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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DIVA LIMOUSINE, LTD., individually and on behalf of all others similarly situated,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.; RASIER, LLC; RASIER-CA, LLC; UBER USA, LLC; and UATC, LLC,

Defendants.

Case No. 3:18-cv-05546-EMC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISQUALIFY

Date: November 20, 2018
Time: 9:30 a.m.
Location: Courtroom 5
Judge: Hon. Edward M. Chen

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I. INTRODUCTION

Uber asks this Court to disqualify Keller Lenkner because of communications between Warren Postman and Uber when Mr. Postman worked at the U.S. Chamber of Commerce. Disqualification is a drastic remedy. It deprives an innocent client of its choice of counsel and is prone to abuse by litigation adversaries. For those reasons, courts impose disqualification only in extreme circumstances. Uber has not approached the showing required to allow it to oust its adversary's counsel. And this case bears no resemblance to the rare fact patterns in which courts have imposed disqualification. The Court should refuse Uber's request.

As counsel for the U.S. Chamber Litigation Center, Mr. Postman communicated with hundreds of businesses, including Uber, on topics of interest to the business community. But Mr. Postman was never Uber's lawyer, and none of those conversations were privileged. Straining to show impropriety, Uber suggests that a duty of confidentiality attaches to communications like an email describing *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 925 (2018), that Mr. Postman sent to 17 lawyers who served on a Litigation Center advisory comittee. But when Mr. Postman emailed his thoughts about a publicly available judicial opinion to representatives from Uber, Lyft, Pizza Hut, Coca-Cola, Caterpillar, and lawyers from nine different law firms, that was a non-privileged exchange of ideas among generally aligned businesspeople and legal professionals. It was not privileged. Most of Mr. Postman's external communications were of this sort and so cannot form the basis for a disqualifying conflict of interest.

Also while at the Chamber, Mr. Postman collaborated with Uber lawyers on a case alleging that a Seattle ordinance was preempted under federal antitrust and labor law. The Seattle litigation did not present either similar facts or similar legal arguments to this case. No party argued that Uber's drivers were employees, much less employees under California law, much less employees under *Dynamex*, which had not yet been decided. Mr. Postman also worked on several amicus briefs in appeals involving Uber. Every appeal and every amicus brief dealt exclusively with the enforceability of Uber's arbitration clause. None of the appeals concerned whether Uber's drivers are its employees. It is implausible that Uber gave Mr. Postman troves of confidential information that is relevant to this case while he was litigating preemption claims based on federal antitrust and

labor law or filing amicus briefs about the Federal Arbitration Act. More importantly, Uber has not produced any *actual evidence* that it did so. And even in the context of the Seattle litigation and the amicus briefs, Uber knew that its communications with Mr. Postman were being shared with other entities who were not parties to the case.

Nothing in Mr. Postman's past gives him any privileged insight into misclassification or any of the other issues in this case. Mr. Postman has no confidential information from or about Uber that is related to this case. That is why two professional responsibility lawyers, retained separately by Keller Lenkner and Mr. Postman before Mr. Postman joined Keller Lenkner, concluded that his work at the Chamber would not create any conflicts with Uber in cases alleging driver misclassification. And that may be why Uber has never sought to disqualify Keller Lenkner in a Third Circuit case against Uber that turns squarely on misclassification.

Uber's motion should be be denied for four independent reasons.

First, the sole ethical rule Uber claims Mr. Postman violated is facially inapplicable. By its terms, California Rule of Professional Conduct 3-310(E) applies only to engagements adverse to a "client or former client." But Uber concedes that Mr. Postman "was never an attorney for Uber." Dkt. 40 at 15; Dkt. 42 ¶ 21. That concession is fatal under the plain text of Rule 3-310(E). The cases on which Uber relies derive from a broader, predecessor rule that the California Supreme Court eliminated. Simply put, Uber's motion is "premised upon a rule which no longer exists." *McElroy v. Pac. Autism Ctr. for Educ.*, 2015 WL 2251057, at *4 (N.D. Cal. May 13, 2015) (Koh, J.).

Second, even under the now-abrogated standard, Uber has not met its "burden to show entitlement to the drastic remedy of disqualification." *Id.* at *7. Uber must show that: (1) within a relationship of confidentiality, (2) it made a broad disclosure of sensitive information to Mr. Postman (3) in a matter that arises from the same facts as this one. Uber cannot satisfy *any* of those factors, let alone all three. The only arguably confidential communications described in Uber's motion involved Mr. Postman's work on the Seattle litigation and appellate amicus briefs. But as Uber knew, the Chamber routinely shared similar information about those matters with other Chamber members and donors. Uber has not shown how that can be reconciled with the common-interest arrangement it claims existed. Uber also cannot show that it made a broad disclosure of

sensitive information to Mr. Postman. In the absence of a previous attorney-client relationship, the case law allows disqualification only when the offending lawyer has access to heaps of sensitive information. But the record Uber provides shows nothing of the sort. Finally, Uber cannot show that the Seattle litigation (which concerned whether a municipal ordinance was preempted by federal law) and the amicus briefs (which dealt solely with the Federal Arbitration Act) arise from the same facts as this case about whether Uber competes unfairly by misclassifying its drivers.

Third, Uber's conduct suggests that it seeks to disqualify Keller Lenkner for strategic gain rather than out of a genuine concern about unfair advantage. Courts routinely deny otherwise meritorious disqualification motions when the moving party failed to raise the same conflict in an earlier, similar case involving the same allegedly conflicted firm. *E.g.*, *Koloff v. Metro. Life Ins. Co.*, 2014 WL 2590209, at *5 (E.D. Cal. June 10, 2014). That is precisely the situation here. In July 2018, Keller Lenkner appeared as counsel for a putative class of Uber drivers in a case against Uber in the Third Circuit. The only issue in that appeal is misclassification, and the case, now fully briefed, likely will be the first federal appellate decision to address the issue as it relates to Uber.

Uber knew in July that Mr. Postman had joined Keller Lenkner, but Uber has never asserted a conflict in the Third Circuit matter. So what has changed? Perhaps it is Diva's motion for partial summary judgment, which creates a risk that Uber's business model in California could be declared unlawful shortly before it plans to conduct a public offering. It could also be that, after appearing in the Third Circuit appeal, Keller Lenkner began serving Uber with demands for arbitration on behalf of individual drivers. By the time Uber appeared in this case, Keller Lenkner had served close to 5,000 arbitration demands. The number now exceeds 10,000. Uber is relying on its disqualification motion to attempt to delay Diva's motion for partial summary judgment. Dkt. 33. And if the motion is successful, Uber surely will use it to attack Keller Lenkner's ability to represent drivers in "thousands of individual arbitrations against Uber." Dkt. 40 at 2 n.3. Uber's concern about Keller Lenkner's supposed unfair advantage appears to have set in only when the stakes got higher. That is a well-established ground for denying Uber's motion.

