IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

STANLEY T. TORRES and JEANNE H. RAYPHAND, Plaintiffs, v. FROILAN C. TENORIO, Governor, Commonwealth of the Northern Mariana Islands, BENIGNO M. SABLAN, Secretary of Department of Lands and Natural Resources, Commonwealth of the Northern Mariana Islands, BERTHA T. CAMACHO, Director, Division of Public Lands, Department of Lands and Natural Resources, Commonwealth of the Northern Mariana Islands and L&T GROUP OF COMPANIES, LTD., Defendants.	CIVIL ACTION NO. 95-390 **MEMORANDUM DECISION DISQUALIFYING PLAINTIFFS' COUNSEL**

On January 19, 1996, the Court heard arguments on Defendant L&T's renewed Motion to Disqualify Plaintiffs' Counsel Theodore R. Mitchell based upon a conflict of interest between Mitchell, and CNMI taxpayers. The question posed is whether an attorney in a taxpayer action under Article X, § 9 of the Commonwealth Constitution, which provides attorney fees to a prevailing party, may represent a plaintiff who is an associate in the attorney's law firm.

FOR PUBLICATION

I. FACTS AND PROCEDURAL BACKGROUND

On April 27, 1995, Plaintiff Jeanne H. Rayphand ("Rayphand") brought this action in her capacity as a taxpayer under Article X, § 9 of the Commonwealth Constitution. Counsel for Plaintiffs, Theodore R. Mitchell ("Mitchell"), is the sole partner in the law firm in which Rayphand is an associate. The Complaint was amended on May 3, 1995, adding Stanley T. Torres ("Torres") as a second plaintiff in his capacity as a taxpayer. The Amended Complaint alleges that the Governor, Director of the Department of Lands and Natural Resources, and the Secretary of the Division of Public Lands breached their fiduciary duty to the taxpayers of the CNMI by leasing public land to L&T Group of Companies, Inc. ("L&T") at commercially unreasonable terms. On November 6, 1995, the Court denied Defendants' Motion to Dismiss and in the Alternative for Summary Judgment.

Defendant L&T initiated settlement negotiations on September 28, 1995. Plaintiffs' Exhibits in Opposition to Motion to Disqualify, filed Jan. 17, 1996, Exhibit 1 ("Jan. 17, 1996 Plaintiffs' Exhibits"). On November 21, 1995, Mitchell offered to settle in exchange for an agreement by L&T to pay a $14,500,000 rental and Plaintiffs' attorney fees calculated on the lodestar method. Government Defendants' Motion to Disqualify, filed Dec. 5, 1995, Exhibit A ("Dec.5, 1996 Motion to Disqualify"). Attorneys for Defendant L&T stipulated that they would not disclose this offer. Jan. 17, 1996 Plaintiffs' Exhibits 9, 10. Mitchell amended this offer the following day. Dec. 5, 1995 Motion to Disqualify, Exhibit B. The modified offer increased the rental amount to $14,687,500 to accurately represent the mean of the opposing sides' two appraisals. *Id.* Morever, it stated that under the lodestar method, Mitchell's fees amounted to $2,253,128. *Id.* Mitchell made his fees a non-negotiable point, stating:

> [W]e have decided to require you to respond to this offer in categorical terms; it may be either accepted or rejected. We will not entertain any counter-offer.

Id. This warning followed Mitchell's offer:

> If you attempt to disclose either the existence of this letter, or any of its contents, either directly or indirectly to the court, this offer is automatically revoked.

Id. The Government responded by stating that Mitchell's demand constituted a conflict of interest

with CNMI taxpayers. Dec. 5, 1995 Motion to Disqualify, Exhibits C, E, G.

A Discovery Conference was held on November 27, 1995. At the request of all parties, the Court set the matter for trial on an expedited schedule and established December 29, 1995 as the discovery cut off date. This date was extended twice.

