

**Tentative Rulings for April 26, 2023**

**Department 501**

**Unless otherwise ordered, all oral argument in Department 501  
will be presented in person or telephonically (not through Zoom).**

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

21CECG02467      *Richard V. Gunner and Margaret S. Gunner, as Trustees of the  
Gunner Revocable Trust v. Lifeway Christian Resources of the  
Southern Baptist Convention* is continued to Tuesday, May 9, 2023.

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 501**

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(24)

**Tentative Ruling**

Re: **Vernick v. Costco Wholesale Corporation**  
Superior Court Case No. 22CECG01113

Hearing Date: April 26, 2023 (Dept. 501)

Motion: by Defendant Costco Wholesale Corporation for Order  
Disqualifying Downtown L.A. Law Group

**Tentative Ruling:**

To grant the motion as to Anthony Werbin, personally. To deny the motion as to Downtown L.A. Law Group.

**If oral argument is timely requested, such argument will be entertained at 3:00 p.m. in Department 501.**

**Explanation:**

Evidentiary Objections/Judicial Notice

All evidentiary objections to the Declaration of Leigh Ann Ruijters are sustained based on lack of foundation to support personal knowledge of the declarant. Code of Civil Procedure section 2009 generally authorizes the use of affidavits and declarations in motion proceedings, creating an exception to the hearsay rule and rendering them *potentially* admissible as evidence. However, declarations must still be based on personal knowledge rather than hearsay. (Evid. Code, § 702.) Here, Ms. Ruijters states she is “the Corporate Representative” for moving defendant (¶1) and that she has personal knowledge of the facts stated in her declaration (¶ 2).<sup>1</sup> This is not enough; the declaration itself must contain *facts* showing the declarant’s connection with the matters stated therein, establishing the source of his or her information. Otherwise, a mere statement that he or she has such knowledge is purely a conclusion. (*Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 850-851)

Ms. Ruijters’ statement that she is Costco’s “Corporate Representative,” without more, is entirely insufficient to establish her personal knowledge of the facts stated in her declaration. She also does not make clear the time period that she has held that position, since even if she had explained that her job duties necessarily required her to have personal knowledge of these types of facts, in order to have personal knowledge of these facts, specifically, she would have had to hold that position for the relevant time period.

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<sup>1</sup> She further states an exception to her personal knowledge, namely where she states matters on information and belief. However, an affidavit based on “information and belief” is hearsay and must be disregarded. (*Baustert v. Superior Court* (2005) 129 Cal. App. 4th 1269, 1275; *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204 [citing cases].)

Evidentiary objections 8, 9 and 10 to the Mason declaration are sustained, but all other evidentiary objections to his declaration are overruled.

### Merits

Defendant Costco Wholesale Corporation ("Costco") seeks to disqualify the plaintiff's law firm, Downtown L.A. Law Group ("DTLA"), because an attorney who works at that firm, Anthony Werbin, was previously an associate at Manning & Kass, Elrod, Ramirez, Trester LLP ("M&K") from July 2017 to January 2020, and during that time he represented Costco in approximately 20 cases involving claimed injuries occurring at various Costco warehouse locations. Costco argues that not only is Mr. Werbin conflicted and thus not able to represent plaintiff without Costco's express consent (which it does not give), this conflict of interest is also imputed to DTLA, such that it is also conflicted and cannot represent plaintiff in this action.

Each court has the power to "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." (Code Civ. Proc. § 128, subd (a)(5).) This power permits courts to disqualify an attorney based upon a conflict of interest on the motion of another party. (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585.) The court must cautiously balance competing interests and "weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest." (*William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048.)

"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 that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent." (Cal. Rules Prof. Cond., rule 1.9(a).) The confidential information obtained during the prior attorney-client relationship must be "material to the current representation." (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1724.) If immaterial, "mere exposure to confidential information of the opposing party does not require disqualification." (*Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 842.)

A "substantial relationship" exists between the former representation and the current "whenever the 'subjects' of the prior and the current representations are linked in some rational manner." (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 711 ("Jessen"), internal quotes omitted.) The "subject" of a representation includes "information material to the evaluation, prosecution, settlement or accomplishment of the litigation or transaction given its specific legal and factual issues." (*Id.* at p. 713.) Where the evidence before the court "supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former

representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues, the matters will be considered 'substantially related.'" (*Ibid.*)

Therefore, the determination of whether an attorney should be disqualified in a successive representation case "turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." (*Jessen, supra*, 111 Cal.App.4th at p. 709, citing primarily to *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445.) In *Jessen*, the court noted that the second factor of this "Ahmanson formula" had particular significance:

If the relationship between the attorney and the former client is shown to have been direct—that is, where the lawyer was personally involved in providing legal advice and services to the former client—then it must be presumed that confidential information has passed to the attorney and there cannot be any delving into the specifics of the communications between the attorney and the former client in an effort to show that the attorney did or did not receive confidential information during the course of that relationship. As a result, disqualification will depend upon the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation.

