

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

PLANTRONICS, INC.,

Plaintiff,

v.

ALIPH, INC. and
ALIPHCOM, INC.,

Defendants.

Case No. 06:09-cv-00024-LED

JURY DEMANDED

**ALIPH'S MOTION TO DISQUALIFY FISH AND RICHARDSON, P.C.
AS COUNSEL FOR PLANTRONICS**

Defendants Aliph, Inc., and AliphCom, Inc., (collectively, "Aliph") hereby move this Court to disqualify Fish & Richardson P.C. ("Fish") from serving as counsel on behalf of plaintiff Plantronics, Inc. Pursuant to Local Rule CV-7(g), Aliph respectfully requests an oral hearing on this motion.

I. INTRODUCTION

This motion arises from a clear violation of one of the most fundamental and longstanding ethical obligations that attorneys owe their clients – the duty of loyalty. In violation of that duty, Fish filed this lawsuit against its own client, Aliph, within hours after purportedly terminating the attorney-client relationship. Courts have universally condemned this kind of conduct, stating that law firms may not drop a client like a hot potato in order to sue it.

As described below, Fish's various attempts at rationalizing its behavior were all ineffective. Fish first asked Aliph to expressly waive its rights so that the firm could represent an unnamed client in undescribed litigation against Aliph. Aliph understandably refused. Fish at

first accepted Aliph's refusal, and then sought to justify its intended adverse behavior by directing Aliph to *general* and *prospective* conflict waiver language in its engagement letter. It did this even though Fish implicitly acknowledged that the vague language was ineffective to avoid the conflict. When that tack failed, Fish tried to terminate Aliph as a client at 8:30 p.m. the night before it filed the instant complaint. But Fish's attempt to dump Aliph "like a hot potato" in order to represent Plantronics in this suit does not avoid a breach of the duty of loyalty. Moreover, it appears that Fish had started working on this case even before the purported termination.

Unlike more complicated and ambiguous disqualification cases, which involve law firm mergers or lateral attorney transfers that occur well after suit has been filed, here Fish knew of its conflict and began acting adverse to Aliph before filing suit. And Aliph objected to Fish's representation of Plantronics from the outset of this litigation, requesting on multiple occasions that Fish withdraw. Declaration of David Schnapf ("Schnapf Decl.") Exh. 1. Fish first ignored and then refused Aliph's requests, most recently in a meet and confer between the parties.

II. FACTUAL BACKGROUND

Aliph is a corporation headquartered in San Francisco, California. Aliph sells "Bluetooth" wireless headsets under the "Jawbone" trademark for use with cellular telephones to permit hands-free operation. Declaration of Diana Haas ("Haas Decl."), ¶ 2. Plantronics is a corporation headquartered in Santa Cruz, California, about 60 miles from San Francisco.

In May 2008 Aliph sought legal counsel to help it comply with regulations of the Federal Communications Commission ("FCC"), the State of California, and various foreign countries. Aliph selected Fish as its counsel because of Fish's claimed unique ability to provide regulatory advice in the various countries where Aliph sells its products. Indeed, Fish used its multi-jurisdictional capabilities as a selling point. Haas Decl. ¶ 3. Exh. A to Haas Decl.

Terry Mahn of Fish's Washington, D.C. office, a "Principal" in the firm, sent an engagement letter to Joanne Park of Aliph on May 27, 2008 (the "Engagement Letter"). Exh. B to Haas Decl. The Engagement Letter states that Fish would be advising Aliph on regulatory compliance for the company's Bluetooth products and acknowledged that Aliph had requested Fish's advice for "the international compliance requirements for this technology." Haas Decl. ¶ 4. Pursuant to the Engagement letter, Fish began giving Aliph legal advice, and continued to do so up until the day before it filed this lawsuit on behalf of Plantronics. Haas Decl. ¶ 7, 16, 17. During this time, Plantronics was never identified to Aliph as a client of Fish, nor was there any mention of the patent in suit. Haas Decl. ¶ 6.

The Engagement Letter includes a vague provision concerning a prospective waiver of conflicts. It merely notes "a possibility of future conflicts," and states, "*In the past*, when we have been retained for regulatory work only, we have made it an express condition of our representation that the firm not be conflicted from taking on any intellectual property work that might otherwise be adverse to our regulatory clients." Haas Decl., Exh. B at p. 2 (emphasis added). The Engagement Letter makes no reference to the possibility of litigation against Aliph, the representation of Plantronics, or this patent dispute. Haas Decl. ¶ 5, and Exh. B.