Fourth, this Court must balance the equities before imposing disqualification, and disqualification would be inequitable here. Keller Lenkner and Mr. Postman separately consulted

leading professional responsibility counsel before deciding to take on matters adverse to Uber, and each lawyer independently advised that it would be permissible for Mr. Postman to be adverse to Uber on misclassification issues. Moreover, whether Uber misclassifies its drivers has been one of the most heavily litigated and closely scrutinized employment-law issues during the past five years. It is difficult to conceive of a relevant non-public fact or legal argument that Keller Lenkner could possess—let alone one that Uber would have shared with Mr. Postman in an unrelated federal preemption case or while discussing an amicus brief about the Federal Arbitration Act. Diva's motion for partial summary judgment illustrates this point. The motion relies solely on facts drawn from public records (mostly Uber's website) and a straightforward application of a widely read California judicial decision. Keller Lenkner has no unfair advantage in litigating that issue, and Uber has offered nothing to suggest otherwise. Disqualification is inappropriate where careful attorneys consulted expert counsel and there is no credible showing of prejudice.

II. FACTS

A. The U.S. Chamber Litigation Center

The U.S. Chamber Litigation Center is a subsidiary of the U.S. Chamber of Commerce with the mission of shaping legal rules to benefit the business community. Postman Dec. ¶ 5. One of the Litigation Center's core functions is to facilitate information-sharing among its members. *Id*. ¶¶ 7–8. Businesses that want to limit civil liability sit on Litigation Center advisory committees and attend Litigation Center events to discuss pending cases, litigation strategy, and best practices. *Id*. Staff gather input from hundreds of businesses on a host of topics, and attorneys for individual businesses call on Litigation Center staff to tap into that knowledge. *Id*. The Chamber is well aware of this information-sharing and markets it as one of the benefits of Chamber membership. *Id*. ¶ 15.

The Litigation Center itself relies on information-sharing among its members to inform its litigation activities. *Id*. ¶ 16. Before filing an amicus brief, Litigation Center staff discuss the case with lawyers from dozens of companies and law firms on Litigation Center advisory committees. *Id*. ¶¶ 16. Those exchanges include discussions about the strengths or weaknesses of a party's legal arguments. *Id*. Advisory committees sometimes review non-final drafts of parties' briefs. *Id*. ¶ 18. And it is common for a committee member to recommend against the Chamber's filing an amicus

brief because the party's legal position would not serve the business the committee member represents or the business community as a whole. *Id*. ¶¶ 17, 19. When a business requests amicus support from the Chamber, Litigation Center staff ask the requester for an analysis of the case and its significance and then share those thoughts with the relevant advisory committees. *Id.* ¶ 24.

Participants on Chamber committees and at Chamber meetings understand that the substance of their conversations with Chamber staff is shared, or could be shared, with dozens of other businesses that have divergent commercial and legal interests, and that the conversations are not privileged. *Id*. ¶¶ 8–14. For that reason, businesses generally limit their discussions with the Chamber (or any trade association, for that matter) to things like analyzing the scope or impact of a recent decision, sharing ideas about potential legal arguments, or discussing the possible outcome of a pending case. *Id*. In this type of setting, a prudent attorney would never share sensitive information about a client. *Id*. When businesses do share information—such as a near-final draft pleading or thoughts about how to refine a particular legal argument—that decision reflects a business judgment that the commercial benefits of sharing information outside of the privilege outweigh the risk that doing so will disadvantage the business. *Id*. ¶ 18.

B. Mr. Postman's Role At The Litigation Center

Mr. Postman joined the Litigation Center as Senior Counsel for Litigation in 2014 and ultimately was promoted to Chief Counsel for Appellate Litigation. *Id*. ¶ 4. During that time, he oversaw the filing of hundreds of amicus briefs, hosted and attended dozens of Litigation Center events and working group meetings, and litigated several lawsuits brought by the Chamber. *Id*. ¶¶ 22–25. He had countless conversations with Chamber members regarding pending cases, recent judicial decisions, and legal strategy on issues such as arbitration, employment law, and class actions. *Id*. Those conversations and matters made him a better, more experienced lawyer. *Id*. ¶ 42.

Mr. Postman regularly discussed employment law issues with interested companies, including Uber. *Id*. ¶¶ 22–25. The substance of those conversations was regularly shared with other Chamber members. Members knew that this sharing was taking place and, indeed, counted on it. *Id*. As described in Uber's motion, after the California Supreme Court decided *Dynamex*, Mr. Postman sent a summary of the case and a short analysis to a Litigation Center advisory committee

and indicated that the Chamber intended to file a letter supporting rehearing. Dkt. 40 at 9; 43-1 at 18. The email was sent to seventeen different businesses and law firms. *Id*. The Chamber later distributed a substantially similar analysis to *hundreds* of its members. Postman Dec. ¶ 31.

In March 2016, the Chamber filed a lawsuit challenging a Seattle ordinance that would have allowed for-hire drivers who were independent contractors to form unions. Kayes Dec. ¶ 16, ex. 1; Postman Dec. ¶ 33. In April 2017, Uber joined the suit through an amended complaint. Kayes Dec. ¶ 16, ex. 1. The position that Uber drivers were misclassified as independent contractors was never asserted by any party in the litigation. Postman Dec. ¶ 36. On its face, the Seattle ordinance applied only to independent contractors. *Id*. Unsurprisingly, the Chamber and Uber never suggested that Uber drivers were employees. *Id*. Indeed, the Chamber made clear in the case that there was "no need for the Chamber to take a position on the employment status of for-hire drivers." Kayes Dec. ¶ 16, ex. 2 at 59-60; *see also id*. ¶ 16, ex. 3 at 19 ("Neither the Chamber nor the individual plaintiff has made even a bare assertion that for-hire drivers are employees: both have [agreed with Seattle] that the for-hire drivers covered by the Ordinance are independent contractors . . . .").

The Chamber raised three facial challenges to Seattle's ordinance. First, the Chamber argued that the ordinance was preempted by federal antitrust law because it encouraged price fixing by drivers. *Id.* ¶ 16, ex. 1 at 18-21. Second, the Chamber argued that the ordinance was subject to so-called *Machinists* preemption, because it allowed independent contractors to unionize even though the National Labor Relations Act leaves them to compete in a free market. *Id.* at 21-23. Third, the Chamber argued that the ordinance was subject to so-called *Garmon* preemption. Because the ordinance applied only to independent contractors and the NLRB was considering cases addressing whether Uber drivers were independent contractors, the Chamber argued that Seattle should have to wait for resolution of those cases before applying its ordinance. *Id*. at 23-25.

Because the Chamber brought a facial challenge to the ordinance, it did not introduce any evidence about its members other than standing declarations. Postman Dec. ¶ 39. The case was litigated on the administrative record without discovery from the Chamber, its members, or Uber. *Id*. ¶ 36. Throughout the case, the Chamber emphasized that no specific facts regarding its members—including Uber—were necessary or relevant to litigate the case. *See, e.g.,* Kayes Dec. ¶

16, ex. 4 at 21 ("This claim presents a 'pure question of law' that does not require consideration of any Chamber members' specific factual circumstances."); *id.* at 10 ("the Court need not consider factual questions specific to [Chamber members] . . . . There is nothing more the individual members need to provide to this court, and no reason for them to participate.").

