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 REPLY IN SUPPORT OF ITS MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

Toyota submits this Reply to address issues raised in Plaintiff Blitzsafe Texas, LLC's Opposition to Toyota's Motion to Disqualify filed Sept. 29, 2016 (Dkt. 174) ("Blitzsafe's Opposition" or "Opp.").

I. INTRODUCTION

Blitzsafe does not dispute that Mr. Rubino was privy to, still remembers, and has shared with his colleagues, Toyota's most sensitive patent litigation strategies, including strategies for settlement, navigating local EDTX rules and procedures, and mediating before Judge Folsom. Blitzsafe argues only that this information is not "relevant" because the currently accused in-vehicle technology (in Blitzsafe's words, "interfaces which allow an external audio player to be connected to a car radio") is not exactly the same as the technology at issue during Mr. Rubino's prior representations of Toyota. Blitzsafe's argument is meritless.

The relevant conflict test is whether the "representation in reasonable probability will involve a violation" of the duty of confidentiality, not whether the accused technologies are necessarily identical. Here, Toyota has gone above and beyond the required showing, *see Duncan v. Merrill Lynch*, 646 F.2d 1020, 1028 (5th Cir. 1981) (the "party seeking disqualification is not required to point to specific confidences revealed to former attorney that are relevant to pending case"), and offered more than two dozen examples of confidential communications received by Mr. Rubino that go to the heart of Toyota's EDTX litigation, *Inter Partes* Review (IPR), and settlement strategy. While made in the context of the AVS matters, each of these communications sheds light on how Toyota is likely to litigate this similarly-situated case. Mr. Rubino even has knowledge of Toyota's confidential analyses of witnesses who may testify *at trial in this case*, and had personal responsibility for logging their privileged communications. It is of no moment that Mr. Rubino did not personally meet these witnesses,

enter an appearance in any of the prior litigations, or interact with in-house Toyota attorneys. The key fact is that Blitzsafe has not offered a declaration from Mr. Rubino, or otherwise denied, that he possesses, remembers, and has shared critical Toyota confidential information.[1]

Blitzsafe makes much of the fact that Toyota has known for months that Mr. Rubino was hired by Brown Rudnick, and asserts that the Berkowitz declaration is misleading for omitting this fact. But Mr. Rubino's mere hiring by Brown Rudnick is not the basis for Toyota's motion; as Mr. Berkowitz put it during his deposition, Toyota "assumed that Brown Rudnick and Mr. Rubino were honoring their ethical obligations . . . and that he was being screened off from the case." Berkowitz Tr.,[2] 156:8-13. Toyota "provided that professional deference." Berkowitz Tr., 156:13-14. This professional deference was not in any way a waiver or a license for Brown Rudnick to elevate Mr. Rubino from screened-off associate to integrated litigation team-member positioned to disclose and misuse Toyota's confidential information. When Toyota learned about Mr. Rubino's new role (through its own diligence, and not through notice by Blitzsafe), it objected within a matter of days, and filed a motion as soon as practical thereafter. No case law that Blitzsafe cites supports a theory that Toyota waived a right to object under these circumstances.

Toyota takes this issue very seriously. Should the Court deny this motion, it would all but eliminate Toyota's confidence that its attorney-client communications will remain confidential and not used to its disadvantage. *See* TEX. DISC. R. 1.05, cmt. 1. ("Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the

[1] Not only did Mr. Rubino not submit a rebuttal declaration, but Blitzsafe objected to his noticed deposition.

[2] Refers to the Deposition Transcript of Matthew G. Berkowitz, Exhibit A of the Fabricant Declaration submitted with Blitzsafe's Opposition.

client to obtain the full benefit of the legal system.") As such, the Court should disqualify Brown Rudnick and grant Toyota the other relief requested in its briefing.