(*Jessen, supra*, 111 Cal.App. 4th at p. 709; see also *In re Complex Asbestos Litigation, supra*, 232 Cal.App.3d at p. 587)

- Issue: Disqualification of Individual Attorney

Even with the ruling on evidentiary objections, there is sufficient evidence presented for the court to find that Anthony Werbin is disqualified from representing plaintiff in this matter. His own declaration establishes that while working at Manning & Kass, Elrod, Ramirez, Trester LLP ("M&K") from July 2017 to January 2020, he represented Costco in approximately 20 cases involving claimed injuries occurring at various Costco warehouse locations. Even if the injuries and how they occurred were different, and different Costco warehouses were involved, similar issues of premises liability negligence will be in play, e.g., constructive notice sufficient to implicate Costco's liability for a dangerous condition. Therefore, the subjects of the prior and the current representations are linked in a rational manner.

Moreover, Mr. Werbin's declaration establishes that he had a direct relationship with his client, Costco: he stresses that he worked independently, receiving "no specific direction" from other attorneys at M&K, and that all litigation decisions were left to his own discretion. (Werbin Decl., ¶¶ 6-8.) Thus, it must be conclusively presumed that he

received confidential information, and there can be no “delving into the specifics” of any such communications.<sup>2</sup> (*Jessen, supra*, 111 Cal.App. 4th at p. 709.)

- Issue: Vicarious Disqualification of the DTLA Firm

When an attorney is disqualified due to a successive representation conflict, the attorney's entire firm may be vicariously disqualified as well. (Cal. Rules Prof. Cond., rule 1.10(s).) “The vicarious disqualification rule recognizes the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154.) However, the rule of vicarious disqualification is not absolute, even where the court presumes the “tainted attorney” holds confidential information, as here. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 800.) Instead, in the proper circumstances, the presumption of disqualification of the entire firm is rebuttable, and can be refuted by evidence “that ethical screening will effectively prevent the sharing of confidences in a particular case.” (*Id.* at p. 801.)

Some typical elements that will be found to create an effective ethical screen include: (1) “physical, geographic, and departmental separation of attorneys;” (2) “prohibitions against and sanctions for discussing confidential matters;” (3) “established rules and procedures preventing access to confidential information and files;” (4) “procedures preventing a disqualified attorney from sharing in the profits from the representation;” and (5) “continuing education in professional responsibility.” (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 116, fn. 6.)

Plaintiff presents the declaration of Amira Rezkallah, the Human Resources Manager and Administrative Director at DTLA. Her duties require her to oversee administrative matters, which include the firm's software features. The declaration of Edward Morgan, a member of DTLA, also supplies detail relating to the firm's ethical screen. Mr. Morgan says DTLA attorneys are divided into teams, with each senior attorney heading a team. The teams have their own set of attorneys, paralegals and office staff, and do not share team members. There is a firm policy in place that Mr. Werbin's team is not assigned any cases involving Costco, and this has been the practice since he began working for DTLA. The teams are geographically separated. The firm has prohibitions against and sanctions for discussing confidential matters, including but not limited to immediate dismissal. Mr. Werbin does not share profits (income or bonuses) that have been made on Costco cases. The firm requires continuing education in professional responsibility. All case information, documents and files are stored electronically, and Mr. Werbin does not have access to any case files or information involving Costco cases. Files are password protected. In December 2021, the firm switched from AbacusLaw to a new software system named

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<sup>2</sup> Even without this conclusive presumption, the court would not credit Mr. Werbin's statement that he “was never provided with any confidential or proprietary information by COSTCO during my employment at M&K” (Werbin Decl., ¶ 9), given his other statements about independently handling all of his cases.

FileVine. AbacusLaw shielded Costco files from Mr. Werbin, but FileVine has a superior shielding mechanism: it allows only those with administrative roles at the firm, or those who have been assigned to a case to be able to view files associated with a case. This means that employees of the firm are unable to search a matter they are not assigned to. Anthony Werbin states that since beginning his employment with DTLA, he has not worked on any Costco case, in any capacity.

This is sufficient to show that an effective ethical screen has been put in place to prevent Mr. Werbin from sharing any confidential information concerning Costco. If he is not working on this case, and he is not sharing any knowledge he has about Costco, there is no basis for disqualification. The purpose of a disqualification must be prophylactic; an attorney may not be disqualified purely as a punitive or disciplinary measure. (*Neal v. Health Net, Inc., supra*, 100 Cal.App.4th at p. 844.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** DTT on 4/21/2023.  
(Judge's initials) (Date)