

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CARETOLIVE, etc.	:	
	:	
Plaintiff,	:	Case No. C2-07-729
	:	
v.	:	JUDGE FROST
	:	
ANDREW VON ESCHENBACH, etc.	:	Magistrate Judge King
et al.	:	
	:	
Defendants.	:	

RESPONSE OF DEFENDANTS IN OPPOSITION TO  
PLAINTIFF’S MOTION TO DISQUALIFY (DOC. 30)

INTRODUCTION

Plaintiff’s Motion to Disqualify (Doc. 30) is another attempt to distract the Court from the real issues of this case, which have been raised in the Defendants’ Motions to Dismiss. Long on speculation and conclusion, and without reference to any established facts, the Motion’s internal inconsistencies foretell its failure. For example, Plaintiff continues to claim that Drs. Pazdur and Scher acted “in conspiracy,” yet at the same time alleges that their “interests...are in conflict...” References to criminal procedure notwithstanding, Plaintiff utterly fails to meet the substantial hurdles that courts properly erect when addressing such motions. The motion is replete with phrases such as “It is ... believed,” “evidence will suggest,” “it is possible,”<sup>1</sup> “conflict may exist,” and “[i]t is maintained that Defendant,” all of which demonstrate that no conflict currently exists. Plaintiff’s suggestion that the proper course is for the defendants in this case to file “cross claim[s]” against each other, and that the failure to do so would be an

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<sup>1</sup> Stated three times in Plaintiff’s Motion.

“indication” that supports Plaintiff’s theories, further illustrates the lack of legal support contained in the Motion.

### ARGUMENT

Disqualification of counsel “is a ‘drastic measure’ that a court should not impose unless ‘absolutely necessary.’” Hall v. Tucker, 863 N.E.2d 1064, 1068 (Ohio Ct. App. 2006) (citations omitted). Accordingly, motions for attorney disqualification “should be viewed with extreme caution for they can be misused as techniques of harassment.” SST Castings, Inc. v. Amana Appliances, Inc., 250 F. Supp. 2d 863, 865-66 (S.D. Ohio 2002) (internal quotation marks and citation omitted). As the Ohio Court of Appeals has cautioned, “trial courts have an obligation to the judicial system to stop any attempt by counsel to use the motion to disqualify as a trial tactic to delay proceedings, deprive the opposing party of counsel of his choice, or as a tool to harass, embarrass, and frustrate the opponent.” Ross v. Ross, 640 N.E.2d 265, 271 (Ohio Ct. App. 1994).

Disqualification of a party’s attorney is a drastic remedy which should be reserved for cases in which an actual ethical impropriety would taint the trial by undermining the court’s confidence in an attorney’s representation of his client. See SST Castings, 250 F. Supp. 2d at 865 (citing Kitchen v. Aristech Chem., 769 F. Supp. 254, 257-59 (S.D. Ohio 1991)). Courts have been particularly reluctant to disqualify the Department of Justice. See, e.g., United States v. Badalamenti, 794 F.2d 821, 828 (2<sup>nd</sup> Cir. 1986); Aetna Cas. & Sur. Co. v. United States, 570 F. 2d 1197, 1202 (4<sup>th</sup> Cir. 1978).

The power to disqualify an attorney, or attorneys, from a case is incidental to all courts. SST Castings, 250 F. Supp. 2d at 865. In this case, the applicable Ohio ethical standard is Rule 1.7 of the Ohio Rules of Professional Conduct:<sup>2</sup>

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client; [or]

(2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests. (Emphasis in original.)

As the moving party, Plaintiff bears the burden of establishing the need for disqualification. Nilavar v. Mercy Health Sys.-W. Ohio, 143 F. Supp. 2d 909, 912 (S.D. Ohio 2001). Plaintiff must provide evidence of "some specifically identifiable impropriety." United States v. Kitchin, 592 F.2d 900, 903 (5<sup>th</sup> Cir. 1979), citing Woods v. Covington County Bank, 537 F.2d 804, 810 (5<sup>th</sup> Cir. 1979). Unless Plaintiff can demonstrate how representation by the Department of Justice would "actively represent[] conflicting interests and that an actual conflict of interest adversely affect[s] [defense counsels'] performance, its motion should be denied. Wilson v. Morgan, 477 F.3d 326, 345 (6<sup>th</sup> Cir. 2007) (internal quotation marks and citation omitted) (applying Tennessee's version of Model Rule 1.7).

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<sup>2</sup> Plaintiff incorrectly cites Canon 5 of the former Ohio Code of Professional Responsibility; the Code was superseded by the Ohio Rules of Professional Conduct as of February 1, 2007. The following is a comment to Ohio Rule 1.7:

"Rule 1.7 replaces DR 5-101(A)(1) and 5-105(A), (B), and (C). Some of the Ethical Considerations in Canon 5 have direct parallels in the comments to Rule 1.7, although no effort has been made to conform the text of any comment to the analogous Ethical Considerations."