Litigation Center staff, including Mr. Postman, coordinated with Uber regarding the litigation, including by sharing draft filings and discussing case strategy. Postman Dec. ¶ x. Attorneys for the Chamber and Uber sometimes included "COMMON INTEREST PRIVILEGED" in the headers of documents and emails. Dkt. 41-1 at 14-19. Uber did not raise the possibility of a formal common-interest agreement until over a year after it began discussing the suit with the Chamber. *Id*. The Litigation Center's now-Chief Counsel responded that the Chamber would be open to an agreement that attempted to operate "nunc pro tunc" to cover the period during which no agreement had been in place. *Id*. But Uber and the Chamber decided that this was not necessary. *Id*.

Throughout the litigation, the Chamber shared information about the case, including case strategy, draft pleadings, and status updates, with other Chamber members and donors that were not parties. Postman Dec. ¶ 37. Uber was aware of some of those disclosures and did not object to them. *Id*. ¶ 38.[1] Because there was no written common-interest agreement, there were no specific parameters governing exactly what case strategy could be discussed, or with whom.

The comfort that Uber and Litigation Center staff had with this arrangement reflected that the Seattle case did not require the discussion of particularly sensitive information. Postman Dec.

[1]Because the Chamber has suggested that Mr. Postman engaged in an ethical violation, Mr. Postman is permitted to reveal confidential information to the extent necessary to respond to that allegation. *See* D.C. Rule of Prof. Conduct 1.6(e). Mr. Postman has therefore described the minimum facts necessary to correct a material omission in Uber and the Chamber's description of the alleged common-interest arrangement. That said, having accused Mr. Postman of unethical conduct, Uber cannot expect him to "double down" by making broader disclosures that risk the appearance of breaching his duty of confidentiality to the Chamber. Moreover, Mr. Postman does not have any emails, calendars, or work product from his time at the Chamber. Uber is under no similar ethical or informational restrictions. As both a practical and a legal matter, Uber should bear the burden of demonstrating that a common-interest agreement existed among *all parties* who were given access to the sort of case-strategy discussions it claims are privileged. *Sony Computer Entm't Am., Inc. v. Great Am. Ins. Co*., 229 F.R.D. 632, 633-34 (N.D. Cal. 2005). And to the extent it argues that the case updates and strategy discussions the Chamber shared with other entities were not sensitive, Uber must show why the discussions *it* had with the Chamber were any different.

¶ 39. That in turn reflected that the case involved no discovery and turned on "pure question[s] of law." Kayes Dec. ¶ 16, ex. 4 at 21. By contrast, when Uber has shared sensitive information in connection with litigation, it has insisted on detailed, written common-interest and confidentially agreements. *E.g., Waymo, LLC v. Uber Technologies, Inc.*, 319 F.R.D. 284, 287 (N.D. Cal. 2017).

During Mr. Postman's tenure at the Chamber, the Chamber filed amicus briefs in four appeals involving Uber's efforts to enforce its arbitration agreement against drivers. Dkt. 42-1, ex. 1 at ii, ex. 2 at ii; ex. 3 at i; ex. 4 at ii. Those briefs dealt solely with whether drivers' state-law arguments for avoiding arbitration were preempted by the Federal Arbitration Act. *Id.* The Chamber never filed a brief addressing misclassification in any case involving Uber. Although two of the four arbitration appeals arose from district-court proceedings in which misclassification claims were presented, the Chamber was involved only on appeal, and addressed only arbitration issues. *Id*. The word "misclassification" never once appears in the 105 pages of amicus briefs attached to Uber's motion. The term "independent contractor" appears once, when the Chamber asserts that arbitration "results in lower prices for consumers, higher wages for employees, and increased income for independent contractors." Dkt. 42-1, ex. 2.

C. Mr. Postman Joins Keller Lenkner

In early 2018, Mr. Postman decided to return to practicing at a law firm. Postman Dec. ¶ 30. At that time, Ashley Keller, Travis Lenkner, and Adam Gerchen had recently founded Keller Lenkner. *Id*. ¶ 29. Mr. Postman and Mr. Gerchen were law school classmates, and Mr. Postman had been friends with Mr. Keller and Mr. Lenkner since 2008, when the three were law clerks at the Supreme Court of the United States. *Id*. ¶ 2. After discussing Keller Lenkner with the founding partners, Mr. Postman became convinced that joining their firm was a unique opportunity to work with close friends on interesting cases. *Id*. ¶ 30.

Before it admitted Mr. Postman to the partnership, Keller Lenkner was in discussions to serve as appellate counsel in a misclassification case against Uber pending in the Third Circuit. *Id*. ¶ 31. Lenkner Dec. ¶ 5. The firm also was considering initiating litigation and arbitrations against Uber involving misclassification issues. *Id*. Keller Lenkner and Mr. Postman discussed the ethical implications of the firm's becoming adverse to Uber on misclassification issues with Mr. Postman

as a partner. Postman Dec. ¶ 31. They conducted their own research but also decided to seek outside counsel regarding the extent of Mr. Postman's conflict profile based on his work for the Chamber. *Id*. ¶ 32.

Mr. Postman retained George Clark. *Id*. ¶ 33. Mr. Clark is a member of the District of Columbia Bar Legal Ethics Committee and a member and past president of the Association of Professional Responsibility Lawyers. Postman Dec. ¶ 34. Keller Lenkner consulted its ethics counsel, Lucian T. Pera. Postman Dec. ¶ 37. Mr. Pera practices and provides expert testimony on legal ethics issues and regularly lectures on professional responsibility throughout the nation. Pera Dec. ¶¶ 19–25. He was involved in the most recent revision to the ABA Model Rules of Professional Conduct and is a past president of the Association of Professional Responsibility Lawyers. *Id*.

Both experts independently advised that Mr. Postman's work at the Litigation Center did not establish an attorney-client relationship with Uber. Pera ¶ 14; Clark ¶ 17. Mr. Pera and Mr. Clark independently advised that, to the extent confidential information shared in connection with the Seattle litigation was subject to the common-interest doctrine, (1) that would only create a potential issue if the Seattle Litigation were substantially related to the future matters, (2) the "substantially related" test was more stringent in cases not involving a former client, and (3) the Seattle litigation did not appear to be substantially related to whether Uber drivers were misclassified. Pera ¶ 14; Clark ¶¶ 12–18; Postman Dec. ¶¶ 35–36. Only after Keller Lenkner and Mr. Postman secured that advice did Mr. Postman join the firm. Postman Dec. ¶¶ 31–32. (Both lawyers have reviewed Uber's motion, and it has not changed their opinions. Pera ¶ 17; Clark ¶ 18.)

