

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BLITZSAFE TEXAS, LLC,

Plaintiff,

v.

HONDA MOTOR CO., LTD. ET AL

Defendants.

Civil Action No. 2:15-cv-01274-JRG-RSP

(LEAD CASE)

JURY TRIAL DEMANDED

BLITZSAFE TEXAS, LLC,

Plaintiff,

v.

TOYOTA MOTOR CORPORATION ET AL

Defendants.

Civil Action No. 2:15-cv-01277-JRG-RSP

(CONSOLIDATED CASE)

JURY TRIAL DEMANDED

TOYOTA'S MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

Defendants Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., Toyota Motor Manufacturing, Texas, Inc.; Toyota Motor Manufacturing Kentucky, Inc., and Toyota Motor Manufacturing Mississippi, Inc. (collectively “Toyota” or “Defendants”), hereby move to disqualify Brown Rudnick, LLP as counsel for Plaintiff Blitzsafe Texas, LLC (“Blitzsafe”) and to strike deposition transcripts of Toyota witnesses taken since July 29, 2016 when one Brown Rudnick attorney, Vincent Rubino, who previously represented Toyota in numerous patent matters and was privy to relevant Toyota privileged communications, began working on the litigation.

Defendants are submitting herewith Ex. A (Declaration of Matthew G. Berkowitz) which references privilege documents (Exs. 1-28) and Ex. F (Declaration of Kathleen Deering) which references privilege document (Ex. 1). If the Court wishes, these documents can be submitted for *in camera* review.

I. INTRODUCTION

Blitzsafe is represented in this action by Brown Rudnick LLP and McKool Smith. Blitzsafe alleges that aspects of Toyota’s “Entune” and “Enform” technology infringe two patents related to integration of portable audio devices, such as iPhones, with the vehicle stereo (or “head unit”). One of Blitzsafe’s attorneys is Vincent Rubino, who entered an appearance in this case on July 29, 2016. Dkt. 129. Prior to representing Blitzsafe, however, Mr. Rubino represented Toyota in patent litigation matters for years as an attorney at Kenyon & Kenyon.

During the course of his representation of Toyota, Mr. Rubino was repeatedly exposed to highly sensitive information regarding Toyota’s legal strategies, including Toyota’s internal assessment of patent infringement claims, its strategy for settlement and mediation, its strategy regarding the use of *Inter Partes* Review proceedings in connection with settlement and

mediation, and discussions concerning Judge Folsom, who is mediating this case. Mr. Rubino was also privy to privileged communications evaluating Toyota engineers, including engineers that Blitzsafe has deposed in *this case*, that are knowledgeable about Entune and Enform technology, and that Toyota has identified in its initial disclosures as possible trial witnesses. While at Kenyon, Mr. Rubino had specific responsibility for a Toyota privilege log involving communications to and from these same trial witnesses. Mr. Rubino was even sent a privileged communication with Toyota's legal personnel discussing *this very action*, including the asserted patents, Blitzsafe as an entity, and its prior litigation history.

After years of defending Toyota in patent litigation matters, Mr. Rubino abruptly switched sides and is now suing his former client. The strategy discussions that Mr. Rubino was privy to, including strategies for litigating in the Eastern District of Texas, strategies for coordination with suppliers, IPR strategies, and strategies for mediation before Judge Folsom, applied not just to the prior cases, but to this case as well. Indeed, Mr. Rubino was privy to Toyota's evaluations of trial witnesses in *this case*, and logged their privileged documents. This confidential information cannot be unlearned. And, by law Mr. Rubino is *presumed to share* those confidences with other members of his firm. The conflict of interest created by Mr. Rubino's participation in this matter is imputed to his entire firm, requiring disqualification not only of Mr. Rubino, but Brown Rudnick as well.

To be sure, this is not simply a litigation tactic by Toyota; its trust in the attorney-client privilege is at stake, given Mr. Rubino's extensive exposure to Toyota's most sensitive discussions that are directly relevant to this matter and that could not possibly be mentally compartmentalized and quarantined. Moreover, Toyota filed this motion as soon as reasonably

possible after learning about Mr. Rubino's possible involvement. Indeed, Brown Rudnick appeared to be walling Mr. Rubino off for most of this litigation, as Toyota expected it would do. It was not until July 29th, just before depositions of Toyota witnesses, that Mr. Rubino made an appearance in the case and began taking depositions of other defendants' witnesses that Toyota appreciated his possible involvement. On August 14, 2016, Toyota requested confirmation that Mr. Rubino had not been involved in any aspect of the litigation involving Toyota. Ex. B (Aug. 14, 2016 Mandir letter to Lambrianakos). Brown Rudnick eventually responded on August 23, 2016, but did not deny his involvement. Ex. C (Aug. 23, 2016 Lambrianakos letter to Mandir).¹

“Disqualification, where appropriate, ensures that the case is well presented in court, that confidential information of present or former clients is not misused, and that a client's substantial interest in a lawyer's loyalty is protected.” Restatement (Third) of the Law Governing Lawyers § 6cmt. i (2000). Disqualification is necessary here to ensure that Blitzsafe does not benefit from the misuse of Toyota's confidential information, to ensure that Toyota receives a fair trial, and to protect Toyota's and the public's confidence in the attorney-client privilege.

II. FACTUAL BACKGROUND

A. The Current Litigation

Blitzsafe sued Toyota alleging that aspects of its Entune and Enform systems, which allow a user to play audio from a device such as an iPhone through the car stereo, infringe two of its patents. No. 15-1277, Dkt. 1 at ¶¶ 12-31 (Blitzsafe Complaint against Toyota), Ex. D (Blitzsafe Infringement Contentions). In its infringement contentions, Blitzsafe has pointed to Toyota's “head units” (or vehicle entertainment systems) as infringing. *Id.* Toyota has identified

¹ See Exhibit G, Declaration of Margaret Welsh, which identifies exhibits B-E cited herein.

a number of engineers and employees as possible trial witnesses, including Sotshi Hata and Brian Inouye. Ex. E (Toyota's Second Supplemental Initial Disclosures) at 10. Blitzsafe has deposited each of these individuals.

Toyota filed petitions for *Inter Partes* Review challenging the validity of the two Blitzsafe patents asserted in this action - U.S. Patent Nos. 7,489,786 and 8,155,342. The Patent Office has instituted review as to all challenged claims of the '342 patent and some claims of the '786 patent. Dkt. 133.

Currently, fact discovery is set to close in this case on September 19, 2016, with expert discovery to complete by October 31, 2016, and Jury Selection on February 6, 2017. Dkt. 56.

Mr. Rubino entered a notice of appearance in this action on July 29, 2016. Dkt. 129. Counsel for Toyota contacted Brown Rudnick on August 14, 2016 requesting confirmation that Mr. Rubino had not had any involvement with any aspects of this action concerning Toyota. Ex. B. The parties conducted a meet and confer regarding the instant motion on August 30, 2016.

B. Mr. Rubino's Prior Representation of Toyota

Immediately prior to joining Brown Rudnick, Mr. Rubino was an associate at Kenyon & Kenyon LLP from 2007 to at least late summer 2015. Ex. A (Declaration of Matthew G. Berkowitz) at ¶ 6.² As a Kenyon attorney, Mr. Rubino represented Toyota in numerous patent litigation matters, including a series of actions brought by American Vehicular Sciences ("AVS") in the Eastern District of Texas. Ex. A at ¶¶ 4, 7. In the period from 2013 to 2015

² Exhibits 1-28 of Ex. A (Declaration of Matthew G. Berkowitz) are available for *in camera* review.

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