The official comments to Ohio's Rule 1.7 make it clear that a possible conflict does not preclude multiple representation. Ohio Rules of Prof'l Conduct, R. 1.7 cmt. [14] (2007) ("The mere possibility of subsequent harm [from joint representation] does not, itself, require disclosure and consent."). Court decisions are in accord. See, e.g., In re Nat'l Liquidators, Inc., 182 B.R. 186, 192 (S.D. Ohio 1995) (construing dual-representation provision of Bankruptcy Code; "[i]t simply exceeds rational bounds to rule that an adverse interest exists merely because a committee member's or a creditor's transactions with the debtor will be investigated, or because a remote, speculative, hypothetical possibility exists that, in the future, the estate or the Committee may dispute the creditor's claim"); Aetna, 570 F.2d at 1201 (holding that the district court erred in disqualifying the Department of Justice based upon the mere possibility that individual federal defendants may have inconsistent views concerning events giving rise to the suit); Cohen v. Oasin, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994) (vague and unsupported allegations of possible future conflict between defendants represented by the Department of Justice insufficient to trigger disqualification).

Plaintiff alleges the Defendants are in conflict in the following areas: (1) The interests of Dr. von Eschenbach allegedly differ from those of Drs. Pazdur and Scher, "who by their actions essentially defrauded the FDA," Mot. at 2; (2) "It is conceivable and even very likely that Defendant[s] Pazdur and Scher will be testifying against each other, and that Defendant von Eschenbach will be testifying against them both," id. at 3; (3) "It is also believed that Defendant Pazdur placed improper political pressure on Defendant von Eschenbach," id.; and (4) "It is also possible ... that Defendant Scher will assert his rights under the fifth amendment not to testify against himself ...," id. at 7-8.

Such wholly speculative “conflicts” fall woefully short of what must be shown to demonstrate a conflict of interest. They are precisely the type of “vague and unsupported allegations of possible future conflict,” Cohen, 844 F. Supp. at 1067, that courts have found insufficient to invoke the drastic remedy of disqualification. In McClenton v. Menifee, 2006 WL 2517002 (S.D.N.Y. Aug. 29, 2006), the plaintiff sought to disqualify the United States Attorney’s Office “because he finds the defendants’ assertion of a qualified immunity defense to be meritless.” Id. at \*1. The court, noting its broad discretion in deciding a motion for disqualification as well as the high standard of proof the party seeking disqualification must satisfy, held that:

the plaintiff has failed to meet his high burden of showing a sufficient basis for disqualifying the USAO from representing the defendants in this case. The plaintiff has failed to show any conflict of interest between the USAO and the individual defendants and has failed to show that the USAO cannot represent the individual defendants consistently with the ethical obligations of the USAO.

Id.

There is no conflict between the defendants and the Department of Justice. All four defendants are named in their official capacity.<sup>3</sup> As to the official capacity claims, the Department is the only entity authorized to represent the Defendants. It is the normal course of action when federal officers are sued in their official capacity that government attorneys will be assigned to represent them. Buck v. Stewart, 2006 WL 1805576, at \*2 (D. Utah 2005). Title 28 U.S.C. § 516 reserves the conduct of litigation “... in which the United States, an agency, or officer thereof is a party” to the Department of Justice. Title 28 U.S.C. § 517 further provides that “... any officer of the Department of Justice may be sent by the Attorney General...to attend

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<sup>3</sup> Drs. Pazdur and Scher are also named in their individual capacities.

to the interests of the United States ... .” Similarly, the United States Attorney is authorized by 28 U.S.C. § 547(2) to “prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned.” There is no allegation that any Department of Justice attorney has any connection to the events alleged in the Amended Complaint. As such, the Department has no conflict of interest in this case.<sup>4</sup>

As to the two defendants named in their individual capacities, and their relationship to the other defendants, the current posture of the case defeats Plaintiff’s argument. The pending Motions to Dismiss are based on well-settled doctrines including, but not limited to, absence of final agency action, failure of exhaustion of remedies, qualified immunity, and lack of personal jurisdiction. To reach these issues, the Court does not have to address any of the speculative assertions contained in Plaintiff’s instant motion. There will be no “testimony” while the Court considers Defendants’ motions. Both Drs. Pazdur and Scher are entitled to qualified immunity, and neither is subject to the jurisdiction of the Court based on the allegations in the Amended Complaint. The arguments raised by Defendants at this stage in the litigation do not create a substantial risk that the ability of the Department of Justice to represent all defendants will be materially limited by the responsibilities of the attorneys to each Defendant, nor does the Department raise arguments for one Defendant that are directly adverse to another. As such, there are no conflicts between or among any Defendants.<sup>5</sup>

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<sup>4</sup> Plaintiff’s citations of Moss v. United States, 323 F.3d 445 (6<sup>th</sup> Cir. 2003), and United States v. Hreljac, 2007 WL 38372 (E.D. Ky. 2007), are not germane to the instant suit, since both cases dealt with the issue of successive representation of co-defendants in criminal cases.