On December 21, 1995, the Court heard the first Motion to Disqualify Plaintiffs' Counsel. Defendants argued that Rule 23 class action jurisprudence is controlling and mandates Mitchell's disqualification They maintained that Rayphand and Mitchell's association gives rise to the appearance that Mitchell's interest in attorney fees may override the best interests of the CNMI taxpayers on whose behalf the action was brought. Furthermore, Defendants argued that Mitchell's conditioning of settlement upon payment of $2.2 million in attorney fees demonstrates a clear conflict. In its Order and Decision on the motion, the Court found that an actual conflict existed.[1] However, the Court attempted to fashion a lesser remedy which would remove the cause of conflict. The Court permitted Mitchell to continue as counsel, but ruled that attorney fees predicated upon Article X, § 9 could not form a basis of settlement. The Court noted that Article X, § 9 expenses may be awarded only by the Court against government defendants. Having reservations as to the adequacy of this remedy, the Court invited Defendants to renew their motions should manifestations of conflict persist. The Court informed the parties that it would view refusal by Plaintiff's counsel to enter into a reasonable settlement agreement as grounds for such a motion.

Since its ruling, the Court has heard numerous discovery motions made by both sides. On two occasions the Court was compelled to sanction Mitchell by ordering payment of Defendants' costs and attorney fees. January 5, 1996 Order; January 16, 1996 Order.

On motion by Defendant L&T, the Court revisited the issue of disqualification on January 19, 1996. This motion adds to the theories earlier addressed, the argument that an unduly hostile attorney is unfit to litigate a taxpayer action on behalf of the public. Defendant L&T argues that Mitchell's spite and dislike of Defendants' counsel has resulted in disruptive discovery tactics and

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[1] The Court issued an oral order from the bench on December 21, 1995. This was reduced to writing on January 19, 1996.

refusal to consider entering into settlement negotiations. Defendant L&T maintains that Mitchell's posture contravenes the best interest of his clients. As evidence, Defendant L&T refers the Court to the additional facts set forth below.

On December, 20, 1995 and December 28, 1995, Mitchell faxed letters to Steven Pixley ("Pixley"), an attorney for L&T, informing him that his disclosure to the Court of Mitchell's settlement offer barred subsequent negotiations. Defendant L&T's Motion to Disqualify, filed Jan. 15, 1996, Attached ("Jan. 15, 1996 Motion to Disqualify"). On January 5, 1995, Mitchell faxed David Banes ("Banes"), also an attorney for L&T, a letter taking issue with a recording made by Banes and Pixley of an off the record discussion wherein Mitchell addressed seven expletives to Pixley.[2] *Id.* Mitchell's letter stated that this incident "completely disqualified [Banes, Pixley and Dunlap, an attorney for Defendant Government] from engaging in anything remotely resembling good faith settlement negotiations." *Id.* Defendant's Motion is accompanied by an Addendum recounting incidents of aggression by Mitchell too numerous to detail here.

In opposition, Mitchell argues that Rule 23 case law addressing the issue of conflict of interest is inapplicable. Mitchell elaborates that this action can not be analogized to a class action as it is brought on behalf of none other than the named plaintiffs. Second, Mitchell states that plaintiffs can not be denied their right to counsel. Third, Mitchell contends that by divulging settlement communications, Defendants breached the trust necessary for future settlement discussions. *Id.* Finally, Mitchell states that the Court exceeded its authority in its Order on the first motion to disqualify. Mitchell refers to the Court's pronouncement that it would view continued refusal to accept a reasonable settlement offer as indication that the Court's Order had not removed the conflict and would present grounds for a second motion. *Id.*

In response to Plaintiffs' claim that his hostile attitude bars his continued representation of this action, Mitchell asserted his dislike of Banes and Pixley, but maintained that his personal opinions cannot form the basis of disqualification. *Id.* In order to clarify the allegations contained in

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[2] This tape has not been submitted to the Court.