D. Keller Lenkner Becomes Adverse To Uber, Uber Does Not Seek Disqualification

Keller Lenkner was retained in its first matter adverse to Uber roughly a month before Mr. Postman joined the firm in June 2018. Postman Dec. ¶¶ 30–31. In July, Keller Lenkner made its first appearance in that matter, as lead counsel for Appellants in *Razak et al. v. Uber Technologies, Inc. et al.*, No. 18-1944 (3d Cir.). Kayes ¶ 16, ex. 5. The sole issue in that case is whether Uber drivers are misclassified under the federal Fair Labor Standards Act and related state laws. Andrew

Spurchise of Littler Mendelson P.C., who submitted a declaration in support of Uber's motion to disqualify in this case, Dkt. 45, also is counsel for Uber in *Razak*. *Id*. Briefing in the case is complete. Uber has not moved—or even mentioned the prospect of moving—to disqualify Keller Lenkner in *Razak*. *Id*. ¶ 6 & ex. 5.

Since Keller Lenkner first appeared in *Razak*, it has begun serving individual demands for arbitration on behalf of Uber drivers. Kayes ¶ 7. Mr. Spurchise represents Uber with respect to those demands. Dkt. 45 ¶ 4. Keller Lenkner served 400 demands in August, about three weeks after it filed the opening brief in *Razak*. Kayes ¶ 8. By the time Uber appeared in this case, Keller Lenkner had served close to 5,000 arbitration demands. *Id.* ¶ 9. The number of pending demands now stands at more than 10,000. *Id.* ¶ 10. Uber has paid the filing fees for only 47. *Id.* ¶ 11.

E. Uber Later Requests Keller Lenkner's Withdrawal

By letter dated October 10, 2018, Uber requested that Keller Lenkner withdraw from this case. Dkt. 41-1. Uber claimed that Mr. Postman violated Rule 3-310(E) because the Seattle litigation has a "substantial and obvious relationship" with the issues raised in this case. Dkt. 41-1 at 3. Uber also claimed that the amicus brief Mr. Postman assisted on in the appeal of the *O'Connor* matter is related to this case because this case is related to *O'Connor* under Local Rule 3-12(a). *Id*.

Keller Lenkner responded by letter. Dkt. 41-1 at 6-7. The letter noted that Uber did "not assert that Mr. Postman received confidential information from Uber that was subject to a common-interest agreement and is material to Diva's claims in this action." *Id*. And it noted that the Seattle litigation and the amicus brief on arbitration "ha[d] nothing to do with this case." *Id*.

Shortly thereafter, counsel for Uber and Keller Lenkner attorneys Ashley Keller and Tom Kayes spoke by phone. Kayes Dec. ¶¶ 12–15. Mr. Kayes told Uber's counsel that Mr. Postman had no confidential information about Uber, much less any that would be material to this case. *Id*. Mr. Kayes then asked whether Uber's counsel could represent that Uber had disclosed any "specific information" to Mr. Postman that it feared he could use in this case. *Id*. Uber's counsel did not identify any such information or say that Uber claimed any existed. *Id*.

Although Uber has not moved to disqualify Keller Lenkner's co-counsel, Robins Kaplan, Uber demanded that Diva's motion for partial summary judgment be withdrawn. Dkt. 48 at 1. When

Keller Lenkner refused to withdraw from the case and Diva refused to withdraw its motion, Uber demanded that briefing on partial summary judgment be stayed indefinitely. *Id*.

III. LEGAL STANDARDS

A. Disqualification Is Heavily Disfavored

Under California law, which applies here, disqualification is "a drastic measure [that] is generally disfavored and imposed only when absolutely necessary." *McElroy*, 2015 WL 2251057, at *3 (citing *In re Cnty. Of L.A.*, 223 F.3d 990, 995 (9th Cir. 2000)); *IPVX Pat. Holdings, Inc. v. 8x8, Inc.*, 2013 WL 6700303, at *2 (N.D. Cal. Dec. 19, 2013). The alleged conflict or misconduct must create "a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court." *Hetos Investments, Ltd. v. Kurtin*, 110 Cal. App. 4th 36, 48 (2003) (collecting cases). The mere appearance of impropriety is not enough; the conflict must matter. *DCH Health Services Corp. v. Waite*, 95 Cal. App. 4th 829, 833 (2002).

Further, because disqualification "is most often tactically motivated and can be disruptive to the litigation process," courts must give disqualification motions "particularly strict judicial scrutiny." *Bommarito v. Nw. Mut. Life Ins. Co.*, 2018 WL 1256713, at *1 (E.D. Cal. Mar. 12, 2018) (citing *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985)). "[M]otions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent." *Dino v. Pelayo*, 145 Cal. App. 4th 347, 352 (2006). They are often "misused to harass opposing counsel [or for] delay." *Id*. And, if granted, they separate innocent clients from their chosen counsel. *See Comden v. Superior Court*, 20 Cal. 3d 906, 915 (1978).

This is no small thing: "The right of a party to be represented by the attorney of his choice is a significant right." *Johnson v. Superior Court*, 159 Cal. App. 3d 573, 580 (1984). It "ought not to be abrogated in the absence of some indication the integrity of the judicial process will otherwise be injured or the adverse party will otherwise be unfairly disadvantaged by the use of confidential information." *Id*. A party seeking disqualification therefore "carries a heavy burden and must satisfy a high standard of proof." *IPVX*, 2013 WL 6700303, at *2 (internal quotation marks omitted).

B. Rule 3-310(E) Allows Disqualification Only By A Client Or Former Client

Rule 3-310(E), which forms the basis for Uber's motion, provides:

> A member shall not, without the informed written consent of the *client or former client*, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(Emphasis added.) The text of Rule 3-310(E) is unambiguous—there is no conflict under the rule where an attorney is not adverse to a "client or former client." The California Supreme Court has never held otherwise, and it follows the rule that "[i]f the language [of a statute] is unambiguous, the plain meaning controls." *Riverside Cty. Sheriff's Dep't v. Stiglitz*, 60 Cal. 4th 624, 630 (2014).

Fidelity to text is especially important in the context of disqualification, as attorneys rely on bright-line rules to decide in advance if they can accept a representation. As California courts have repeatedly observed:

> [W]ith regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client.

Sanchez Ritchie v. Energy, 2014 WL 12637956, at *2 (S.D. Cal. Aug. 13, 2014) (quoting *Snider v. Superior Court*, 113 Cal. App. 4th 1187, 1197–98 (2003)).

The "bright line" that Rule 3-310(E) draws between clients and non-clients reflects a deliberate departure from an earlier, more expansive rule. Former Rule 5-102(B) provided that an attorney "shall not represent conflicting interests, except with the written consent of all parties concerned." The rule did not use the word "client," so previous courts, relying on *William H. Raley Co. v. Superior Court*, reasoned that—in exceedingly narrow circumstances—a relationship with a non-client could sometimes raise a disqualifying conflict. 149 Cal. App. 3d 1042, 1049–50 (1983). But five years after *Raley*, the California Supreme Court eliminated Rule 5-102(B) and added Rule 3-310. Thus, as Judge Koh remarked in a similar case, "*Raley* [rests] upon a rule which no longer exists." *McElroy*, 2015 WL 2251057, at **4–5.

