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IN THE HIGH COURT  
OF THE  
REPUBLIC OF THE MARSHALL ISLANDS

EIGIGU HOLDINGS CORPORATION, Plaintiff,  -v-  LEANDER LEANDER and LIJUN LEANDER,  Defendants	Civil Action No. 2014-067  <b>ORDER GRANTING MOTION TO DISQUALIFY</b>
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To: Gordon Benjamin, counsel for Eigigu Holdings Corporation  
John Masek, counsel for Leander Leander and Lijun Leander

This case is before the court on Eigigu Holdings Corporation's motion to disqualify John Masek from representing Leander Leander and Lijun Leander. For the reasons discussed below, the court grants the motion.

**Relevant Factual and Procedural History**

From 1993 through 2012, Ruben Tsitsi acted under authority granted by the Government of the Republic of Nauru to represent Nauru's business interest of Eigigu Holdings Corporation (EHC). During the course of his representation of EHC, Tsitsi engaged in negotiations with, and acted as manager for, the Eastern Gateway property complex in Majuro.<sup>1</sup> His authority was revoked by act of the Nauru Cabinet on April 23, 2012, at which time he was recalled back to Nauru.

On April 24, 2012, Mr. Tsitsi was given written notice of his recall and revocation of his authority. Included in that notice was EHC's demand that he return all records

<sup>1</sup> The Eastern Gateway complex comprises property held by various Marshallese landowners. Although the landowners were, and remain, integral parties to the Eastern Gateway complex contracts, in this ruling the court refers to Eigigu Holdings Corporation as the beneficiary of those contracts, as EHC is the plaintiff in this case, and the legal relationship between EHC and the landowners is not necessary to parse out for purposes of this ruling.

related to Eastern Gateway, including an accounting of all financial transactions he made on behalf of EHC during his management of Eastern Gateway.<sup>2</sup>

After his authority to act on behalf of Nauru was revoked, until his death on June 5, 2014, Tsitsi was involved in litigation in the Marshall Islands High Court with various entities and individuals. Among those cases are: CA 2012-143 (Tsitsi's petition for registration as a citizen, filed August 21, 2102); CA 2012-144 (Tsitsi's appeal of the Division of Immigration's order that he be removed from the Marshall Islands, filed August 21, 2012); CA 2012-202 (*Ruben Tsitsi v. Eigigu Holdings Corporation*: breach of contract for unpaid wages and entitlements as manager of the Eastern Gateway complex, filed November 6, 2012); CA 2013-005 (*Eigigu Holdings Corporation v. Ruben Tsitsi*: seeking injunctive relief in the nature of eviction from the Eastern Gateway properties, filed January 16, 2013); and CA 2014-021 (*Eigigu Holdings Corporation v. Ruben Tsitsi*: for money damages from lease and sublease payments received and improperly retained by Tsitsi from Eastern Gateway tenants, filed February 14, 2014).<sup>3</sup> In all of these cases except CA 2014-021, Tsitsi was represented by John Masek.<sup>4</sup>

Review of the chronology and nature of the cases Tsitsi was involved in demonstrates that his legal difficulties in the above-cited cases stemmed from the termination of his authority to represent the Nauru Government in its dealings with the Eastern Gateway complex. Where the cause of action or matters involved in a former suit are substantially related to the present action, an attorney who represented a client in that former suit should not represent his adversary in the present action. *Kabua v. Kabua*, 1 MILR (Rev.) 96, 111 (1988). Although the nature of the claims in each case was necessarily different, the underlying facts for each shared a common basis: Mr. Tsitsi's

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<sup>2</sup> Letter from David Aingimea, Executive Chariman EHC, to Rubin[] Tsitsi, April 24, 2012.

<sup>3</sup> The court takes judicial notice of the exhibits in these files for purposes of this ruling.

<sup>4</sup> By October 2013, Mr. Tsitsi had stopped paying Mr. Masek for the legal services Mr. Masek provided to him. In early November 2013, Mr. Masek moved to withdraw from all cases in which he represented Tsitsi. Although there is no order reflecting that the court ruled on his motions, Mr. Masek indicates that he was granted leave to withdraw from all cases. (Masek affidavit, December 8, 2014, ¶ 14.) Tsitsi was represented by the Office of the Public Defender in CA 2014-021, which was filed after Masek moved to withdraw from Tsitsi's other cases.

dispute with EHC.<sup>5</sup> In the cases that did not concern his immigrant status, the underlying facts involved EHC's claims that Mr. Tsitsi had either negotiated Eastern Gateway leases or subleases without full authority, wrongfully withheld money paid by lessees or sub-lessees and due to EHC, or wrongfully withheld records that reflected the business dealings he purportedly conducted with Eastern Gateway lessees or sub-lessees on EHC's behalf.<sup>6</sup>

When Tsitsi died, all of the cases in which he was a party were dismissed. But the issues caused by his alleged mishandling of leases and subleases remained. And Tsitsi's actions of having allegedly directly interfered with EHC's ability to renegotiate contracts with lessees and sub-lessees after his discharge further exacerbated EHC's ability to preserve its business interests.

