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Attorneys for Defendants Ute Indian Tribe of the Uintah and Ouray Reservation, a federally chartered corporation; Ute Indian Tribe of the Uintah and Ouray Reservation, a federally recognized Indian tribe; the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings, LLC, a Delaware LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

LYNN D. BECKER,

Plaintiff,

vs.

UTE INDIAN TRIBE OF THE UINTAH
and
OURAY RESERVATION, a federally
chartered corporation; UTE INDIAN TRIBE
OF THE UINTAH AND OURAY
RESERVATION, a federally recognized
Indian tribe; the UINTAH AND OURAY
TRIBAL BUSINESS COMMITTEE, and
UTE ENERGY HOLDINGS, LLC, a
Delaware LLC,

Defendants.

**MOTION TO DISQUALIFY
AND MEMORANDUM IN
SUPPORT OF MOTION TO
DISQUALIFY**

Civil No. 2:13-cv-00123

Honorable Dee Benson

Defendants Ute Indian Tribe of the Uintah and Ouray Reservation, a federally-chartered corporation (“the Tribal Section 17 Corporation”); the Ute Indian Tribe of the Uintah and Ouray Reservation, a federally-recognized Indian Tribe (the “Tribe”); the Uintah and Ouray Tribal Business Committee (the “Business Committee”), and Ute Energy Holdings, LLC, a Delaware LLC (“Ute Holdings”) (together, the “Tribal Defendants”) file this motion to disqualify David Isom, as attorney or record for Plaintiff Lynn Becker (“Becker”).

SUMMARY OF THE TRIBAL DEFENDANTS’ MOTION

“A party seeking disqualification must establish that (1) an actual attorney-client relationship existed between the moving party and the opposing counsel; (2) the present litigation involves a matter that is substantially related to the subject of the movant’s prior representation; and (3) the interests of the opposing counsel’s present client are materially adverse to the movant. *U.S. v. Lustyik*, No. 2:12-CR-645-TC, 2012 U.S. Dist. LEXIS 178251 at *22 (D. Utah, Dec. 17, 2012) (quoting *U.S. v. Stiger*, 413 F.3d 1185, 1196 (10th Cir. 2005), *aff’d* 251 Fed. App’x. 508 (10th Cir. 2007)) (internal quotations omitted). “Rule 1.9 allows disqualification of an attorney who sues a former client in a substantially related matter.” *Artificial Nail Technologies Inc. v. Flowering Scents, LLC.*, No. 2:06CV609DAK, 2006 U.S. Dist. LEXIS 54735 at *6, (D. Utah, Aug. 4, 2006) (*citing Houghton v. Dep’t. of Health*, 962 P.2d 58, 61 (Utah 1998)).

STATEMENT OF FACTS

The David K. Isom Law Offices represented the Ute Indian Tribe and members of the Tribe’s Business Committee from approximately April 2004 until approximately November 2004. Affidavit of J. Preston Stieff at ¶ 3, Exhibit A, attached hereto. The David K. Isom Law Offices, through attorney David K. Isom and J. Preston Stieff, represented the Tribe and Business Committee as attorneys of record in the following cases: *Wopsock v. Natchees*, No. 2:04-CV-

00675-TS, slip op. (D. Utah June 21, 2005), *aff'd*, 279 Fed. App. 679 (10th Cir. 2008) and *Shaw Resources Limited, LLC v. Pruitt, Gushee & Bachtell, P.C.*, Case No. 040902251 (3rd Jud. Dist., Salt Lake County, Utah). Affidavit of J. Preston Stieff at ¶4.

The David K. Isom Law Offices also represented the Tribe and Business Committee on a number of non-litigation issues including the negotiating on behalf of the Tribe with EOG Resources on matters pertaining to the Tribe's oil and gas resources including valuations, supply, and development of the same. Affidavit of J. Preston Stieff at ¶ 9. The David K. Isom Law Offices' representation of the Tribe on oil and gas matters involved attorney-client privileged meetings attended by Becker, among others from the Tribe. Affidavit of J. Preston Stieff at ¶ 10.

ARGUMENT

A. David K. Isom has an impermissible conflict of interest that requires disqualification under URPC 1.9(a).

David K. Isom is prohibited from representing Becker in this case because David K. Isom previously represented the Ute Indian Tribe and members of the Business Committee in litigation and in matters substantially related to this case. The United States District Court for the District of Utah has adopted the Utah Rules of Professional Conduct ("URPC"). *Lustyik*, 2012 U.S. Dist. LEXIS 178251 at *21. URPC 1.9 provides:

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 consent, confirmed in writing

URPC 1.9(a). "A party seeking disqualification must establish that (1) an actual attorney-client relationship existed between the moving party and the opposing counsel; (2) the present litigation involves a matter that is substantially related to the subject of the movant's prior representation; and (3) the interests of the opposing counsel's present client are materially adverse to the movant.