II. ARGUMENT

A. Blitzsafe Does Not Dispute that Mr. Rubino Was Privy To, and Still Remembers, Toyota's Highly Confidential Strategy Analyses Concerning EDTX Patent Litigation and Witnesses Who Will Testify in this Case

Nowhere in its 23-page response does Blitzsafe dispute that Mr. Rubino possesses the information outlined in the Berkowitz Declaration, that he remembers it, and that he has shared it with his colleagues at Brown Rudnick (and possibly, with McKool Smith).[3]

Blitzsafe simply argues that Mr. Rubino's Toyota knowledge-base is not "relevant," because, unlike the cases where Mr. Rubino represented Toyota, this case involves "connecting an external device such as an iPod or iPhone to a car's audio system using an interface." Opp. at 7. Blitzsafe slices this matter far too thin, and misstates the law. Toyota need not show that the AVS matters Mr. Rubino worked on previously are "substantially related" to the present case.[4] Rather, Mr. Rubino's present representation of Blitzsafe gives rise to an ethical conflict because he "possesses relevant, confidential information such that there is a reasonable probability that

[3] Regardless, Mr. Rubino is irrebuttably presumed to have shared the confidential information. *See Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467 (Tex. 1994) ("any rule focusing on actual disclosure would place a virtually insurmountable burden on the party seeking disqualification, since the only persons who know whether confidences were actually shared will generally be the very lawyers seeking to avoid disqualification.")

[4] In any event, the "substantial relationship" analysis does not focus on whether the specifically accused technologies are identical, as Blitzsafe suggests, but on whether "reasonable persons" would understand the confidential information known to the conflicted attorney to be "important to the issues involved" in the case. *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1346 (5th Cir. 1981) (overruled on other grounds by *Gibbs v. Paluk*, 742 F.2d 181, 185 (5th Cir. 1984)); *Osborn v. District Court, Fourteenth Judicial District*, 619 P.2d 41, 47 n. 10, 48 (Colo. 1980) (the term "substantially related" is equivalent to the expression "facts of which are somewhat interwoven" or similar factual situations and legal questions).

the information could be used to the former client's disadvantage." *Abney v. Wal-Mart*, 984 F. Supp. 526, 528 (E.D. Tex. 1997). *Islander E. Rental Program v. Ferguson*, 917 F.Supp. 504, 511 (S.D. Tex. 1996) (disqualification is appropriate where the "confidences could be used to [the former] client's disadvantage in [the current] litigation") Further, a presumption attaches that a lawyer in possession of client confidences shares those confidences with other lawyers at his firm. *In re Am. Airlines* 972 F.2d at 614 n. 1 (*citing Corrugated Container*, 659 F.2d at 1346).

Here, Toyota has submitted evidence that Mr. Rubino spent more than 1500 hours over the last three years representing Toyota in patent litigation in the EDTX and parallel IPR proceedings (like the present matter).[5] *Compare Carbo Ceramics, Inc. v. Norton-Alcoa Proppants*, 155 F.R.D. 158, 162 (N.D. Tex. 1994) ("extremely confidential matters which are privileged may be communicated in a conversation of less than a few minutes, irrespective of whether or not billable time was generated."). While some of his prior representations concerned different Toyota technology (e.g., exterior vehicle monitoring systems), the thousands of confidential emails, memos, and presentations that Mr. Rubino reviewed while defending those prior cases are directly applicable to this matter. Toyota's unrebutted evidence demonstrates that Mr. Rubino knows Toyota's EDTX patent litigation strategy, how it mediates before Judge Folsom, and its different trigger points for settlement in view of various EDTX litigation outcomes and parallel IPR proceedings. He had access to Toyota's IPR strategy, which was not "general" as AVS suggests, but rather, as Mr. Berkowitz testified, "specific to Toyota, very specific to Toyota." Berkowitz Tr., 164:3-6. Even if those confidential discussions were made

[5] As indicated in the Motion, Toyota offers to submit the documents identified in the Berkowitz Declaration to the Court for *in camera* review.

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