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

BLITZSAFE TEXAS, LLC,	§	
Plaintiff,	§	**Case No. 2:15-CV-1274-JRG-RSP**
v.	§	**(LEAD CASE)**
HONDA MOTOR CO., LTD., ET AL.,	§	**JURY TRIAL DEMANDED**
Defendants.	§	

PLAINTIFF BLITZSAFE TEXAS LLC'S SUR-REPLY IN OPPOSITION TO TOYOTA'S MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

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Plaintiff Blitzsafe Texas, LLC ("Blitzsafe") hereby submits its Sur-Reply in Opposition to Toyota's Motion to Disqualify Plaintiff's Counsel.

I. Toyota Waived the Right to Assert a Conflict of Interest

Toyota's lack of candor in its initial submission is rivaled only by its lack of candor on reply. Prior to the meet-and-confer on this motion, Toyota took the position that Brown Rudnick never should have hired Mr. Rubino in November 2015, because of his alleged conflict, stating in an August 30, 2016 e-mail from its counsel William Mandir:

> At the time Mr. Rubino was hired by Brown Rudnick, he was working on Toyota litigations. The Blitzsafe case was also being litigated at this time. In view of this conflict, **it is Toyota's position that Brown Rudnick should not have hired Mr. Rubino**. …

See Exhibit 1 to the accompanying Declaration of Alfred R. Fabricant ("Fabricant Decl.") (emphasis added). During the meet-and-confer that same day, Brown Rudnick informed Toyota that it had waived any conflict because it learned of Mr. Rubino's arrival at Brown Rudnick in November 2015, but had taken no action. Three days later, aware that waiver was a central issue, Christine L. Lofgren testified that she learned *from her outside counsel* that Mr. Rubino had left Kenyon *in August 2016* even though Matthew Berkowitz, the only attorney who reports to Ms. Lofgren, told her in December 2015 or January 2016 that Mr. Rubino had gone to Brown Rudnick. Mr. Berkowitz attended Ms. Lofgren's deposition and no doubt participated in her preparation for the deposition, and yet Toyota would have this Court believe that Mr. Berkowitz never reminded Ms. Logfren prior to her deposition that he had told her eight months earlier that Mr. Rubino had been hired by the law firm representing Blitzsafe in this action. Then, even if he did not remind Ms. Lofgren of this fact prior to her deposition, upon hearing Ms. Lofgren's testimony that he knew to be inaccurate, Mr. Berkowitz failed to correct it, either during her deposition or thereafter, and submitted a declaration seeming to corroborate her false testimony. (Dkt. 143-1 ¶ 26.) It was only when he testified under oath in his own deposition that he

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admitted what Brown Rudnick knew to be true. Now, on reply, "Toyota *readily admits* that it has known for many months that Brown Rudnick hired Mr. Rubino in 2015," (Dkt. 183 at 7 (emphasis added)), while somehow failing to explain to the Court why this critical fact, which was the subject of the meet-and-confer, was not disclosed to the Court in its opening brief or in the Berkowitz Declaration. There would be no reason to omit this critical fact from the opening brief and supporting declaration except to avoid the waiver problem.

Toyota's story is not only factually suspect, it is legally inconsistent. Toyota has repeatedly stated that if Mr. Rubino has disqualifying confidential information, it would have been imputed to Brown Rudnick upon his hire, and the firm must be disqualified regardless of whether the information is actually shared. (Dkt. 182 at 3-4.) In its reply, Toyota changes its revised argument which is now that "Mr. Rubino's mere hiring by Brown Rudnick **is not** the basis for Toyota's motion." (Dkt. 182 at 2.) Toyota is now urging that a conflict of interest did not arise upon Mr. Rubino's hiring, but attached only when he appeared in late July 2016.[1] Toyota presents no authority to support its hybrid conflict theory that it did not waive the conflict because it believed that Mr. Rubino was being screened off from this matter *even though a confidentiality screen would be ineffectual to prevent confidential information from being imputed to Brown Rudnick under the controlling law relied on by Toyota.* Nor does such authority exist.