That the California Supreme Court excised the rule underlying *Raley* led this Court in *McElroy* to find "compelling reason to believe that the California Supreme Court, by expressly

removing former Rule 5-102 (which did not mention 'client') and replacing it with new Rule 3–310 (which refers to conflicts involving clients or former clients only) intended to clarify that only attorney-client relationships may give rise to conflicts of interest under the Rules of Professional Conduct governing attorneys." *Id*. Other courts have agreed. *E.g., Oaks Mgmt. Corp. v. Super. Ct.*, 145 Cal. App. 4th 453, 465 (2006) (same).

McElroy was right. In view of the unambiguous text, the clear import of the rule change is that subsequent representations can generate forbidden conflicts only with respect to current and former clients. *Raley*, which never was binding on this Court, is no longer good law. That some courts have continued to rely on *Raley* is not compelling. Those decisions also are not binding and make no effort to explain how the intervening rule change or the text of the current rule permit disqualification of an attorney by someone who is not a "client or former client."

C. California Law Previously Allowed Disqualification Based On A Non-Client Relationship, But Only In The Most Compelling Cases

Even if *Raley* remained good law, disqualifying lawyers based on relationships with non-clients still would be limited to the most compelling circumstances. Where an attorney becomes adverse to a former *client*—a situation in which disqualification already is disfavored—courts will disqualify only if the new matter is substantially related to the lawyer's prior representation of the client. *See, e.g.*, *McElroy*, 2015 WL 2251057, at *5. In the former-client context, courts determine whether matters are "substantially related" by looking to "[1] the similarities between the two factual situations, [2] the legal questions posed, and [3] the nature and extent of the attorney's involvement." *Id*.

Where disqualification is sought by someone who was *never* a client, courts applying the superseded rule "have applied a 'substantial relationship' test *similar to* the one typically used" in the former-client context. *Id.* (emphasis added). But those cases make clear that, where there was never an attorney-client relationship, more is required than in the former-client context to show that matters are substantially related. Specifically, a party seeking disqualification in the absence of a previous attorney-client relationship must show three things:

First, the movant must show that the lawyer owed a duty of confidentiality, such as that arising from a common-interest or joint-defense arrangement. *See, e.g.*, *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 984 (2009); *Oaks*, 145 Cal. App. 4th at 472.[2] Those arrangements reflect a narrow exception to the otherwise applicable rules governing waiver of privileged communications. To fall within the protection of the common-interest doctrine, the parties to the communication must: (1) "have a joint legal interest," as opposed to merely a joint commercial interest in litigation, *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007); (2) reasonably expect the communication to remain confidential, *OXY Res.*, 115 Cal. App. 4th at 891; and (3) share only communications "designed to further *that* [legal] effort" in which the parties "hold a joint interest," *Nidec*, 249 F.R.D. at 579–80 (emphasis and alteration in original).

The core of the common-interest doctrine applies to parties that are, or plan to be, co-litigants in a case. *Id.* at 578. An entity that is not a party to a case can sometimes have a shared legal interest with a litigant—but only if the non-party has a specific legal right at stake in the outcome of the case, such as the licensee of a patent whose license will be valid or invalid depending upon the success of the patent owner's case. *Id.* (citing *In re Regents of the Univ. of California*, 101 F.3d 1386, 1390 (Fed. Cir. 1996)). A general desire that a case turn out a particular way—a "rooting interest" in the outcome—"is not a common *legal* interest." *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 732 (N.D. Ill. 2014) (emphasis in original).

Communications that do not meet those criteria and are not otherwise privileged cannot support disqualification. *See Lynn v. George*, 15 Cal. App. 5th 630, 637–39 (2017) (reversing disqualification of a lawyer based on finding that allegedly confidential non-client communications were, in fact, not confidential). Courts take disqualification off the table if, after a hard look at the allegedly confidential communications and the circumstances surrounding them, it appears that they "could reasonably be considered" non-confidential. *Id.* at 641. And, of course, information

[2] A separate strand of cases bases disqualification on fiduciary duties, *Raley*, 149 Cal. App. 3d at 1047, but Mr. Postman never owed Uber a fiduciary duty, and Uber has not argued otherwise.

that is public or "has become generally known" cannot support disqualification. *Acacia Patent Acquisition, LLC v. Superior Court*, 234 Cal. App. 4th 1091, 1097–98 (2015).

Second, after establishing a genuine duty of confidentiality, a party seeking disqualification must show that it made a broad disclosure of sensitive information to the lawyer. *See, e.g.*, *id.* at 1104 (a "court must examine . . . whether the first representation resulted in a *broad disclosure* of the nonclient's privileged information") (emphasis added). Diva is aware of no case disqualifying a lawyer based on a relationship with a non-client absent a broad disclosure of sensitive information. *Compare id.* at 1105 (finding disqualification warranted where a law firm obtained its adversary's entire litigation file) *with Oaks*, 145 Cal. App. 4th at 472 (reversing disqualification of a lawyer who saw a handful of an adversary's financial statements). This "broad disclosure" requirement is necessary to verify what is assumed in the attorney-client context—that the client probably gave the lawyer a great deal of highly sensitive information. In the non-client context, that cannot be assumed; the moving party must prove it.

Third, in the non-client context, the party must show that the matter in which disqualification is sought is substantially related to the matter in which the duty arose and can only do so by showing that both are based on essentially identical facts. *Compare Oaks*, 145 Cal. App. 4th at 472 (reversing disqualification where a duty of confidentiality arose in a lending relationship but the motion was filed in separate real estate litigation) *with All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc*., 2008 WL 5484552, at *4 (N.D. Cal. Dec. 18, 2008), *order clarified*, 2009 WL 292536 (N.D. Cal. Feb. 5, 2009) (disqualifying a law firm that defended a client under a joint-defense agreement during a criminal antitrust investigation and then represented plaintiffs in bringing a civil case based on the subject of the investigation against another party to the joint-defense agreement).

The case law's fidelity to the same-facts requirement is striking. Courts order disqualification in non-client cases only when it is satisfied. *Hynix*, 2008 WL 5484552, at *4 (same underlying antitrust violations); *Rosen v. Cream*, 2018 WL 2146761, at *6 (Cal. App. 1st Dist. May 10, 2018) (same underlying environmental contamination); *Acacia*, 234 Cal. App. 4th at 1105 (same predicate lawsuit); *Meza*, 176 Cal. App. 4th at 984 (same underlying tort case). When it is

not satisfied, courts uniformly refuse to disqualify. *Oaks*, 145 Cal. App. 4th at 472; *McElroy*, 2015 WL 2251057, at *7. Diva is not aware of any case that disqualifies a lawyer based on an alleged duty of confidentiality to a non-client where the two matters did not involve the same facts.[3]

D. Disqualification Is Waived If Not Sought In The First Appropriate Case

A litigant "who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right." *Tr. Corp. of Montana v. Piper Aircraft Corp*., 701 F.2d 85, 87 (9th Cir. 1983); *see also River W., Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1309 (1987). The requirement that litigants raise conflicts promptly applies across cases. *See, e.g*., *Koloff v. Metro. Life Ins. Co.*, 2014 WL 2590209, at *5 (E.D. Cal. June 10, 2014). If the litigant confronts the allegedly conflicted lawyer in one case and fails to raise the conflict there, the conflict is waived and the litigant cannot raise the conflict as grounds for disqualification in a later case involving the lawyer. *Id*.; *see Tibbott v. N. Cambria Sch. Dist*., 2017 WL 2570904, at *4 (W.D. Pa. June 13, 2017); *Javorski v. Nationwide Mut. Ins. Co*., 2006 WL 3242112, at *8 (M.D. Pa. Nov. 6, 2006). Where a litigant is not concerned enough about unfair advantage to seek disqualification in one case but then seeks it in a later, similar case, courts infer that the litigant's motives are strategic rather than genuine.

