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CHICAGO TITLE COMPANY and
CHICAGO TITLE INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

KIM FUNDING, LLC; KIM H. PETERSON; JOSEPH J. COHEN; ABC FUNDING STRATEGIES, LLC; PAYSON R. STEVENS; KAMALJIT K. KAPUR and THE PAYSON R. STEVENS & KAMALJIT KAUR KAPUR TRUST DATED MARCH 28, 2014;

Plaintiffs,

v.

CHICAGO TITLE COMPANY; CHICAGO TITLE INSURANCE COMPANY; THOMAS SCHWIEBERT; ADELLE DUCHARME; BETTY ELIXMAN; and DOES 1 through 50, inclusive;

Defendants.

Case No. 37-2019-00066633-CU-FR-CTL

CHICAGO TITLE COMPANY AND CHICAGO TITLE INSURANCE COMPANY'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION TO DISQUALIFY LATHAM & WATKINS LLP

Hearing Date: August 28, 2020
Time: 8:30 a.m.
Courtroom: Dept. 74
Judge: The Honorable Ronald L. Styn

Complaint Filed: December 13, 2019

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I. INTRODUCTION

From 2008 to 2012, the law firm of Latham & Watkins ("Latham") defended Chicago Title Company ("CTC") and Chicago Title Insurance Company ("Chicago Title Insurance") in four related lawsuits brought by investors in a widely-publicized real estate Ponzi scheme perpetrated by a San Diego financial planner named Rollo Richard Norton II. Investors in that scheme (referred to as the "Norton Scheme") alleged that CTC employees in San Diego had knowingly assisted and/or turned a blind eye toward that scheme, in disregard of company policies and procedures and the law. The lawsuits culminated in a four and a half month trial, for which Latham was lead counsel. The breadth and depth of Latham's representation of CTC and Chicago Title Insurance in these matters was extraordinary: in total, Latham devoted *over 41,000 hours* and billed *almost $17 million* in fees for its defense of CTC and Chicago Title Insurance. And a San Diego partner named John T. Ryan alone billed more than 3,800 hours to CTC and Chicago Title Insurance as one of their principal trial lawyers.

Notwithstanding this representation, and in remarkable and blatant violation of California's Rules of Professional Conduct, Latham—including partner John T. Ryan—now represents four investors in a lawsuit *against* CTC and Chicago Title Insurance for CTC's role in a widely-publicized Ponzi scheme perpetrated by a San Diego real estate developer named Gina Champion-Cain (the "Champion-Cain Scheme"). Once again, CTC faces claims that CTC employees in San Diego knowingly assisted a Ponzi scheme, and once again, CTC faces claims that it had inadequate policies and procedures and/or failed to adhere to its policies and procedures. Only this time, Latham has switched sides, pursuing claims against its former clients, armed with deep and extensive knowledge of and insight into a wealth of confidential and highly sensitive information that it acquired during its prior representation.

The nature and depth of Latham's former representation of CTC and Chicago Title Insurance in the Norton Scheme reveals a startling ethical breach. Over the course of nearly five years, Latham partner John T. Ryan, backed by approximately *eighty* Latham timekeepers, worked hand-in-hand with CTC's management and legal department, including CTC's head of litigation, who remains in that role today. Ryan participated in two lengthy mock jury exercises

and attended every day of a four and a half month jury trial. He was privy to confidential information about CTC's policies and procedures, litigation and trial strategies, settlement strategies, corporate financial information relevant to alter ego liability, and insurance coverage and strategy.

The factual similarities between the Norton Scheme and the Champion-Cain Scheme are striking. Both involve allegations that a Ponzi scheme orchestrated by a San Diego businessperson was facilitated by CTC employees in San Diego County who used and enabled sham escrows, ignored indicia of fraud, including forged signatures, and falsified escrow instructions and certifications. Both involve allegations that CTC lacked appropriate policies and procedures and/or ignored or failed to enforce its policies and procedures. And as to both matters, key witnesses as to CTC's policies and procedures—some of whom Latham prepared and defended in the Norton matter—including CTC's chief compliance officer, chief operating officer, and national escrow administrator, will likely be the same.

The legal claims against CTC and Chicago Title Insurance are nearly identical as well—fraud based on CTC's purported aiding and abetting and conspiring with the main perpetrator of the fraud; negligence, entailing questions as to CTC's fiduciary duties to plaintiffs; claims of financial elder abuse; and purported alter ego liability for Chicago Title Insurance. In other words, with the benefit of deep knowledge of CTC and Chicago Title Insurance derived from nearly five years of litigating on their behalf, Latham now asserts the very same claims and theories against CTC and Chicago Title Insurance that it previously defended.

The concerns about Latham's use of confidential information against CTC and Chicago Title Insurance are not merely hypothetical. In another lawsuit against CTC and Chicago Title Insurance arising from the Champion-Cain Scheme, *Levin et al. v. Chicago Title Company, et al.*, plaintiffs have explicitly alleged the parallels between CTC's role in the Norton Scheme and the Champion-Cain Scheme and have even cited to deposition testimony provided by CTC employees in the Norton litigation. That the two matters have already been linked by plaintiffs in a related case, even before discovery has begun in earnest, amply illustrates the dangers posed by Latham's improper representation against its former clients.

The ethical rules are clear: a lawyer may not represent a client whose interests are materially adverse to the interests of a former client in a substantially related matter—defined as a matter where the lawyer normally would have obtained confidential client information in the prior case that he would be expected to use in the subsequent case. Here, the record amply shows that in the course of its years-long representation of CTC and Chicago Title Insurance in a strikingly similar case both factually and legally, Latham had access to, and in fact obtained, a wealth of confidential information about CTC and Chicago Title Insurance that it is poised to use against its former clients, in plain violation of the bedrock duties of loyalty and confidentiality. The result should be equally clear—Latham must be disqualified.

