

1 **BROOKE WEITZMAN** SBN 301037
 2 **WILLIAM WISE** SBN 109468
 3 **ELDER LAW AND DISABILITY**
 4 **RIGHTS CENTER**
 5 1535 E 17th Street
 6 Santa Ana, California 92705
 7 T. 714-617-5353
 8 E. BWEITZMAN@ELDRCENTER.ORG
 9 E. BWISE@ELDRCENTER.ORG

8 **CAROL A. SOBEL** SBN 84483
 9 **MONIQUE ALARCON** SBN 311650
 10 **LAW OFFICE OF CAROL SOBEL**
 11 725 ARIZONA AVENUE, SUITE 300
 12 SANTA MONICA, CA 90401
 13 T. 310 393 3055
 14 E CAROLSOBELLAW@GMAIL.COM
 15 E. MONIQUE.ALARCON8@GMAIL.COM

PAUL L. HOFFMAN SBN 71244
CATHERINE SWEETSER SBN 271142
COLLEEN M. MULLEN SBN 299059
SCHONBRUN, SEFLOW, HARRIS &
HOFFMAN
 11543 OLYMPIC BOULEVARD
 T. 310 396-0731
 E. HOFFPAUL@AOL.COM
 E. CSWEETSER@SSHHLAW.COM
 E. CMULLEN@SSHHLAW.COM

Attorneys for Plaintiffs

16
 17 UNITED STATES DISTRICT COURT
 18 FOR THE CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

19 HOUSING IS A HUMAN RIGHT, et al., Case No: 8:19-00388 DOC JDE

20
21 Plaintiffs,

REPLY RE APPLICATION TO
DISQUALIFY JONES DAY AS
COUNSEL FOR DEFENDANTS

22
23
24 v.

Date: none
Time: none
Ctrm: 10C (The Hon. James V. Selna)

25 THE COUNTY OF ORANGE, et al.,

26 Defendants.
27
28

1 **I. INTRODUCTION**

2 The power to disqualify attorneys for ethics violations is a power ‘incidental
3 to all courts, and is necessary for the preservation of decorum, and for the
4 respectability of the profession.’ *Ex Parte Burr*, 22 U.S. 529, 531 (1824). The ethics
5 issue created by Jones Day’s role as defense counsel in this action is concrete,
6 substantial and immediate. The only way the firm can represent the interests of its
7 current clients in this matter is to advance positions directly adverse and injurious to
8 that of its former clients. The California Rules of Professional Conduct (“CRPC”)
9 prohibit such a breach of the duty of loyalty to a former client. No exception would
10 allow Jones Day to continue in this case and the firm must be disqualified.

11 **II. FOR OVER A YEAR, JONES DAY REPRESENTED UNHOUSED
12 PERSONS AND ORGANIZATIONS IN LITIGATION CHALLENGING
13 CRIMINALIZATION OF UNAVOIDABLE ACTIVITIES IN PUBLIC
14 PLACES BASED ON THEIR HOMELESS STATUS**

15 **A. Jones Day’s Representation**

16 Jones Day represented unhoused plaintiffs and their advocates for over a year
17 in still-ongoing litigation in the Central District.¹ The firm executed its first retainer
18 in March, 2017 and only terminated that agency in April, 2018, just six days before
19 the action was filed.² The retainer purported to limit Jones Day’s work to challenging
20 solely the seizure and destruction of the property of unsheltered persons without due
21 process in Anaheim, an issue raised against all defendants in the instant litigation,
22 including San Clemente, one of the cities represented by Jones Day. In fact, Jones
23 Day’s actual role in the earlier cases was far broader than described in their retainer.

24 While acting as pro bono counsel with the Legal Aid Society of Orange County
25 (LASOC), the firm represented the organizational plaintiff Peoples Homeless Task
26 Force (“PHTF”) while two related cases were being developed simultaneously,

27 ¹ See *PHTF v. City of Anaheim*, 8:18-cv-00220 DOC KES.

28 ² Declaration of Roman Darmer and Exhibits A-D [Doc. 56-1].