<sup>5</sup> Even if the case continues beyond the Rule 12 motion to dismiss stage, the APA will control, and (as shown in Defendants’ Motion for Protective Order (Doc. 26)), discovery would not be available even then, since APA cases are confined to review of the administrative record

To be sure, the Sixth Circuit has indicated that “there is a ‘need for sensitivity to the risk of conflict’” when government counsel in a § 1983 lawsuit simultaneously represents both the government and individual-capacity defendants. Wilson v. Morgan, 477 F.3d 326, 345 (6th Cir. 2007) (quoting Gordon v. Norman, 788 F.2d 1194, 1199 (6th Cir. 1986)). But the reason such “sensitivity” is needed is specific to § 1983 or other lawsuits where a government or official-capacity defendant might be able to *reduce* its potential liability at the cost of *increasing* the potential liability of an individual-capacity defendant. Thus in the leading case, Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984), an on-duty police officer repeatedly struck a man who was making sexual advances towards the officer’s wife, and a county attorney represented both the county and the police officer in the ensuing § 1983 lawsuit. Id. at 905. At trial, the county attorney undermined the officer’s good-faith defense by repeatedly arguing that he had acted as an irate husband rather than a police officer. Id. The Second Circuit held that on these facts, the county attorney’s simultaneous representation created a conflict of interest and deprived the officer of a fair trial. Id. at 907-09. However, it found a conflict of interest only because (it held) the municipality “may avoid liability by showing that the employee was not acting within the scope of his official duties,” while if the employee could “show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality.” Id. at 907.

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that was before the agency when it made its decision. Plaintiff will thus not be able to depose any of the defendants, and thus there would not even be a forum at which defendants would be offering testimony, much less an opportunity for plaintiff to attempt to elicit conflicting testimony.

This is not a § 1983 case, and the concern expressed in Wilson, 477 F.3d at 345, Gordon, 788 F.2d at 1199, and Dunton, 729 F.2d at 907-09, simply is not present here. In contrast to simultaneous-representation § 1983 cases, Plaintiff's official-capacity claims in this case do not seek damages from the government, so there are no damages the government could attempt to shift to individual-capacity defendants. Moreover, the government could not further weaken Plaintiff's demands for declaratory and injunctive relief (e.g., a declaration that Provenge is not a "new drug," or an order directing FDA to grant Dendreon's BLA application) by making accusations against the individual-capacity defendants. There is thus no way in which the government could reduce its potential liability on any of Plaintiff's official-capacity claims by pointing a finger against the individual-capacity defendants.<sup>6</sup>

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<sup>6</sup> The absence of any potential conflict is further bolstered by the United States Attorney's certifications that Drs. Pazdur and Scher were at all relevant times acting within the scope of their employment. See Dkt. # 34, Ex. A (certification of scope of employment for Dr. Scher); Dkt. #35, Ex. A (same, for Dr. Pazdur). This case is thus similar to Coleman v. Smith, 814 F.2d 1142, 1147-48 (7th Cir. 1987), in which a Village attorney's office represented the village and its former mayor and police chief in a § 1983 action. On appeal, the former mayor and police chief argued that "a conflict of interest between the Village and themselves made the joint representation by the Village's attorney improper and exposed them to serious prejudice." Id. at 1147. The Seventh Circuit rejected any such argument, pointing out that – in contrast to Dunton, 729 F.2d at 907, on which the former mayor and police chief relied – "[t]here was no 'fingerpointing' or divided allegiance. In contrast to the defense asserted by counsel in Dunton, the Village conceded that the actions of Smith and Frierson had been taken in their official capacities." Coleman, 814 F.2d at 1148 (emphasis added).

Thus, even if the government could somehow reduce its potential liability in this case by pointing fingers at the individual-capacity defendants (and as shown above, it could not), the U.S. Attorney's certifications would thwart any such possibility. Indeed, the certifications were filed precisely to substitute the United States as the defendant in the individual-capacity claims, so that any finding of liability would be against the government under the Federal Tort Claims Act; even if there were a finding of joint liability, "the individual defendants would not be required to pay the damages, since a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against them," thus precluding any conflict of interest. Aetna, 570 F.2d at 1201.

As previously stated, the vague and unsupported allegations of possible future conflict between defendants presented in Plaintiff's Motion are insufficient to carry its heavy burden.

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response was filed with the Court on this 19<sup>th</sup> day of October, 2007, using the Court's CM/ECF system, which will serve a copy on all counsel.

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