Ins. Fund, 192 F.Supp.3d at 1088 ("Loyalty is a particularly important consideration when a lawyer is thinking of concurrently representing clients with adverse interests."). It is likely that the positions and information discovered in this case and revealed by defense counsel to all of their clients could have an adverse impact on the individual defendants with respect to the IA investigation.

5 Although the court is mindful of the importance of the mediation confidentiality rule, counsel may not rely on the rule to hide potential ethical violations. See, e.g., Baker v. Allstate Ins. Co., 2020 WL 978729, *2 (C.D. Cal. 2020) ("[T]he Court determined [counsel] acted in bad faith by sending numerous profanity-laced emails, using discriminatory epithets, and repeatedly threatening physical violence against Allstate's witnesses, attorneys, and their families purportedly as negotiation tactics.") (emphasis added). The threats and language at issue in Baker occurred in communications regarding settlement. (See Baker v. Allstate Ins. Co., CV 19-8024 ODW (JCx), Dkt. 22-1).

***7** In short, the court finds that there are, at least, potential conflicts of interest between the entity and individual defendants in this case.

B. Waiver of the Conflicts.

Defense counsel asserts that "[a]ll of the defendants have signed conflict waivers in this matter, agreeing to their concurrent representation by the law firm of Carpenter, Rothans & Dumont LLP and the Pasadena City Attorney's office." (Dkt. 130, Sarno Decl. at ¶ 4; see Dkt. 130, Opp. at 13-14). But defendants did not submit copies of their conflict

waivers with their opposition and without such waivers, the court cannot determine whether to allow defense counsel to proceed despite the conflict. See, e.g., Exp. Dev. Can., 2017 WL 3122157, at *6 ("[Defendant] and his Counsel have filed a waiver of the conflict at issue."); State Comp. Ins. Fund, 192 F.Supp.3d at 1102 ("It's helpful to start by stepping back and looking at ... all of the relevant language from each waiver[.]"). District courts have "substantial latitude" in approving waivers of conflicts of interest. Exp. Dev. Can., 2017 WL 3122157, at *3 (internal quotation marks omitted). "Determining whether a client provided adequate informed, written waiver is obviously a fact-specific inquiry." State Comp. Ins. Fund, 192 F.Supp.3d at 1099 (internal quotation marks omitted). Among other things, the court must consider:

> (1) the waiver's breadth; (2) its temporal scope, i.e., whether it waived only current conflicts or applied to all conflicts in the future; (3) the quality of the conflict discussion between attorney and client; (4) the specificity of the waiver; (5) the nature of the actual conflict; (6) the sophistication of the client; and (7) the interests of justice.

Exp. Dev. Can., 2017 WL 3122157, at *6 (internal quotation marks and alteration omitted).

In addition to evaluating the conflict waiver, the court must evaluate defense counsel's compliance with Rule 1.7. Specifically, all defense counsel must show that: "(1) the lawyer reasonably believes[ ] that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Cal. R. Prof. Conduct 1.7(d). In addition, "[i]f a lawyer initially represents multiple clients with the informed written consent[ ] as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent[ ] of the clients under paragraph (a)." Id. at 1.7, cmt. 2.

The inherent conflict in a § 1983 case, i.e., where an attorney concurrently represents both the governmental entity and the officers, is not, on its own, sufficient to justify disqualification. Cf. Cal. R. Prof. Conduct 1.13(g). Nevertheless, where, as here, information has been put forward to raise a potential conflict of interest that raises a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to another client, the court must determine whether to disqualify defense counsel in order to ensure the orderly administration of justice and that the integrity of the proceedings is not compromised. See Exp. Dev. Can., 2017 WL 3122157, at *5 ("When a conflict exists, the Court must determine whether to disqualify counsel from the representation in order to ensure that the integrity of the proceedings is not compromised."); Erickson, 87 F.3d at 303 (reversing and remanding for a new trial because "[t]he district court abdicated its duty to examine the charge of unethical behavior and impose the necessary sanctions.") (citation omitted); SpeeDee Oil, 20 Cal.4th at 1144 ("[J]udges must examine [disqualification motions] carefully to ensure that literalism does not deny the parties substantial justice.") (citation omitted). This involves not only reviewing all the conflict waivers executed by all defendants to determine whether each waiver was voluntary, knowing, and intelligent, but also ensuring that defense counsel thoroughly explained to each client all potential conflicts and the risks of moving forward with counsel that have, at a minimum, a potential conflict of interest. See United States v. Martinez, 143 F.3d 1266, 1269 (9th Cir. 1998) ("Trial courts may allow an attorney to proceed despite a conflict if the [client] makes a voluntary, knowing, and intelligent waiver.") (internal quotation marks omitted). In other words, the court must determine whether the clients gave "informed written consent," for "it is the court's duty to ensure that [defense counsel's] client[s], so involved, [are] fully aware of the nature of the conflict and understand[ ] the potential threat to the protection of [their] interests." Dunton, 729 F.2d at 908 (internal quotation marks omitted). Therefore, the court will order additional filings as explained below.

