IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

Measure 8 Ventures, LP, Gron Ventures Fund I, LP, Zola Global Investors Ltd., Anson Advisors Inc. on behalf of Anson East Master Fund LP, AC Anson Investments Ltd., Anson Investments Master Fund LP, and Anson Opportunities Master Fund LP, Serendipity SPC – Trimble Fund SP on behalf of Emerald Spur Limited, Lapid US Investments LLC, and Hadron Healthcare and Consumer Special Opportunities Master Fund, Plaintiffs, vs. Nitin Khanna, Karan Khanna, Angelo Lombardi, Sam Knapp, Nicholas J. Slinde, Benjamin C. Stoller, and Allan Goodman, Defendants.	No. 22CV00946 **NITIN KHANNA'S AND KARAN KHANNA'S OPPOSITION TO SUSMAN GODFREY'S PRO HAC VICE MOTIONS AND MOTION TO DISQUALIFY SUSMAN GODFREY FROM REPRESENTING PLAINTIFFS** **Hon. Jerry B. Hodson**

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MOTIONS

Defendants Nitin Khanna and Karan Khanna move in opposition to Susman Godfrey's *pro hac vice* motions and move for an order disqualifying Susman Godfrey from representing plaintiffs.

Oral argument is requested and defendants estimate 45 minutes will be required. Official court reporting services are requested.

This motion is supported by the following Memorandum of Points and Authorities and the declarations of Joe Mabe, Nitin Khanna, and Vivek Kothari and the exhibits attached thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Susman received confidential information in the same or substantially related matter from Nitin and Karan Khanna ("Prospective Clients"). In that situation, Oregon Rule of Professional Conduct ("Rule") 1.18 imposes two duties on Susman: a duty of confidentiality and a duty to notify the Prospective Clients if it takes on a materially adverse representation in a substantially the same matter. Susman failed to honor either duty. As a result, the Prospective Clients have been significantly harmed in multiple ways. The confidential information enabled Susman and its clients to win the race to file (and gain all its attendant advantages), better value the claims, defenses, and counterclaims, and inform pre-suit settlement strategy. Rule 1.18 requires disqualification under these circumstances. Susman should not be allowed to practice in Oregon, and it should be disqualified as counsel in this case.

FACTS

I. Sentia made and sold CBD products.

Nitin Khanna founded Sentia Wellness, Inc. in 2019. (Decl. of Nitin Khanna in Support of Mot. to Disqualify ¶ 2.) Sentia manufactured and sold CBD products. (*Id.*) It

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quickly became the industry leader with more retailers carrying its product than any other brand. (*Id.*) Nitin, his brother Karan Khanna, and Nick Slinde were major Sentia shareholders. (*Id.* ¶ 3.) Sentia's debtholders included Measure 8 Ventures, LP and the Anson entities listed as plaintiffs. (*Id*.)

The plaintiffs invested in Sentia through convertible debentures. (Measure 8 Ventures Convertible Debenture and Measure 8 Subscription Agreement for Sentia, attached to Decl. of Vivek Kothari in Support of Mot. to Disqualify as Exs. 1 and 2.) The debentures and the subscription agreement contain forum selection clauses. (*Id.*) Neither forum selection clause identifies Oregon state court as the proper forum to bring a dispute. (*Id.*)

II. The FDA raised "serious concerns" about the safety of CBD products.

Nitin founded Sentia just months before the FDA raised "serious concerns about the potential harm" posed by CBD products. (N. Khanna Decl. ¶ 4, 11/25/2019 FDA News Release, attached as Ex. 1.) The FDA's stance devastated the CBD industry and demand for Sentia's products plummeted overnight. (*Id*.)

III. Sentia's shareholders disagreed with its debtholders about how to respond to the FDA's decision.

Sentia's struggles led to disputes between its shareholders and its debtholders. (N. Khanna Decl. ¶ 5.) Leading the dispute for the debtholders were Measure 8 and Anson represented by Boris Jordan and Sunny Puri respectively, both of whom sat on Sentia's board of directors. (*Id*.)

The dispute between the shareholders and the debtholders focused on [redacted]

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[redacted]

[redacted]

IV. Sentia's shareholders sought Susman Godfrey to represent their interests against Sentia's debtholders who are the plaintiffs in this case.