IV. ARGUMENT

Uber's motion fails for four independent reasons.

A. Uber's Motion Relies On An Inapplicable Rule And Abrogated Precedent

Uber claims that "Mr. Postman's representation of Plaintiff has been and continues to be in violation of California Rule of Professional Conduct, Rule 3-310(E)." Dkt 41-1 at 4; *see also* Dkt.

[3] *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* may appear to depart from the same-facts rule, but it does not. 69 Cal. App. 4th 223, 226 (1999). In *Morrison* (and *Raley*, for that matter), the lawyer's relationship with the non-client was *ongoing*. *Id*. In *Morrison*, the plaintiff's counsel continued to serve as monitoring counsel with access to relevant confidential information of the defendant during the later lawsuit. The court declined to apply the absolute bar to concurrent conflicts only because the plaintiff's attorney was retained by the defendant's insurer. But it was the *combination* of that quasi-concurrent conflict and a successive-representation conflict that warranted disqualification. Moreover, the law firm in *Morrison*, in its capacity as monitoring counsel, had years' worth of—and continuing access to—essentially all of the defendant's litigation communications with its actual attorneys. That extreme situation is not present here.

40 at 11, 12. But Rule 3-310(E) does not apply to non-clients. The rule instead "controls conflicts of interest and disqualification motions only in the context of attorney-client relationships." *Oaks*, 145 Cal. App. 4th at 465. Uber concedes that Mr. Postman "was never an attorney for Uber." Dkt. 40 at 15; Dkt. 42 ¶ 21. So its motion rests on a facially inapplicable rule.[4]

Uber also invokes a line of cases beginning with *Raley,* 149 Cal. App. 3d at 1050. But *Raley* is no help to Uber because it rests "upon a rule which no longer exists." *McElroy*, 2015 WL 2251057, at **4–5. *Raley* was based on a *predecessor* to Rule 3-310, Rule 5-102, which referred broadly to "conflicts," not just to client conflicts. *Id*. The California Supreme Court eliminated Rule 5-102 when it adopted Rule 3-310. *Id*. Uber's other cases simply cite *Raley* and either ignore the rule change entirely or state that *Raley* remains "good law" without any explanation. *E.g*., *Hynix*, 2008 WL 5484552, at *4*; Morrison*, 69 Cal. App. 4th at 232.[5]

In applying Rule 3-310(E) in this case, the Court's task is to anticipate the holding of the California Supreme Court. Diva submits that the California Supreme Court would conclude that "client or former client" means "client or former client." If this Court agrees, then Uber has not established a violation of any ethics rule, and it has not explained why Keller Lenkner should be disqualified in the absence of one.

B. Even Under The Abrogated *Raley* Standard, Uber Has Not Met Its Burden

Even if the *Raley* standard still were good law, Uber has not met its burden on any of that standard's three requirements. Each failure is an independent reason to deny Uber's motion.

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[4]Uber also includes Cal. Bus. & Prof. Code § 6068(e)(1) at the end of a string cite. But like Rule 3-310(E), it only creates a duty between a lawyer and "his or her client." *Id*.

[5]Uber attempts to come up with a new way to save the old cases. It cites three cases applying the *federal* rule created for criminal joint-representation agreements and argues that "[i]n such a situation, as here, an attorney assumes ethical duties to a non-client, as it would to his or her own client, and is subject to Cal. Rule of Professional Conduct 3-310(E)." Dkt. 40 at 12. But that is apples and oranges. The federal criminal cases apply an entirely different standard, one that is both harder to meet than the "substantially related test" and affords less protection than Rule 3-310(E) would if it applied. *See, e.g., United States v. Stepney*, 246 F.Supp.2d 1069, 1082–83 (N.D.Cal.2003) (noting that there is no presumption of information sharing, that the moving party must make a specific showing of material confidential information, and that these arrangements do not "creat[e] either a true attorney-client relationship or a general duty of loyalty"). Uber makes no attempt to meet the federal standard. And in any event, the California cases on which Uber relies do *not* take this approach.

1. Uber has not shown that the communications on which its motion relies were shared within the context of a duty of confidentiality

Even under the *Raley* line of cases, Uber must first establish that it shared sensitive information with Mr. Postman within the context of a duty of confidentiality. *E.g.*, *Meza*, 176 Cal. App. 4th at 984; *Oaks*, 145 Cal. App. 4th at 472. Uber describes three categories of communications between Uber and Mr. Postman, but it fails to establish that any category was confidential.

First, Uber refers extensively to communications it exchanged with Mr. Postman in his capacity as a resource for Chamber members and entirely separate from discussions regarding the Seattle litigation or any amicus briefs. *E.g.*, Dkt. 40 at 5–6, 9; Dkt. 43-1 at 9–18; Dkt. 46-1 at 76–78, 90. But a close reading of Uber's brief reveals that it never argues that those communications were confidential, or explains why they were so. *See* Dkt. 40 at 14–18. For good reason. There is no attorney-client privilege because Mr. Postman was never Uber's lawyer. Dkt. 40 at 15. And there is no common-interest protection, both because Uber had no expectation of confidentiality as to those communications, *OXY Res.*, 115 Cal. App. 4th at 891, and because they were shared with third parties, *e.g., Acacia*, 234 Cal. App. 4th at 1097–98. Uber's prime exhibit, the *Dynamex* email, was sent to at least 17 different law firms and companies. Dkt. 43-1 at 18. Such wide disclosure is inconsistent with a common-interest relationship, and wide disclosure was the usual course. Postman Dec. ¶ 8. These types of general, trade-association communications are no basis for disqualification.

Second, Uber claims that communications related to four amicus briefs were protected by the common-interest doctrine. Dkt. 42 ¶ 24; Dkt. 44 ¶¶ 7–8. But Uber has failed to show that it had any reasonable expectation of confidentiality with respect to amicus-brief exchanges. The Chamber's amicus efforts routinely involved disclosure of the party-litigant's communications, including draft briefs, with dozens of outside lawyers and companies that served on advisory committees. Postman Dec. ¶¶ 16–18. Committee members have not agreed to a joint litigation effort and do not all share a common legal interest. Uber was well aware of this—its litigation team was briefed on the process and designated an Uber lawyer to serve on a committe. Tellingly, while the Chamber's declaration agrees with Uber's claim that discussion of the Seattle litigation was subject

to the common interest doctrine, the Chamber does *not* support Uber's argument with regard to amicus brief discussions. Dkt. 42. Amicus-related communications cannot be a basis for disqualification.

