

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANGELIA JOHNSON,

Plaintiff,

v.

CONN APPLIANCES, INC. D/B/A
CONN’S HOMEPLUS

Defendant.

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CASE NO. 4:19-cv-01622

DEFENDANT’S MOTION TO DISQUALIFY,
APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF, AND
MOTION FOR SANCTIONS

COMES NOW Conn Appliances, Inc. (“CAI”) and files this Motion to Disqualify, Application for Temporary and Permanent Injunctive Relief, and Motion for Sanctions (the “Motion”) as follows:

I.
SUMMARY OF ARGUMENT

Plaintiff Angelina Johnson’s counsel—and CAI’s former in-house counsel who handled consumer litigation for CAI—Ms. Trista Johnson, should be disqualified and sanctioned for filing this lawsuit. Ms. Johnson should also be permanently enjoined from taking on further similar representation or sharing CAI’s confidential information or strategies with third-parties. Ms. Johnson willfully ignored her ethical and professional obligations when she filed this lawsuit for Plaintiff against CAI for the exact same consumer claims she handled on a daily basis as CAI’s in-house company counsel. Plaintiff’s counsel unequivocally knows that her prior employment as CAI’s in-house company counsel directly conflicts with her representation of Plaintiff here.

Plaintiff's counsel must be disqualified from this action and enjoined from future similar representation because binding Fifth Circuit precedent forbids an attorney from representing a client against a former client if:

- (1) The subject matter of the present and former representation are substantially related; or
- (2) The current representation in reasonable probability will involve the violation of confidentiality rules.

The facts and circumstances detailed herein unequivocally establish the subject matter of the present and former representation are substantially related, if not identical. Likewise, conclusive evidence shows the current representation will inevitably involve the violation of the confidentiality rules.

II. **FACTS**

Plaintiff sues CAI under two causes of action: (i) Telephone Consumer Protection Act ("TCPA") and the Texas Debt Collection Act ("TDCA").¹

CAI hired Ms. Johnson on or about December 19, 2016, as its Senior Legal Counsel at its Woodlands, Texas corporate headquarters.² Plaintiff's counsel was not only integral, but often took the lead, in establishing, developing, and implementing CAI's Telephone Consumer Protection Act ("TCPA") and Texas Debt Collection Act ("TDCA") defense and strategies.³ As examples, Ms. Johnson was in charge of or participated heavily in the following tasks with respect to CAI's TCPA and TDCA defense throughout her employment:

- Identifying and selecting outside counsel;
- Identifying and selecting expert witnesses;

¹ See Dkt. No. 1, Plaintiff's Original Complaint.

² See Affidavit of Mark Prior ("Prior Affidavit"), at ¶ 3, attached to this Motion as Exhibit "A."

³ *Id.*

- Identifying and selecting corporate witnesses;
- Reviewing and providing legal advice in litigated matters with respect to the use of CAI's telephone equipment;
- Reviewing and providing legal advice in litigated matters with respect to CAI's telephone calling procedures;
- Reviewing and providing legal advice in litigated matters with respect to CAI's collection efforts;
- Preparing corporate witnesses for depositions in various legal matters including depositions for arbitration hearings;
- Preparing corporate witnesses for arbitration hearings;
- Preparing expert witnesses for deposition;
- Preparing expert witnesses for arbitration hearings;
- Preparation of discovery and discovery responses;
- Preparation of briefing and motions;
- Review and edit of outside counsel's work product;
- Attendance and participation in depositions;
- Attendance and participation in final arbitration hearings;
- Routinely conducting strategy meetings and telephone conferences with outside counsel; and
- Negotiating and settling matters, including preparing the settlement documents in cases that settled.⁴

Notably, Ms. Johnson assisted in organizing and leading a corporate witness training between Conn's corporate witnesses and outside counsel in March 2017.⁵ During the meeting,

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶ 4.

outside counsel and Ms. Johnson presented on topics related to the TCPA, TDCA, and CAI's defense strategies.⁶

