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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 VASILE SIMONCA,

NO. CIV. S-08-1453 FCD GGH

13 Plaintiff,

14 v.

MEMORANDUM AND ORDER

15 MICHAEL B. MUKASEY, Attorney
16 General of the United States
17 Department of Justice, MICHAEL
CHERTOFF, Secretary of the
United States Department of
Homeland Security, et al.,

18 Defendants.
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20 This matter is before the court on a motion to disqualify
21 plaintiff Vasile Simonca's ("plaintiff") counsel of record,
22 Jagdip Singh Sekhon ("Sekhon"), brought by defendants Michael B.
23 Mukasey, Attorney General of the United States Department of
24 Justice, Michael Chertoff, Secretary of the United States
25 Department of Homeland Security, Condoleeza Rice, Secretary of
26 the United States Department of State and Carol Webster, Special
27 Agent of the United States Immigration and Customs Enforcement
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1 (collectively, "defendants" or the "government").¹ The
2 government moves to disqualify Sekhon as counsel in this civil
3 action due to an alleged conflict of interest created by
4 counsel's indictment in a related criminal case, United States v.
5 Caza, et al., CR No. 06-58 FCD. The government maintains that
6 because the criminal prosecution of Sekhon, and others, is itself
7 the cause of the delay in adjudicating the asylum applications
8 that are the subject of this lawsuit, Sekhon cannot properly
9 continue his representation of plaintiff and the proposed class.

10 BACKGROUND

11 On June 24, 2008, plaintiff filed this action on behalf of
12 himself, and all others similarly situated, seeking declaratory,
13 injunctive and mandamus relief pursuant to 28 U.S.C. §§ 1361 and
14 2241, governing writs of mandamus and habeas corpus, and the
15 Administrative Procedures Act, 5 U.S.C. § 702. Plaintiff filed,
16 as of right, a first amended complaint on June 26, 2008, which is
17 the operable pleading in this action. Therein, plaintiff alleges
18 that the adjudication of his asylum application was improperly
19 delayed due to the ongoing criminal investigation of plaintiff's
20 attorneys, who are alleged to have prepared fraudulent asylum
21 applications.

22 In the pending criminal prosecution of United States v.
23 Caza, et al., filed on October 18, 2006, the government indicted
24 Sekhon and four of his colleagues at the law firm of Sekhon &
25 Sekhon on allegations of false statements in asylum applications

27 ¹ Because oral argument will not be of material
28 assistance, the court orders this matter submitted on the briefs.
See E.D. Cal. Local Rule 78-230(h).

1 and conspiracy to defraud the United States, in violation of 18
2 U.S.C. §§ 371, 982(a)(6)(A)(ii)(I) & (II), and 1001. The
3 government asserts that Sekhon and the other Caza defendants
4 prepared and submitted applications for asylum and withholding of
5 removal to the United States Immigration and Customs Enforcement
6 that contained fabricated claims of persecution. The criminal
7 matter is set for trial on February 24, 2009.

8 Plaintiff Simonca is one of the aliens who was represented
9 by the Sekhon & Sekhon law firm in immigration proceedings which
10 are the subject of the criminal prosecution. Plaintiff submitted
11 an application for asylum and withholding of removal in April
12 2002. In October 2003, he was placed into removal proceedings,
13 and on November 24, 2003, the Immigration Judge denied his
14 application and ordered plaintiff removed as charged. Plaintiff
15 appealed to the Board of Immigration Appeals, and his appeal was
16 successful. On May 26, 2005, his case was remanded to the
17 Immigration Judge for a decision consistent with the Board's
18 conclusions. After the remand, the United States Immigration and
19 Customs Enforcement informed the Immigration Judge of the
20 criminal investigation into the Sekhon & Sekhon law firm. On
21 March 10, 2006, plaintiff's application for asylum and
22 withholding of removal was suspended and his case
23 administratively closed pending the outcome of the Caza trial.
24 (FAC at ¶s 43-77.)

25 Plaintiff contends that in suspending his application and
26 administratively closing his case, and the cases of others
27 similarly situated, defendants have violated his right to the
28 adjudication of his asylum application under the Immigration and

1 Nationality Act, and its implementing regulations, and have
2 denied him his right to due process of law under the Fifth
3 Amendment. Plaintiff alleges that as a result of defendants'
4 actions, he and other applicants for asylum have been denied
5 their statutory right to expeditious and final adjudications of
6 their claims; for those asylees that have established their
7 eligibility for relief, they have been denied their right to
8 immigrate their family members; and other asylees have been
9 denied their permanent resident status which, once obtained,
10 would allow them to seek United States citizenship. (FAC at ¶
11 77.)