1 *Ramirez v. County of Orange*, Case No. 8:18-cv-00220 DOC (C.D. Cal.), and *Peoples*
2 *Homeless Task Force v. City of Anaheim*, Case No. 8:18-cv-00642 DOC (C.D. Cal.).
3 The firm’s representation of individual plaintiffs in the Anaheim case began six
4 months earlier in March 2017, Darmer Ex. A, and continued until April 12, 2018, just
5 six days before the Anaheim lawsuit was filed and more than two months after the
6 *Ramirez* case was filed against Orange County on February 7, 2018.³

7 Contrary to Jones Day’s assertion, both *Ramirez* and *PHTF v. Anaheim*
8 challenge, *inter alia*, not only the unlawful seizure and immediate destruction of the
9 property of unsheltered persons, but also claims for violations of disability laws,
10 Eighth Amendment violations and state-created danger under the 14th Amendment.
11 *PHTF*, 18-cv-00642 [Doc. 1]; *Ramirez*, 18-cv-00220 [Doc. 1]. No meaningful
12 distinction exists between these claims in *PHTF v. Anaheim*, *Ramirez* and this case.

13 **B. A Difference in Organizational Names Does Not Vitate a Conflict**

14 While the organizational plaintiff in this action is Housing is a Human Right
15 Orange County (“HHROC”), the distinction between the names PHTF and HHROC
16 is of no moment in deciding whether Jones Day must be disqualified. Plaintiffs
17 submitted unrefuted evidence that HHROC is the alter ego of PHTF. The difference
18 in organizational names may explain why a conflicts check did not disclose the
19 former representation - although a call to Legal Aid would have - but it does not
20 mitigate or excuse the conflict that exists here with a former client.

21 Regardless of the name difference, even if the motion is not filed by the former
22 client asserting a conflict, “the moving party can have standing to bring a motion to
23 disqualify. [*Colyer v. Smith*, 50 F. Supp. 2d 966, 972 (C.D. Cal. 1999)]. Thus, it's not
24 surprising for the California Court of Appeal to observe that ‘[c]ase law abounds with
25 examples of orders disqualifying counsel that have not been the product of motions

26
27 ³ See fn. 1.
28

1 by present or former clients.’ *Kennedy v. Eldridge*, 201 Cal. App. 4th 1197, 1204, 135
 2 Cal. Rptr. 3d 545 (2011).” *State Comp. Ins. Fund v. Drobot*, 192 F.Supp.3d 1080,
 3 1089 (C.D. Cal. 2016). *See also Freedom Wireless, Inc. v. Boston Commc’ns Group,*
 4 *Inc.*, Nos. 2006-1020 et al., 2006 WL 8071423, *2 (Fed. Cir. Mar. 20, 2006)
 5 (interpreting the same rule in another jurisdiction).

6 The irrefutable facts shew that, starting as early as March 2017, Jones Day
 7 spent more than a year meeting with individual and organizational plaintiffs, as well
 8 as other unhoused persons, in the course of investigating, strategizing, and preparing
 9 litigation with LASOC in two cases filed last year just two months apart, with PHTF
 10 as a named plaintiff in both still ongoing cases. This is not a remote occurrence.

11 **III. JONES DAY’S REPRESENTATION OF THE DEFENDANT CITIES**
 12 **NECESSARILY CREATES A BREACH OF ITS DUTY OF LOYALTY**
 13 **TO A FORMER CLIENT**

14 **A. The California Rules of Professional Conduct Require**
 15 **Disqualification Here**

16 Jones Day very recently represented PHTF in litigation advancing the
 17 constitutional and statutory rights of homeless individuals against governmental
 18 entities. Now, the firm has switched sides, advocating a deliberately and directly
 19 adverse position in the same jurisdiction on behalf of municipal entities against
 20 homeless individuals and its former client. This is a clear violation of the ethics rules.

21 California’s Rules of Professional Conduct were amended three times in the
 22 past decade. Jones Day relies on cases all of which predate these amendments and
 23 construed different statutory language than in the current Rules. *See Opp.* at p. 6.

24 In unambiguous terms, the CRPC defines a lawyer’s duty to former clients.

25 A lawyer who has formerly represented a client in a matter shall
 26 not thereafter represent another person in the same or a substantially
 27 related matter in which that person’s interests are materially adverse to
 28 the interests of the former client unless the former client gives informed
 written consent.

CRPC 1-9(a).

While the ethics rules require only that the new matter be “substantially

1 related” to the prior litigation, Jones Day’s representation of the municipal defendants
 2 in this case is directly related and diametrically adverse to the interests of the PHTF
 3 in the ongoing cases filed in 2018 and to HHROC in the current litigation.