On or shortly before December 29, 2008, Diana Haas, the Director of Strategic Program and Account Management of Aliph, received a phone call from Mr. Mahn in which he said that Fish wanted Aliph's consent to represent an unidentified client in an unexplained matter adverse to Aliph. Haas Decl. ¶¶ 1, 8. Mr. Mahn then sent a letter to Ms. Haas that same day. See Exh. C to Haas Decl. In that letter, Fish acknowledged that Aliph was a current client and stated that it wished to represent another party in litigation adverse to Aliph. Again, Fish did not identify the other party (ironically invoking its duty of confidentiality to that party) or provide any details

about the proposed adverse matter, other than the ominous comment that it "is a significant adversity." Haas Decl. ¶ 9 and Exh. C.

A series of emails between Mr. Mahn and Ms. Haas followed. Exh. D to Haas Decl. In an email dated January 6, 2009, Aliph refused to grant the requested consent. Haas Decl. ¶ 10 and Exh. D. In a reply email that same day, Mr. Mahn said that he understood Aliph's decision and looked forward to continuing to represent Aliph. Haas Decl. ¶ 11 and Exh. D. But Mr. Mahn sent Ms. Haas another email on January 9, 2009, asking her to reconsider. He directed her to the prospective waiver language in the Engagement Letter, while pointedly admitting, "I realize the language is quite general and does not mention litigation." Exh. D at 2. He again stated: "We will, of course, respect your decision in this matter." Haas Decl. ¶ 12, Exh. D at 2. Ms. Haas replied on January 13, 2009, again refusing to consent. Haas Decl. ¶ 13.

But Mr. Mahn changed course in an email sent on January 14, 2009, at 8:30 p.m. Pacific Time. He said that Fish's management had directed him to inform Aliph that the firm would no longer represent Aliph so long as it declined to consent to Fish being adverse. Haas Decl. ¶ 14 and Exh. D. Without waiting for a response, the very next day Fish filed this lawsuit against Aliph. Fish has not returned or forwarded Aliph's files. Haas Decl. ¶ 15. Aliph is still working on securing replacement counsel. Haas Decl. ¶ 18.

During the period it was trying to get Aliph's consent, Fish continued to provide legal advice to Aliph. For example, Fish sent a letter to Aliph on January 12, 2009, regarding FCC product compliance. Haas Decl. ¶ 16. Fish also sent Aliph an email on January 14, 2009, regarding the applicability of certain marking requirements. Haas Decl. ¶ 17.

III. ARGUMENT

A. Fish's Actions are Subject to the California Rules of Professional Conduct

Since this motion involves conduct in, or directed to, three different jurisdictions – Texas,

California, and the District of Columbia – consideration of choice of law principles is warranted. However, under the ethical rules of any of these jurisdictions, Fish should not be permitted to sue its own client.

In general, traditional principles govern choice of law in nondisciplinary litigation involving lawyers. Restatement (Third) of the Law Governing Lawyers § 1 cmt. e (2000). *Streber v. Hunter*, 221 F.3d 701, 719 (5th Cir. 2000) (citing *Klaxon Co. v. Stentor Elec. Manu. Co.*, 313 U.S. 487, 496 (1941)).

There is no question that Fish’s duty to Aliph is most significantly related to California, where Aliph is located. The California Rules of Professional Conduct were enacted to protect the public and to promote respect and confidence in the legal profession. California Rule of Professional Conduct (“RPC”) 1-100(A). Regarding lawyers from other jurisdictions, the rules govern the activities of those lawyers while engaged in the performance of legal functions in California. RPC 1-100(D)(2).¹

Law firms that give advice to clients in California are governed by California ethical rules if the most significant contacts of the dispute are within California. Here, Fish advised Aliph on matters concerning California regulations, and the firm has two offices in California. All communications from Aliph to Fish originated in California. Aliph received documents in California from Fish and submitted documents to Fish from its California headquarters.