Lustyik, No. 2:12-CR-645-TC, 2012 U.S. Dist. LEXIS 178251 at *22, quoting *Stiger*, 413 F.3d at 1196 (internal quotations omitted). “Rule 1.9 allows disqualification of an attorney who sues a former client in a substantially related matter.” *Artificial Nail Technologies Inc.*, 2006 U.S. Dist. LEXIS 54735 at *6 (citing *Houghton*, 962 P.2d at 61).

1. An Actual Attorney-Client Relationship Existed between the Ute Indian Tribe and the David K. Isom Law Offices.

The first prong Defendants must prove is that an attorney-client relationship existed between the Ute Indian Tribe and the David K. Isom Law Offices. “An attorney-client relationship exists when the client reasonably believes the attorney represents the client’s legal interests.” *Rocerick v. Ricks*, 54 P.3d 1119, 1125 (Utah 2002). Attorneys from the David K. Isom Law Firm were attorneys of record on behalf of the Tribe and members of the Business Committee in at least two cases and advocated for the Tribe in other areas related to oil and gas development on Tribe’s behalf. Affidavit of J. Preston Stieff at ¶¶ 3, 4, and 9.

Court records as well as the Affidavit of J. Preston Stieff establish an attorney-client relationship existed between the David K. Isom Law Offices, the Ute Indian Tribe, and the Business Committee.

2. The Present Litigation Involves a Matter that is Substantially Related to the Subject of the David K. Law Offices’ Previous Representation of the Ute Indian Tribe.

The next issue is whether the present litigation involves a matter that is substantially related to the subject of the David K. Isom Law Offices’ previous representation of the Ute Indian Tribe. “Matters are substantially related if the factual contexts of the two representations are similar or related.” *Lustyik*, No. 2:12-CR-645-TC, 2012 U.S. Dist. LEXIS 178251 at *28 (quoting *Stiger*, 413 F.3d at 1196.) “The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in

question.” *Id.* “If there is a reasonable probability that during the course of the earlier representation, the former client disclosed confidential information which could be used against him in the subsequent adverse representation, the two matters are considered to be substantially related.” *Lustyik*, 2012 U.S. Dist. LEXIS 178251 at *28 (quoting *Funplex Partnership v. F.D.I.C.*, 19 F. Supp. 2d 1201, 1207 (D. Colo. 1998)). “Substantiality is present if the factual context of the two representations are similar or related.” *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985) (quoting *Trust Corp of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983)).

In this case, the David K. Isom Law Offices’ prior representation of Ute Indian Tribe and members of the Business Committee is substantially related to David K. Isom’s representation of Becker in his claims against the Tribal defendants, including the Ute Indian Tribe and the Business Committee. The David K. Isom Law Offices negotiated on behalf of the Tribe with EOG Resources on matters pertaining to the Tribe’s oil and gas resources. Affidavit of J. Preston Stieff at ¶ 9. The David K. Isom Law Offices’ representation of the Tribe on oil and gas matters involved attorney-client privileged meetings attended by Becker, among others from the Tribe. Affidavit of J. Preston Stieff at ¶ 10. This work required the David Isom Law Offices, when representing the Ute Indian Tribe, to work hand-in-hand with Becker, by virtue of Becker’s position with the Tribe. *Id.*

In the *Shaw* litigation, the David K. Isom Law Offices represented the Ute Indian Tribe’s interests in a motion to intervene and a motion for a protective order which, relevantly, was in order to protect the Tribe from unauthorized use of its confidential information by former legal counsel. Affidavit of J. Preston Stieff at ¶ 7. The *Shaw* case involved oil and gas fields located on the Uintah and Ouray Reservation in the Hill Creek extension. *Id.* During its representation of the Tribe, David K. Isom Law Offices had near daily phone calls between the David K. Law

Offices and Davis Graham & Stubbs, the Tribe's then general counsel. Affidavit of J. Preston Stieff at ¶ 8. During this time, David K. Isom Law Offices worked on matters that are at issue here including extensive work on the issues of the Tribe's sovereign immunity and protection of confidential information in *Shaw* where the Tribe's oil and gas resources were directly at issue. *Id.*

In the *Wopsock* litigation, the David K. Isom Law Offices represented members of the Business Committee in their official and individual capacities. The matters at issue in *Wopsock* are substantially related to the matters in this case. The David K. Isom Law Offices defended the Business Committee members by arguing the Ute Indian Tribe has not submitted itself to Federal Court jurisdiction; that a violation of the Indian Reorganization Act does not give rise to Federal Court jurisdiction; that tribal sovereign immunity bars the lawsuit; that the plaintiffs failed to exhaust tribal remedies; and under various theories involving the Tribe's organization including theories about the Tribe's Section 17 Corporation, a defendant here. The *Wopsock* litigation was dismissed on sovereign immunity grounds and for failure to exhaust tribal remedies which are the identical issues presented here. Affidavit of J. Preston Stieff at ¶ 5.