4 **B. There is No “Informed Consent” By Former Clients to Allow Jones**
 5 **Day to Continue its Representation of Defendants in this Action**

6 **1. The duty owed to a former client**

7 “After termination of a lawyer-client relationship, the lawyer owes
 8 two duties to a former client. The lawyer may not (i) do anything that
 9 will injuriously affect the former client in any matter in which the lawyer
 10 represented the former client, or (ii) at any time use against the former
 11 client knowledge or information acquired by virtue of the previous
 relationship. (See *Oasis West Realty, LLC v. Goldman* (2011) 51
 Cal.4th 811 [124 Cal.Rptr.3d 256]; *Wutchumna Water Co. v. Bailey*
 (1932) 216 Cal. 564 [15 P.2d 505].) ... These duties exist to preserve a
 client’s trust in the lawyer and to encourage the client’s candor in
 communications with the lawyer.”

12 Comment [1] to Rule 1-9 (edit supplied).

13 Jones Day contends that it has no “confidential” information as a result of its
 14 representation of PHTF and any potentially confidential information it has belongs
 15 to the individuals, not PHTF, concluding that nothing it did while counsel for more
 16 than a year for homeless persons and their advocates has any relationship here.

17 Plaintiffs say that a former Jones Day associate, Mr. Borle,
 18 interviewed homeless individuals at the Santa Ana Riverbed to develop
 the facts for their possible claims against Anaheim for property seizure.
 19 J. Robbins Decl. ¶ 9 (stating that Borle “engaged in multiple
 conversations with the homeless individuals who are plaintiffs in [our
 lawsuit] over property confiscations”); Davis Decl. ¶¶ 6-7 (attesting that
 20 Borle “was out in the riverbed interfacing with homeless individuals”);
 see also Darmer Decl. ¶ 7. But that is not the “confidential information”
 21 of PHTF, much less of HHROC; it is the information of the homeless
 individuals (who are not parties here and who are not seeking Jones
 22 Day’s disqualification). Moreover, that material has no conceivable
 relevance to this case, which does not involve those plaintiffs or
 23 defendants or legal theories. Nothing that Jones Day did in the course of
 the Anaheim matter is material to the issues here—namely whether the
 24 defendant cities are abiding by Martin, complying with the Housing
 Accountability Act, or engaging in disability discrimination. There is
 25 thus no basis for disqualification for that reason too.

26 Opp. at p. 14.⁴

27
 28 ⁴ Defense counsel edited Ms. Robbins’ declaration to substitute the word
 “Anaheim” for “our lawsuit.” As she attested, there was no clear distinction

1 Jones Day misunderstands the law on this issue. “[T]he test does not require
2 the ‘former’ client to show that actual confidences were disclosed. That inquiry would
3 be improper as requiring the very disclosure the rule is intended to protect. It is the
4 possibility of the breach of confidence, not the fact of the breach, that triggers
5 disqualification. (*Trone v. Smith* (9th Cir. 1980) 621 F.2d 994, 998-999)[]” *Woods*
6 *v. Superior Court*, 149 Cal. App. 3d 931, 934 (1983) (additional citations omitted).
7 See Comment [8] to 2018 Rules of Professional Conduct 1-7.

8 Jones Day submitted no evidence to show that the information it collected was
9 so narrow as it now contends. There is no evidence that the firm asked people where
10 they were from before interviewing some of the 1000 or more people then living in
11 the riverbed. Nor did Jones Day present any evidence that its inquiries were limited
12 to property seizure issues at a time when the focus, with the Orange County Sheriff’s
13 Department leading the plan, was on a concerted campaign to conduct law
14 enforcement sweeps in the riverbed on a variety of purported criminal laws. See e.g.,
15 [https://voiceofoc.org/2017/09/a-view-from-the-riverbed-homeless-camp-as-sheriff](https://voiceofoc.org/2017/09/a-view-from-the-riverbed-homeless-camp-as-sheriff-starts-patrols)
16 [-starts-patrols](https://voiceofoc.org/2017/09/a-view-from-the-riverbed-homeless-camp-as-sheriff-starts-patrols) (Sept. 18, 2017).