In May 2020, Nitin, through Joe Mabe, sought litigation counsel to represent the shareholders' interests. (*See* Decl. of Joseph Mabe in Support of Mot. to Disqualify ¶ 4.) Mr. Mabe reached out to Rachel Black at Susman Godfrey. (*Id.*) Mr. Mabe knew Ms. Black having opposed her in prior litigation and believed that Susman was the right fit for the shareholders in this dispute. (*Id.* ¶ 7.) Ms. Black was the only attorney he contacted about this matter. (*Id.* ¶ 13.)

On May 9, 2020, Mr. Mabe told Ms. Black that he had been "asked by the shareholders of Sentia Wellness to protect their interests in the Company." (5/9/20 Mabe Email to Black, Mabe Decl. ¶ 4, Ex. 1.) He also called her and left her a voicemail. (Mabe Decl. ¶ 4.). Ms. Black responded that same day, expressed interest in the case, and asked for a conflict check. (*Id.*) Later that day, Mr. Mabe sent Ms. Black a list of clients and adverse parties. (*Id.*) That list included Nitin, Karan, Mr. Slinde, and others as Susman's clients and Measure 8, Mr. Jordan, Anson, Mr. Puri, and Sentia as potential adverse parties. (5/9/20 Mabe Conflict Check Email to Black, Mabe Decl. ¶ 4, Ex. 2.) It was "imperative" to Mr. Mabe that Susman clear conflicts before he disclosed any more confidential information than necessary. (Mabe Decl. ¶ 6).

A. Susman's conflict check lists Nitin, Karan, and Mr. Slinde as potential clients [redacted] against Measure 8, Anson, and others.

On May 11, 2020, Susman ran conflicts. (5/11/20 Conflicts Request Form, Kothari Decl. Ex. 3.)[1] That conflict check identifies Nitin Khanna, Karan Khanna, and Nick Slinde

[1] This and other exhibits contain confidential information and we have moved for them to be submitted for an *in camera* inspection.

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as a "Potential Client." (*Id.*) It also identified Measure 8 Venture Partners, Mr. Jordan, Anson, and Mr. Puri as "Potential Adverse." (*Id.*) The conflict check also identifies the potential claim as a "[redacted]." (*Id.*). That same day, Ms. Black confirmed that Susman had cleared conflicts. (Mabe Decl. ¶ 8).

B. Mr. Mabe communicated the facts underlying the dispute, the shareholders' strategy, and their goals with Susman.

Mr. Mabe then discussed the facts underlying the dispute with Ms. Black. (*Id.* ¶ 8). He identified Sentia's debtholders and described [redacted]. (*Id.*) He informed Ms. Black that litigation would be needed to resolve the dispute. (*Id.*) He also discussed other strategic considerations and goals with her. (*Id.*) Mr. Mabe considered the information he provided to be "material, privileged, and confidential." (*Id.*) In his opinion it "could be significantly harmful" to them. (*Id.*)

On May 12, 2020, Mr. Mabe followed up with an update and informed Ms. Black that she would "be retained by the shareholder clients he sent to her this weekend." (5/12/20 Mabe Email to Black, Mabe Decl. ¶ 5, Ex. 3). Ms. Black agreed to represent the shareholders. (Mabe Decl. ¶ 9).

C. Susman's fee agreement states that it received information about "strategic advantages" from the shareholders.

On May 12, 2020, Ms. Black sent Mr. Mabe a fee agreement. (5/12/20 Susman Godfrey Fee Agreement, Mabe Decl. Ex. 4.) The fee agreement specifies that Susman would represent "Kali Mata, LLC (owned by Nitin and Karan), Serpico (partially owned by Mr. Slinde), and other Sentia shareholders in connection with claims that they had against Measure 8 Venture Partners, Mr. Jordan, Anson, Mr. Puri, and Sentia." (*Id.* at 1.)

The fee agreement memorializes portions of the conversations between Mr. Mabe and Ms. Black. It specifies that the scope of the representation is "[redacted]." (*Id.* at 1.) It also states that Mr. Mabe has "advised

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[Susman] that there are considerations of cost as well as strategic advantages for each of you in joint representation." (*Id.* at 2).

D. Susman's Case Evaluation Memo identifies the matter as Nitin Khanna, et al. v. Measure 8, et al.

On May 12, 2020, Ms. Black drafted a "Case Evaluation Matter Opening Memo" identifying Nitin Khanna, et al. as the "Potential Client Party," Measure 8 Venture Partners, et al. as the "Potential Adverse Party," and "Nitin Khanna/Measure 8 Venture" as the matter:

Matter Title: Nitin Khanna/Measure 8 Venture
Potential Client Party: Nitin Khanna, et al.
Potential Adverse Party: Measure 8 Venture Partners, et al.