CONCLUSION

***8** Based on the foregoing, IT IS ORDERED THAT:

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1. Plaintiff's Motion **(Document No. 127)** is **granted in part and denied in part without prejudice** subject to filing a renewed motion to disqualify after defendants and defense counsel comply with the provisions of this Order.

2. No later than **April 20, 2020**, defense counsel shall provide a copy of this Order to all defendants.

3. No later than **April 20, 2020**, defendants shall supplement all their discovery responses [6] relating to: (I) the IA investigation; and (ii) whether the officers' conduct was in compliance with municipal policy. [7] See Fed. R. Civ. P. 26(e).

6 If there is nothing to add to defendants' previous discovery responses, then defendants shall state as much in their declaration.

7 The court issued an order compelling defendants to respond to discovery relating to whether Esparza and Lujan complied with municipal policy. (See Dkt. 136, Court's Order of June 10, 2019). However, the court has not seen defendants' discovery responses. During the meet and confer on any subsequent motion to disqualify, the parties should consider whether the interests of justice could be satisfied by having the Firm represent only the individual defendants going forward and the City Attorney representing the entity defendants. This may be appropriate if the discovery responses reveal that there is an actual conflict at this time between the entity and the individual defendants.

4. No later than **April 27, 2020**, defendants and/or defense counsel shall file a Notice of Filing of Conflict Waivers, Supporting Declarations, and Discovery Responses ("Notice"). At a minimum, the Notice shall include:

A. All conflict waivers signed by all defendants in connection with this case. [8]

B. Declarations under penalty of perjury from the City Attorney and the Firm addressing Rule 1.7 and (I) the waivers' breadth; (ii) their temporal scope, i.e., whether they waived only current conflicts or applied to all future conflicts; (iii) the quality of the conflict discussion(s) between attorneys and clients; (iv) the specificity of the waivers; (v) the nature of the actual and potential conflicts; (vi) the sophistication of the clients; and (vii) the interests of justice. In addition, all defense counsel shall indicate, without revealing the substance of such information, whether he or she received confidential information within the meaning of Cal. Bus. & Prof. Code § 6068(e)(1) [9] and Cal. R. Prof. Conduct 1.6 [10] that could help one client at the expense of another, and whether such information has been revealed to all the clients. [11]

C. In addition to the requirements set forth in paragraph B above, all defendants shall provide declarations that, at a minimum, include the following: (I) a statement that they received and reviewed a copy of this Order; (ii) the number of times each defendant discussed the conflict waiver(s) with each defense counsel team (i.e., the City Attorney's Office and the Firm), including approximate dates; (iii) the nature of the actual and potential conflicts of interest discussed; (iv) whether defendants were advised to have the conflict waiver reviewed by independent counsel and whether they did so; and (v) whether defendants and defense counsel discussed the risk of sharing confidential information that could be harmful to one party but beneficial to the other.

***9** D. Defendants shall submit copies of the discovery responses required by paragraph 3 above.

8 For the entity defendants, "the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented[.]" Cal. R. Prof. Conduct 1.13(g).

9 "It is the duty of an attorney to ... maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e)(1).

10 Rule 1.6 provides in relevant part that "[a] lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent[.]" Comment 2 to Rule 1.6 provides that "[t]he principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality[.]"

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11 "To be informed, the client's consent to dual representation must be based on disclosure of all material facts the attorney knows and can reveal." Sheppard, 6 Cal.5th at 84; see Miller, 138 F.Supp.2d at 1256 ("In part, the rule requiring the informed written consent when there is a potential conflict of interest between clients is designed to protect clients from sharing confidences without realizing the potential impact or consequences of doing so.") (citation omitted). The court "recognize[s] that client confidentiality may, in some cases, limit what a [lawyer] may tell one client about [his or her] representation of another." Sheppard, 6 Cal.5th at 86 n. 8. However, if disclosure is precluded either by law, see, e.g., Cal. Bus. & Prof. Code § 6068(e)(1); Cal. R. Prof. Conduct 1.6, or one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision, then "representation subject to paragraph (a), (b), or (c) of ... rule 1.7 is ... prohibited." Rule 1.7, cmt. 7; see Sheppard, 6 Cal.5th at 86 n. 8.

5. No later than **May 18, 2020**, plaintiff, after conducting a telephonic meet and confer with defense counsel, may file another motion to disqualify addressing any other identified conflicts and whether defendants' waivers are sufficient to overcome the conflicts discussed in this Order as well as any newly identified conflicts. At a minimum, plaintiff's Motion shall address defense counsel's analysis of the factors set forth above. See supra at § II.B.

6. Failure to comply with any of the provisions of this Order may result in the imposition of sanctions.

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