II. BACKGROUND

A. The Norton Scheme and Lawsuits

The Norton Scheme was a Ponzi scheme orchestrated by a San Diego financial planner named Rollo Richard Norton II ("Norton"). *See Miller, et al. v. Chicago Title Co., et al.,* No. 37-2008-00083969-CU-PO-CTL and related cases (together, "*Miller*"). Norton purchased a San Diego apartment complex with the intent to convert the apartments into condominiums. *See* Ex. T ¶¶ 157, 159. Struggling with the project's costs, Norton recruited his friend Craig Gainor, who later became a CTC sales manager, as his partner. *Id.* ¶¶ 159-60. They developed a fraudulent mortgage scheme to funnel money into the conversion project. *Id.* ¶¶ 159-60; Ex. W at 15.

Norton and Gainor described the scheme to investors as a no-lose investment vehicle, convincing them to take out loans to purchase condos that Norton promised to manage on their behalf from rental income. Ex. T ¶¶ 2-3; Ex. W at 5. In fact, Norton looted the equity from the condos and ruined investors' credit by making late payments or no payments at all. Ex. T ¶¶ 30, 137, 169, 188. He "sold" condos to different investors or repeatedly refinanced the same units for higher loans, as the real estate market appreciated, churning "investor to investor" escrow and title transactions through one of CTC's San Diego offices. *Id.* ¶ 55; Ex. W at 2-3. Using sham escrow accounts, Norton forged signatures, stole identities, and falsified loan documents to keep the scheme running. Ex. T ¶¶ 29, 33. He pled guilty to mail fraud and was sentenced to 2 years in prison.

In the wake of the Norton Scheme, numerous plaintiffs filed lawsuits against CTC and Chicago Title Insurance in San Diego Superior Court. Four of these cases were consolidated for trial, and the court appointed *Miller* as the lead case. The plaintiffs (collectively, the "Norton Plaintiffs") alleged that CTC employees, including an escrow officer handpicked by Gainor, aided and abetted, conspired, and participated in the scheme by creating sham escrow accounts, ignoring red flags, and failing to follow CTC policies and practices—all in violation of their fiduciary duties as an escrow company and while accepting bribes for their misconduct. Ex. T ¶¶ 38, 128, 188, 278, 317, 327. The Norton Plaintiffs brought claims for fraud, based on CTC's aiding and abetting and conspiracy with Norton, elder abuse, and negligence. *See generally id*. They also alleged alter ego liability against Chicago Title Insurance. *Id.* ¶ 129.[1]

The adequacy of CTC's policies and procedures and its compliance practices and culture were at the very core of the Norton Plaintiffs' claims. For example, the *Miller* complaint alleges that CTC had "a history of skirting the law governing escrow and title operations," that its "technical memoranda and written policies [governing] the escrow and title process are . . . ignored by and/or unknown to escrow personnel," that CTC provided inadequate training and supervision, and that CTC disregarded company policies and procedures. *Id.* ¶ 18.

From 2008 to 2012, Latham served as CTC and Chicago Title Insurance's lead counsel in these lawsuits, including through extensive discovery and a multi-month jury trial in 2010. In total, dozens of Latham attorneys spent more than 41,000 hours on these matters and billed *almost $17 million* in fees. *See* Declaration of Mark Schiffman ("Schiffman Decl.") ¶ 6. Latham's partner John T. Ryan alone billed more than 3,800 hours, participating in every day of the trial. *Id.* Latham's senior partner on the matter, Michael Weaver, billed over 3,000 hours. *Id.* Latham also advised on litigation with Chicago Title Insurance and CTC's insurance carriers over coverage of certain claims and settlements. *Id.* ¶¶ 20-21. Through these roles, and as further described below, Latham obtained extensive confidential and highly sensitive information about CTC's policies and practices, compliance program, business practices, financial condition,

[1]This motion focuses on the *Miller* pleadings for ease of reference, but each of the Norton Plaintiffs' claims arose from the same general factual allegations.

litigation and settlement strategies, and insurance coverage.

B. The Champion-Cain Scheme and Lawsuits

Like the Norton Scheme, the Champion-Cain Scheme involves an alleged Ponzi scheme orchestrated by a well-known San Diego businessperson. From approximately 2012 to 2019, Gina Champion-Cain ("Champion-Cain"), a San Diego real estate investor and entrepreneur, perpetrated a scheme to provide short-term, high-interest "bridge loans" to liquor license applicants. Plaintiffs' First Amended Complaint ¶ 21, (May 26, 2020), ("FAC"); *see also* Ex. X ¶¶ 4-5. Champion-Cain described the scheme as a no-lose investment opportunity and promised that funds would be held safe in CTC escrow accounts. FAC ¶ 21; Ex. X ¶¶ 16, 26. In fact, she used the investors' funds for her own personal benefit and kept the scheme running through forged signatures and falsified escrow documents. FAC ¶¶ 51, 76(h); Ex. X ¶¶ 6, 32-35. One of Champion-Cain's investors was Kim Peterson, Latham's current client. FAC ¶¶ 21-22. Peterson soon became Champion-Cain's partner, and working together, Champion-Cain and Peterson eventually solicited $140 million from various investors. *Id.* ¶¶ 23-24, 40; *see also* Ex. Y ¶¶ 69, 76. The scheme finally came to an end in August 2019 when the Securities and Exchange Commission obtained a temporary restraining order and the appointment of a receiver.

As in the Norton Scheme, the Champion-Cain Scheme resulted in numerous lawsuits by investors seeking to recover their losses from the obvious deep pockets, CTC and Chicago Title Insurance. Thus far, two lawsuits have been filed in federal court and three lawsuits have been filed in San Diego Superior Court, including this action by Latham on behalf of Kim Peterson, his partner Joseph J. Cohen, and two of their entities (the "Peterson Plaintiffs").