17 Fundamentally, Jones Day’s response fails to recognize that the duty of
18 “loyalty” and the duty of “confidentiality” attorneys owe to their former clients are
19 completely independent obligations. So, even assuming that Jones Day has no
20 confidential information obtained by virtue of the firm’s prior representation of
21 PHTF, or the time Jones Day spent interviewing unsheltered individuals in the
22 riverbed, the firm still owes an absolute duty of “loyalty” that bars it from doing
23 anything that will “injuriously affect” PHTF in any matter in which the firm
24 previously represented PHTF.

25 It makes no difference that Jones Day terminated its representation of PHTF
26

27 between Jones Day and the PHTF in the two lawsuits in which the organization
28 is currently a plaintiff. Decl. of J. Robbins at ¶¶ 9-10. Regardless, the unrefuted
evidence shows that Jones Day did not so restrict its involvement with PHTF.

1 a few days before the action against Anaheim was filed, or that the retainer purported
2 to limit the firm’s representation. When an attorney is retained to file an action,
3 spends more than a year deeply involved in preparing that litigation, repeatedly
4 engages with the client beyond the scope of the engagement letter and then quits less
5 than a week before the lawsuit is filed, the firm has an attorney-client relationship on
6 a “matter” as that term is broadly defined in the Rules of Professional Conduct.⁵

7 **2. The requirement to obtain “informed written consent”**

8 CRPC 1.7(a) establishes the necessity to obtain “informed written consent” to
9 overcome a conflict created by a breach of the duty of loyalty to a former client.
10 “‘Informed consent’ means a person’s agreement to a proposed course of conduct
11 after the lawyer has communicated and explained (i) the relevant circumstances and
12 (ii) the material risks, including any actual and reasonably foreseeable adverse
13 consequences of the proposed course of conduct. The “informed written consent”
14 requires that the disclosures and the consent must be in writing. CRPC 1.0.1(e-1).
15 *See also Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*,
16 6 Cal. 5th 59 (2018), applying former CRPC Rule 3-310(A)(2), (1).

17 The requirement in the Rules of Professional Conduct that an attorney identify
18 “relevant circumstances” and “actual and reasonably foreseeable” events with any
19 advance waiver of conflicts is consistent with prior Rule 3-310(A)(1). *See Sharp v.*
20 *Next Entertainment, Inc.*, 163 Cal.App.4th 410, 429-31 (2008). Neither element was
21 met here. There is no legally sufficient informed written consent from PHTF and no
22 evidence of any attempt by Jones Day to obtain it from any of its former clients.
23 Whether that duty was ignored because Jones Day did not realize it had a prior
24 representation that raised a potential or actual conflict, or whether the firm decided

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26 ⁵ A “matter” is “any judicial or other proceeding, application, request for
27 a ruling or other determination, contract, transaction, claim, controversy,
28 investigation, charge, accusation, arrest, or other deliberation, decision, or action
that is focused on the interests of specific persons, or a discrete and identifiable
class of persons.” CRPC Rule 1.7(e).

1 somehow that the former and current matters were not, at minimum, “substantially
2 related” is irrelevant. Informed consent is not optional. It is required where, as here,
3 Jones Day now intends to represent defendants and aggressively advance punitive
4 measures directly against the interests of its former plaintiff clients.

5 **3. The issues in these cases are directly, if not “substantially” related**

6 Jones Day contends no conflict exists here because the formal retainer executed
7 with the individual plaintiffs in what became *PHTF v. Anaheim* in April 2018, and
8 the formal letter of engagement executed with PHTF in August 2017, were limited
9 to representation on the property seizures by Anaheim. Jones Day further argues that
10 any confidential material obtained from individual plaintiffs in the riverbed “has no
11 conceivable relevance to this case, which does not involve those plaintiffs or
12 defendants or legal theories. Nothing that Jones Day did in the course of the Anaheim
13 matter is material to the issues here—namely whether the defendant cities are abiding
14 by *Martin*, complying with the Housing Accountability Act, or engaging in disability
15 discrimination.” Opp. at 14, l. 19-24.