(5/12/20 Case Evaluation Opening Memo, Kothari Decl. Ex. 4.)

V. The shareholders chose to pursue a business, not legal, resolution.

On May 18, 2020, Mr. Mabe informed her that an adversarial board meeting had created the opportunity for negotiations between the shareholders and debtholders. (5/18/20 Mabe Email to R. Black, Mabe Decl. ¶ 10, Ex. 5.) After those negotiations, the shareholders did not retain Susman. (Mabe Decl. ¶ 10.)

VI. Sentia failed due to challenges posed by the regulatory environment and COVID-19 pandemic.

Sentia later failed in part due to the disagreements between the shareholders and debtholders about how to run the business given the regulatory environment and challenges posed by the COVID-19 pandemic. (N. Khanna Decl. ¶ 7.) The debtholders lost part, but not all, of their investment in Sentia. (*Id.* ¶ 8.)

VII. In early 2021, Susman agreed to represent Measure 8 Ventures, et al. in a breach of fiduciary duty lawsuit against Nitin Khanna, et al.

In February 2021, Geoffrey Harrison, Susman's lead counsel in this case, ran a conflict check that hit on Nitin and Mr. Jordan. (2/23/21 Susman Email Chain, Kothari Decl. Ex. 5.). He asked Ms. Black what happened with the prior case. (*Id.*) Ms. Black responded that she had "no recollection" of the case. (*Id.*) After her secretary sent her the conflicts

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request, Ms. Black recalled that Mr. Mabe contacted her to represent "potential clients Kali Mata LLC, Serpico LLC, Cameron Forni, Adam Greene, and Jaswinder Grover against the partners of Sentia Wellness (Measure 8 Venture Partners, Boris Jordan, Anson Funds, and Sunny Puri), [redacted]." (*Id.* at 1-2.) She also claimed that she "did not do a case evaluation." (*Id.*)

Two minutes after receiving her email, Mr. Harrison replied: "That's helpful and happily does NOT present a conflict." (*Id.* at 1 (comparing the timestamp between Ms. Black's email and Mr. Harrison's response).) No one informed Nitin, Karan, or Mr. Slinde that Susman had agreed to represent Measure 8, Anson, or the other debtholders in a breach of fiduciary duty lawsuit against them. (Mabe Decl. ¶ 14.) Susman did not screen Ms. Black until after it filed this lawsuit. (2/4/22 Susman Letter, Kothari Decl. Ex. 9.)

VIII. Throughout 2021, Measure 8 and Mr. Jordan threatened to sue Nitin.

Throughout 2021, Mr. Jordan repeatedly threatened Nitin "with litigation based on vague and unspecified claims of impropriety." (11/29/21 Letter from V. Kothari, Kothari Decl. Ex. 6.) He offered not to take part in whatever litigation the other debtholders might bring if Nitin returned Measure 8's remaining investment in Sentia, amounting to $20 million. (N. Khanna Decl. ¶ 9.). Nitin repeatedly refused. (*Id.*) Measure 8 also repeatedly demanded that Nitin return $6 million from Sentia to the debtholders. (11/29/21 Kothari Letter, Kothari Decl. Ex. 6.)

These threats and demands became so persistent that Nitin sought legal counsel. (*Id.* ¶ 10.) Nitin again sought a negotiated resolution. (11/29/21 Kothari Letter, Kothari Decl. Ex. 6.) He responded to Measure 8 and Anson through his attorney, explaining that he had resigned his position, so he did not have the legal authority to transact Sentia business. (*Id.*) He proposed that the debtholders reinstate him and provide him with a release and indemnity so he could return the debtholders' money. (*Id.* at 1-2.) He asked that they respond to him

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by December 15, 2021. (*Id.* at 2.) Nitin also warned that he had legal claims of his own. (*Id* at 2-3.)

On December 27, 2021, Measure 8's general counsel refused Nitin's proposal. (12/27/21 Clateman Email, Kothari Decl. Ex. 7.)

IX. Susman and Measure 8, et al. beat Nitin, et al. to the courthouse.

On January 6, 2022, Susman and Mr. Banks filed suit on behalf of Measure 8, Anson, and the other debtholders against Nitin, Karan, Mr. Slinde, and other defendants. *See* Complaint. At the time, Susman's lead counsel knew that Nitin, Karan, and Mr. Slinde had consulted with them about bringing claims against Measure 8 and Anson. (2/23/21 Susman Email Chain, Kothari Decl. Ex. 5.) Mr. Banks has over 35 years' experience focusing "exclusively on the recovery of investment losses for individual investors, groups, retirement funds, and pension plans throughout the country." (Kothari Decl. Ex. 8.)