Having taken extreme liberties with the law and facts, Toyota tries to cloak itself in professionalism by arguing that it did not waive any conflict because it declined to seek disqualification sooner in the exercise of "professional deference." (Dkt. 182 at 2.) Even putting

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[1] Toyota appears to concede certain facts that establish that Rubino's actual involvement in the Blitzsafe litigation does not present a conflict. It is undisputed that: Rubino took two depositions in the Blitzsafe litigations, one of a Honda 30(b)(6) witness and the other of a Nissan 30(b)(6) witness. Those depositions concerned only Nissan and Honda products and had nothing whatsoever to do with Toyota. Rubino participated in a deposition of a former Blitzsafe employee, Ed Fischer, who was a non-party witness That deposition related to Blitzsafe's own products and technology. Toyota does not contend nor is there any evidence that Mr. Rubino ever worked on the Blitzsafe litigation against Toyota but rather only that he was in possession of the "playbook."

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aside Toyota's lack of candor with the Court, it is beyond belief that Toyota, in a single brief, can sound the alarm that Mr. Rubino brought the coveted Toyota litigation playbook to Brown Rudnick and that, if allowed to continue, its confidence in the attorney client privilege would be eliminated (*id.*), but nonetheless declined to seek disqualification for almost nine months while this entire case was litigated at great expense in the name of "professional deference." This motion should be seen for what it truly is, a litigation tactic. No matter how Toyota attempts to frame the argument, the only purported ethical conflict raised by Toyota is that Mr. Rubino possessed highly confidential information when he arrived at Brown Rudnick. Toyota's attempt in its reply brief to avoid waiver by arguing that the conflict was triggered only by Mr. Rubino's appearance at a deposition in the Honda case should be rejected because the date of his appearance is irrelevant to that conflict analysis. It is nothing more than an excuse manufactured to avoid waiver.

II. Toyota Has Failed To Establish That Mr. Rubino Has Relevant Toyota Confidential Information

Toyota's reply continues to argue that Mr. Rubino knows Toyota's litigation "playbook" because while at Kenyon he, along with everyone else on a "list serv" bulk delivery service, received emails in the AVS matters. It is conceded by Toyota that he did not even work on most of these AVS cases. (Dkt. 174 at 6-7; Dkt. 182-6.) But, Toyota has not shown that Mr. Rubino received important policy or procedure documents that rise to the level of a confidential "playbook" which could be used to Toyota's disadvantage in this case, or that he had the type of long-standing and central role in Toyota litigation matters that the case law requires to show a deep knowledge of Toyota's litigation practices. (Dkt. 174 at 17.) Rather, Toyota argues that since Mr. Rubino received documents concerning AVS matters, Mr. Rubino can "predict Toyota's next moves in this matter." (Dkt. 182 at 4-5.) The claim that Toyota's "moves" in this case are so easily predicted based on the AVS matters is incredible given that this case involves

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different parties, different patents, different accused products and technology, different attorneys, and different infringement and invalidity risks.

Toyota offers no explanation for its allegation that Mr. Rubino, who Toyota concedes never appeared of record in any Toyota matter, nor met with Toyota's in-house team nor contributed to strategic decisions (Dkt. 182 at 5), somehow holds the keys to Toyota's litigation kingdom based on his work spent primarily drafting IPR documents.[2] If Toyota's breathless and panicked claims of prejudice were true, it would have moved for disqualification the moment that Ms. Lofgren and Masahiro Yamashita, who is in charge of this matter, learned that Mr. Rubino had arrived at Brown Rudnick at least ten months ago. Yet, upon being told that Mr. Rubino had left Kenyon for Brown Rudnick , neither the Toyota employees nor their counsel took any action whatsoever. They did not put Brown Rudnick on notice that there was any conflict or even a concern. To the contrary, Mr. Berkowitz continued his frequent and ongoing e-mails, texts, phone calls and personal get-togethers with Mr. Rubino, even asking him who from Brown Rudnick was arguing the *Markman* hearing. Such inaction strongly evidences that, at the time, Toyota had no concern that Mr. Rubino held the litigation "playbook" or possessed any other confidential Toyota information that could be used against Toyota in this lawsuit. Toyota's decision to forego seeking disqualification until its fortunes in this litigation had soured belies Toyota's true motivations.

Contrary to Toyota's argument, Blitzsafe has never argued that the technology in the AVS matters must be identical to the technology in this case for a conflict to arise. (D.E.182 at 3.) Rather, the standard is whether Mr. Rubino "possesses relevant, confidential information such that there is a reasonable probability that the information could be used to the former client's disadvantage." *Abney v. Wal-Mart*, 984 F. Supp. 526, 528 (E.D. Tex. 1997). In view of

[2] To this day, Toyota has not raised any conflicts issue or made a disqualification motion to the Patent Trial and Appeal Board. This is not surprising since no conflict of interest can reasonably arise from comparing the unrelated AVS patents to the publicly available prior art in an IPR petition.

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