Fish’s breach of the duty of loyalty resulted in injury to Aliph in California, where it is located. *Streber* at 720. Due to the breach and Fish’s conflicting allegiance, Aliph abruptly and without warning lost its representation before agencies of the State of California. Aliph has had

¹ Other jurisdictions apply the same analysis. *See, e.g., Ackerman v. Schwartz*, 733 F.Supp. 1231, 1240-41 (N.D. Ind. 1989) (Indiana court, which applies "most significant contacts" analysis, applied attorney malpractice law of Indiana where a Michigan attorney drafted a tax advice opinion letter in Michigan and sent it to Indiana client).

to expend resources to locate new counsel and will have to instruct them on its business plans and product lines.² Since it is the improper concurrent and adverse representation of two clients, each of which is located in California that caused the injury to Aliph, the California ethical rules should apply.³

Moreover, the Fifth Circuit considers national law regulating attorney behavior. *In re Dresser*, 972 F.2d 540, 544 (5th Cir. 1992) ("When presented with a motion to disqualify counsel in a more generic civil case, however, we consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights."). As will be discussed below, the majority of jurisdictions that have ruled on facts similar to these are in line with the ethical rules of California.

B. Fish is Directly Adverse to a Current Client and Must Be Disqualified Under California, Texas and District of Columbia Ethical Rules

1. California Ethical Rules Require Disqualification of Fish

California RPC 3-310(C)(3) states that "A member shall not, without the informed written consent of each client: ... Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." There is no circumstance where this rule applies with greater force than when a law firm sues one of its own clients.

As explained by the California Supreme Court, the primary value at stake in cases of simultaneous or dual representation is the attorney's duty — and the client's legitimate expectation — of loyalty. *Flatt v Superior Court*, 885 P.2d 950, 955 (Cal. 1995). Even where

² In fact, the instant litigation, between two California-based companies, has little relationship to Texas, as discussed in Aliph's concurrently filed motion to transfer to the Northern District of California. If the Court decides to transfer the case to California, it need not reach the instant motion, leaving it to the California court to address the local law issues.

³ While the D.C. office of Fish provided regulatory advice to Aliph, that work is not the "conduct causing the injury".

the simultaneous representations have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required. *Id.* "The reason for such a rule is evident, even (or perhaps especially) to the non-attorney. A client who learns that his or her lawyer is also representing a litigation adversary cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship." *Id.*

Under the "hot potato rule," a law firm may not avoid disqualification by attempting to convert a present client into a former client. *See American Airlines v. Sheppard, Mullin, Richter, & Hampton*, 117 Cal.Rptr.2d 685, 700 (2002). Other jurisdictions agree. "A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." *Picker International, Inc. v. Varian Associates, Inc.*, 670 F.Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989).

California has implemented a *per se* disqualification rule where a law firm violates the hot potato rule.

"[M]ay the automatic disqualification rule applicable to concurrent representation be avoided by unilaterally converting a present client into a former client prior to hearing on the motion for disqualification? We answer each question in the negative and hold, consistent with all applicable authority, that a law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing from the representation of the less favored client before hearing." *Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, 6 Cal.App.4th 1050, 1057 (1992).

"So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it." *Flatt v Superior Court*, 885 P.2d 950, 957 (Cal. 1995). "[A] lawyer may not avoid breaching the duty of loyalty which the concurrent representation rule is designed to avoid by unilaterally converting a present client into a former client. In fact, such conversion may itself be a breach of loyalty." *American Airlines, Inc. v.*

Sheppard, Mullin, Richter & Hampton, 96 Cal.App.4th 1017, 1037 (2002). *See also* *GATX/Airlog Co. v. Evergreen Intern. Airlines*, 8 F.Supp.2d 1182, 1187 (N.D. Cal. 1998)

Fish's behavior here is exactly what is condemned by the hot potato doctrine. In its letter dated December 29, 2008, Fish stated that it wished to file a lawsuit on behalf of an unnamed third party directly adverse to Aliph. After repeated failures to get Aliph's consent, Fish attempted to terminate the relationship by giving notice at 8:30 p.m. (Pacific Time) the night before it filed the instant suit.

At the same time it was requesting Aliph's consent, Fish was providing substantive legal advice to Aliph. And it is apparent that it was also preparing to sue Aliph on behalf of Plantronics. Indeed, consistent with Fed.R.Civ.P. 11, Fish was required to make a reasonable inquiry and analyze Aliph's products relative to the asserted Plantronics patent before it filed suit. Given that the litigation was filed only a few hours later, the conclusion is inescapable that Fish had begun providing adverse legal representation to Plantronics before it purported to drop its less lucrative client Aliph.

2. Fish is Also Disqualified Under Either Texas or D.C. Ethical Rules

Both Texas and the District of Columbia also prohibit a law firm from representing clients with adverse interests in a matter. The Fifth Circuit and the Eastern District of Texas apply ABA Model Rule 1.7 in conflict-of-interest cases. In fact, Fish itself was disqualified by this Court just recently under that rule. *See Rembrandt Technologies, LP v. Comcast Corp.*, 2007 WL 470631, *2 (E.D. Tex. Feb. 8, 2007) (disqualifying Fish for concurrent conflict of interest under Rule 1.7). ABA Model Rule 1.7 states that a concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client."