The lawsuit alleges that Nitin Khanna and others mismanaged Sentia and bases several claims, including a breach of fiduciary duty claim on those allegations. (Complaint; *see* Kothari Decl. ¶ 4.) The lawsuit was filed six business days after Measure 8 rejected Nitin's offer of a resolution. (*Id.* ¶ 2.) News of the lawsuit generated intensely negative press coverage for Nitin on matters entirely unrelated to the lawsuit's claims. (Kothari Decl. ¶ 2.)

OREGON'S ETHICAL AND LEGAL STANDARDS

I. Legal standard for disqualification.

The rules of professional conduct have the status of law and bind all members of the bar. *State ex rel. Bryant v. Ellis*, 301 Or 633, 636 (1986). Courts may disqualify an attorney or law firm "in order to restrain [them] from a prejudicially improper act of legal representation." *Collatt v. Collatt*, 99 Or App 463, 465 n.1 (1989) (citing *State ex rel. Bryant v. Ellis*, 301 Or 633 (1986)). When assessing a motion to disqualify, the court should consider prejudice to parties whose interests may be adversely affected. *Id.*

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Motions to disqualify are disfavored and the party moving to disqualify must satisfy a high burden of proof. *See Jimenez v. Rivermark Cmty. Credit Union*, No. 3:15-CV-00128-BR, 2015 WL 2239669, at *3 (D. Or. May 12, 2015). At the same time, "the paramount concern must be the preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar." *Id.* "Prejudice to the lawyer's present client (or to other parties whose interests may be adversely affected by delay or other consequences) must be taken into account, along with timeliness of the request for relief, the adequacy of a carefully limited order and similar equitable considerations." *State ex rel. Bryant*, 301 Or at 639.

"[A]ny doubts must be resolved in favor of disqualification." *Smith v. Cole*, No. CV 05-372-AS, 2006 WL 1207966, at *2 (D. Or. Mar. 2, 2006) (citing, *e.g., Chugach Elec. Ass'n v. United States Dist. Court*, 370 F.2d 441, 444 (9th Cir. 1966) ("where conflict of interest is asserted, right of attorney to practice profession must give way in cases of doubt").

II. Under Oregon law, attorneys and law firms have ethical duties to prospective clients.

Rule 1.18 codifies duties that lawyers have to prospective clients. *First*, it defines a prospective client as a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." *See* Rule 1.18(a). A prospective client may consult with an attorney through an agent. *Jimenez*, 2015 WL 2239669, at *6 (finding that contact from the prospective client's agent was "not sufficient to bar Plaintiff from being a prospective client under Rule 1.18(a)").

Second, it establishes that "even when no client-lawyer relationship ensues," a lawyer who learns information from a prospective client "shall not use or reveal that information," even if the information is not itself confidential. Rule 1.18(b); ABA Formal Op. 492 (2020).

Third, it explains that a law firm will be disqualified from representing a client whose interests are materially adverse to a prospective client when it has received information from

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the prospective client that could be "significantly harmful" to that person in the "same or substantially related matter." Rule 1.18(c).

When deciding whether information is significantly harmful, courts consider whether the information relates to motives, strategies, or weaknesses, sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence, the personal thoughts and impressions about the facts of the case, or premature possession of information that could have a substantial impact on settlement proposals. *See e.g., In re Carpenter*, 863 N.W.2d 223 (N.D. 2015) (considering disqualification in the context of disciplinary proceedings); *SkyBell Techs., Inc. v. Ring, Inc.*, 2018 WL 6016156 at *6 (recognizing that strategic information and the factual basis of the prior lawsuit constitute confidential information). The Rule requires only that the information "could be significantly harmful, a standard that "focuses on the *potential* use of the information." ABA Formal Op. 492 (emphasis in original).

Courts have held that matters are substantially related when a lawyer "received confidential information . . . that can be used against that client in the subsequent representation of parties adverse to the former client" or when the attorney received facts that are "relevant and material" to the prior and current representation. *O Builders & Assocs., Inc. v. Yuna Corp. of NJ*, 206 N.J. 109, 125 (2011). "Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences." *Novo Terapeutisk Lab. v. Baxter Travenol Labs.*, 607 F.2d 186, 195 (7th Cir.1979) (en banc). Courts do not require the moving party "to disclose the actual content of those confidences to outside counsel or attorneys behind an ethical screen." *Laryngeal Mask Co. Ltd. v. Ambu A/S,* No. 07–CV–1988–DMS (NLS), 2008 WL 558561 at *5 (S.D. Ca. Feb. 25, 2008). The moving party may "substantiate its claim by describing the nature of the relevant information or the general topics of discussion." *Id.* at *5.