The current case reflects EHC's efforts to follow up on what occurred between Tsitsi and Leander Leander and Lijun Leander, during negotiations where EHC alleges Tsitsi acted without authority, and that he improperly, if not illegally, retained funds purportedly paid for the benefit of EHC. The complaint encompasses allegations of irregularities concerning the lease agreement Tsitsi entered into with the Leanders, including that it was entirely unauthorized, the term was contrary to 24 MIRC Section 438, law, the amount received was contrary to practice, the document was not provided by Tsitsi to EHC, and EHC had been fully unaware of the agreement. EHC requests the court declare, among other things, that the 2006 sub-lease between Tsitsi and the Leanders, and the sub-leases between the Leanders and any sub-lessees, are invalid.

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<sup>5</sup> For the reasons stated in this order, the court rejects Masek's claim that the subject matter in this case is not substantially related to the matters in which he represented Tsitsi.

<sup>6</sup> *See*, letter from EHC Executive Chairman David Aingimea and Director Dexter Brechtefeld to Ruben Tsitsi, dated May 11, 2012: "Your claim for entitlements [the claim raised in CA 2012-202], cannot be worked out until financial reports show what monies were paid to yourself by yourself and how these are justified and authorized." That letter also addresses the deadline (that day) for Mr. Tsitsi to vacate the Eastern Gateway premises [addressed in CA 2013-005]; Mr. Tsitsi's decision not to return to Nauru, but instead to request EHC's assistance in obtaining a Nauru passport so that he might stay in RMI [addressing the immigration issues raised in CA 2012-143 and CA 2012 144]; and Mr. Tsitsi's request that EHC finance his children's travel to the USA instead of return to Nauru [very possibly raised in CA 2013-005], all of which were "on hold pending a full financial report from you as above."

At all times between 1996 and April 23, 2012, Tsitsi was an agent for EHC. EHC moves to disqualify Masek, who formerly represented their agent, from now representing the Leanders,<sup>7</sup> based upon contracts Tsitsi negotiated with them as EHC's agent.

### **Flaws in EHC's Argument**

The focus of EHC's motion to disqualify is that Masek may have an unfair advantage in this litigation, because he is privy to information gained during the course of his representation of Tsitsi to which EHC is entitled but does not have, and that the Leanders may use this information to EHC's disadvantage. As Masek points out, even if this were true, it does not provide a basis for the court to disqualify Masek from representing the Leanders. EHC's counsel points to no rule or other authority that focuses the inquiry on EHC's rights, and it is not the court's obligation to level the playing field between the parties under this scenario.

EHC also argues that Masek must be disqualified because EHC intends to call Masek as a witness to testify concerning the information he came into possession of during the course of his representation of Tsitsi. Again, as pointed out by Masek, this argument does not rise to the level of requiring Masek's disqualification, although not because EHC's counsel should have discovered this information while Tsitsi was alive, as argued by Masek. EHC's mere allegation that it will call Masek as a witness does not make it so, and, as urged by Masek, the court must subject this claim to "particularly strict judicial scrutiny." *Optyl Eyewear Fashion Intern. Corp. v. Style Cos., Ltd.*, 560 F.2d 1045, 1050 (9<sup>th</sup> Cir. 1985). The court finds no scenario supported by the record at this time to conclude that Masek is an indispensable witness to this case, and rejects this as grounds to disqualify Masek.

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<sup>7</sup> For purposes of this ruling, the court treats Leander Leander and Lijun Leander together. Currently, both are in default. During the course of the hearing on EHC's motion for default judgment, the then-presiding judge recused himself, and Masek then substituted for Leanders' former counsel. Masek has filed a motion to set aside entry of default. The Leanders' former counsel only addressed contact that he had had with Leander Leander, and not Lijun Leander, who apparently is residing outside this country. Mr. Masek entered an appearance for both Leander Leander and Lijun Leander, whereby the court presumes their interests are the same.

### **Other ethical issues disqualify Masek from further representation of the Leanders**

EHC's motion focuses on whether Masek's former representation of Tsitsi has compromised EHC's counsel ability to properly represent EHC based on Masek's allegedly being in possession of information belonging to EHC that he may use against EHC in this case. The court has concluded that this is not an ethical issue requiring Masek's disqualification. However, Masek's representation of the Leanders does raise two serious ethical issues. 1) May Masek ethically represent a party sued by a principal, based upon negotiations between that party and the principal's agent, when he formerly represented the agent in matters related to his agency? 2) May Masek ethically represent a client, when he is constrained from providing that client a full defense, due to representation of a former client?

When Tsitsi conducted business in the Marshall Islands concerning the Eastern Gateway property complex, his only authority to do so was as EHC's agent. This is uncontested. When he acted within the scope of his authority, he was, essentially, EHC, and his interests were aligned with EHC's interests. If he acted outside the scope of his authority, his interests were adversarial to EHC's interests.