The David K. Isom Law Offices' prior representation of the Ute Indian Tribe and members of the Business Committee in *Shaw* and *Wopsock* involved confidential factual information obtained by virtue of the representation in *Shaw* and *Wopsock* and is now being used to advance the interests of Becker in this case as a direct result of David K. Isom's knowledge of the Tribe's deliberations and responses, including any deficiencies, when defending against the claims at issue in this case. Affidavit of J. Preston Stieff at ¶ 6. Here, there is a reasonable probability that during the course of the David K. Isom Law Offices' representation of the Ute Indian Tribe in negotiations with EOG concerning oil and gas development; the *Shaw* case involving protection of the Tribe's oil and gas resources; and in *Wopsock* that the Tribe and members of the Business Committee

disclosed confidential information which could be used against the Tribal Defendants in this case. As such, under *Lustyik*, the matters are considered substantially related and as similar and related matters, they are considered substantially related under *Whatcott*.

In *Lustyik*, the court found compelling the existence of nine attorney-client privileged phone calls and determined that there is a reasonable possibility that the attorney subject to disqualification learned facts that may have bearing in the case. *Lustyik*, No. 2:12-CR-645-TC, 2012 U.S. Dist. LEXIS 178251 at *29. During its representation of the Tribe, David K. Isom Law Offices had near daily phone calls between the David K. Law Offices and Davis Graham & Stubbs, the Tribe's then general counsel. Affidavit of J. Preston Stieff at ¶ 8. Now, David K. Isom is attempting to represent Becker in his claims against the Ute Indian Tribe and the Business Committee on matters that are the same, similar, and related to the David K. Isom Law Offices' prior representation of the Tribe and members of the Business Committee. Such representation is prohibited under URPC 1.9(a) and caselaw.

a. There is an irrebutable presumption that David K. Isom has received facts from the Ute Indian Tribe and Business Committee that require David K. Isom's disqualification here.

The next issue is whether David K. Isom has received privileged and confidential information that require David K. Isom's disqualification as Becker's attorney in this case. "If the movant establishes the first two prongs, an irrebutable presumption arises that a client has indeed revealed facts to the attorney that require his disqualification." *Id.* (quoting *Smith v. Whatcott*, 757 F.2d at 1100.) "Once a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification. The majority of circuits that have considered the issue have held this presumption to be irrebutable." *Whatcott*, 757 F.2d at 1100 (citing *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1347 (5th Cir.

1981); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980); *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 384 (8th Cir. 1979), overruled on appealability issue, *In re Multi-piece Rim Products Liability Litigation*, 612 F.2d 377, 378 (8th Cir. 1980), vacated sub nom; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754 (2nd Cir. 1975); cf. *Kevlik v. Goldstein*, 724 F.2d 844, 851 (1st Cir. 1984). But see *EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1461 (Fed. Cir. 1984); *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 256 (7th Cir. 1983)). The irrebutable presumption is intended to prevent proof that would be improper to make. *Id.* (quoting *Corrugated Container*, 659 F.2d at 1347.) “The substantial-relationship test grew out of case law on disqualification. Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 12-01 (Jan. 10, 2012) (citing *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F.Supp. 265, 268 (S.D.N.Y. 1953) (“the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him”)). *See also*, Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 12-01 (Jan. 10, 2013) (citing *Centerline Indus., Inc. v. Knize*, 894 S.W.2d 874 (Tex. App. 1995) (lawyer must be disqualified even though all confidences obtained from former client had been disclosed in another proceeding: if two matters are substantially related, it should make no difference whether the lawyer gained no confidences or whether all the confidences gained have been publically disclosed)).

Having met the first two prongs, there is an irrebutable presumption that the Ute Indian Tribe and members of the Business Committee revealed confidential information to the Isom Law Firm that necessitates the Isom Law Firm’s disqualification here.

3. Becker’s Interests are Materially Adverse to the Ute Indian Tribe.

The final prong the Tribal Defendants must establish for disqualification is that Becker's interests are materially adverse to the Ute Indian Tribe. One of the principal tenets of the ethical rules forbidding conflicts in representation is that an attorney should not gain an unfair advantage for a current client against a former client by possessing information which the attorney could not have obtained but for the former client's confidential disclosures. *Arkansas Valley State Bank v. Phillips*, 171 P.3d 899 (Okla. 2007). One of the reasons behind Rule 1.9(a) is that an attorney should not gain an unfair advantage for a current client against a former client by possessing information which the attorney could not have obtained but for the former client's confidential disclosures. *Phillips*, 171 P.3d at 910.