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Fourth, it provides two ways for a law firm to avoid disqualification, both of which require notice to the prospective client. *See* Rule 1.18(d). The first is for a firm to get informed, written consent from both the prospective and current clients. *See* Rule 1.18(d)(1). The second requires 1) that the lawyer who received the information took "reasonable measures" to avoid exposure to more information than was necessary, 2) screening that lawyer from the matter, and 3) giving written notice "promptly . . . to the prospective client." Rule 1.18(d)(2).

ARGUMENT

The Court should disqualify Susman as counsel because it violated Oregon Rule of Professional Conduct 1.18. Nitin and Karan Khanna qualify as prospective clients. They communicated confidential information about their strategies, their goals, and the facts underlying the dispute to Susman. Even so, Susman chose to represent the plaintiffs even though their interests are directly adverse to Nitin and Karan in the same or substantially similar matter without providing notice as required in Rule 1.18.

Susman's own documentation shows that it disregarded the Rules. Only two minutes after being told that Susman had explored bringing a breach of fiduciary duty claim that is the exact inverse of the one that plaintiffs have brought here, Mr. Harrison "happily" concluded that no conflicts existed. But two minutes is hardly enough time to perform the diligence necessary to reach an informed decision. It was not enough time to determine whether Susman had received information from Nitin and Karan that would be significantly harmful to them. Nor were those two minutes sufficient to research Oregon's ethical rules which include a rule dedicated to duties to prospective clients.

As a result of its haste, Susman failed to meet its two duties to the Prospective Clients. It revealed the Prospective Clients' confidential information to their adversaries and failed to notify them of Susman's representation of adverse parties in this matter.

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The Prospective Clients have been significantly harmed by Susman's failure in multiple ways, all of which could have been avoided had Susman observed the duties codified by Rule 1.18. Conversely, Susman will not be prejudiced by disqualification because the case is in its infancy. Similarly, its clients will not be prejudiced because Mr. Banks, with more than 35 years' experience representing investors in precisely these types of matters, can continue to represent them

Under these circumstances, Rule 1.18 requires disqualification. Oregon's *pro hac vice* application requires attorneys to certify that they "be familiar with and comply with disciplinary rules of the Oregon State Bar." Susman failed in its first opportunity to comply with the Rules. The Court should deny Susman's *pro hac vice* applications and disqualify them from this case.

I. Susman owes duties of confidentiality and notice to the Prospective Clients under Oregon Rule of Professional Conduct 1.18.

Susman owes duties to Nitin and Karan under Rule 1.18. Both qualify as prospective clients and previously communicated confidential information to Susman on matters that are also at the heart of the current matter. Therefore, Susman owes them duties of confidentiality and notice under Rule 1.18.

A. Nitin and Karan Khanna qualify as prospective clients on a matter regarding [redacted].

Nitin and Karan Khanna both qualify as prospective clients under Rule 1.18 with respect to matters [redacted]. Both consulted with Susman about the "possibility of forming a client-lawyer relationship" through Mr. Mabe who acted as their agent. *See* Rule 1.18. Mr. Mabe provided Susman with "information about actions being taken by the Adverse Parties to the detriment of the Sentia shareholders." (Mabe Decl. ¶ 8a.) Susman identified each as a "Potential Client," ran conflicts on both, and prepared a fee agreement to represent them. Susman's fee agreement identifies the representation as regarding "[redacted]." (Mabe Decl. Ex.

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4.). Therefore, both Nitin and Karan qualify as prospective clients on this matter. *See Jimenez*, 2015 WL 2239669, at *6 (finding that prospective clients may consult with attorneys through an agent).

B. Susman received information from the Prospective Clients about [redacted] that is significantly harmful to them.

The Prospective Clients provided Susman with information that has already significantly harmed them and will continue to significantly harm them throughout this lawsuit. Mr. Mabe communicated to Susman the factual basis of the Prospective Clients' claims, their strategies, and their goals. (Mabe Decl. ¶ 8a-c.) Ms. Black took no measures to avoid exposure to more information than necessary. (*Id.* ¶¶ 11, 12.) None of that information was publicly available. The facts, strategies, and goals communicated by Mr. Mabe "could be significantly harmful" to the Prospective Clients. *See In re Carpenter*, 863 N.W.2d at 230–31 (identifying strategies, information that could not have been obtained in the course of due diligence, personal thoughts about the facts of the case, and premature possession of information that could impact settlement as significantly harmful). The Prospective Clients are not required "to disclose the actual content of those confidences to outside counsel or attorneys behind an ethical screen." *Laryngeal Mask Co.*, 2008 WL 558561, at *5.