Additionally, Ms. Johnson organized and led a meeting in CAI's main call center between its internal employees and its TCPA outside defense counsel in early February 2018.⁷ The meeting agenda included confidential and privileged communications regarding CAI's telephone and communications equipment, calling procedures, defense strategies, and use of expert and corporate witnesses.⁸ This early February 2018 meeting also included a site visit by CAI's expert witness and privileged discussions between outside counsel and in-house counsel (including Plaintiff's counsel) regarding his incorporation into the TCPA matters.⁹

On or about February 22, 2018, Ms. Johnson voluntarily terminated her position as in-house counsel with CAI.¹⁰ Upon her departure, Ms. Johnson expressed that she was not happy about her time with CAI or her departure.¹¹ On May 2, 2019, CAI received notice that Ms. Johnson filed a lawsuit alleging violations of the TCPA and TDCA in the Southern District of Texas on behalf of Plaintiff.¹² On May 3, 2019, CAI sent Ms. Johnson a demand letter requesting that she immediately cease her unethical representation of Plaintiff.¹³ CAI's letter specifically identified the offended rules of professional conduct and warned Ms. Johnson that if she failed to take remedial action it would have no choice but to seek disqualification and sanctions in the form of attorney's fees.¹⁴ Ms. Johnson responded that she was well aware of her obligations to CAI and the ethical rules, but she would not withdraw from this case.

⁶ *Id.* at ¶ 4.

⁷ *Id.* at ¶ 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at ¶ 6.

¹¹ *Id.*

¹² *Id.* at ¶ 7.

¹³ *Id.*; *See also* Cease & Desist Letter to Trista Johnson dated May 3, 2019, attached to this Motion as Exhibit "B."

¹⁴ *Id.*

III.
ARGUMENT & AUTHORITIES

Motions to disqualify an attorney are substantive motions determined by standards developed under federal law. *In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir. 1992). When considering motions to disqualify, courts should begin the inquiry with "the local rules promulgated by the local court itself." *FDIC v. U.S. Fire Ins.*, 50 F.3d 1304, 1312 (5th Cir. 1995). However, local rules are not the "sole" authority governing motions to disqualify counsel. *U.S. Fire Ins.*, 50 F.3d at 1312.

When reviewing the disqualification of an attorney, courts must "consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigant's rights." *Dresser*, 972 F.2d at 543. The norms embodied in the ABA Model Rules of Professional Conduct Model Rules (the "Model Rules") and the Model Code are relevant to our inquiry, "as the national standards [are] utilized by this circuit in ruling on disqualification motions." *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992).

Additionally, consideration of the Texas Rules is also necessary because that is where the attorney being challenged is licensed and conducting the offensive conduct. *Id.* By consulting these governing rules, courts must weigh the need for disqualification in light of the public interest and the litigants' rights.

A. Southern District of Texas Local Rules.

The Local Rules of the Southern District of Texas provide that "the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct" (Texas Rules), and that violations of the Texas Rules "shall be grounds for disciplinary action, but the court is not limited by that code." S.D. TEX. LOCAL R. APP. A, R. 1(A) & 1(B).

B. Texas Law and Ethical Standards.

Under Texas law, a lawyer can be disqualified under Texas Disciplinary Rule 1.09 (“Texas Rule 1.09”), which reads in pertinent part:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

...

(2) if the representation in reasonable probability will involve a violation of rule 1.05; or

(3) if it is the same or a substantially related matter.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997); *see also American Airlines*, 972 F.2d at 615 & n.2 (holding that the federal test for disqualification and Texas Rule 1.09 are substantively similar.).

Texas Rule 1.09(a)(2) incorporates Rule 1.05, which prohibits a lawyer's use of confidential information obtained from a former client to that former client's disadvantage. Texas Rule 1.09 thus on its face forbids a lawyer to appear against a former client if: (1) the current representation in reasonable probability will involve the use of confidential information; or (2) if the current matter is substantially related to the matters in which the lawyer has represented the former client. *See In re American Airlines, Inc.*, 972 F.2d at 615.