Like the Norton Plaintiffs, the Peterson Plaintiffs allege that CTC employees, including an escrow officer handpicked by Cain, aided and abetted, conspired, and participated in the scheme by creating and operating sham escrow accounts, helping Cain create fictitious escrow instructions, and making false representations to investors and auditors, in violation of their fiduciary duties as an escrow company and while accepting bribes and benefits for their misconduct. FAC ¶¶ 41-45, 65-67, 70(f), 71-73. Like the Norton Plaintiffs, the Peterson Plaintiffs place CTC's policies and procedures squarely in the spotlight, claiming that CTC and

its employees ignored red flags in escrow transactions, implemented inadequate internal controls and compliance programs to detect fraud, and refused to follow CTC policies and practices. FAC ¶¶ 31, 48, 51, 76. And like the Norton Plaintiffs, the Peterson Plaintiffs assert claims for fraud based on CTC's aiding and abetting and conspiring with the perpetrator of the Ponzi scheme, elder abuse, and negligence, as well as alter ego liability against Chicago Title Insurance. *See generally* FAC.

Other investors in the Champion-Cain Scheme who are not represented by Latham have already identified the similarities in the cases brought against CTC and Chicago Title Insurance by the Norton Plaintiffs and the Peterson Plaintiffs. On March 16, 2020, a group of investors represented by Michael Kirby, the same lead trial attorney that represented the Norton Plaintiffs, filed suit against CTC and its employees, Chicago Title Insurance, and Kim Peterson and his family trust. *See generally Levin, et al. v. Chicago Title Co., et al.*, (San Diego Super. Ct.) ("*Levin*"). As further discussed below, the *Levin* plaintiffs expressly reference CTC and Chicago Title Insurance's role in the Norton Scheme as purported evidence of a lack of internal controls.

C. Latham Denies There is Any Conflict

Latham filed its complaint on behalf of the Peterson Plaintiffs on December 13, 2019. *See* Plaintiffs' Complaint, ROA 1. On January 6, 2020, CTC and Chicago Title Insurance requested that Latham provide its complete client file from the Norton matter, as required by California Rule of Professional Conduct 1.16(e)(1). *See* Declaration of Steven M. Strauss ("Strauss Decl.") ¶ 4; *see also* Ex. A. On January 10, 2020, CTC and Chicago Title Insurance wrote to Latham expressly raising concerns about its potential conflict of interest under Rule 1.9 of the California Rules of Professional Conduct and requesting to meet and confer. *See* Strauss Decl. ¶ 5; *see also* Ex. B. Latham waited over a month to respond. *See* Strauss Decl. ¶ 9. When it finally did, it essentially dismissed CTC and Chicago Title Insurance's concerns and failed to address the standards set forth in Rule 1.9. *See id.*; *see also* Ex. F. By March, despite CTC and Chicago Title Insurance's repeated efforts to resolve these issues, it had become clear that Latham did not intend to meaningfully meet and confer on CTC and Chicago Title Insurance's concerns and was

refusing to withdraw as counsel. *See* Strauss Decl. ¶ 14; *see also* Ex. J.[2]

Further, despite at least five requests, Latham still has not completed production of the Norton file materials as CTC and Chicago Title Insurance first requested on January 6. *See* Strauss Decl.¶¶ 4-6, 12, 14-16. In particular, although Latham has produced numerous boxes of hard copy documents such as pleadings and deposition transcripts, it has still not completed production of email communications and internal work product—the very kinds of evidence that are most likely to reveal Latham's possession of sensitive and confidential client information. *Id.* ¶ 16.[3] Latham also stated that it would retain copies of the client files and has failed to confirm, despite a specific request that they do so, that those individuals responsible for reviewing and producing the Norton file to CTC and Chicago Title Insurance have been walled off of the Peterson matter. *Id.* ¶¶ 7, 15; *see also* Ex. D; *see also* Ex. K.[4]

III. LEGAL STANDARD FOR DISQUALIFICATION OF FORMER COUNSEL

California Rule of Professional Conduct 1.9 (formerly Rule 3-310(E)) prohibits an attorney from engaging in successive representations "in the same or a substantially related matter" where the interests of the subsequent client are "materially adverse" to the interests of the former client. Comment One to Rule 1.9 specifies that a lawyer owes a duty to a former client to abstain from "us[ing] against the former client knowledge or information acquired by virtue of the previous relationship." Comment Three to Rule 1.9 provides that two matters are "the same or substantially related" if they involve a "substantial risk" that a lawyer may breach the duty to a former client to abstain from using knowledge or information acquired through the prior matter. Comment 3 further explains that two matters are substantially related where the lawyer "normally would have obtained [confidential] information in the prior representation . . . and would be expected to use or disclose that information in the subsequent representation because it is material

[2] CTC and Chicago Title Insurance would have filed this motion much sooner but for the Court's closure due to COVID-19.

[3] CTC and Chicago Title Insurance did not maintain their own copies of the Norton file. *See* Schiffman Decl. ¶ 23.

[4] During the meet and confer process, Latham suggested that Cooley may itself have a conflict because it had previously represented Peterson. In fact, as Cooley informed Latham in early March, Cooley has no records showing that Peterson was ever a client, and there is no other basis for a purported conflict in Cooley's representation of CTC and Chicago Title Insurance. Since then, Latham has not raised this claim again. *See* Strauss Decl. ¶¶ 9, 14.

to the subsequent representation." This rule "must be vigorously applied to protect a former client's legitimate expectations of loyalty and trust." *Adams v. Aerojet-General Corp.*, 86 Cal. App. 4th 1324, 1340 (2001) (applying former Rule 3-310(E)); *see also M'Guinness v. Johnson*, 243 Cal. App. 4th 602, 608 (2015) (however drastic the remedy, when the circumstances of a disqualifying conflict exist, disqualification is required).