Susman suggests that Ms. Black's memory differs from Mr. Mabe's. But, as recently as February 2021, she conceded that she has "no recollection of this" matter. (2/23/21 Susman Email Chain, Kothari Decl. Ex. 5 at 2.) Even after refreshing her memory, she misremembered crucial details of the prior matter. She stated unequivocally that she "did not do a case evaluation." (*Id.* at 1.) But her files show that she completed a "Case Evaluation Matter Opening Memo" on May 12, 2020. (Kothari Decl. Ex. 4.). She also incorrectly characterized the parties adverse to the Prospective Clients as "the partners of Sentia Wellness" when they were in fact the debtholders of Sentia Wellness. (2/23/21 Susman

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Email Chain, Kothari Decl. Ex. 5 at 1.) Therefore, there is a substantial risk that her memory is either blank or faulty.

Nor can Susman use Ms. Black's faded memory to avoid its obligations under Rule 1.18. The Rule focuses on whether significantly harmful information was communicated to the law firm. It does not require the conflicted firm or attorneys to remember the confidential information. *See Laryngeal Mask*, 2008 WL 558561 at *5 (requiring disqualification even where the attorneys "do not presently recall the details of the confidences").

1. Susman's files corroborate Mr. Mabe's testimony that he provided confidential information to Ms. Black.

Moreover, Susman can hardly dispute Mr. Mabe's testimony when its own files corroborate his account. Susman's internal emails, fee agreement, and conflict check all corroborate Mr. Mabe's testimony that he communicated the factual basis of the Prospective Clients' lawsuit. Susman's internal emails show that the Prospective Clients sought Susman's services because Sentia's debtholders "[redacted]." (2/23/2021 Susman Email Chain, Kothari Decl. Ex. 5. at 1-2.).] The conflict check shows that they discussed [redacted]. (5/11/20 Conflicts Request Form, Kothari Decl. Ex. 3.) The fee agreement specifies that Susman would represent the Prospective Clients with respect to a claim related to "[redacted]." (5/12/20 Fee Agreement, Mabe Decl. Ex. 4 at 1.) Thus, Susman received confidential information regarding the factual basis for the Prospective Clients' lawsuit. *See SkyBell Techs.*, 2018 WL 6016156, at *6 (recognizing that factual basis of the prior lawsuit constitutes confidential information).

The fee agreement also corroborates Mr. Mabe's testimony that he communicated the Prospective Clients' strategy to Susman. It states that the Prospective Clients "advised Susman Godfrey that there are considerations of cost as well as **strategic advantages** for each of you in joint representation." (5/12/20 Fee Agreement, Mabe Decl. Ex. 4 at 2

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(emphasis added).) Again, Susman's documentation confirms Mr. Mabe's testimony that he communicated confidential information to Susman. *See Skybell Techs.*, 2018 WL 6016156, at *6 (recognizing that strategic information constitutes confidential information).

C. The Prospective Clients have already suffered significant harm.

Susman's possession of confidential information has significantly harmed the Prospective Clients in at least three ways. Susman and its clients used the confidential information they received from the Prospective Clients to win the race to file (and gain all its attendant advantages), better value the claims and defenses, and inform pre-suit settlement strategy.

1. The Prospective Clients lost the race to file.

First, that confidential information armed Susman with inside information that allowed it to be first to file its lawsuit, with all the advantages that entails, from forum selection to litigating the case in the press. Susman used its inside information to its advantage. Susman knew that the Prospective Clients had contemplated litigation on the same subject matter as its new clients. It was also in a position to know, through its clients Measure 8 and Anson, that litigation was imminent because Nitin had threatened to sue them if they turned down his proposal. By delaying a response to Nitin's November 29, 2021 letter (Kothari Decl. Ex. 6) until the middle of the holiday season (December 27, 2021, instead of the requested response date of December 15, 2021), and then filing a lawsuit almost immediately thereafter, Susman and its clients ensured that it could gain the upper hand by choosing Oregon state court as the forum even though none of the relevant agreements negotiated between these sophisticated parties identify it as the appropriate forum. For example, the Sentia Subscription Agreement under which the debtholders agreed to buy securities from Sentia includes a clause requiring 30 days' notice to be given before resorting to private arbitration in JAMS. (*See* Kothari Decl. Ex. 2.) The securities themselves select New York state court as the forum in which to litigate disputes.