Defendants' Addendum, Mitchell untimely filed a Declaration. Mitchell Declaration, filed Jan. 22, 1996. Nonetheless, the court accepts the Declaration to afford Mitchell every opportunity to be heard. In the Declaration, Mitchell: justifies the expletives aimed at Pixley (para. 7); explains that he used a sarcastic tone when he called attorney Dunlap's alma mater a "podunk law school" (para.14); and rationalizes disparaging comments he made during depositions regarding the quality of the work of Dunlap, Banes, and Clifford, an attorney for Government Defendant, by explaining the basis his opinion. (para. 13).[3]

II. ISSUE

Whether an attorney in a taxpayer action under Article X, § 9 of the Commonwealth Constitution, which provides attorney fees to a prevailing party, may represent a plaintiff who is an associate in the attorney's law firm.

III. DISCUSSION

A. Standing. The comment to Rule 1.7 of the ABA Model Rules of Professional Conduct, adopted in the CNMI, explains that opposing counsel may raise the issue where the "conflict is such as clearly to call in question the fair or efficient administration of justice." MODEL RULES OF PROFESSIONAL CONDUCT 1.7 cmt., 01:120.

> This principal was applied in a taxpayer case before the adoption of the Model Rules. This Court feels that if parties believe a petition is not filed in good faith in Court, in a matter involving the public, or public rights, they should have the right to appear in Court and call the attention of the Court to the lack of good faith . . .

Williams v. City of Wilmington, 171 N.E.2d 757 (Oh. Ct.C.P. 1960).

B. Settlement. As a matter of policy, to encourage candid discussions, settlement

[3] The Court leaves unstated significant portions of Defendant's Addendum and Mitchell's Declaration.

negotiations should not as a general rule become public record.[4] However, where an attorney's settlement posture evinces a clear conflict with the interests of his clients, that attorney is not entitled to the protection of confidentiality. *See, generally, Lyon v. Arizona,* 80 F.R.D. 665 (1978); *Lowenschuss v. Bludhorn*, 613 F.2d 18, 19 (2d Cir. 1980). This is especially true where he is charged with representing the entire body of taxpayers in the CNMI. Thus, disclosure of settlement discussions is proper where necessary to remedy a grave conflict. This case involves such grave conduct.

C. Taxpayer Actions In its December 21, 1995 Order, the Court ruled that taxpayer actions are analogous to class actions. The Court is now convinced that a taxpayer action is a *form* of class action, analogous to Rule 23 class actions, which prohibits conflicts of interest between counsel and the class he represents.

Generally, standing to bring a taxpayer action requires the plaintiff to demonstrate that he has directly suffered individual harm unique from that visited upon the general public. *Blanding v. Las Vegas*, 280 P. 644 (Nev. 1929.) However, by statute or by common law, most jurisdictions recognize an exception for actions seeking to restrain illegal acts of public authorities or diminution of public funds or property. *Herr v. Rudolph*, 25 N.W.2d 916 (1947). In those instances peculiar damage need not be shown. *Id.* In addition, the de minimis damage suffered by any one taxpayer is not a bar to recovery because courts assess the plaintiff's injury in light of the aggregate loss suffered by the taxpayers. *Smith v. Government of Virgin Islands*, 329 F.2d 131 (3rd Cir. 1964). The purpose behind the liberal construction of standing is to promote the vigilant enforcement of the common good. *Faden v. Philadelphia Housing Authority*, 227 A.2d 619 (Pa. 1967); *Smith v. Government of Virgin Islands*, 329 F.2d 131 (3rd Cir. 1964). As a practical inducement, and in recognition of the representative nature of the cause of action, a growing number of jurisdictions have awarded attorney fees to a prevailing plaintiff. *United States Fidelity & Guaranty Co. v. Frohmiller*, 227 P.2d 1007 (Ariz. 1951). This is express in Article X, § 9, which grants expenses commensurate with the

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[4] The rules of evidence prohibit the admissibility of settlement discussions only for purposes of proving or disproving liability or the amount of a claim. COM.R.EVID. 408.

common benefit achieved.