12 STANDARD

13 Motions to disqualify counsel are strongly disfavored, as
14 they often pose the very threat to the integrity of the judicial
15 process that they purport to prevent. Visa U.S.A. v. First Data
16 Corp., 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003); In re Marvel,
17 251 B.R. 869 (N.D. Cal. 2000) ("A motion for disqualification of
18 counsel is a drastic measure which courts should hesitate to
19 impose except when of absolute necessity. They are often
20 tactically motivated; they tend to derail the efficient progress
21 of litigation.") As such, requests for disqualification "should
22 be subjected to particularly strict judicial scrutiny." Optyl
23 Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050
24 (9th Cir. 1985) (citations omitted). Ultimately, the decision of
25 whether to disqualify counsel is within the sound discretion of
26 the district court. Trone v. Smith, 621 F.2d 994, 999 (9th Cir.
27 1980). The court must weigh in deciding whether disqualification
28 is warranted, the combined effect of:

1 a party's right to counsel of choice, an attorney's
2 interest in representing a client, the financial burden
3 on a client of replacing disqualified counsel and any
4 tactical abuse underlying a disqualification proceeding,
5 against the fundamental principle that the fair
6 resolution of disputes within our adversary system requires
7 vigorous representation of parties by independent counsel
8 unencumbered by conflicts of interest.

9 Allen v. Academic Games League of America, Inc., 831 F. Supp.
10 785, 789 (C.D. Cal. 1993) (citations omitted).

11 Pursuant to Eastern District Local Rule 83-180(e), the
12 standards of professional conduct required of members of the
13 State Bar of California and contained in the State Bar Act, the
14 rules of Professional Conduct of the State Bar of California and
15 any applicable court decisions have been adopted as the standards
16 of professional conduct in this court. This rule is enforced
17 through the court's supervisory power and its inherent authority
18 to preserve the integrity of the adversarial process. Chambers
19 v. NASCO, Inc., 501 U.S. 32, 43 (1991).

20 ANALYSIS

21 Defendants argue there is a "patent conflict of interest"
22 between Sekhon's role as counsel in this civil matter on the one
23 hand and his position as indicted defendant in the Caza criminal
24 matter because: (1) the subject matter of both actions is the
25 same--the alleged filing of fraudulent asylum applications--and
26 the sole claim in this action is that the pending criminal matter
27 has caused the unlawful delay in adjudication of plaintiff's and
28 the proposed class' asylum applications; (2) the timetable for
adjudication of the underlying asylum applications hinges
entirely on the disposition of the criminal matter; (3) the
outcome of the criminal proceedings could affect the substantive

1 adjudication of the underlying asylum applications; (4) civil
2 discovery in this matter could create a conflict with evidentiary
3 matters in the criminal proceeding; and (5) any settlement or
4 plea agreement in either case will influence the other pending
5 matter. As a result, the government contends disqualification of
6 counsel is required because Sekhon's dual role as attorney for
7 plaintiff and the proposed class and criminal defendant in
8 matters "so intertwined" both "degrades the integrity" of the
9 court and "interferes with the administration of justice." (Mem.
10 of P.& A., filed Sept. 26, 2008, at 4:9-10.)

11 Plaintiff responds that defendants' motion must be denied in
12 the first instance because defendants lack standing to move to
13 disqualify plaintiff's counsel. Plaintiff alternatively argues
14 that even if defendants have standing, disqualification of
15 counsel is not warranted because there exists no conflict of
16 interest between plaintiff and his counsel under the pertinent
17 Rules of Professional Conduct of the State Bar of California, and
18 defendants' motion is merely a tactical attempt to undermine
19 plaintiff's complaint.

20 As to standing, as a general rule, courts do not disqualify
21 an attorney on the grounds of conflict of interest unless a
22 former or current client moves for disqualification. Colyer v.
23 Smith, 50 F. Supp. 2d 966, 969 (C.D. Cal. 1999). Although the
24 Ninth Circuit has not squarely addressed whether a non-client may
25 raise an objection to opposing counsel, the court in Colyer
26 adopted the majority rule that allows only former and current
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1 clients standing to seek to disqualify opposing counsel.² Id.
2 Several California district courts have followed Colyer. See
3 e.g. Yee v. Capital Servs., 2006 WL 3050827 (N.D. Cal. Oct. 26,
4 2006); Canatella v. Stovitz, 2004 WL 2648284 (N.D. Cal. Sept. 13,
5 2004); Decaview Dist. Co., Inc. v. Decaview Asia Corp., 2000 WL
6 1175583 (N.D. Cal. Aug. 14, 2000). This court finds Colyer and
7 these subsequent Northern District cases persuasive and applies
8 the majority rule to this case.