Courts employ two tests when assessing successive representations.[5] *See Costello v. Buckley*, 245 Cal. App. 4th 748, 754-57 (2016). Each test establishes a conflict of interest. *Id.*

First, where the two representations have a "substantial relationship," the attorney may not represent a successive client in litigation adverse to the interests of the first client. *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 283 (1994). When determining whether the representations have a substantial relationship, courts examine whether the attorney's relationship with the former client was "direct and personal" and "whether there is a connection between the two successive representations." *Farris v. Fireman's Fund Ins. Co*., 119 Cal. App. 4th 671, 679 (2004). In other words, the two representations have a substantial relationship where "the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation." *City & Cty. of S.F. v. Cobra Sols., Inc.*, 38 Cal. 4th 839, 847 (2006). A substantial relationship does not mean that the cases match exactly. *Farris*, 119 Cal. App. 4th at 687-88. It only requires evidence of a "rational link" between subject matters, factors, or issues. *See Advanced Messaging Techs., Inc. v. Easylink Servs. Int'l Corp.*, 913 F. Supp. 2d 900, 908 (C.D. Cal. 2012). Once a substantial relationship is shown, "the attorney is presumed to possess confidential information," and "the former client need not prove that the attorney possess actual confidential information." *City & Cty. of S.F.*, 38 Cal. 4th at 847. This presumption operates to "avoid[] the ironic result of disclosing the former client's confidences and secrets through an inquiry into the actual state of the lawyer's knowledge." *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.*, 229 Cal. App. 3d

[5] Revised in November 2018, California Rule of Professional Conduct Rule 1.9(a) replaced prior Rule 3-310(E). In adopting Rule 1.9, the Commission made clear that the revised language is meant to codify established case law. *See* Rule 1.9, *available at* https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.9-Exec_Summary-Redline.pdf.

1445, 1453 (1991). Thus, once a party shows that there is a substantial relationship, the inquiry ends and disqualification should be ordered. *W. Cont'l Operating Co. v. Natural Gas Corp.*, 212 Cal. App. 3d 752, 759-60 (1989).

Second, an attorney must also be disqualified where the attorney *in fact* acquired confidential information that could be used against the former client in the current litigation. *Costello*, 245 Cal. App. 4th at 755-56, 757. Although the attorney must have actually received confidential information, there need not be a precise relationship between the prior and current cases.[6] *See Beltran v. Avon Prods.*, 867 F. Supp. 2d 1068, 1077 (C.D. Cal. 2012). Where it is shown that an attorney received confidential client information that could be used in the current matter, he must be disqualified. *Id.; see also H.F. Ahmanson*, 229 Cal. App. 3d at 1451-52; *see also Wu v. O'Gara Coach Co.*, 38 Cal. App. 5th 1069, 1083 (2019) ("knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude [a successive] representation.") (quoting ABA Model Rules Prof. Conduct, rule 1.9, cmt. 3).

If a conflict exists between two successive representations, the attorney's law firm will also be disqualified, as courts impute the conflict to the entire law firm. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 801 (2010); *see also See Nat'l Grange of Order of Patrons of Husbandry v. California Guild*, 38 Cal. App. 5th 706, 721 (2019).

IV. ARGUMENT

Latham's representation of the Peterson Plaintiffs against CTC and Chicago Title Insurance constitutes an improper successive representation in violation of California Rule of Professional Conduct 1.9. First, this matter is substantially related to the Norton matter, and second, Latham attorneys in fact obtained CTC and Chicago Title Insurance's confidential information during their prior representation, and that information is material to the instant case. For both of these reasons, Latham should be disqualified.

[6] Motions to disqualify based on receipt of confidential information should generally be decided by reference to declarations and written submissions. *In re Complex Asbestos*, 232 Cal. App. 3d 572, 583 n. 5 (1991). It is within the court's discretion to hold an evidentiary hearing if it cannot decide the issue without one, but this should be a rare circumstance. *Id.*

A. Latham Should Be Disqualified Because the Norton and Peterson Matters are Substantially Related

Latham's direct, extensive, multi-year representation of CTC and Chicago Title Insurance in the Norton matter, in light of the significant factual and legal overlap between the Norton and Peterson matters, makes abundantly clear that it "would have obtained" confidential information *from* CTC and Chicago Title Insurance that it "would be expected to use or disclose" *against* CTC and Chicago Title Insurance. *Cf.* Cal. Rules of Prof. Conduct, rule 1.9, cmt. 3. These factual and legal overlaps easily establish the "rational link" between the matters needed to show a substantial relationship. *See Advanced Messaging Techs.*, 913 F. Supp. 2d at 908.

Latham's representation in the Norton matter lasted nearly five years, resulted in a four and a half month jury trial, generated more than 41,000 in billable hours from approximately 80 different timekeepers, and garnered nearly $17 million in fees for the firm. *See* Schiffman Decl. ¶¶ 5-6. What's worse, the very same partner, John T. Ryan, who helped lead Latham's representation of CTC and Chicago Title Insurance in the Norton matter (billing over 3800 hours), including at trial, has *signed the complaint* against CTC and Chicago Title Insurance in the Peterson matter. *See* FAC at 31 (Ryan signature); *see also* Schiffman Decl. ¶¶ 5-6. Led by partners Michael Weaver and Ryan, the Latham team worked closely and extensively, sometimes daily, with Mark Schiffman, the deputy chief legal officer of Fidelity National Financial ("FNF"), CTC and Chicago Title Insurance's parent company, who manages significant litigation and continues to serve in that position today. Schiffman Decl. ¶¶ 5-6. Other key members of CTC's management, including Peter Sadowski, the chief legal officer of FNF, and Paul Perez, FNF's deputy chief legal officer who manages compliance, were involved in the Norton matter and are likewise involved in the Peterson matter. *Id.* ¶ 11. Each of Messrs. Schiffman, Sadowski, and Perez possess extensive confidential information about CTC policies, litigation and settlement strategies, business practices, and insurance disputes. *Id*. ¶¶ 10-11. The depth of Latham's representation is "ample evidence" that Latham and Ryan's involvement was "substantial and exposed [them] to confidences that were not part of the public record." *Beltran*, 867 F. Supp. 2d at 1079 (billing 336 hours over six years to various matters was more than enough evidence to

establish attorney was directly involved in providing legal advice); *see also Jessen v. Hartford Casualty Ins. Co.*, 111 Cal. App. 4th 698, 709 (2003) (presumption that confidential information passed applies whenever "the lawyer was personally involved in providing legal advice and services to the former client").