While the 5th Circuit has yet to specifically address the hot potato doctrine, it agrees with the underlying reasoning: "However a lawyer's motives may be clothed, if the sole reason for

suing his own client is the lawyer's self-interest, disqualification should be granted." *In re Dresser*, 972 F.2d 540, 545 (5th Cir. 1992). As noted by this Court, "*Dresser* requires disqualification when a firm is adverse to its own client in litigation." *911 EP v. Whelan Engineering Co., Inc.*, (E.D. Tex. Nov. 16, 2006); Schnapf Decl. Ex. 2. Further, this Court recently applied the exception to the hot potato rule – the "thrust upon" exception – thus implicitly accepting the premise of the rule. *Microsoft v. Commonwealth Scientific and Industrial Research Organisation*, 2007 WL 4376104, *7 (E.D. Tex. Dec. 13, 2007). None of the exceptions to the hot potato doctrine apply in this case.⁴

The District of Columbia is equally strict on conflicts of interest. "Thus, in a matter involving a specific party or parties, paragraphs (b)(1) and (c) require notice and informed consent if the lawyer will take a position on behalf of one client adverse to another client even though the lawyer represents the latter client only on an unrelated position or in an unrelated matter." D.C. R.Prof.Cond. 1.7, cmt. 10. See also *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F.Supp. 468, 481 (D. D.C. 1997) ("A lawyer is required to decline employment if the exercise of his independent professional judgment would be likely to involve him in representing differing interests ... the duty of undivided loyalty is breached where a lawyer represents clients with conflicting interests.").

While the D.C. courts have not yet addressed the hot potato doctrine, the D.C. Bar has issued an ethics opinion interpreting Model Rule 1.7 that squarely coincides with California's approach, in words with striking application to the facts here:

⁴ As noted by this Court in *Microsoft*, an exception to the "hot potato" doctrine may arise where, through no fault of its own, a conflict is "thrust upon" a law firm, such as by a corporate merger. This exception does not apply here, as the conflict was entirely the creation of Fish in accepting the new litigation matter from Plantronics while concurrently representing Aliph.

[W]e also strongly agree that the important values of client loyalty and confidence of the public in the bar preclude an interpretation of the rules that would enable a lawyer or a law firm to abandon a client during an active representation in anticipation of pursuing another, perhaps more lucrative, conflicting representation. If, for example, a lawyer were in the midst of representing a client when a prospective client came along seeking the lawyer's assistance in bringing a potentially rewarding lawsuit against the existing client in an unrelated matter, we believe that withdrawal from the existing representation under those circumstances would not be permissible under Rule 1.16. Our analysis of such a situation would be that virtually by definition the existing client would suffer material adverse harm by the withdrawal.

D.C. Bar Legal Ethics Comm., Formal Op. 272 (1997).

Furthermore, however the behavior is labeled the bedrock duty of loyalty compels rejecting actions that violate the hot potato doctrine. *See, e.g., Santacroce v. Neff*, 134 F.Supp.2d 366, 370-371 (D. N.J. 2001) (disqualifying law firm under N.J. R. Prof. Cond. 1.7 for abrupt termination of client); *International Longshoremen's Association, Local Union 1332 v. International Longshoremen's Association*, 909 F.Supp. 287, 293 (E.D. Pa. 1995) (applying doctrine under Penn. R. Prof. Cond. 1.7); *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 2007 WL 2710807, *12 (W.D. Mich. Sept. 13, 2007) (disqualifying firm under Mich. R. Prof. Cond. 1.7; stating that "[t]he courts universally hold that a law firm will not be allowed to drop a client in order to resolve a direct conflict of interest, thereby turning a present client into a former client"); *Harrison v. Fisons Corp.*, 819 F.Supp. 1039, 1042 (M.D. Fl. 1993) ("A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes awkward. Allowing lawyers to pick the more attractive representation would denigrate the fundamental concept of client loyalty."); *Stratagem Development Corp. v. Heron Intern. N.V.*, 756 F.Supp. 789, 794 (S.D. N.Y. 1991) ("Nor may it seek consent for dual representation and, when such is not forthcoming, jettison the uncooperative client."); *SWS Financial Fund A v. Salomon Bros., Inc.*, 790 F.Supp. 1392 (N.D. Ill. 1992) ("Moreover, an express termination made

by Schiff would have been invalid if made for the purposes of dropping Salomon like a "hot potato" in order to obtain the more lucrative business Hickey could provide.").