C. The Model Rules

The Fifth Circuit has recognized the Model Rules as the national standards to consider in reviewing motions to disqualify. *Id.* Relevant to this Motion, Model Rule 1.9 is identical to Texas Rule 1.09 in all important respects:

(a) A lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are

materially adverse to the interests of the former client unless the former client consents after consultation.

(c) A lawyer who has formally represented a client in a matter . . . shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client

See *In re American Airlines, Inc.*, 972 F.2d at 615, fn. 2 (citing Model Rule 1.9).

D. The Fifth Circuit Precedent

In consideration of the local, state, and national standards the Fifth Circuit has promulgated “two ways in which a former client may bar an attorney from representing an adverse party.” *Abney v. Wal-Mart*, 984 F. Supp. 526 (E.D. Tex. 1997). Disqualification can be justified: (1) if “the subject matter of the present and former representation are substantially related”, or (2) “if [movant’s] former attorney possessed relevant confidential information in the manner contemplated by [Texas Rule 1.09(a)(2)].” *Islander East Rental Program v. Ferguson*, 917 F. Supp. 504, 508, 509 (S.D. Tex. 1996) (quoting *In re American Airlines*, 972 F.2d at 615).

E. Substantially Related Test

The “substantially related” test is categorical in requiring disqualification upon the establishment of a substantial relationship between past and current representations. *In re American Airlines, Inc.*, 972 F.2d at 614. The Southern District of Texas has previously held that:

It is beyond dispute that an attorney is prohibited from accepting representation adverse to a former client if the subject matter of the current representation is substantially related to the subject matter of the former representation. The uncompromising prohibition against representation in substantially related matters is found in the relevant ethical standards, to the text of the note as well as case law predating the promulgation of the Model Code or the Model Rules. It is also rooted in traditional notions of common sense and fundamental fairness.

Id. (J. Kent, Samuel).

A substantial relationship may be found after the moving party delineates with specificity the subject matters, issues and causes of action common to the prior and current representations. *In re American Airlines, Inc.*, 972 F.2d at 614. A party seeking to disqualify counsel under the substantial relationship test need not prove that the past and present matters are so similar that a lawyer's continued involvement threatens to "taint" the trial, nor does the subject matter of the prior action need to be "relevant" in an evidentiary sense to the present action. *Id.* at 618. Rather, the former client need only demonstrate that the two matters are substantially related. **"A substantial relationship exists when the prior representation concerns the particular practices and procedures which are the subject matter of [the] suit."** *Id.* at 625 (emphasis added) (internal quotations omitted).

Further, the Fifth Circuit has refused to reduce the concerns underlying the substantial relationship test to a client's interest in preserving its confidential information. *Id.* The second fundamental concern protected by the test is not the public interest in lawyers avoiding "even the appearance of impropriety," but the client's interest in the loyalty of his attorney. *Id.* Thus, an attorney may be disqualified from representation when the past and present matters of representation are substantially similar even if there is "no chance that confidential information might be used against the former client." *Id.*; *E.F. Hutton & Company v. Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969) ("If courts protect only a client's disclosures to his attorney, and fail to safeguard the attorney – client relationship itself – a relationship which must be one of trust and reliance--they can only undermine the public's confidence in the legal system as a means for adjudicating disputes."); *Duncan*, 646 F.2d at 1027 ("the integrity of the judicial system would be sullied if courts tolerated such abuses by those who profess and owe undivided loyalty to their clients"); *In Re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 90 (5th Cir. 1976)

(prohibition of representation of conflicting interests rests on lawyers duties of loyalty and confidentiality); *In Re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 161-62 (3d Cir. 1984); *In Re Agent Orange Product Liability Litigation*, 800 F.2d 14, 17-18 (2d Cir. 1986).

“Because the substantial relationship test is concerned with both a lawyer's duty of confidentiality and his duty of loyalty, a lawyer who has given advice in a substantially related matter must be disqualified, whether or not he has gained confidences.” *In re American Airlines, Inc.*, 972 F.2d at 618, 619 (emphasis added). Once the moving party has established that the prior matters are substantially related to the present case, the court irrebuttably presumes that relevant confidential information was disclosed during the former period of representation, and disqualification is categorically required. *Hutton v. Parker-Hannifin Corp.*, 2016 U.S. Dist. LEXIS 102176, CA H-15-3759, *9,10 (S.D. Tex. Aug. 4, 2016) (citing *In re Am. Airlines* 972 F.2d at 614).