The significant factual similarities between the Norton Scheme and the Champion-Cain Scheme and the alleged role of CTC in each scheme further establish the presumption that Latham received confidential information in the Norton case that it "would be expected to use or disclose" in this case. Both the Norton Plaintiffs and Peterson Plaintiffs claim that CTC title and escrow officers created "sham" escrow accounts to improperly disburse funds to the perpetrators of the frauds. *Compare* Ex. T ¶¶ 2(c), 233, 261, 318 *with* FAC ¶¶ 65-66, 79; *see also* Ex. U ¶¶ 14-17; *see also* Ex. W at 10-11, 15. In Norton, depositions of CTC witnesses (some of whom were also represented by Latham) focused on training, policies, and procedures for California escrow officers on opening, maintaining, and auditing escrow files. *See* Ex. U ¶¶ 13-17. And in this matter, Latham's discovery requests to CTC, which seek CTC's training materials, policies, and procedures going back to 2011, including documents related to "establishing or maintaining escrows or other accounts," and "audits of escrows, accounts, agreements, or contracts," amply demonstrate that CTC's policies and procedures will be a central issue. *See* Ex. L, Nos. 2, 4.

Similarly, both cases allege that CTC ignored indicia of the underlying fraud while providing escrow services when it knew or should have known the transactions were shams. *Compare* Ex. T ¶¶ 82, 208, 261-62 *with* FAC ¶¶ 51-52; *see also* Ex. Y ¶ 195 ("Chicago Title was involved *again in disregarding obvious red-flags* for fraud and failing to protect Chicago Title's escrow customers and depositors") (emphasis added). For example, both the Norton Plaintiffs and Peterson Plaintiffs claim that CTC facilitated the schemes by ignoring fake and forged information and documents, complying with requests to "brush off" third party inquiries or to redirect them to the perpetrator of the fraud, and failing to properly communicate with third parties. *Compare* Ex. T ¶¶ 8, 18, 29, 64-65, 76, 128, 206 *with* FAC ¶¶ 51-52, 55, 60, 77. This record reflects that CTC's policies and practices for auditing escrow accounts, identifying fraud, communicating with third parties, and supervising employees were central to the Norton case and

are squarely at issue in the present case. *See, e.g.,* Ex. U ¶¶ 13-17; Ex. L Nos. 2, 4-5.

Plaintiffs in both cases also allege that CTC and its employees profited from the scheme by accepting bonuses, commissions, fees, and bribes stemming from the frauds which they allege caused CTC and its employees to participate in and turn a blind eye to the fraudulent schemes. *Compare* Ex. T ¶¶ 156, 188 *with* FAC ¶¶ 70-73. As a result, both matters involve analysis of CTC's policies surrounding employees' acceptance of gifts. *See* Schiffman Decl. ¶¶ 7-8.

Where the same company policies and practices are at issue, courts routinely find the matters are substantially related. *See, e.g., Farris*, 119 Cal. App. 4th at 682 (if representations relate to the same policies they are substantially related, even if the attorney provides different services); *see also Beltran*, 867 F. Supp. 2d at 1082 (products liability case and consumer class action were substantially related because they involved the same testing protocols). And while the two matters arose some years apart, there is no question that many of the same policies and practices are at issue in both, as evidenced by Peterson's discovery request for CTC's complete policies and procedures from January 2011 (when Latham was still representing CTC in the Norton matter) to the present relating to escrow accounts, employee acceptance of gifts, fraud prevention, employee conduct, compliance, and auditing. See Ex. L, Nos. 2-4.

Not surprisingly given the significant factual overlap, some of the same CTC executives who testified in Norton will almost certainly be subpoenaed to testify on the very same topics in Peterson. *See* Schiffman Decl. ¶¶ 11-12. For example, Paul Perez is Fidelity's chief compliance officer; he testified in Norton about increased training for escrow personnel, guidance to escrow officers to identify fraudulent schemes, Fidelity's fraud monitoring and auditing programs, and policies and practices related to escrow accounts, fraud detection, and employee supervision. *Id.* ¶ 11. Roger Jewkes is Fidelity's chief operating officer; he testified in Norton about Chicago Title's audit practices, field compliance policies, increased mandatory escrow training, and other actions taken to detect fraud. *Id.* Peter Sadowski is Fidelity's chief legal officer; he testified about CTC's employment practices regarding CTC employees who were allegedly involved in the fraud. *Id.* And Lisa Tyler is Fidelity's national escrow administrator; in an action related to Norton, she testified about CTC's policies, practices, and written materials regarding escrow

accounts (including when and how those policies had been created), training, and fraud detection. *Id.* Latham prepared at least Perez and Jewkes for their testimony in Norton and defended them at their depositions, and thus would inevitably have been privy to confidential information, not to mention insights into their strengths and weaknesses as witnesses. And each of these executives hold essentially the same positions today. *See* Schiffman Decl. ¶ 12; *see also Farris*, 119 Cal. App. 4th at 675 (cases were substantially related because "some of the witnesses in this action will be FFIC senior claims personnel who formerly worked closely with Wilkins when he represented FFIC").

Not only do the facts and key CTC witnesses overlap, Plaintiffs in both cases assert the same legal claims. For example, both cases allege fraud, based on CTC employees' aiding and abetting and conspiring with the main perpetrators of the frauds in their operation of escrow accounts, and negligence based on the failure to recognize certain red flags in the operation of the escrow accounts. Both also allege that CTC breached its fiduciary duties to plaintiffs in handling the fraudulent transactions at issue. *Compare* Ex. T ¶¶ 66, 261, 273, 276 *with* FAC ¶¶ 67, 95(b). Whether a fiduciary duty exists and was breached is a question of law and fact that requires plaintiffs to examine the contours of CTC's relationship with depositors, escrow account holders, and interested third parties. *See Marzec v. Public Employees' Retirement Sys.*, 236 Cal. App. 4th 889, 915 (2015). The analysis of CTC's fiduciary relationship to the Peterson Plaintiffs will rest on the same facts and issues as in Norton.