Third, Uber relies on communications it exchanged with Mr. Postman during the Seattle litigation. Dkt. 40 at 14–16. Here again, Uber invokes the common-interest doctrine to establish confidentiality. *Id*. But Uber knew that the Chamber was regularly sharing with entities who were not parties to the case the same categories of information that its motion claims justify disqualification. Dkt. 40 at 4 ("Legal strategy and tactics," "Potential legal claims and defenses," etc.); Postman Dec. ¶¶ 37–39. Uber's motion failed to disclose that key fact, let alone explain how it is consistent with the expectation of confidentiality necessary to sustain a common-interest argument. *OXY Res.*, 115 Cal. App. 4th at 89; *Acacia*, 234 Cal. App. 4th at 1097–98. "Where a third party is present, no presumption of confidentiality obtains, and the usual allocation of burden of proof, resting with the proponent of the privilege, applies in determining whether confidentiality was preserved." *Sony Computer*, 229 F.R.D. at 634. Here again, Uber fails to meet its burden and the Seattle litigation discussions provide no basis for disqualification.

2. Uber has not shown that it made a broad disclosure of privileged information to Mr. Postman

The next requirement Uber cannot satisfy is that its communications with Mr. Postman must have "resulted in a broad disclosure of [its] privileged information." *Acacia*, 234 Cal. App. 4th at 1097–98. The cases illustrate that, in this context, broad means broad. For example, *Acacia* imposed disqualification on a law firm that represented the opponent's prior law firm, and therefore had the same access to the moving party's files as its own lawyer. 234 Cal. App. 4th at 1094. In *Morrison Knudsen Corp.*, the disqualified firm was "monitoring counsel" for its opponent's insurer; it had full access to all of the moving party's litigation files and "all of the work product of" the moving party's defense lawyers. 69 Cal. App. 4th at 236.

Mr. Postman's exposure to Uber confidences in the Seattle litigation was nothing like the direct and broad access held by the attorneys in *Acacia* or *Morrison*. Uber and the Chamber had short weekly phone calls and occasional meetings to discuss scheduling, case updates, or comments

on pleadings. The case was litigated without discovery, based on the administrative record. The Chamber expressly and repeatedly emphasized that no facts about Uber were relevant to the case. And Uber knew that the Chamber was sharing draft pleadings and strategy with other entities that were not parties to the case. This is not sort of fact pattern in which Uber would (or did) expose broad, deep confidences about its employment or pricing practices.

Uber tries to overcome this by submitting a large number of pages of record material with its motion. But the majority of those pages are appellate amicus briefs on arbitration that never mention "misclassification." Uber even filed one of the briefs twice. *Compare* Dkt. 42-1, ex. 1 *with* Dkt. 44-1, ex. 1. It did the same thing with other documents. *Compare* Dkt. 41-1, ex. 4 *with* Dkt. 46-1 exs. 1, 10, 11, 12; *compare* dkt 43-1, ex. 2 *with* Dkt. 46-1, ex. 6. The other materials Uber has submitted, though almost entirely redacted, reinforce this. Uber notes that Mr. Postman attended a meeting to review a memo Uber produced. But the memo is titled "Review of Complaint" and, as just described, there is no reason to think that a discussion of the Seattle complaint would contain broad disclosure of sensitive information—or, frankly, any sensitive information at all.

Finally, Uber does not specify any disclosure of the one thing that typically justifies disqualification—confidential *facts*. The firms in *Morrison* and *Acacia* knew confidential facts about their adversaries that were relevant to the cases in which they were disqualified. Mr. Postman has no such knowledge. It would be implausible to expect Uber to have shared confidential facts relevant to the pricing and misclassification issues in this case during the litigation of a no-discovery preemption case, or in connection with a handful of arbitration-related amicus briefs. In sum, five copies of public amicus briefs, some scheduling emails, and a few completely redacted memos about unrelated legal claims comes nowhere close to the sort of record evidence that would support a finding of broad disclosure.

3. Uber has not shown that the Seattle litigation or the arbitration-related amicus briefs arise from the same facts as this case

Even assuming Uber had satisfied the confidentiality and broad-disclosure requirements, it still would need to satisfy the more demanding version of the "substantially related" test that applies to non-client cases. *McElroy*, 2015 WL 2251057, at *5. That test requires Uber to show that this

case arises from essentially the same facts as the prior matters. *Id.*; *Oaks*, 145 Cal. App. 4th at 472. Uber relies on the Seattle litigation and the arbitration-related amicus briefs. Dkt. 40 at 16–18.[6] None of those matters satisfies the test.

The Seattle litigation and this case share neither the same facts *nor* the same legal issues. The Seattle litigation challenged a municipal ordinance as preempted by federal antitrust and federal labor law. This case alleges unfair competition based on the contention that Uber misclassifies its drivers as employees under California law. Dkt. 1 ¶ 1. In the Seattle litigation, "Neither the Chamber nor [Uber] made even a bare assertion that for-hire drivers are employees: both have [agreed with Seattle] that the for-hire drivers covered by the Ordinance are independent contractors . . . ." Kayes Dec. ¶ 16, ex. 3 at 19. Here, the misclassification question is the primary dispute. The two cases have nothing to do with each other. The best Uber can muster in support is a few conclusory statements that summon the words "misclassification" or "independent contractor" in hopes that their mere incantation will meet the substantial-relationship test. Dkt. 40 at 16–17. Uber asserts that the Seattle litigation required "consideration" of misclassification, but it never bothers to explain how that could be so, given the legal context of the case. And its vague, deliberate phrasing is telling. *E.g.*, Dkt. 40 at 5 ("[T]he parties discussed independent contractor issues and their intersection with antitrust and labor laws."); *id*. at 17 (Uber and Mr. Postman discussed "how the ordinance would affect companies that have independent contractors, rather than employees, providing transportation to riders."). With disqualification on the line, Uber must do better than carefully parsed generalities.

Uber's arguments about the amicus briefs are no better. The amicus briefs dealt exclusively with arbitration. Dkt. 42 ¶ 4. But there is no arbitration agreement here. That the underlying claims in two of the four appeals in which the amicus briefs were filed dealt with misclassification is immaterial. Even the less stringent substantial-relationship test applicable to former clients considers "the legal questions posed" in the two matters and "the nature and extent of the attorney's

[6]Although Uber's motion describes general Chamber working group discussions at length, it does not actually contend that those could give rise to a disqualifying conflict. As explained above, Uber's implicit concession is correct.

involvement" in each. *McElroy*, 2015 WL 2251057, at *7. Although misclassification may have been an issue in the trial court,[7] the issue on appeal was arbitration. Dkt. 42-1, ex. 1 at ii, ex. 2 at ii; ex. 3 at i; ex. 4 at ii. The matters on which Mr. Postman worked thus do not share a common legal question with this case.