F. The Present Case is Substantially Related to Plaintiffs’ Counsel’s Prior Representation of CAI.

As detailed above, Ms. Johnson was employed by CAI for approximately fourteen months as senior legal counsel.¹⁵ During her employment, CAI’s legal department consisted of two paralegals and two lawyers – the General Counsel and Ms. Johnson.¹⁶ As the only lawyer other than the General Counsel, Ms. Johnson was responsible for the day-to-day management of CAI’s TCPA and TDCA matters (the “Prior Suits”).¹⁷ Plaintiff’s counsel was in charge of or participated in all aspects of the litigation, including pre-suit intake and settlement strategy, litigation tasks and strategy, witness preparation, document review and preparation, settlement strategy and decisions,

¹⁵ Prior Affidavit, Exhibit A, at ¶ 3.

¹⁶ *Id.* at ¶ 8.

¹⁷ *Id.*

and appellate tasks and procedures.¹⁸ Consistent with her position and role in the litigation, Ms. Johnson was always identified as a person “Involved in the Arbitration” to the American Arbitration Association for the purpose of conducting conflict checks.¹⁹

Specific to the TCPA, the Prior Suits alleged that CAI’s calling practices and procedures violated the law, because CAI allegedly utilized an automatic telephone dialing system to place calls to individuals allegedly without their consent or where consent had been allegedly revoked.²⁰ With respect to the TDCA, the Prior Suits alleged that CAI’s calling practices and procedures constitute harassment.²¹ Both claims involved the review and production of documents and witnesses, as well as the presentation of evidence, related to CAI’s calling practices, telephony equipment, consumer contracts, purchasing procedures, and employee training.²² CAI’s witnesses typically included one of approximately three corporate witnesses and an expert witness.²³

In the present case, Ms. Johnson has filed suit under the TCPA alleging that CAI violated the statute by allegedly utilizing an automatic telephone dialing system to place calls to Plaintiff without her consent or where consent had been legally revoked.²⁴ Plaintiff further alleges that CAI’s calling practices and procedures violated the TDCA.²⁵ As Ms. Johnson is aware, this case is nearly identical to lawsuits in which she represented CAI during her employment as its Senior Legal Counsel.²⁶ This instant matter will center around the same issues Ms. Johnson handled daily as Senior Legal Counsel—CAI’s calling practices, telephony equipment, consumer contracts,

¹⁸ *Id.*

¹⁹ *See e.g.* AAA Initial Lists, attached to this Motion as Exhibits “C” and “D.”

²⁰ *Id.* at 9; *See e.g.* AAA Petition, attached to this Motion as Exhibit “E”; *see also* Prior Affidavit, Exhibit A, at ¶¶ 8-11.

²¹ *Id.*

²² Prior Affidavit, Exhibit A, at ¶ 9.

²³ *Id.* at ¶ 9.

²⁴ *See* Dkt No. 1, Plaintiff’s Original Complaint.

²⁵ *Id.*

²⁶ Prior Affidavit, Exhibit A, at ¶ 10.

purchasing procedures, and employee training.²⁷ Moreover, CAI's training and calling procedures are the same or nearly the same.²⁸ CAI's corporate witness and expert witness will also be identical and present nearly identical testimony.²⁹ In fact, the only significant difference between this case and Ms. Johnson's prior representations as CAI's counsel is the name of the plaintiff suing CAI. Regardless, the Fifth circuit disqualification standard does not require identical parties, but rather "similar procedures and practices which are the subject matter of [the] suit." *In re American Airlines, Inc.*, 972 F.2d at 625; *see also Owens v. First Family Financial Services, Inc.*, 379 F.Supp.2d 840, 845 (S.D. Miss. 2005). In other words, it is insignificant that the plaintiffs may be different, if the defendant is the same:

As a general response to the evidence and arguments above, Plaintiffs repeatedly state that in the cases on which Wilson worked while at Forman Perry, the Plaintiffs in those cases were different than the Plaintiffs in this case. But this statement misses the point. While the same Plaintiffs may not be involved, the same Defendants are. And so are the very same claims, and the very same documents on which this lawsuit and the others are based. Moreover, the fact that different Plaintiffs are involved does not change the method by which these Defendants may analyze potential settlements for consumer fraud actions, and under the substantial relationship test, [counsel] is presumed to have been privy to such confidential information.

Owens, 379 F.Supp.2d at 850.

Without question, the Prior Suits in which Ms. Johnson represented CAI are substantially similar, if not identical in every respect except the named plaintiffs. Ms. Johnson's engagement of such a client and filing of her claim against CAI is a clear and unambiguous violation of the ethical rules:

The rule against representing conflicting interests disqualifies an attorney from appearing adversely to his former client in litigation

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

growing out of the subject matter of the prior representation. Disqualification vindicates the former client's trust in and reliance on his attorney. It promotes the use of the legal system for the adjudication of disputes by upholding the dignity of the legal profession.

E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 395 (S.D. Tex. 1969). Accordingly, Ms. Johnson must be disqualified.

G. Plaintiff's Counsel Received Confidential Information While Employed by CAI that Could be Used by Plaintiff to CAI's Detriment.

Even if the Court somehow found that the Prior Suits and the instant action are not similar, Ms. Johnson still must be disqualified because she received confidential information while employed by CAI that could be utilized in the instant case to CIA's detriment. Texas Rule 1.09 forbids a lawyer to appear against a former client if the current representation in reasonable probability will involve the use of confidential information. As stated by the Fifth Circuit, Texas Rule 1.09 provides a separate and distinct ground for disqualification and "the Rules expand the protections for former clients beyond those afforded by the substantial relationship test." *In re American Airlines, Inc.*, 972 F.2d at 625. "[The moving party may disqualify counsel on the basis of prior representations]...by pointing to specific instances where it revealed relevant confidential information regarding its practices and procedures." *Id.* (quoting *Duncan*, 646 F.2d at 1032).

As discussed previously, Ms. Johnson attended and participated in numerous strategy meetings with outside counsel, corporate witness preparations and depositions, expert witness preparations and depositions, and final arbitration hearings.³⁰ During these activities, Ms. Johnson helped develop and received specific and confidential information regarding CAI's pre- and post-petition settlement strategies, CAI's collection and calling practices and procedures, and CAI's

³⁰ *Id.* at ¶ 11.

litigation procedures and strategies.³¹ As specific examples, Ms. Johnson organized and participated in a corporate witness training session, during which the potential witnesses met with outside counsel and Ms. Johnson (while employed by CAI) and received detailed information on the company's telephony equipment, its capabilities, and CAI's litigation strategy.³² Ms. Johnson also participated in preparing corporate witnesses and experts for depositions and final hearings, during which she obtained further information regarding CAI and its counsel's strategy tailored to those individual situations.³³ The strategies and practices that were applied during Ms. Johnson's employment with CAI remain in effect today.³⁴ Thus, Ms. Johnson's knowledge of this confidential information demands that she be disqualified.

IV. MOTION FOR SANCTIONS

Ms. Johnson's bad faith and unethical actions of engaging a client and filing suit against her former client despite a clear and unambiguous conflict warrant the imposition of sanctions. Pursuant to 28 U.S.C. § 1927, the Court may sanction an attorney who multiplies the proceedings in any case unreasonably and vexatiously by requiring the individual to personally satisfy excess costs, expenses, and attorneys' fees. *See* 28 U.S.C. § 1927 (1994). Likewise, a Court may use its inherent power to assess attorney's fees against a party that has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or has defiled the "very temple of justice." *Chambers v. NASCO*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27 (1991).