Both cases allege a violation of the elder abuse statute, California Welfare & Institutions Code § 15610.30, even though it is seldom brought as a separate claim. *See Berkley v. Dowds*, 152 Cal. App. 4th 518, 529 (2007). Yet, armed with its experience defending that claim in Norton, Latham now asserts such a separate cause of action against its former client.

And both cases allege that Chicago Title Insurance is the alter ego of CTC, even though it was indisputably CTC alone that engaged in the conduct at issue. *See* Ex. V at 9; *see also* FAC ¶ 10. To establish that Chicago Title Insurance is the alter ego of CTC, plaintiffs must demonstrate a unity of interest and ownership between the entities—a highly fact-intensive inquiry. *See Zoran Corp. v. Chen*, 185 Cal. App. 4th 799, 811-12 (2010). Having vigorously defended Chicago Title

Insurance against alter ego and agency claims in the Norton matter, even to the point of filing a separate trial brief, *see* Ex. V at 1, 9-10, 12, Latham will be able to use confidential information it gained about the relationship between CTC and Chicago Title Insurance to pursue the same claim here. Indeed, the Peterson complaint references non-public information about the relationship between CTC and Chicago Title Insurance. *See* FAC ¶ 10. Given the fact-intensive nature of the analysis, it is no surprise that courts have held that bringing alter ego claims against a former client is itself evidence of a substantial relationship. *See City of Placentia v. KFM Eng'g, Inc.*, No. 046098, 2012 WL3127971, at *10 (Cal. App. Aug. 2, 2012) (affirming disqualification because "the substantial relationship between his prior representation of [the former client] and [his current client's] alter ego claim gives rise to a conclusive presumption he received confidential information from [the former client] material to the alter ego claim.").

In sum, given Latham's exhaustive and lengthy representation of CTC and Chicago Title Insurance in a matter with substantially similar facts, many of the same witnesses, and legal issues, there can be no doubt but that Latham "would have obtained [confidential] information" that it "would be expected to use or disclose" in its representation of the Peterson Plaintiffs. No further inquiry is required, and under Rule 1.9 Latham must be disqualified. *See W. Cont'l Operating Co.*, 212 Cal. App. at 759-60.

B. <u>Latham Should Be Disqualified Because It Received Confidential Information</u>

Although the *presumption* that Latham possesses confidential CTC and Chicago Title Insurance information plainly requires disqualification, the record makes clear that Latham *in fact* acquired confidential CTC and Chicago Title Insurance information—information that lies at the very heart of the issues to be litigated in the present case. *Costello*, 245 Cal. App. 4th at 755-56; *see also* Cal. Rules of Prof. Conduct, rule 1.9, cmt. 3.

First, Latham obtained access to numerous confidential CTC policies and procedures, including those relating to fraud prevention, employee gifts, escrow accounts, third party deposits, fraudulent transactions, audit practices, and training, as well as technical memoranda about escrow transactions, fraud, and forgery. *See* Schiffman Decl. ¶¶ 7-8. Some of the policies that Latham obtained may be the same today, while others have been updated but are still largely

the same as to the provisions relevant to both the Norton and Peterson matters. *Id.* ¶ 8. For example, Latham has possession of CTC's "Escrow E-Manual," a confidential internal document that sets forth policies and procedures for escrow transactions. The sections of that manual relating to procedures for audits, fraud detection, escrow instructions, disbursements, and dormant funds—all issues that will be relevant to the Peterson litigation—remain identical or substantially similar today. *Id*. California courts are clear that absent substantial changes to relevant policies or other significant underlying facts, the passage of time does not neutralize a conflict in substantially related cases. *Brand v. 20th Century Ins. Co./21 Century Ins. Co.*, 124 Cal. App. 4th 594, 607, 607 n. 5 (2004). And not only does Latham possess confidential policies and procedures, it participated in discussions with key CTC legal and business executives about the interpretation and application of those policies and procedures. Schiffman Decl. ¶ 10. As a result, Latham obtained highly confidential information and insights into an issue that will be central to the Peterson litigation—CTC's compliance with and the adequacy of its policies and procedures.

That certain of CTC's policies and procedures may have been amended or revised since Latham's representation ended does not make them any less confidential (or potentially valuable to Latham in this matter). For example, as noted above, Latham has served discovery requests on CTC seeking CTC's current policies and procedures on various topics. *See* Ex. L, Nos. 2-4. By comparing the current versions with prior versions (which Latham possesses solely by virtue of its representation of CTC in Norton), Latham may seek to question CTC witnesses about the reasons for any changes in policies and procedures. *See* Schiffman Decl. ¶ 9.

Second, Latham obtained detailed knowledge of CTC's litigation strategy through its regular conferences, communications, and strategy sessions with CTC and Chicago Title Insurance's in-house legal team, including Mark Schiffman, FNF's deputy chief legal officer managing litigation, and Peter Sadowski, FNF's chief legal officer. *Id.* ¶ 6; *see also Farris*, 119 Cal. App. 4th at 682 (disqualification required because attorney "developed direct, personal relationships with key decision makers. He had a privileged viewpoint from which to observe, and in fact direct or guide, how [the company] handled particular claims" and settlement

strategies). Indeed, Latham's partner John Ryan conferred with Schiffman almost daily during certain periods in the Norton matter, including during trial preparation and the trial. Schiffman Decl. ¶ 6. Beyond his litigation and trial strategy, Schiffman also disclosed CTC's methodology for assessing settlement offers to plaintiffs with particular damages characteristics. *Id.* ¶ 14*; see also Beltran*, 867 F. Supp. 2d at 1082 (disqualification required because acquisition of confidential information about client's business practices and litigation and settlement strategies would confer significant advantage to adverse party if disclosed). Latham's knowledge of CTC's litigation and settlement strategy is particularly relevant because Schiffman will once again be CTC's key decision maker in the Peterson litigation on all trial and settlement issues, with oversight from Sadowski, who remains chief legal officer. *See* Schiffman Decl. ¶¶ 2-3.