Thus, it is settled law that a "taxpayer's bill is essentially a class bill and can be filed only in the common interest of all the taxpayers" *Gericke v. City of Philadelphia*, 44 A.2d 233 (Pa. 1945)*(quoting Schlanger v. West Berwick Borough*, 104 A. 764 (Pa. 1918). Moreover, the exception to demonstrating peculiar harm applies only to cases brought in a representative capacity as a form of class action on behalf of other taxpayers. *Cawker v. City of Milwaukee*, 113 NW 417 (Wis. 1907). This requirement has been strictly construed in evaluating the sufficiency of the complaint. Many courts will dismiss a complaint which does not expressly allege that the plaintiff brings the action in a representative capacity. *Wilson v. Blaine*, 105 A. 555 (Pa. 1918); *Ransbottom v. Robbins*, 96 N.E. 762 (In. 1911); *Gericke, supra.* Other courts refuse to dismiss so long as it is clear from the face of the complaint that the right sought to be vindicated is shared by the body of taxpayers. *Cawker v. City of Milwaukee*, 113 N.W. 417 (Wis. 1907).[5]

Like all class actions, taxpayer actions are binding upon the class of taxpayers. Non-represented taxpayers are subject to res judicata rather than mere collateral estoppel. *Hodgkins v. Sanson*, 135 S.W.2d 759 (Tx. 1939); *Petition of Gardiner*, 170 A.2d 820 (Super. Ct. N.J. 1961). This is necessary to prevent multiple suits, and is fair as other taxpayers have the right of intervention. *Lee v. City of Casey,* 109 N.E. 1062 (Ill. 1915); *Petition of Gardiner*, 170 A.2d 820 (Super. Ct. N.J. 1961).

Despite Mitchell's recent disavowals, it is without question that Plaintiffs bring this action in a representative capacity. The Amended Complaint speaks for itself:

> Stanley T. Torres and Jeanne H. Rayphand bring this action as taxpayers and citizens of the Commonwealth, in the hope of obtaining a declaratory judgment that the Governor has breached his fiduciary duty to the people of the Commonwealth by leasing this land at an unreasonably low price and on terms unreasonably favorable to the lessee and detrimental to the public interest.

Amended Complaint, para. 5. Moreover, the purpose of an Article X, § 9 award of fees is to prevent

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[5] A taxpayer action can be brought by a private individual for a unique harm. In such a case however, attorney fees would be foregone as costs are awarded in proportion to the public benefit conferred by the suit.

the inequity of having individuals bear the costs of litigation which benefits all taxpayers. Plaintiffs refer to this rationale in their claim for attorney fees and costs, stating: "In the event that the plaintiffs prevail in this action, then the resulting benefit accruing to the people of the Commonwealth will be substantial." Amended Complaint, para. 94.

D. Rule 23 Class Actions. Rule 23 class actions and taxpayer actions each seek recovery for a common harm, each have a binding affect upon non-represented parties, and each provide attorney fees as an incentive to promote suits. Distinct, however, are the safeguards inherent in Rule 23 certification requirements.[6] Rule 23 class actions require court certification of the Plaintiff and his counsel to ensure adequate representation of the class. *Pope v. City of Clearwater*, 138 F.R.D. 141 (M.D.Fla. 1991). This Court is not suggesting that it adopt formal certification procedures in taxpayer actions. However, as this motion raises the same concerns addressed in objections to certification, and given the shared characteristics of the two forms of action, Rule 23 jurisprudence on the topic of conflict of interest is a valuable source of consultation.