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By striking first, Susman was able to select its preferred forum (even though Oregon state court is not specified in any relevant agreement between the parties), go public with the lawsuit (even though this dispute should arguably have stayed private), and influence jurors in their selected forum with salacious (and entirely unrelated) news stories about the individual they chose as the lead defendant. *See In re Carpenter,* 863 N.W.2d at 230 (recognizing that sensitive or privileged information, personal thoughts and impressions about a case, and information regarding strategies may qualify as significantly harmful).

2. Susman could better evaluate the claims and defenses in the case.

Second, Susman had the unique ability to leverage the confidential information to assess the value and viability of the claims it has brought, the Prospective Clients' potential defenses, and potential counterclaims with greater insight than a typical litigant. This has the potential to affect the trajectory of the entire case. *See id.* (recognizing that "information that has long-term significance" could be significantly harmful).

3. Susman's clients could have used the confidential information to inform pre-suit settlement positions.

Third, the confidential information could have influenced pre-suit settlement efforts. *See* ABA Formal Opinion at 6 (permitting the courts to consider significant harm resulting from the "*potential* use of the information."). Measure 8 and Mr. Jordan made pre-suit settlement demands of Nitin requesting a complete refund of the remainder of their initial investment. The inside information informed their adoption of a hardline strategy of demanding 100 cents on the dollar. On one hand, they knew that Nitin preferred a negotiated resolution over litigation because he had previously contacted Susman but opted not to sue. At the same time, they were in a position to know that Nitin would find it difficult to follow through on his litigation threat. To do so, he would need to educate another law firm on the facts, enabling them to file first. Thus, the confidential information may have impacted their

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settlement position. *See In re Carpenter*, 863 N.W.2d at 230 ("information that could have a substantial impact on settlement proposals" constitutes significantly harmful information).

4. The Prospective Clients have and will continue to suffer significant harm.

Ultimately, Susman's possession of confidential information gave and continues to give it and their new clients a substantial advantage. The inside information allowed them to win the race to file, to precisely value the claims and defenses, and has substantially impacted settlement proposals. Each of these "could be significantly harmful" to the Prospective Clients. *See Id*.

D. Both the prior and current matters are the same or substantially related because they involve many of the same parties, factual issues, and legal claims.

The prior matter is the same or substantially related to the current matter. As shown above, Susman "received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client." *See O Builders,* 206 N.J. at 125. In fact, that information has already been used to prejudice the Prospective Clients. *See supra*, Argument C.

The Prospective Clients also provided information that is "relevant and material" to the current matter. The prior matter and the current matter involve many of the same parties and legal issues. Both matters involve Nitin Khanna, Karan Khanna, Mr. Slinde, Measure 8, and Anson. In both matters, Nitin and Measure 8 are the lead plaintiffs/defendants. Underscoring the related nature of the cases, the prior and current matters are styled as perfect inverses of each other. Susman styled the prior matter as Nitin Khanna, et al. v. Measure 8, et al. It styled the current matter as Measure 8, et al. v. Nitin Khanna, et al. Thus, the confidential information provided by the Prospective Clients remains "relevant and material" here. *See O Builders,* 206 N.J. at 125 (stating that matters are substantially related

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when "facts relevant to the prior representation are relevant and material to the subsequent representation").

The subject matter of the two matters is also the same. The prior matter included a [redacted]. The current matter includes a breach of fiduciary duty stemming from alleged mismanagement of Sentia. (*See* Kothari Decl. ¶ 3.) For example, it alleges that Sentia management "burned through" over $65 million without anything to show for it, that it didn't sell through various sales channels, and that it failed to use an established brand. (*See id.*) Therefore, the prior matter and current matter are the same or substantially related.

II. Susman violated Oregon Rule of Professional Conduct 1.18 by divulging the Prospective Clients' confidential information to plaintiffs' lead counsel and failing to notify them of its new representation.

Susman failed to follow Oregon's ethical rules. It did not undertake anything resembling a serious effort to determine if it had received significantly harmful confidential information, screen Ms. Black to prevent further dissemination of that information, or notify the Prospective Clients of its new representation of adverse clients. *See* Rule 1.18(b) and (d) (imposing a duty of confidentiality and requirement of notice to prospective clients).