The depth of Latham's possession of extraordinarily sensitive information about CTC's litigation strategy cannot be overstated. It includes the results of two mock jury exercises that Latham, including Ryan and Weaver, conducted on CTC's behalf in order to explore the strengths and weaknesses of CTC's defense case and to assist in developing its trial strategy. *Id.* ¶¶ 15-18.

In March 2009, Latham led a two-day focus group exercise using 20 mock jurors selected to resemble an actual San Diego County jury pool. *Id.* ¶ 16. In preparation for that focus group, Schiffman had extensive discussions with the Latham team about their assessment of the evidence and trial strategies in order to determine what issues and themes to test with the mock jurors. *Id.* The focus group consisted of a discussion with the mock jurors of their views and attitudes on key issues in the case (e.g., economic conditions and the title and escrow business) followed by presentations of selected evidence and arguments on behalf of both plaintiffs and defendants. *Id.* The mock jurors were asked to complete detailed questionnaires on their views as to CTC's role and liability, such as whether CTC appropriately followed its own policies and procedures. *Id.* The focus group exercise resulted in a highly detailed and confidential 75 page report which Latham still possesses today. *See* Strauss Decl. ¶ 16.

Following the focus group, in May 2009 Latham led a two-day mock trial exercise on CTC's behalf with a group of 41 surrogate jurors. *See* Schiffman Decl. ¶ 17. In preparation for the mock trial, Schiffman had extensive discussions with the Latham team about trial strategy as

well as the results of the focus group in order to determine how to structure the mock trial and what issues and themes to focus on. *Id.* ¶¶ 15-16. The results were summarized in a 158 page report which Latham maintains in its Norton case file. *Id.* ¶ 18. The report identifies persuasive arguments, assesses case strengths and weaknesses, gauges reactions to damages amounts and arguments, and tests the impact of key jury instructions and verdict form questions. *Id.* ¶¶ 17-18. It used juror reactions to assess the best and worst arguments on topics like the use of forged and fraudulent documents, CTC's involvement in the fraud, its failure to investigate or respond to red flags, and plaintiffs' own responsibility for their investment decisions. *Id.* The report also analyzed each juror's profile and mapped their characteristics against their viewpoints in order to identify the preferred juror profile in San Diego County. *Id.* ¶ 18. Through this report, Latham possesses a highly confidential strategic roadmap to prospective juror reactions to the very issues that will be critical to the Peterson matter. *See, e.g., Zizzo v. Super. Ct.*, No. D062255, 2013 WL313916 at, at *1, *9-13 (Cal. App. Jan. 28, 2013) (disqualifying attorney in subsequent representation case despite ten year passage of time because she possessed insider information about the former client's strengths, weaknesses, and strategy).

Third, CTC provided Latham with confidential information about CTC's and Chicago Title Insurance's finances, assets, holdings, corporate structure, and capitalization, in order to assist Latham in defending against Norton's alter ego claims. *See* Schiffman Decl. ¶ 13. That information remains equally relevant—and extraordinarily valuable—to the alter ego claims that Latham now asserts against Chicago Title Insurance. *Id.*; *see also Brand*, 124 Cal. App. 4th at 607, 607 n. 5 (absent major changes to corporate structure, the passage of time does not neutralize a conflict in substantially related cases); *see also City of Placentia*, 2012 WL3127971, at *9, *14 (affirming trial court's disqualification of attorney in subsequent representation case and refusing to consider 12-year lapse between representations).

Finally, Latham obtained detailed knowledge of CTC and Chicago Title Insurance's strategies with respect to its insurance coverage. *See* Schiffman Decl. ¶ 20-21. In Norton, Latham participated in CTC and Chicago Title Insurance's negotiations with insurance carriers regarding claim coverage, insurance structure, and insurer disputes. *Id.* ¶ 20. Latham (including

Ryan) also attended a 2012 mock trial led by Chicago Title Insurance and CTC's insurance counsel to prepare for litigation against certain insurance carriers—the same insurance counsel who will be handling negotiations with CTC and Chicago Title Insurance's carriers in connection with the Champion-Cain Scheme. *Id.* ¶ 21.[7] Latham's knowledge of this information will give it a particular advantage against CTC and Chicago Title Insurance by allowing it to structure allegations to either strengthen or weaken claim coverage in order to leverage settlement pressure. *See Jessen*, 111 Cal. App. 4th at 713 ("confidential information includes information concerning similar matters which would be useful to the current client in pressing its current claim, including. . . the existence and amount of insurance coverage") (citing *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 233, 236-37 (1999)). Indeed, Latham is currently seeking discovery of CTC's communications with its insurance carriers—ample evidence that the knowledge it gained as CTC's counsel will be squarely relevant here. *See* Ex. N at 1-2.

C. Other Factors Underscore The Threat Posed By Latham's Ethical Breach

As the above discussion makes clear, Latham's representation of Peterson against CTC and Chicago Title Insurance violates its duties to CTC and Chicago Title Insurance as former clients under Rule 1.9 of the Rules of Professional Conduct. It is the courts' duty to "protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship" and to maintain the public's trust in the fairness of the judicial system and the integrity of the bar. *Dept. of Corp. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1147 (1999); *see also Jessen*, 111 Cal. App. 4th at 714. But Latham's breach of ethics poses a heightened threat to CTC and Chicago Title Insurance for two additional reasons.

First, the substantial relationship between the Norton Scheme and the Champion-Cain Scheme has *already been publicly identified*. In the *Levin* matter, filed by Michael Kirby, the lead trial counsel that represented the Norton Plaintiffs, in this court just two months after the Peterson complaint, plaintiffs allege as follows:

[7] As noted above, Latham has promulgated discovery requests for CTC materials as far back as 2011—a period that overlaps with Latham's representation of CTC and Chicago Title Insurance in the Norton matter.

