

FILED

12 JUL 26 AM 9:25

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-2-21829-3 SEA

THE HONORABLE CAROL SCHAPIRA
NOTED WITHOUT ORAL ARGUMENT ON JULY 27, 2012

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GEOFF TATE and SUSAN TATE, a married
couple,

Plaintiffs,

v.

EDDIE JACKSON and TERESA GOLDEN-
JACKSON, a married couple; SCOTT
ROCKENFIELD and MISTY
ROCKENFIELD, a married couple;
MICHAEL WILTON and KERRIE LYNN
WILTON, a married couple; TRI-RYCHE,
CORPORATION, a Washington corporation;
QUEENSRYCHE MERCHANDISING, INC.,
a Washington corporation; and MELODISC
LTD., a Washington corporation,

Defendants.

Case No. 12-2-21829-3 SEA

REPLY MEMORANDUM IN FURTHER
SUPPORT OF MOTION TO DISQUALIFY
COUNSEL FROM REPRESENTING THE
CORPORATE DEFENDANTS

REPLY MEMORANDUM IN FURTHER
SUPPORT OF MOTION TO DISQUALIFY
COUNSEL FROM REPRESENTING THE
CORPORATE DEFENDANTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

I. Introduction

In their initial motion papers, plaintiffs Geoff and Susan Tate explain why Mr. Thomas Osinski, Jr. should be disqualified as counsel for defendants Tri-Ryche Corporation, Queensryche Merchandising, Inc., and Melodisc Ltd. (collectively, the “QR Companies”), due to the non-waivable conflicts of interests Mr. Osinski faces in jointly representing the QR Companies and its majority shareholders and directors Scott Rockenfield, Eddie Jackson, and Michael Wilton, who are also defendants represented by Mr. Osinski.

In addition, as the Tates explain, the QR Companies do not require Mr. Osinski to represent them since they already have counsel, Neil Sussman, who has been representing the QR Companies for years, and they are merely nominal defendants in this lawsuit.

Mr. Osinski asserts there is no conflict or, if there is, it can be waived. In so doing, however, he ignores key points why he is conflicted, misstates relevant RPCs and Washington case law, attempts to distract this Court with self-serving and irrelevant facts, and wholly fails to establish that no conflict exists or that it can be waived. Thus, he should be disqualified from representing the QR Companies.

II. Authorities

A. Mr. Osinski Has a Conflict of Interest Because He Represents All of the Shareholders in a Closely-Held Corporation

17
18
19
20
21
22
23
24
25
26

As the Tates explain in their motion, Mr. Osinski has a conflict of interest because the QR Companies are small, closely-held corporations and, as a result, Mr. Osinski owes a fiduciary duty to all shareholders, including Geoff Tate. Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., 541 N.E.2d 997, 1002 (Mass. 1989). Clearly, Mr. Osinski cannot comply with his duties to Geoff because of his conflicting duties to Rockenfield, Jackson, and Wilton. Mr. Osinski did not address this conflict in his opposition, or how it can possibly be waived, conceding it is valid. Thus, on this basis alone, disqualification is appropriate.

1 **B. Mr. Osinski Cannot Represent the QR Companies Because of He Owes His**
2 **Undivided Loyalty to the Individual Defendants**

3 As the Tates also explain in their motion, in this lawsuit, Geoff asserts claims
4 individually as a shareholder in the QR Companies and derivatively, on behalf of the QR
5 Companies. One claim asserted in his individual capacity is the claim for oppression. The
6 assertion of the individual claims creates conflicts of interest between Rockenfield, Jackson, and
7 Wilton on the one hand, and the QR Companies on the other. And because of his duties to
8 Rockenfield, Jackson, and Wilton, Mr. Osinski cannot adequately represent the QR Companies
9 with respect to the individual claims. Instead, Mr. Osinski's ability to represent the QR
10 Companies with respect to these claims is materially limited by his representation of the
11 individual defendants. Indeed, Mr. Osinski can take only one course of action with respect to
12 these claims – deny their validity – since doing anything else would violate his ethical duties to
13 Rockenfield, Jackson, and Wilton. This is so regardless of whether denying the validity of the
14 claims is in the interests of the QR Companies. Indeed, another attorney could reasonably
15 determine that the QR Companies should not deny the claims, but Mr. Osinski cannot consider
16 taking this position since it would violate his duties to Rockenfield, Jackson, and Wilton. This
17 material limitation on the representation of the QR Companies creates a conflict of interest under
18 the RPCs. RPC 1.7(a).

19 Tellingly, Mr. Osinski does not respond to this argument in the motion, conceding it is
20 valid. For this reason, too, disqualification is warranted.

