

1 LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
2 WILLIAM S. LERACH (68581)
TRAVIS E. DOWNS III (148274)
3 AMBER L. ECK (177882)
DAVID T. WISSBROECKER (243867)
4 655 West Broadway, Suite 1900
San Diego, CA 92101
5 Telephone: 619/231-1058
619/231-7423 (fax)
6 - and -
WILLOW E. RADCLIFFE (200087)
7 100 Pine Street, Suite 2600
San Francisco, CA 94111
8 Telephone: 415/288-4545
415/288-4534 (fax)
9
ROBBINS UMEDA & FINK, LLP
10 MARC M. UMEDA (197847)
610 West Ash Street, Suite 1800
11 San Diego, CA 92101
Telephone: 619/525-3990
12 619/525-3991 (fax)

13 Attorneys for Plaintiffs

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SANTA CLARA
16

17 In re MERCURY INTERACTIVE CORP.)
SHAREHOLDER DERIVATIVE)
18 LITIGATION)

Case No. 1:05-cv-50710

(Derivative Action)

19 This Document Relates To:)
20)

ALL ACTIONS.)
21)

Assigned to: Judge James Kleinberg

PLAINTIFFS' MEMORANDUM OF POINTS
& AUTHORITIES IN SUPPORT OF MOTION
FOR DISQUALIFICATION OF WILSON
SONSINI GOODRICH & ROSATI P.C. AS
COUNSEL

22 DATE: November 3, 2006

23 TIME: 9:00 a.m.

24 DEPT: 14

25 DATE ACTION FILED: November 4, 2005
26
27
28

1 **I. INTRODUCTION**

2 Plaintiffs move this Court to disqualify Wilson Sonsini Goodrich and Rosati P.C. (“Wilson
3 Sonsini”) as counsel for defendant Kenneth Klein (“Klein”) in this action due to a conflict of interest
4 arising from Wilson Sonsini’s representation of both Klein and Hewlett Packard (“HP”), a corporation
5 that has entered into a merger agreement with Mercury Interactive Corporation (“Mercury” or the
6 “Company”), and as such stands to inherent Mercury’s claims against Klein that Mercury has
7 authorized plaintiffs to pursue. Wilson Sonsini’s simultaneous representation of Klein and HP violates
8 California Rule of Professional Conduct (“Cal. Rule”) Rule 3-310 and numerous conflict of interest
9 rules, raises ethical questions and mandates Wilson Sonsini’s automatic disqualification. To avoid the
10 actual conflicts that have arisen in this case, Wilson Sonsini must be disqualified as counsel for Klein
11 and HP.

12 Under Cal. Rule 3-310, such an actual conflict involving “simultaneous representation” requires
13 “*per se*” or “automatic” disqualification “in all but a few instances.” *Flatt v. Superior Court*, 9 Cal. 4th
14 275, 284 (1994). The rule is not complicated – allowing an attorney to represent clients “whose
15 interests are *directly* adverse *in the same litigation*,” as is the case here, is “patently improper.” *Id.* at
16 285 n.3 (emphasis in original).¹ Nor is the reason for the rule difficult to understand – “[s]omething
17 seems radically out of place if a lawyer sues one of the lawyer’s own present clients in behalf of another
18 client . . . the client who is sued can obviously claim that the lawyer’s *sense of loyalty* is askew.” *Id.*
19 at 285. Thus the outcome of this motion, which seeks a disqualification that is “automatic,” should not
20 be much in doubt. Wilson Sonsini has undertaken simultaneous representation of clients whose
21 interests are directly adverse, and therefore must be jettisoned from this litigation.

22 This is a shareholder action for Mercury against certain of the Company’s former directors and
23 officers – including Klein – for breaches of fiduciary duty, waste of corporate assets and other
24 violations of California law. As detailed in the Consolidated Complaint for Breach of Fiduciary Duty,
25 Violations of the California Corporations Code, Abuse of Control, Gross Mismanagement, Waste of

27 ¹ Unless otherwise stated all emphasis is added and citations omitted.