> "The lack of competent internal controls and audits at the San Diego office of Chicago Title is even more inexcusable because during the 2007-2010 time period, Chicago Title was involved in another Ponzi scheme which resulted in years of litigation and Chicago Title being held responsible for fraud, investor losses and punitive damages . . . less than a decade later, the same downtown San Diego escrow office of Chicago Title was involved again in disregarding obvious red flags for fraud and failing to protect Chicago Title's escrow customers and depositors." Ex. Y ¶ 195.

Moreover, the *Levin* plaintiffs specifically point to depositions of CTC employees in the Norton matter in support of their alter ego claim:

> "In prior litigation against CTC and CTIC brought in San Diego Superior Court in 2007-2010 by numerous defrauded investors in a different Ponzi scheme run through Chicago Title's escrow department in downtown San Diego, numerous Chicago Title employees gave deposition testimony that they did not know there was any difference between CTC and CTIC." *Id.* ¶ 65.

Thus, the substantial relatedness between the two matters *is already at issue*, highlighting the threat posed by Latham's egregious ethical violation. In other words, the threat to CTC and Chicago Title Insurance of Latham's prior representation is no mere hypothetical; rather, it is a virtual certainty that Latham "would be expected to use or disclose" the confidential information it obtained in its prior representation. *Cf.* Cal. Rules of Prof. Conduct, rule 1.9, cmt. 3. And in the context of a consolidated action, unless it is disqualified, Latham will be in a position to team up with the very same plaintiffs' counsel it opposed in Norton, resulting in a shocking breach of Latham's duties of loyalty and confidentiality.

Second, as if these ethical transgressions were not bad enough, Latham has an additional conflict because, incredibly, the firm advised Kim Peterson about Champion-Cain's liquor license loan program and participated in Peterson's efforts to solicit investments in the scheme. *See* Ex. Q at 1; *see also* Ex. R. Documents produced by Torrey Pines Bank ("TPB") show that in early 2017, Peterson applied for a $5 million line of credit with TPB to provide funding for Champion-Cain's scheme. *Id.* In the course of its due diligence, TPB discovered a number of facts that called into question the legitimacy of Peterson's loan application. *See* Ex. S. For example, TPB discovered that Peterson had submitted to TPB 30 purported CTC escrow agreements bearing the signature of someone who was not in fact a real CTC employee; that Peterson had provided TPB with emails purporting to be from two CTC employees that in fact appeared to be from fictitious

email addresses; that Peterson's partner, Champion-Cain, had recently set up a company with the name "Chicago Title and Escrows"; and that most of the liquor licenses the purchases of which Peterson would supposedly be funding with the loan proceeds were in fact not even eligible to be transferred. *Id.*; *see also* Ex. O 93:25-96:1.

Given the seriousness of these concerns, TPB conveyed them, both in writing and in an in-person meeting, to Peterson and his attorney, a Latham partner (and partner-in-charge of Latham's San Diego office) named Scott Wolfe, in order to give them the opportunity to respond. For example, in an email dated February 9, 2017, TPB counsel wrote to Peterson, copying Champion-Cain and Wolfe, stating in part as follows:

> Before we can proceed with your [funding] request, we must first resolve the circumstances surrounding the escrow agreements you presented to the Bank as binding obligations of Chicago Title. We need to know who Wendy Reynolds [i.e., the fictitious employee] is, why she signed the documents, what her relationship is to Chicago Title and whether she has the authority to bind Chicago Title.

Ex. P. Remarkably, at a follow-up meeting among TPB representatives, Peterson, and Wolfe, Peterson attempted to explain that Wendy Reynolds, the fictitious CTC employee who had purportedly signed the 30 escrow agreements, was in fact *the cousin* of a real CTC employee—a nonsensical explanation that did nothing to allay TPB's suspicions. *See* Ex. O at 181:2-182:23. As if to buttress that explanation, Peterson also showed TPB a box of six years' worth of escrow agreements for prior liquor license loans that had been signed by this Wendy Reynolds—a circumstance that made his explanation that Wendy Reynolds was the cousin of a real CTC employee even more bizarre. *See id.* at 198:12-201:14.

Not surprisingly, TPB declined to fund the loan. *See* Ex. Q. In response, Peterson threatened to sue TPB, and as an accommodation TPB offered to refund Peterson's loan fee in exchange for a release. *See* Ex. S. Peterson and Latham rejected that proposal, insisting that TPB agree to a representation and warranty that TPB not disclose its discoveries to third parties and a non-disparagement clause—presumably in an attempt to ensure that TPB's discoveries about Peterson's conduct would remain a secret. *Id.* TPB declined to agree to those demands, and not surprisingly, TPB counsel believed that Peterson "was trying to keep what Torrey Pines had discovered . . . quiet." *See* Ex. O at 219:9-14. Yet even after learning of TPB's discoveries,

Wolfe continued to help Peterson solicit investors.[8]

As these events demonstrate, Latham attorneys are percipient and important witnesses to Peterson's central role in Champion-Cain's scheme, including his attempt to obtain a bank loan based on demonstrably false information and his continued solicitation of investors thereafter. Under these extraordinary circumstances, and given its own role in a series of troubling events and its inherent conflict of interest, Latham's breach of Rule 1.9 poses an even more serious threat to CTC and Chicago Title Insurance, and indeed to public confidence in the judicial system.

V. CONCLUSION

CTC and Chicago Title Insurance have established that the Norton and Peterson matters are substantially related *and* that Latham received relevant confidential client information in the course of its prior representation. For the reasons set forth above, CTC and Chicago Title Insurance respectfully request that Latham be disqualified.[9]

Dated: May 27, 2020

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[8] Latham's counsel in this matter, John T. Ryan, is also likely to be a relevant witness. In May 2019, he attended a meeting with Peterson, his partner Joseph Cohen, and Champion-Cain, in which they discussed their response to subpoenas they had just received from the SEC. Peterson's continued fundraising efforts despite knowledge of the SEC's investigation, including whether he disclosed that investigation to prospective investors, will certainly be a subject of discovery.

[9] On May 26, 2020 CTC and Chicago Title Insurance filed an unopposed *Ex Parte* Application seeking leave to file this Memorandum of Points and Authorities in excess of the 15 page limit.