In the certification process, courts consider whether the Plaintiff is the true driving force behind the case rather than the attorney's desire for remuneration. *Kramer v. Scientific Control Group*, 534 F.2d 1085 (3rd Cir. 1976). This is designed to prevent abuse of the attorney fee provision and to protect the best interests of non-represented class members. *Id.* In addition, it is designed to preserve the ethical image of the bar and the integrity of the justice system in the eyes of the public. *U.S. v. Palmer*, 578 F.2d 105 (5th Cir. 1978). Legal representation by a plaintiff's law associate is generally prohibited in Rule 23 class suits. *Kramer v. Scientific Control Group*, 534 F.2d 1085 (3rd Cir. 1976); *Jaroslawicz v. Safety Kleen Corp.*, 151 F.R.D. 324 (N.D.Ill. 1993); *Susman v. Lincoln American Corp.*, 561 F.2d 86 (1977); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371

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[6] Rule 23 certification involves many requirements. Foremost among these are that :
(A) one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members that joinder of all members is impracticable, (2) there are questions of law or fact in common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and *(4) the parties will fairly and adequately protect the interest of the class.*
Pope v. City of Clearwater, 138 F.R.D. 141 (M.D.Fla. 1991) (emphasis added).

(11th Cir. 1984); *Hedges Enterprises, Inc. v. Continental Group*, 81 F.R.D. 461 (1979); *Pope v. City of Clearwater*, 138 F.R.D. 141 (M.D.Fla. 1991); *Brick v. CPC Int'l, Inc.*, 547 F.2d 185 (1976); *Norman v. McGee*, 290 F.Supp. 29 (1968). The *Susman* decision, *supra*, succinctly poses the problem inherent in close associations between attorney and class plaintiff:

> We believe that the likelihood of a conflict of interest exists where the class representative's possible recovery is far outweighed by attorney's fees which might be awarded to a law firm in which he is a member.

Susman, *supra*. at 94 n. 11. This risk is alleviated where " the class representative and counsel are somewhat independent insur[ing] that the representative will exercise unconstrained judgment." *Kramer*, *supra*, (Rosenn, J., concurring).

Many courts have established a *per se* rule that the mere appearance of impropriety is sufficient to warrant disqualification.

The fact that other named plaintiffs are not allied with the attorney is an inadequate prophylactic. *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371 (11th Cir. 1984) (representation impermissible where one of three class representatives was associated with counsel); *Kramer*, *supra*. Furthermore, in ordering disqualification, courts have noted that choice of counsel is not sacrosanct. "[A]lthough the right to counsel is absolute, there is no absolute right to a particular counsel." *U.S. ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied*, 90 S.Ct. 964 (1970) (cited in *Kramer*, *supra*).

The Court finds that the appearance of impropriety inherent in Rayphand and Mitchell's legal association warrants disqualification. Rayphand's relationship with Mitchell produces the image that she may put the interest of her employer above that of the people. Irrespective of the truth of this image, the danger that the public will perceive an abuse and lose faith in the integrity of the bar and of the justice system must be taken seriously. Furthermore, the normal difficulty of proving an actual conflict militates in favor of a per se rule. The Court finds that the addition of Torres as a second plaintiff is insufficient to dispel the damaging appearance, and orders disqualification.

E. Actual Conflict. An actual conflict of interest has been found where an attorney who also served as class representative refused a settlement offer which would have "enabled class

members to recover as much as they reasonably could have expected to at trial." *Lowenschuss v. Bludhorn*, 613 F.2d 18, 19 (2d Cir. 1980). Similarly, in *Lyon v. Arizona,* 80 F.R.D. 665 (1978), the court found that:

> the fact that Plaintiffs' counsel sought to settle [. . .] for excessive attorneys' fees [. . .] in the context of the conflicts of interest present in these cases, to the appearance of improper utilization of the uncertified and unnamed class for the benefit of counsel [. . .] requires dismissal of plaintiffs' allegations on the basis that the named plaintiffs and their counsel are not representative parties which will fairly and adequately represent the absent class.