21 **C. Mr. Osinski Attempts to Distract the Court with Irrelevant Facts**

22 Instead of addressing these two arguments in the motion, Mr. Osinski attempts to argue
23 certain facts about the QR Companies and what he claims Geoff has done since the litigation was
24 commenced. But the facts are inadmissible since Mr. Osinski lacks personal knowledge
25 regarding the QR Companies and his declaration is based on hearsay. The facts are also
26 misleading, inaccurate or just plain false. But the Tates need not respond to them, and this Court

1 need not consider them, since they are entirely irrelevant to whether Mr. Osinski's joint
2 representation of the individual defendants and the QR Companies creates a conflict of interest
3 that requires his disqualification.

4 **D. Joint Representation is Inappropriate in Derivative Suits**

5 Due to the derivative claims, which place the QR Companies in the place of the plaintiffs,
6 the interests of the QR Companies and Rockenfield, Jackson, and Wilton are directly adverse. If
7 Rockenfield, Jackson, and Wilton are found liable, they must pay the QR Companies damages.
8 This creates a conflict of interest under RPC 1.7(a).

9 In opposition, Mr. Osinski cites a case where the trial court disqualified an attorney and
10 sanctioned him for defending a company and its directors in a derivative lawsuit. Hicks v.
11 Edwards, 75 Wn.App. 156, 161 (1994). Understandably, the attorney did not appeal the
12 disqualification order, but merely sought reversal of the sanctions. Thus, Hicks only further
13 supports disqualification here. In addition, Mr. Osinski incorrectly quotes Hicks. The quote he
14 cites is not from the Washington court, as he represents to this Court, but from a case in
15 Louisiana that the Washington court recognized went against the great weight of authority that
16 holds that joint representation of a corporation and its directors in a derivative case is
17 inappropriate Id. at 163-64.

18 Thus, Mr. Osinski fails to establish that there is no conflict. Instead, as the weight of
19 authority makes clear, there is a conflict here under the RPCs and disqualification is warranted.

20 **E. Informed Consent is Inapplicable in Derivative Suits**

21 Despite the conflicts of interests which exist between his clients and the QR Companies,
22 Mr. Osinski states that any conflicts may be waived through informed consent.¹ Mr. Osinski
23 cites RPC 1.13(g) to support this incorrect argument. Yet, 1.13(g) says informed consent is
24 subject to RPC 1.7 and the commentary to 1.13 says waiver is inappropriate if the derivative

25 ¹ Although difficult to decipher, it appears that Mr. Osinski admits that his individual clients,
26 Rockenfield, Jackson, and Wilton, and the corporate defendants, the QR Companies, have not
consented to the joint representation.

1 claims involve “serious charges of wrongdoing.” Mr. Osinski does not deny that the claims here
2 involve serious charges of wrongdoing against Rockenfield, Jackson, and Wilton. Thus,
3 informed consent is not available.

4 In addition, courts do not allow waiver in derivative suits when the consent is provided
5 by the very defendant shareholders or directors whose actions harmed the corporation. Forrest v.
6 Baeza, 67. Cal. Rptr. 2d 857, 864, (Cal. Ct. App. 1997); Cannon v. U.S. Acoustics Corp., 398 F.
7 Supp. 209, 216, fn. 10, (N.D. Ill 1975) (“This consent rationale seems peculiarly inapplicable to
8 a derivative suit, because the corporation must consent through the directors, who, as in the
9 present case, are the individual defendants.”); In re Oracle Securities Litigation, 829 F. Supp
10 1176, 1189 (N.D. Cal. 1993) (corporations “cannot effectively waive a conflict of interest”
11 because it is the directors themselves who are the defendants in a derivative suit.)

12 Thus, the conflict faced by Mr. Osinski by his joint representation of Rockenfield,
13 Jackson, and Wilton, on the one hand, and the QR Companies on the other, cannot be waived.
14 Mr. Osinski must be disqualified as counsel for the QR Companies.

15 III. Conclusion

16 Due to the conflicts of interest he faces in representing the individual defendants and the
17 QR Companies, this Court should disqualify Mr. Osinski from representing the QR Companies.

18 Dated this 26th day of July, 2012.

19 Respectfully submitted,

20 VERIS LAW GROUP PLLC

21 /s/ Benjamin J. Stone

22 Benjamin J. Stone, WSBA No. 33436
23 Joshua C. Brower, WSBA No. 25092
24 Denver R. Gant, WSBA No. 38552
25 Attorneys for Plaintiffs
26 Geoff Tate and Susan Tate

4849-6204-1616, v. 1