Ms. Johnson cannot claim ignorance of the rules. Beyond the general imposition that attorneys are deemed to have knowledge of the ethical rules, prior to filing this motion, CAI's

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

counsel sent Ms. Johnson a letter on May 3, 2019, requesting that she take appropriate action to cease her unethical conduct.³⁵ The letter specifically identifies the relevant Rule of Professional Conduct, Texas Rule 1.09, and the factual circumstances necessitating disqualification.³⁶ The letter further warned that should Ms. Johnson not take immediate steps to rectify the situation, CAI would seek “monetary damages, an injunction, attorney’s fees and costs” associated with seeking her disqualification.³⁷ In response, Ms. Johnson responded that she had fully reviewed and considered the potential ethical issues and that she had no intention of withdrawing.

Frankly stated, Ms. Johnson’s actions are inexcusable. The governing ethical rules and the federal standard for disqualification could not be more clear. It defies all common sense and logic that Ms. Johnson would believe that her actions are within ethical bounds. This type of egregious, unprofessional and unethical conduct is the fuel that makes our profession the butt of jokes. Whether borne from the anger of her departure from CAI, her eagerness to make a buck, or some other unknown rationale, Ms. Johnson’s actions erode the delicate trust that exists between clients and their lawyers, as well as society and the bar:

The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the clients in the same matter. As the court recognized in *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969), this would undermine public confidence in the legal system as a means for adjudicating disputes.

In re Am. Airlines, Inc., 972 F.2d at 618.

Had Ms. Johnson turned down this case or simply withdrawn when presented with CAI’s demand letter, further motion practice – including, this Motion and the accompanying application

³⁵ *Id.* at ¶ 12; See Cease & Desist Letter to Trista Johnson dated May 3, 2019, attached to this Motion as Exhibit “B.”

³⁶ *Id.*

³⁷ *Id.*

for injunctive relief– would not have been necessary. Thus, Ms. Johnson has unnecessarily and in bad faith multiplied the proceedings, warranting monetary sanctions. *See* 28 U.S.C. § 1927 (1994). CAI requests that the Court enter an order granting sanctions in an amount to be determined after all motion practice and oral advocacy, if any, on the issues presented in this Motion are resolved.

V.
APPLICATION FOR INJUNCTIVE RELIEF

This Court should enter a temporary restraining order, preliminary injunction, and ultimately a permanent injunction, enjoining Ms. Johnson, including any other attorneys or legal professionals she employs, from representing Plaintiff or any other individual asserting TCPA or TDCA claims against CAI. Absent such injunctive relief, CAI will be immediately and irreparably harmed by Ms. Johnson’s breach of her ethical duties and obligations to it as a former client and by the disclosure of CAI’s confidential client information in proceedings directly adverse to CAI. Absent injunctive relief, the public interest will also be harmed, because both the Texas and federal judiciary systems strongly uphold the sanctity of attorney-client relationships and seek to prevent any appearance of impropriety which might damage the reputation of the legal profession.

A. Argument and Authority for Application for Injunctive Relief

CAI hereby incorporates the foregoing paragraphs by reference.

A temporary restraining order is designed to protect the status quo pending a hearing on a preliminary injunction. To obtain injunctive relief, a party must establish the following: (1) there is a likelihood of success on the merits; (2) there is a substantial likelihood that it will suffer irreparable harm if the injunction is not issued; (3) any threatened injury outweighs the damage the injunction might cause the opponent; and (4) the injunction will not disserve the public interest. *See e.g., Griffin v. Box*, 910 F.2d 255, 259 (5th Cir. 1990). The facts and circumstances at issue, easily satisfy each of these requirements.

1. CAI has conclusively established Ms. Johnson's unethical conduct demonstrating a high likelihood of success on the merits.