16 This argument fails for two reasons: first, the unrefuted evidence is that the
17 firm participated in investigation and strategy discussions on more than *PHTF v.*
18 *Anaheim*. See e.g., Decl. of J. Robbins, ¶¶ 4-5, 7-10. Jones Day attorneys met with
19 the County on behalf of PHTF;⁶ however, the County was only a party to the *Ramirez*
20 case. The emails between the firm and PHTF responded to the client’s concerns
21 about the broader issues raised by all of the cases currently before Judge Carter. See
22 Decl. of Mike Robbins and Exhibit A. The firm assured the clients that all their
23 concerns would be discussed in strategy meetings. *Id.* At no time did Jones Day
24 respond to the emails and tell PHTF it could not investigate or discuss issues other
25 than specific property seizures by Anaheim.

26 The second reason why this argument necessarily fails is that this case, as all
27 of the cases now before Judge Carter, raises explicit allegations of unlawful seizure

28 ⁶ Decl. of J. Robbins at ¶¶ 9-10.

1 and destruction of personal property of unhoused persons in their jurisdictions as one
2 of several claims. While *PHTF v. Anaheim* raises these claims only against Anaheim,
3 *Ramirez v. County of Orange*, 8:18-cv-0220 DOC KES, filed by LASOC in February
4 2018 with PHTF as a named plaintiff, makes the same allegations of unlawful
5 conduct against the County. *Ramirez*, First Amended Complaint at ¶¶ 114-118. [Doc.
6 70]. The County is also a defendant in this action.

7 Plaintiffs in this action raise many of the same causes of action as in *Ramirez*
8 and *PHTF v. Anaheim*. They allege that each person’s “right to due process of law
9 was violated by each of the Defendants through the application of constitutionally
10 vague laws used to threaten intimidate, and coerce Plaintiffs to leave public space to
11 avoid citation or arrest for, *inter alia*, “camping” in public, loitering, and *placing*
12 *their possessions on public property* when they have no other place to engage in daily
13 life activities.” Corrected First Amended Complaint, ¶ 118 [Doc. 28] (emphasis
14 supplied). As defense counsel notes, Plaintiff Duane Nichols makes these same
15 specific allegations against movant San Clemente. Corrected First Amended
16 Complaint, ¶ 142 [Doc. 28].

17 While the specific facts may differ somewhat from case to case, there is a basic
18 commonality and the legal theories and constitutional rights at issue are the same.
19 Because like claims are raised in each of the cases, Jones Day’s defense of the movant
20 defendants is directly adverse to the position of its former client, PHTF.

21 If there were any doubt that these cases are, at base, “substantially related,”
22 Jones Day’s arguments in the motion to recuse Judge Carter put such doubt to rest.⁷
23 There, the firm argues that “[b]oth lawsuits center around the problem of
24 homelessness in Orange County, and the alleged failure of local government entities
25 to adequately address that problem.” Memorandum in Support of Motion to Recuse

26
27 ⁷ *Orange County Catholic Worker v. County of Orange* involves all the
28 cities in the County because the City of Santa Ana moved to file a Complaint in
Intervention, naming all of the cities as cross-defendants. The Court granted
the motion. Doc. 124, 130.

1 at p.1. [Doc. 42-1].⁸ Plaintiffs agree with the argument Jones Day made in its Motion
2 to Recuse the Hon. David O. Carter. Based on its own arguments, Jones Day has an
3 unwavering ethical obligation that bars the firm from taking a position directly
4 adverse to a former client without informed written consent of the client.

5 **IV. CONCLUSION**

6 For all of the foregoing reasons, the motion to disqualify should be granted.

7
8 Dated: June 10, 2019

Respectfully submitted,

9 LAW OFFICE OF CAROL A. SOBEL
10 ELDER LAW & DISABILITY RIGHTS CENTER
SCHONBRUN, SEPLOW, HARRIS & HOFFMAN

11 /s/ Carol A. Sobel
12 By: CAROL A. SOBEL
Attorneys for Plaintiffs

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23 _____
24 ⁸ Jones Day takes contrary positions in these two motions. In the recusal
25 motion, Dkt. 42-1 at 11, it asserts Judge Carter’s conversations with homeless
26 individuals are related to this case as they concern “the homelessness problem
27 in Orange County”. They describe this case as a “follow-on action that only
28 made its way to Judge Carter because it involves substantially similar issues of
fact and law.” *Id.* at 10. Here, however, they contend that information gathered
by investigating the claims of homeless individuals on the riverbed has “no
conceivable relevance” to the instant case. Dkt. 56 at 14.