9 In Colyer, the court did, however, recognize an exception to
10 the strict majority rule requiring client-status to move to
11 disqualify counsel. The court held that a third party (non-
12 client) has standing to object to opposing counsel's
13 representation "if the litigation will be so infected by the
14 presence of opposing counsel so as to impact the moving party's
15 interest in a just and lawful determination of its claims."
16 Canatella, 2004 WL 2648284, *2 (citing Colyer, 50 F. Supp. 2d at
17 971-72). For example, in a case where the ethical breach by
18 counsel is so "severe, manifest and glaring" that it "obstructs
19 the orderly administration of justice," the third-party who finds
20 his claims so obstructed has standing to request
21 disqualification. Colyer, 50 F. Supp. 2d at 971-72.

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24 ² Without deciding the issue, as it was not presented to
25 the court, in Kasza v. Browner, 133 F.3d 1159, 1171 (9th Cir.
26 1998), the Ninth Circuit noted that a movant who is neither a
27 former or current client likely did not have standing to seek
28 disqualification of opposing counsel. Subsequent cases have
recognized that the Ninth Circuit's remarks in Kasza suggest that
the court would follow the majority rule, granting standing to
only former and current clients, if presented with the issue.
See e.g., Xcentric Ventures, LLC v. Stanley, 2007 WL 2177323, *3
(D. Ariz. July 27, 2007).

1 Because Article III standing, necessary for any party to
2 seek relief in federal court, requires that the party have
3 personally suffered from an "injury in fact" which is causally
4 related to the conduct in issue,³ courts have emphasized in the
5 disqualification context, that the moving party must demonstrate
6 how opposing counsel's representation in the case causes the
7 *movant* injury. It is not sufficient that the party moving for
8 disqualification shows that the lawyer's client may be injured by
9 his counsel's continued involvement in the case. Xcentric
10 Ventures, LLC v. Stanley, 2007 WL 2177323 (D. Az. July 27, 2007)
11 (finding the moving party's arguments pertaining to opposing
12 counsel's proprietary and personal interests in the case which
13 were predicated exclusively on harm that the plaintiffs might
14 suffer from their counsel's continued representation insufficient
15 to confer standing). The moving party must show how the
16 "diminished quality of the representation" of an opposing party
17 causes the *movant* injury. Id. at *2.

18 Thus, it is defendants ultimate burden to show they have
19 standing to raise the issues in their disqualification motion in
20 order for the court to exercise jurisdiction over the motion.
21 See O'Conner v. Jones, 946 F.2d 1395, 1400 (8th Cir. 1991).
22 Accordingly, the court must consider whether defendants have
23 demonstrated an injury in fact, that *they* will endure, as opposed
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25 ³ To satisfy the requirements for standing under Article
26 III of the United State Constitution, the party seeking relief
27 must show: (1) he has suffered an injury in fact that is concrete
28 and particularized and actual or imminent; (2) the injury must be
fairly traceable to the challenged action of the opposing party;
and (3) it is likely that the injury will be redressed by a
favorable decision. Wilbur v. Locke, 423 F.3d 1101, 1107 (9th
Cir. 2005).

1 to plaintiff, as a result of Sekhon's representation of plaintiff
2 and the proposed class in this action.

3 The court finds that defendants have not made the requisite
4 showing. Each of the alleged conflicts described above is
5 predicated exclusively on harm that plaintiff and the proposed
6 class might suffer as a result of counsel's continued
7 representation of them. Defendants contend that because of the
8 overlapping subject matter of the two actions, counsel's status
9 as an indicted defendant could adversely affect plaintiff and the
10 class' interests in this civil action and/or the underlying
11 asylum proceedings. Defendants maintain that because the
12 timetable for adjudication of the underlying asylum applications
13 hinges on the disposition of the criminal action, plaintiff's
14 civil action could be delayed by Sekhon's conduct in the criminal
15 action. Similarly, defendants assert the outcome of the criminal
16 proceedings could negatively affect the substantive adjudication
17 of the underlying asylum applications, if for example, Sekhon was
18 to enter a plea admitting to the submission of fraudulent
19 applications. Defendants also contend that unspecified
20 discovery conflicts could arise between the two actions which
21 would detrimentally affect plaintiff's interests in this civil
22 action.

23 Each of these potential adverse consequences would affect
24 plaintiff's and the proposed class' interests in this case and in
25 obtaining asylum via their underlying immigration applications.
26 In making their motion, defendants have not articulated any
27 interest of their own which would be negatively impaired by
28 Sekhon's continued representation of plaintiff in this case.