Here the Court is presented with evidence of an actual conflict which equals the gravity of the conflicts found in *Lowenschuss* and *Lyon.* The first indicia of this conflict is Mitchell's demand of $2.2 million in attorney fees as a prerequisite to settlement. This establishes that Mitchell was putting his interest before those of the named plaintiffs and the CNMI. In his defense Mitchell argues that Defendants should have realized that his absolute demand was mere posturing intended to invite a counter offer. Hearing on Motion to Disqualify, Dec. 21, 1995, Mitchell Testimony. The Court is impatient with this argument. The definitive language of the letter speaks for itself, and is consistent with his subsequent refusal to settle.

Second, Mitchell contends that his demand was in furtherance of the interests of the CNMI taxpayers as it would exact the burden of attorney fees upon L&T rather than the Government, and consequently the taxpayers. *Id.* The Court is unable to follow Mitchell's strained logic to conclude that erecting an obstacle to settlement, designed for his own pecuniary benefit, advances the public interest. The total sum Mitchell sought approaches $17 million[7]. If Mitchell's primary interest was to benefit the public, he would have demanded this figure from L&T and left the assessment of attorney fees to the Court under Article X § 9. Instead, Mitchell has allowed his personal interest in compensation to stand in the way of his clients' settlement.

Mitchell's admitted inability to consider settlement demonstrates that this conflict persists. An attorney who will not entertain reasonable settlement discussions is not promoting the best interests of his clients. *Norman v. Arcs Equities Corp., supra.* This is especially true where his

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[7] Mitchell asked for $14,687,500 in rent, plus $2,253,128 in attorney fees.

clients, the taxpayers, will ultimately pay for the increased attorney fees incurred by protracted or needless litigation.

F. Unduly Antagonistic. Courts have held that an unduly antagonistic class representative bearing a personal grudge against the opposing side is unfit to carry out the interests of the class. *Norman v. Arcs Equities Corp.*, 72 F.R.D. 502 (S.D.N.Y.); *Kamerman v. Ockap Corp.*, 112 F.R.D. 195, 197 (S.D.N.Y.) (class representatives' antagonism might "override his amenability to negotiating with defendants, although beneficial to the class"). The same principal applies to an attorney acting as legal representative, particularly in the context of existing conflicts presented by a close relationship with the class representative.

As a preliminary matter, the Court, like Mitchell, finds his *opinions* regarding opposing counsel irrelevant. Mitchell's actions and statements however are relevant. They are unprofessional and unfitting of an attorney. The Court refers not only to Mitchell's out of court conduct, but to his generation of needless discovery practice for which he has been sanctioned. Mitchell has demonstrated an attitude of animosity that has rendered productive settlement discussion an impossibility and has burdened the Court with unnecessary motions and heightened the cost of litigation for all concerned.

As a policy, the Court does not consider antagonistic behavior as grounds to disqualify in the absence of other, distinct manifestations of conflict. Here, however, other evidence of a conflict abound: conditioning settlement upon an exorbitant fee; refusal to consider settlement discussions; and dilatory discovery tactics.

Defendants' disclosure of Mitchell's demand for $2.2 million in attorney fees is no justification for Mitchell's subsequent behavior. It was appropriate for Defendants to draw the Court's attention to an extreme abuse, especially one implicating taxpayers' rights. Any perceived impropriety in revealing Mitchell's settlement tactics is outweighed by the need to correct the serious conflict of interest existing between Mitchell and the taxpayers.

The Court conditioned its denial of the earlier Motion to Disqualify based upon its fear that Mitchell's animosity toward opposing counsel might lead him to further obstruct discovery or

settlement in disregard of the interests of the taxpayers. This fear has been realized. The situation has escalated to the point where the best interests of Mitchell's clients are a secondary concern. As stated in *Norman, supra* at 506, " a class representative who is motivated by spite against a defendant is no different than one which has an adverse pecuniary interest."

IV. CONCLUSION

For the foregoing reasons, Defendant L&T's Motion to Disqualify Plaintiffs' Counsel is GRANTED.

So ORDERED this 25th day of January, 1996.

EDWARD MANIBUSAN, Associate Judge