Any argument by Fish that technically it was no longer representing Aliph at the time the lawsuit was filed must be rejected. *See, e.g., Santacroce v. Neff*, 134 F.Supp.2d 366, 370 (D. N.J. 2001) (relevant date for determining conflict of interest is interval in which law firm represented both parties); *Stratagem Development Corp. v. Heron Intern. N.V.*, 756 F.Supp. 789, 793 (S.D. N.Y. 1991) ("Because Epstein Becker had not clearly terminated its representation of FSC by the time preparations for the instant litigation were begun, Epstein Becker is *per se* ineligible to represent Stratagem in this matter.").

C. The Engagement Letter Did Not Waive The Conflict Because the Prospective Waiver Failed to Provide Informed Consent

Fish may argue that a vaguely worded "prospective waiver" in its Engagement Letter effectively waived Aliph's right to object to its representation of Plantronics in this action. But Fish understood that this language was not effective because it repeatedly asked Aliph for an express waiver, promising Aliph that it would "respect" its decision regarding the waiver. It should not be heard to reverse position after its requests were denied. Moreover, the case law rejects general language prospective waivers because they fail to provide "informed consent." For example, in *Concat v. Unilever PLC*, 350 F.Supp.2d 796 (N.D. Cal. 2004), the court considered a similar prospective waiver:

Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you.

Concat, 350 F.Supp.2d at 801.

The district court rejected the law firm's argument, reasoning that (1) the terms of the waiver were extremely broad and evidently intended to cover almost any eventuality; (2) its temporal scope was likewise unlimited; (3) the record contained no evidence of any discussion of the waiver; and (4) the waiver lacked specificity as to the conflicts that it covered and effectively granted the law firm an almost blank check. *Concat*, 350 F.Supp.2d at 820. Although the plaintiff did have a certain degree of sophistication and business experience, and the law firm had expressly stated that it would not represent the plaintiff in a "substantially related" matter, the court still determined that the four factors demonstrated there was no informed consent. *Id.*

Those four factors are equally present in this case. Indeed, the prospective waiver considered in *Concat* was even more informative than that used here by Fish. Indeed, Fish Principal Terry Mahn admitted as much when he apologetically noted that the Fish prospective waiver was quite general and did not mention litigation. His promise that Fish would respect Aliph's decision also confirms this fact.⁵ Indeed, the very fact that Fish repeatedly asked Aliph for its express consent necessarily implies that the firm was fully aware that the language was ineffective.⁶ Further, unlike the agreement in *Concat*, the Fish prospective waiver does not have a provision carving out matters "substantially related" to its regulatory advice. And significantly, the Fish Engagement Letter does not make waiver a condition of engagement; it only observes that Fish has made waiver an express condition "*in the past*," *i.e.*, with previous clients. This language was chosen by Fish, and must be interpreted as it stands, a mere observation of the firm's prior actions not applicable to the current engagement.

The rules of Texas and the District of Columbia are no different. In *City of El Paso v.*

⁵ It is submitted that Fish's promise to "respect" Aliph's decision is enforceable, and Fish's decision to ignore its promise provides yet another reason Fish should be disqualified.

⁶ Importantly, Fish's requests for express consent failed to meet the requirements for "informed consent" which required Fish to identify the adverse client and the nature of the matter.

Soule, 6 F.Supp.2d 616, 625 (W.D. Tex. 1998), the court granted the motion to disqualify, holding that a general waiver is invalid when the client was not fully informed. *See also Griva v. Davison*, 637 A.2d 830, 846 (D.C. 1994) ("Where dual representation creates a potential conflict of interest, the burden is on the attorney involved in the dual representation to approach both clients with an affirmative disclosure."). *See also In re James*, 452 A.2d 163 (D.C. 1982) (stating that full disclosure "require[s] a detailed explanation of the risks and disadvantages to the client" that would result from a waiver). Both Texas and D.C. ethical rules require informed consent after full disclosure, and therefore these cases require full disclosure of the specific nature of the conflict before enforcing a conflict waiver.