1 Defendants' bald claim of a "degradation of the integrity of the
2 court" and alleged "interference with the administration of
3 justice" as a result of counsel's involvement in this case is
4 simply insufficient, under the case law set forth above, to
5 confer standing on defendants, as non-clients, to disqualify
6 opposing counsel. See Canatella, 2004 WL 2648284, *2 (holding
7 the defendant's "obliqu[e] references [to] how a potential
8 conflict of interest may impact his interests in a just and
9 lawful determination of his claims" insufficient to confer
10 standing); Xcentric Ventures, LLC, 2007 WL 2177323, *2 (holding
11 the defendants failed to establish standing to seek
12 disqualification of opposing counsel where they failed to show
13 how the diminished quality of the plaintiff's representation
14 caused defendants any injury); Yee, 2006 WL 3050827, *1 (finding
15 the defendants lacked standing to disqualify the plaintiff's
16 counsel on the basis of his dual role as counsel and potential
17 witness in the case since defendants did not show how that dual
18 role detrimentally affected them, as opposed to the plaintiff).

19 To move to disqualify opposing counsel, as non-clients,
20 defendants are required to show how counsel's representation of
21 plaintiff and the proposed class detrimentally affects their
22 interests in a just and fair determination of this case.
23 Defendants have not done so. Indeed, at best, defendants have
24 simply shown how the interests of plaintiff and the proposed
25 class may be harmed by Sekhon's continued role as counsel in this
26 case. However, such injury to *plaintiff* is not sufficient to
27 confer standing on defendants to move for disqualification.
28 Moreover, the court notes that plaintiff in this case has

1 attested to his knowledge about the criminal indictment of Sekhon
2 and other members of Sekhon's law firm and declares that he
3 wishes to have Sekhon continue in this matter as his attorney.
4 (Ex. A to Opp'n, filed Oct. 31, 2008).

5 Only in the reply do defendants acknowledge their heavy
6 burden in establishing standing to bring this motion. For the
7 first time therein, defendants argue that *they* may be harmed by
8 Sekhon's continued representation in this case because (1) a
9 delay in the criminal trial date could affect the ability of the
10 parties to settle this case; (2) the setting of a civil discovery
11 schedule could affect the government's ability to properly
12 prepare for the criminal trial; and (3) an order in this case to
13 adjudicate the asylum applications could impact the government's
14 criminal investigation. These are new arguments, raised for the
15 first time in the reply, and as such, they may be properly
16 disregarded by the court. Zamani v. Carnes, 491 F.3d 990, 996
17 (9th Cir. 2007) ("The district court need not consider arguments
18 raised for the first time in a reply brief.") However, in the
19 court's discretion, it has considered these arguments but finds
20 them insufficient to establish standing.

21 It is the government's burden to substantiate an actual,
22 particularized and immediate injury in fact. See Xcentric
23 Ventures, LLC, 2007 WL 2177323, *2 (recognizing that the
24 defendants must show "imminen[t]" injury to establish standing);
25 Canatella, 2004 WL 2648284, *2 (recognizing that the mere
26 "possibility" that a conflict of interest could affect the
27 movant's interests is insufficient to establish standing);
28 Colyer, 50 F. Supp. at 973 (holding that the defendant's interest

1 in the administration of justice is "insufficiently concrete and
2 particularized" to support a finding of standing). Here, the
3 government points to only *potential* injury of a *speculative*
4 nature. The government does not give any details as to how its
5 investigation of the criminal matter will be detrimentally
6 affected by Sekhon's representation in this case or how any
7 proceedings in this civil case will negatively impact the
8 government's ability to try the criminal matter. (Reply, filed
9 Nov. 6, 2008.) Without specifics, this court cannot find that
10 the government will sustain an injury in fact that is
11 attributable to Sekhon's continued representation of plaintiff
12 and the proposed class in this case.

13 Because defendants lack standing to bring the instant
14 motion, the court does not reach the parties' other arguments for
15 and against the granting of this motion.⁴ Defendants' motion
16 must be denied on standing grounds.

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24 ⁴ The court does note, however, that the government has
25 failed to identify any specific Rule of Professional Conduct of
26 the State Bar of California which plaintiff's counsel is
27 violating by his representation of plaintiff and the proposed
28 class in this action. At this juncture, it does not appear
counsel is in violation of any rules of professional conduct;
indeed, as set forth above, he has apparently made full
disclosure to his client as to the related criminal proceedings,
and his client wishes to retain him as counsel in this matter.

1 **CONCLUSION**

2 For the foregoing reasons, defendants' motion to disqualify
3 plaintiff's counsel is DENIED.

4 IT IS SO ORDERED.

5 DATED: November 25, 2008

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FRANK C. DAMRELL, JR.
9 UNITED STATES DISTRICT JUDGE
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