EHC's suit against the Leanders concerns leases and sub-leases between EHC and the Leanders that Tsitsi negotiated on behalf of EHC. If Tsitsi were acting within the scope of his authority when he negotiated these leases on EHC's behalf, his interests are aligned with EHC's, and Masek's representation of the Leanders would entail representation of the interests of one client that are materially adverse to the interests of the former client. If Tsitsi were acting outside the scope of his authority when he negotiated these leases on EHC's behalf, any defense of the validity of the leases will require asserting Tsitsi's lack of authority, which is materially adverse to the interests of Masek's former client. Under either scenario, Rule 1.9, American Bar Association Model Rules of Professional Conduct, prevents Masek's representation of the Leanders, unless Tsitsi gives informed written consent, which is impossible.<sup>8</sup>

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<sup>8</sup> Rule 1.9, Duties to Former Clients provides that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which

Additionally, as EHC alleges that Tsitsi was acting outside the scope of his authority when he negotiated the leases with the Leanders, if Masek represents the Leanders, there is a significant risk that his representation will be limited by his ethical responsibilities to Tsitsi, which survive Tsitsi's death. Rule 1.7 proscribes such representation.<sup>9</sup> If Masek became aware of information through confidential communications with Tsitsi that might assist the Leanders in their defense, he is precluded from using that information in any manner during the course of his representation of the Leanders. The potentially viable defense of claiming that Tsitsi misrepresented EHC during the course of the Leanders' negotiations with him, or that Tsitsi is otherwise at least partially responsible for EHC's claims against the Leanders, cannot be raised if Masek represents the Leanders.<sup>10</sup> Furthermore, due to his former representation of Tsitsi, Masek cannot even fully advise the Leanders concerning all possible defenses available to them. Masek would be constrained from defending the Leanders by pointing the finger at Tsitsi, regardless of whether he is in possession of any information that might be used to support that theory of defense, and cannot argue that it was Tsitsi, not the Leanders, who acted inappropriately.

Although the ethical issues raised in Rule 1.7 and 1.9 may be waived, a condition precedent to a Rule 1.9 waiver is the written informed consent of the former client. A condition precedent to a Rule 1.7 waiver is the written informed consent of both clients.

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that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. Close cases are resolved in favor of disqualification in order to preserve the integrity of the judicial system. *Roosevelt Irrigation District v. Salt River Project Agricultural Improvement and Power District*, 810 F. Supp. 2d 929, 944 (D. Az. 2011).

<sup>9</sup> Rule 1.7, Conflict of Interest: Current Clients provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interests where representation of one client will be directly adverse to another client, or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to a former client. This conflict may be waived if four conditions are met, one of which is informed written consent by both clients.

<sup>10</sup> EHC seeks a declaration that the 2002 sublease entered into between Rubin Tsitsi and the Leanders, and all sub-leases the Leanders entered into, are invalid. (Complaint, pg. 5 ¶ 2.) As the Leanders are currently in default, and have not answered the complaint, the court has no way of knowing how they might defend. But a review of each allegation in the complaint, and each claim for relief, leads the court to conclude that it is highly improbable that the Leanders can present any defense, other than requiring strict proof and standing on denials, that does not implicate Tsitsi in some manner.

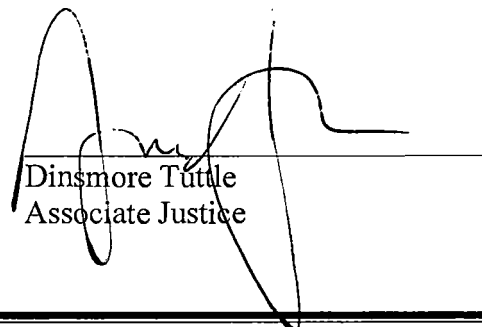
Tsitsi clearly cannot give his consent. And before the court could conclude that the Leanders gave their informed consent, they would need to be advised by conflict-free counsel. Clearly, Masek would not be able to advise them on this issue. Therefore, as the conflicts identified in Rules 1.7 and 1.9 may not be waived, this forms an insurmountable obstacle to Masek's continued representation of the Leanders.

The court makes this conclusion reluctantly, understanding the Leanders' right to counsel of their choice. However, the court is charged with preserving the public trust both in the scrupulous administration of justice and in the integrity of the bar, and a client's important right to counsel of his choice must yield to considerations of ethics which go to the very integrity of the judicial process. *Comden v. Superior Court of Los Angeles County*, 576 P.2d 971, 975 (Cal. 1978). One of the most basic principles underlying the attorney-client relationship is that one seeking legal counsel may entrust confidences to his lawyer, and trust that those confidences will not be revealed without one's express permission, even after death. And it is equally important that one may expect his attorney to represent him unconstrained by his duty to other clients, current or former. These are the principles that cannot be reconciled here, and cause the court to disqualify Mr. Masek from representing the Leanders.

For the reasons stated above, the motion is GRANTED.

The court grants the Leanders 45 days to hire a new attorney. As the current motion to set aside default was filed by Masek on behalf of the Leanders, the court must reject that motion. If the Leanders' new lawyer files a motion to set aside default by February 17, 2015, the court will enter a briefing schedule on that motion. Otherwise, at that time the court will reschedule the continued hearing on the motion for entry of default judgment.

Dated: 29 December 2014



Dinsmore Tuttle  
Associate Justice