Court decisions in many other jurisdictions also require full disclosure for "informed consent" *before* a prospective conflict can be enforced. *See, e.g., El Camino Resources, LTD. v. Huntington Nat'l Bank*, 2007 WL 2710807 (W.D. Mich.) (granting motion to disqualify law firm that attempted to use a broad conflict waiver without full disclosure of the facts); *Goss Graphics Systems, Inc. v. Manroland Druckmaschinen Aktiengesellschaft*, 2000 WL 34031492 (N.D. Iowa) (granting motion to disqualify counsel because the prospective waiver lacked required specificity); *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F.Supp.2d 1356, 1361 (N.D. Ga. 1998) (granting motion to disqualify law firm because the prospective waiver was non-specific); *Florida Ins. Guar. Ass 'n, Inc. v. Carey Canada, Inc.*, 749 F.Supp. 255, 260 (S.D. Fla. 1990) (granting motion to disqualify, holding that "standing consent" must be "exceedingly explicit").

D. Fish's Attempted Withdrawal as Aliph's Counsel Was Ineffective

Disqualification is required where a law firm sues one of its current clients without informed consent. Avoidance of this rule would naturally motivate law firms to terminate current clients so they can be sued, and this behavior, in turn, has led the courts to adopt the "hot potato" rule. However, this Court need not rely on that rule if it determines that Fish had not

effectively terminated Aliph as a client when it filed suit, because it could not sue a current client.

Merely giving notice is not sufficient to withdraw as counsel. Before it could effectively withdraw as Aliph's counsel, Fish was required, at a minimum, to comply with applicable ethical rules. The relevant California Rule of Professional Conduct states:

RPC 3-700. Termination of Employment

(A) In General. ... (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) [requiring return of client property and files], and complying with applicable laws and rules.⁷

The comment to RPC 3-700 points out that the actions required to meet the rule will “vary with the circumstances.” However, the rule makes this much unambiguously clear: Fish could not terminate an active client effective at the moment it transmitted the notice. Here, the mandatory requirements of the rule had not been met when this suit was filed, *i.e.*, files had not been returned, and other counsel had not been employed. Thus, Fish was still representing Aliph when it filed suit against Aliph several hours after its late night email.

E. An Ethical Wall Will Not Cure Fish's Violation

An “ethical wall” is insufficient to cure a violation of the duty of loyalty.

⁷ The ABA Model Rule is essentially the same as the California rule:

DR 2-110 Withdrawal from Employment.

(A) ... (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

“Although an ethical wall may, in certain limited circumstances, prevent a breach of confidentiality, it cannot, in the absence of an informed waiver, cure a law firm's breach of its duty of loyalty to its client. Screening measures like those instituted by Morgan, Lewis do nothing to mitigate conflict arising from concurrent adverse client relationships, since the purpose of the prohibition against such relationships is to preserve the attorney's duty of loyalty, not confidentiality, to his client.” *Concat, LP v. Unilever, PLC*, 350 F.Supp.2d 796, 822 (N.D. Cal. 2004) (internal citations removed).

IV. REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS

Because of the clear nature of this conflict of interest and Fish's unreasonable refusal to voluntarily withdraw, this Court should award Aliph its attorney's fees and costs incurred in pursuing this motion. See 28 U.S.C. § 1928. Aliph respectfully requests permission to submit a bill of fees and costs should the Court grant this motion.

V. CONCLUSION

Fish at first correctly understood that it had a conflict when it proposed suing its client Aliph. Aliph was completely within its rights to decline consent. When Aliph refused to allow its lawyers to file suit against it, Fish reversed course and decided it didn't need consent; it could just fire the less-lucrative client and file the litigation a few hours later. This behavior represents a gross violation of the most sacred duty of a lawyer, to act with loyalty to his client, regardless of how much money he might make otherwise. Because Fish has breached that duty of loyalty, this Court should disqualify it from representing Plantronics in this action.

Dated: February 13, 2009

Respectfully submitted,

By: /s/ James Pooley (Collin Maloney by permission)

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REQUEST FOR ORAL HEARING

Pursuant to E. Dist. Tex. Local. Ct. R. 7(g), defendants Aliph, Inc. and AliphCom, Inc. request an oral hearing on this motion.

Dated: February 13, 2009

By: /s/ Collin Maloney

CERTIFICATE OF CONFERENCE

Counsel for defendants Aliph, Inc. and AliphCom, Inc. have complied with the meet and confer requirement of Local Rule CV-7(h) and plaintiff Plantronics, Inc. does not consent to this motion.

By: /s/ Collin Maloney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 13th day of February, 2009.

By: /s/ Collin Maloney