For the reasons stated above, CAI can easily demonstrate a likelihood of success on the merits. Ms. Johnson is intent on representing Plaintiff in a matter directly adverse to CAI that is substantially similar to her former representation of CAI in direct violation of the Texas Rules of Professional Conduct. Likewise, considering the fact Ms. Johnson played an integral role in developing and asserting CAI's defenses in the Prior Suits, it is inevitable that the representation of Plaintiff will result in the continued sharing of CAI's confidential information. Ms. Johnson's response to CAI's request to withdraw from representation also demonstrates a strong willingness, if not an intent, to represent others in TCPA and TDCA actions against CAI. Ms. Johnson's current representation undeniably violates the Model Rules and the Texas standards of professional conduct giving CAI a clear probable right to relief. As a matter of law, CAI believes it has established a probable right to recovery based on conduct by Ms. Johnson that has already occurred and which is likely to continue, therefore there is a high probability that CIA will succeed on the merits.

2. CAI has shown that, absent the requested injunctive relief, it will suffer immediate and irreparable injury.

Absent the requested injunctive relief, CAI will suffer substantial immediate and irreparable injury. Specifically, if Ms. Johnson is permitted to continue to represent Plaintiff in proceedings directly adverse to CAI, CAI's ability to adequately defend against Plaintiff's claims will be negatively impacted. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1027 (5th Cir. 1981) ("it would be grossly unfair to permit an attorney to reveal confidences of his former client to the client's adversary").

As detailed above, Ms. Johnson played a critical role in developing CAI's existing strategy and defenses for claims similar to those asserted by Plaintiff. Ms. Johnson also played an active role in managing all aspects of similar litigation for CAI by doing the following throughout her employment:

- Identifying and selecting outside counsel;
- Identifying and selecting expert witnesses;
- Identifying and selecting corporate witnesses;
- Reviewing and providing legal advice in litigated matters with respect to the use of CAI's telephone equipment;
- Reviewing and providing legal advice in litigated matters with respect to CAI's telephone calling procedures;
- Reviewing and providing legal advice in litigated matters with respect to CAI's collection efforts;
- Preparing corporate witnesses for depositions in various legal matters including depositions for arbitration hearings;
- Preparing corporate witnesses for arbitration hearings;
- Preparing expert witnesses for deposition;
- Preparing expert witnesses for arbitration hearings;
- Preparation of discovery and discovery responses;
- Preparation of briefing and motions;
- Review and edit of outside counsel's work product;
- Attendance and participation in depositions;
- Attendance and participation in final arbitration hearings;
- Routinely conducting strategy meetings and telephone conferences with outside counsel; and

- Negotiating and settling matters, including preparing the settlement documents in cases that settled.³⁸

Based on her job duties and function while employed by CAI, Ms. Johnson possesses CAI's privileged and confidential information that will be at the center of this litigation and other cases like it. It is highly probable that Ms. Johnson has already breached her ethical and confidentiality obligations to CAI in the process of engaging Plaintiff and filing this action. Allowing Ms. Johnson to run this litigation with CAI's playbook in hand will cause severe, immediate, and irreparable harm in this case. *Duncan*, 646 F.2d at 1027. Such information also will inevitably become part of the official record of this matter, giving other attorneys and litigants access to CAI's confidential and privileged information to be used against it in the future.

3. The threatened injury to CAI if injunctive relief is not granted far exceeds and outweighs any potential injury to Ms. Johnson if the relief sought is granted.

For the reasons stated above, CAI will suffer substantial irreparable harm if Ms. Johnson is not immediately restrained from representing Plaintiff and other potential plaintiffs asserting TCPA and TDCA claims against CAI. Such representation violates not only the sanctity of the attorney-client relationship but will inevitably result in CAI's confidential information being divulged publically. In light of the extreme public interest in support of protecting the sanctity of the attorney-client relationship, any inconvenience to Ms. Johnson losing potential fees or Plaintiff securing alternate counsel is heavily outweighed.

On the other hand, the harm to Ms. Johnson and Plaintiff is minimal. While Ms. Johnson may potentially lose the opportunity to collect fees on these cases, she is more than capable to find other work that does not come at the cost of breaching her ethical duties. Likewise, Plaintiff should be able to alternate counsel with ease as this case is in its infancy. There are a number of plaintiff

³⁸ Prior Affidavit, Exhibit A, at ¶ 3.

law firms throughout the city of Houston that work exclusively in this area. The balancing of harm analysis strongly favors the issuance of the requested injunctive relief.