An irrebuttable presumption arises in favor of disqualification if a movant establishes that an actual attorney-client relationship existed between movant and opposing counsel and that the present litigation involves a matter that is substantially related to the subject of movant's prior representation. *Stiger*, 413 F.3d 1185, 1196. If such a conflict exists, the possibility that movant's confidence has been breached is presumed regardless of whether it can actually be proved. *Kearns v. Fred Lavery Porche Audi Co.*, 745 F.2d 600, 603 (Fed. Cir. 1984). Additionally, when considering whether an attorney should be disqualified, "any doubt is to be resolved in favor of disqualification." *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2nd Cir. 1975); *see also Blue Planet Software, Inc. v. Games Int'l, LLC*, 331 F. Supp. 2d 273 (S.D.N.Y. 2004).

Here, Becker is suing the Tribal Defendants, including the Ute Indian Tribe and the Business Committee. His interests are materially adverse to the Ute Indian Tribe and the Business Committee. Becker's attorney, David K. Isom, must be disqualified to protect David K. Isom's former clients, the Ute Indian Tribe and the Business Committee. Any doubt as to the whether

David K. Isom should be disqualified must be resolved in favor of disqualification under *Hull* and *Blue Planet*.

B. David K. Isom owes a duty of loyalty and confidentiality to the Ute Indian Tribe.

The next issue is whether David K. Isom owes a duty of loyalty and confidentiality to the Ute Indian Tribe and whether representation of Becker against the Ute Indian Tribe violates that duty. URPC 1.9 provides:

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(b)(1) whose interests are materially adverse to that person; and

(b)(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

“Rule 1.9(b) provides that an attorney may not use information relating to the representation of a former client to the disadvantage of that client to ensure confidentiality and loyalty owed to the client is not compromised.” *Id.* The duty of loyalty is “perhaps the most basic of counsel’s duties.” *Strickland v. Washington*, 466 U.S. 668, 692 (1984). In order to fulfill that duty, counsel must commit her undivided attention to providing her client with the fullest possible defense, uncorrupted by competing loyalties to adversary clients. *Id.* at 688.

The confidential information that the David K. Isom Law Offices received from the Ute Indian Tribe and members of the Business Committee related to oil and gas development, the common defenses of the Ute Indian Tribe and other sovereign defendants, the similar and related defenses the Tribal Defendants have raised here will make it virtually impossible for the David K. Isom to represent Becker here without divulging protected information learned during his representation of the Ute Indian Tribe. Accordingly, the David K. Isom must be disqualified from representing Becker in this case.

CONCLUSION

Based on the facts and legal authorities cited herein, Plaintiff's attorney of record, David K. Isom, must be disqualified. An actual attorney-client relationship existed between the Ute Indian Tribe and the David K. Isom Law Offices. This case involves a matter that is substantially related to the subject of the David K. Isom Law Offices' previous representation of the Ute Indian Tribe and members of the Business Committee. There is an irrebutable presumption that the David K. Isom has received facts from the Ute Indian Tribe and Business Committee that require David K. Isom's disqualification here. Becker's interests are materially adverse to the Ute Indian Tribe and Business Committee. David K. Isom owes a duty of loyalty and confidentiality to the Ute Indian Tribe and Business Committee.

WHEREFORE, Defendants respectfully request that this honorable Court disqualify David K. Isom from the representation of Plaintiff

Dated this 10th day of May, 2013.

J. PRESTON STIEFF LAW OFFICES

/s/ J. Preston Stieff

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2013, I electronically filed the foregoing **MOTION TO DISQUALIFY AND MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY** with the U.S. District Court for the District of Utah. Notice will automatically be electronically mailed to the following individual(s) who are registered with the U.S. District Court CM/ECF System:

David K. Isom
Isom Law Firm, PLLC
299 S. Main Street, Ste. 1300
Salt Lake City, UT 84111

/s/ Patricia Keefe

Patricia Keefe

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

<p>Lynn D. Becker,</p> <p>Plaintiff,</p> <p>vs.</p> <p>Ute Indian Tribe of the Uintah and Ouray Reservation, a federally chartered corporation; Ute Indian Tribe of the Uintah and Ouray Reservation, a federally recognized Indian tribe; the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings, LLC, a Delaware LLC,</p> <p>Defendants.</p>	<p>INDEX OF EXHIBITS FOR MOTION TO DISQUALIFY</p> <p>Civil No. 2:13-CV-00123</p> <p>Honorable Dee Benson</p>
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INDEX OF EXHIBITS

FOR MOTION TO DISQUALIFY

Exhibit A Affidavit of J. Preston Stieff