A. Susman did not seriously investigate whether it had a prospective client conflict.

After receiving information from Ms. Black about the prior representation, it took all of two minutes for Susman's lead counsel in this case, Mr. Harrison, to conclude "happily" that (in his view) there was no conflict. (*See* Kothari Decl. Ex. 5 at 1.)

Mr. Harrison was wrong. Had he taken the time to perform appropriate diligence, he would have learned of his error. Instead, he did not bother to read the fee agreement or examine the conflict check. Had he done so, he would have known that Susman had received confidential information from the Prospective Clients. He also failed to determine whether Ms. Black accurately remembered that she had not prepared a case evaluation form. Had he

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done so, he would have learned that her memory was incorrect—she had, in fact, prepared one. He failed to do so even though Susman bills itself as having a nationwide practice with ethics counsel available to it. (*See* Susman Godfrey Fee Agreement, Mabe Decl. Ex. 4 at 6-7 (stating that when conflicts arise, "we sometimes seek the advice of outside ethics counsel or a partner at SG who is an expert on ethics matters.")

Nor was two minutes sufficient to research Oregon rules and law. Had Mr. Harrison done so, he would have learned that the Oregon Rules of Professional Conduct materially differ from the Texas Disciplinary Rules of Professional Conduct in this regard. The Oregon Rules contain a rule dedicated to prospective client conflicts while Texas's do not. Had he become "familiar with and comply with disciplinary rules of the Oregon State Bar" as he certified (under penalty of perjury) in his *pro hac vice* application, he would have learned that Oregon imposed a duty of confidentiality to prospective clients and a requirement to notify them under these circumstances. His failure to do so left him ignorant of the relevant facts and law.

B. Susman violated its duty of confidentiality and notice to the Prospective Clients.

As a result of its haste, Susman violated its duties under Rule 1.18 in two ways. First, it violated its duty of confidentiality under Rule 1.18(b). Susman took no steps to prevent the dissemination of the confidential information it received from the Prospective Clients. Instead, it waited until after it had filed its lawsuit—and gained the resulting forum and press advantages—to screen Ms. Black.

Ms. Black divulged information that she had learned from the Prospective Clients to Susman's lead counsel on this case, Mr. Harrison. She revealed the reason—[redacted]—that the Prospective Clients contemplated suing the debtholders. The fact that the Prospective Clients had sought counsel and their reasons for doing so were sensitive and confidential. (*See* Mabe Decl. ¶ 8d.)

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In any case, Rule 1.18 does not limit the duty of confidentiality to confidential or significantly harmful information. It requires that a lawyer maintain confidentiality over "all information learned during the consultation" whether or not the information is confidential. ABA Formal Op. 492; Rule 1.18(b). Susman fell short of honoring its duty of confidentiality to the Prospective Clients.

Second, Susman also violated its duty to notify the Prospective Clients that it had accepted clients with interests materially adverse to those of the Prospective Clients in a substantially related matter. Susman had almost a full year to notify the Prospective Clients and failed to do so. During that time, its current clients, potentially armed with inside information, attempted to negotiate a resolution to this lawsuit.

III. The Court should disqualify Susman Godfrey in this case.

The Prospective Clients have already been significantly harmed by Susman's cavalier approach to its ethical duties under Oregon law. By contrast, neither Susman nor its clients will suffer undue prejudice from disqualification. Mr. Banks will remain in the case. He has over 35 years' experience focusing "exclusively on the recovery of investment losses for individual investors, groups, retirement funds, and pension plans throughout the country." And, the case is still in its infancy. Thus, the Court should deny Susman's *pro hac vice* applications and disqualify them as counsel in this case. *See SkyBell Techs.*, 2018 WL 6016156 (granting motion to disqualify after firm received strategic information and factual basis of lawsuit).

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CONCLUSION

For these reasons, the Court should deny Susman's applications for *pro hac vice* admission and disqualify the firm from representing plaintiffs in this case.

DATED this 18th day of March, 2022.

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By: *s/ Vivek Kothari*

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ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I have made service of the foregoing **NITIN KHANNA'S AND KARAN KHANNA'S OPPOSITION TO SUSMAN GODFREY'S PRO HAC VICE MOTIONS AND MOTION TO DISQUALIFY AND MOTION TO DISQUALIFY SUSMAN GODFREY FROM REPRESENTING PLAINTIFFS** on the parties listed below in the manner indicated:

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DATED this 18th day of March, 2022.

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