And Uber's vague descriptions of those matters lose sight of the purpose of the substantial-relationship test: to determine whether the cases are so related that, having worked on the first case, the lawyer can be *presumed* to have learned confidential things that he can put to use in the second one. Why would discussing "legal strategy and tactics," "potential legal claims and defenses," and "threshold issues like ripeness and standing" in a case about federal preemption of a Seattle ordinance require Uber to divulge to Mr. Postman any meaningful, non-public facts about its operations relevant to misclassification or pricing under California law? Why would Uber divulge confidential facts related to its wage-and-hour case strategy to Mr. Postman when what it wanted from the Chamber on appeal were amicus briefs supporting the enforceability of arbitration clauses? Uber's motion offers no answers.

Taking a step back and considering the relevant precedents further confirms that Uber's motion misses the forest for the trees. The cases that allow a non-client to disqualify its opponent's counsel are nothing like this case. In the case on which Uber principally relies, *Hynix*, the court disqualified a firm that defended a client under a joint-defense agreement during the investigation of a criminal antitrust conspiracy and then represented plaintiffs in bringing a civil case alleging the same antitrust conspiracy against a party to the joint-defense agreement. 2008 WL 5484552, at *4. The firm essentially switched sides *in the same case*.

Meza is the same. 176 Cal. App. 4th at 984. There, the disqualified lawyer represented a defendant in a multi-defendant tort case before switching sides to represent a plaintiff *in the same case*. *Id*. Every case Diva is aware of that disqualifies a lawyer based on a duty of confidentiality owed to a non-client follows this rule. *See e.g., Rosen v. Cream*, 2018 WL 2146761, at *7 (lawyer

[7]That Diva designated this case asrelated to *O'Connor* changes nothing. Diva related this case to the trial-court litigation, not the appeal where Mr. Postman appeared, let alone the matter that he worked on, which was a single amicus brief addressing arbitration.

represented company with respect to environmental contamination; later disqualified from action adverse to a co-defendant regarding the same contamination because "the facts and legal questions in the two cases are the same or similar"); *Acacia*, 234 Cal. App. 4th at 1094 (second case involved "the same underlying litigation").

This case is miles from the above cases. Mr. Postman is not representing the City of Seattle in attempting to enforce its ordinance against Uber. He is not representing a party challenging one of Uber's arbitration clauses. Uber has therefore failed to satisfy the substantial-relationship requirement as it has been applied in non-client cases (or even as it is applied in former-client cases).

C. Uber's Conduct Suggests It Is Seeking Disqualification For Strategic Reasons

If a litigant confronts an allegedly conflicted lawyer in one case and fails to raise the conflict there, the conflict is waived and the litigant cannot raise the conflict as grounds for disqualification in a later, similar case involving the same lawyer. For example, in *Koloff*, a lawyer personally represented a particular insurer in 55 long-term-disability claim disputes over 10 years. *Id*. at *3. The lawyer then switched sides and filed a complaint alleging that his former client improperly denied a claimant's long-term disability benefits. *Id*. at **1-3. The insurer failed to seek disqualification and the case was dismissed, but it then sought disqualification several months later when the plaintiff filed a new case. *Id*. *5. Even though the attorney was suing a former client on the same type of claim he had defended the client against for years, the court inferred that the "filing of a motion to disqualify [the lawyer] at this juncture seems to be only tactically motivated," and it denied the motion. *Id*. Similar fact patterns return similar results. *Tibbott*, 2017 WL 2570904, at *4; *Javorski*, 2006 WL 3242112, at *8.

The same reasoning applies here. Keller Lenkner has been counsel of record in the *Razak* appeal since July 25, 2018. *Razak* turns exclusively on whether Uber drivers are misclassified under federal law. But Uber has not moved to disqualify Keller Lenkner in that case. Uber has never been a shy litigant. Its failure to seek disqualification in *Razak* can only mean that Uber was not particularly concerned in July and August that Keller Lenkner had an unfair advantage in litigating misclassification issues.

But Uber has more to gain by disqualifying Keller Lenkner now. First, Diva has filed a motion for partial summary judgment. That threatens Uber with a ruling that its business model in California is illegal, months before it hopes to engage in a public offering worth $120 billion. Uber therefore has 120 billion reasons to delay this case. And Uber has attempted to use this motion to do just that. Even though Uber has not moved to disqualify Keller Lenkner's co-counsel, and even though Diva has agreed to delay briefing on the partial summary judgment motion until after this motion has been decided, Uber has argued that this motion requires that Diva's partial summary judgment motion be withdrawn, or that briefing be delayed *indefinitely*. Dkt. 48.

Second, Keller Lenkner now represents more than 10,000 individual drivers who have demanded arbitration against Uber. If Uber's motion were successful, Uber surely would use that to attack Keller Lenkner's ability to represent these drivers. That Uber did not show any concern about Keller Lenkner having an unfair advantage in July, and developed its concern only after it had more to gain from disqualification, is the sort of red flag that regularly causes courts to deny such motions.

D. Disqualification In This Case Would Be Inequitable

The Court always retains equitable discretion regarding whether to disqualify counsel. *Oaks*, 145 Cal. App. 4th at 468; *see also White v. Experian Info. Sols*., 993 F. Supp. 2d 1154, 1166 (C.D. Cal. 2014). Disqualification here would be inequitable for three reasons.

First, the facts of this case are as far as can be from attorneys ignoring a clear prohibition. The sole ethics rule that Uber invokes is facially inapplicable. Further, Mr. Postman and Keller Lenkner conscientiously sought and obtained expert ethical guidance before becoming adverse to Uber; they were independently advised that, even under the approach California has since rejected, disqualification would be improper; and they reasonably relied on that advice.

Second, Uber cannot credibly show that Keller Lenkner's presence in this case will create any prejudice. The question of whether Uber misclassifies its drivers has been one of the most heavily litigated and closely scrutinized issues in employment law in the past five years. It is difficult to conceive of a non-public fact or legal argument that Keller Lenkner could possess—let alone one that Uber would have shared in an unrelated federal preemption case or while discussing

an amicus brief about the Federal Arbitration Act—that would cause Uber prejudice in this case. Diva's motion for partial summary judgment illustrates this; it relies solely on facts drawn from Uber's website and public records, and a straightforward application of a widely read California judicial decision. "When an attorney cannot use confidential information gleaned from a nonclient to his or her disadvantage, the adversarial system would not be compromised by allowing the attorney to represent the opposing party." *Oaks*, 145 Cal. App. 4th at 468.

Third, where a litigant asks a Court for the severe and heavily disfavored remedy of disqualification, equity requires that the litigant be candid. The sort of story that would justify disqualification does not require shading. The Court therefore should not take lightly that Uber has failed to include material facts in its brief. Uber asserted that all of the Seattle and amicus communications were shared within a common-interest agreement between Uber and the Chamber. But it did not tell the Court that the Chamber shared many of those same communications with others who were not parties to those cases. Uber submitted a declaration from Uber's counsel in *Razak*, but the declaration and Uber's brief failed to mention *Razak* or explain Uber's failure to seek disqualification there. Equity should not reward such behavior.

V. CONCLUSION

For the foregoing reasons, Uber's motion to disqualify should be denied.

Dated: October 31, 2018

Respectfully submitted,

/s/ Ashley Keller

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to served on all ECF-registered counsel of record via the Court's CM/ECF system.

Dated: October 31, 2018.

/s/ Ashley Keller