4. Injunctive relief will further public interest.

In this case, the public interest will benefit from the issuance of injunctive relief. Both the Model Rules and the Texas Disciplinary Rules of Professional Conduct provide that a lawyer, as a member of the legal profession, “is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT PREAMBLE AND SCOPE 1; TEX. DISC. R. OF PROF’L CONDUCT PREAMBLE 1. “Lawyers, as guardians of the law, play a vital role in the preservation of society...A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.” TEX. DISC. R. PROF’L CONDUCT PREAMBLE 1. Courts have also spoken clearly stating that, “[t]he integrity of the judicial system would be sullied if courts tolerated such abuses by those who profess and owe undivided loyalty to their clients.” *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1027 (S.D. Tex. 1969).

“The desire for the respect and confidence of the members of the profession and of society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct... So long as practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.” TEX. DISC. R. OF PROF’L CONDUCT PREAMBLE 9. More specifically, the “policy of encouraging communication between client and attorney would be frustrated if the public perceived that attorneys were free to divulge information previously given in confidence.” *Duncan*, 646 F.2d at 1027.

Allowing Ms. Johnson to continue to breach her ethical obligations to CAI does not uphold the public interest, because it “compromises the independence of the profession and the public interest which it serves.” *Id.* To the contrary, issuance of an injunction preventing Ms. Johnson from continuing her prohibited representation and from continuing to breach attorney-client privilege and confidentiality affirmatively upholds the public interest by maintaining the integrity of and the public’s faith in the legal profession.

5. Security

CAI does not believe providing any level of security is necessary or warranted based on the present facts and circumstances. However, CAI is willing and able to provide security in an amount considered appropriate by the Court if the Court feels it is necessary.

VI. **CONCLUSION AND PRAYER**

In consideration of the foregoing authority and arguments, CAI respectfully requests that the Court enter an order: (1) granting its Motion to disqualify Plaintiff’s counsel, Ms. Trista Johnson, from representing Plaintiff in the above styled lawsuit; (2) containing a “turnover bar” preventing Ms. Trista Johnson from providing subsequent counsel with any attorney notes or work product; (3) enjoining Plaintiff’s counsel from taking any further similar representation against CAI; and (4) granting sanctions in an amount to be determined after all motion practice and oral advocacy related to this issue are completed.

In addition, CAI respectfully requests pursuant to Federal Rule of Civil Procedure 65, the following injunctive relief be granted:

- (1) Give notice to Ms. Johnson and Plaintiff and this Court promptly and on exigent basis set a hearing or conference on CAI’s Application for Temporary Restraining Order;
- (2) Following the hearing or conference, the Court issue a temporary restraining order enjoining Ms. Johnson, as well as her agents, employees, and other persons engaged in active concert or participation with her as follows:

- a. Immediately cease and desist representation of Plaintiff any other party bringing TCPA and TDCA claims against CAI or otherwise substantially similar to Ms. Johnson's prior representation of CAI;
- b. Immediately cease and desist the disclosure in any manner, to any person, of any of CAI's confidential information, which includes all information protected by the attorney-client privilege, information Ms. Johnson helped develop while employed by CAI, Ms. Johnson received while at CAI, or information Ms. Johnson acquired while employed by CAI, during the course of her representation of CAI in TCPA, TDCA, or other similar claims; and
- c. Restrain the disclosure of Ms. Johnson's work product containing CAI's confidential information to any successor counsel for Plaintiff or any other attorney representing individuals adverse to CAI.

Finally, CAI requests that it recover all such other relief, at law or in equity, to which CAI may show itself justly entitled.

Dated: June 6, 2019

Respectfully submitted,

By: /s/ Michael A. Harvey

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CERTIFICATE OF CONFERENCE

This is to certify that the undersigned has conferred with counsel regarding the relief sought in the above motion and she is opposed.

/s/ Michael A. Harvey
Michael A. Harvey

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record by means of e-filing this 6th day of June, 2019.

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/s/ Michael A. Harvey
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