

---

---

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**AMERICAN TRAFFIC SOLUTIONS, INC.,**

*Plaintiff/Appellant/Cross-Appellee,*

v.

**REDFLEX TRAFFIC SYSTEMS, INC.,**

*Defendant/Appellee/Cross-Appellant.*

**No. 10-16419, No. 11-15519**

**D.C. No. 2:08-cv-02051-FJM  
District of Arizona, Phoenix**

**APPELLANT'S OPENING BRIEF**

**Lynne Liberato  
Mark Trachtenberg  
Polly Graham  
HAYNES AND BOONE, LLP  
1221 McKinney Street, Suite 2100  
Houston, Texas 77010-2007  
Telephone: (713) 547-2000  
Telecopier: (713) 547-2600**

**Michael D. Myers  
Robert H. Espey II  
Randy J. McClanahan  
MCCLANAHAN MYERS ESPEY, L.L.P.  
3355 West Alabama, Suite 210  
Houston, Texas 77098  
Telephone: (713) 223-2005  
Telecopier: (713) 223-3664**

*Counsel for Plaintiff/Appellant/Cross-Appellee,  
American Traffic Solutions, Inc.*

## **CORPORATE DISCLOSURE STATEMENT**

Appellant American Traffic Solutions, Inc. states that it is a Kansas corporation and a wholly-owned subsidiary of ATS Consolidated Inc.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	v
STATEMENT OF JURISDICTION.....	viii
INTRODUCTION .....	ix
ISSUES PRESENTED FOR REVIEW .....	xi
RULES ADDENDUM.....	xii
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS .....	2
A.    In 2003, Greenberg facilitated a strategic partnership between ATS and Mulvihill that culminated in a corporate merger .....	2
B.    After the merger, Greenberg was eager to expand its relationship with ATS .....	3
C.    Greenberg continued to provide legal services to ATS and Mulvihill until early 2006 .....	5
D.    ATS’s former attorney is a shareholder at Greenberg .....	6
E.    In 2008, Greenberg switched sides and began representing ATS’s principal competitor, Redflex .....	6
F.    The district court erroneously denied ATS’s pretrial motion to disqualify Greenberg .....	7
G.    Contract procurement issues were hotly disputed at trial .....	8

H.	The record reveals multiple instances where confidential information was potentially at issue.....	9
	STANDARD OF REVIEW .....	11
	SUMMARY OF THE ARGUMENT .....	12
	ARGUMENT AND AUTHORITIES.....	14
I.	Arizona law governs the disqualification inquiry .....	14
II.	The district court abused its discretion in failing to disqualify Greenberg because disqualification is mandatory when an attorney acts adversely to a former client in a substantially related matter .....	14
A.	The district court properly held that Greenberg had an attorney-client relationship with ATS .....	15
B.	The district court abused its discretion in finding that Greenberg’s past and present representations were not “substantially related” .....	17
1.	The district court failed to adequately analyze the relationship between Greenberg’s past and present representations .....	18
2.	Greenberg violated its duty of loyalty .....	20
a.	Greenberg’s past and present representations share a common factual background .....	20
b.	Greenberg’s past and present representations involve an identical issue.....	22
3.	Greenberg violated its duty of confidentiality .....	23
4.	Redflex’s counter-argument fails to withstand scrutiny .....	25
III.	The district court abused its discretion by disregarding relevant evidence .....	27

A.	The district court based its decision on an erroneous legal standard.....	28
B.	ATS submitted proper rebuttal evidence.....	29
C.	There is no ground in the record for refusing to consider ATS’s evidence .....	30
D.	ATS suffered prejudice from the district court’s improper exclusion of evidence .....	32
IV.	ATS is entitled to a new trial .....	32
	CONCLUSION AND PRAYER .....	35
	STATEMENT OF RELATED CASES .....	36
	CERTIFICATE OF COMPLIANCE.....	37
	CERTIFICATE OF SERVICE .....	38

## TABLE OF AUTHORITIES

### CASES

<i>Ahanchian v. Xenon Pictures, Inc.</i> , 624 F.3d 1253 (9th Cir. 2010) .....	29
<i>Analytica Inc. v. NPD Research, Inc.</i> , 708 F.2d 1263 (7th Cir. 1983) .....	25
<i>Braggs v. Arpaio</i> , 373 Fed. Appx. 680 (9th Cir. 2010).....	28
<i>Cal. Med. Ass’n v. Shalala</i> , 207 F.3d 575 (9th Cir. 2000).....	31
<i>Chugach Elec. Ass’n v. United States Dist. Ct.</i> , 370 F.2d 441 (9th Cir. 1966) .....	<i>passim</i>
<i>City of Whitewater v. Baker</i> , 299 N.W.2d 584 (Wis. Ct. App. 1980).....	33
<i>In re County of Los Angeles</i> , 223 F.3d 990 (9th Cir. 2000) .....	14
<i>Doe v. Reed</i> , 586 F.3d 671 (9th Cir. 2009) .....	28
<i>Emle Indus., Inc. v. Glen Raven Mills, Inc.</i> , 478 F.2d 562 (2d Cir. 1973).....	22, 23, 34
<i>Foulke v. Knuck</i> , 784 P.2d 723 (Ariz. Ct. App. 1989).....	<i>passim</i>
<i>Gadda v. State Bar of Cal.</i> , 511 F.3d 933 (9th Cir. 2007) .....	28
<i>Lane v. Dep’t of the Interior</i> , 523 F.3d 1128 (9th Cir. 2008) .....	30

<i>Miller v. CMG Worldwide Inc.</i> , 454 F.3d 975 (9th Cir. 2006) .....	28, 29, 30
<i>Miller v. Hambrick</i> , 905 F.2d 259 (9th Cir. 1990) .....	30
<i>Morford v. Morford</i> , 619 N.E.2d 71 (Ohio Ct. App. 1993).....	33
<i>In re Murphy</i> , 936 P.2d 1269 (Ariz. 1997).....	15
<i>Norman v. Norman</i> , 970 S.W.2d 270 (Ark. 1998).....	33
<i>Obrey v. Johnson</i> , 400 F.3d 691 (9th Cir. 2005) .....	32
<i>Okeani v. Superior Court</i> , 871 P.2d 727 (Ariz. Ct. App. 1993).....	22
<i>Otaka, Inc. v. Klein</i> , 791 P.2d 713 (Haw. 1990) .....	24
<i>Peters v. The Lincoln Elec. Co.</i> , 285 F.3d 456 (6th Cir. 2002) .....	28, 29, 30
<i>In re Petrie</i> , 742 P.2d 796 (Ariz. 1987).....	15
<i>State v. Hursey</i> , 861 P.2d 615 (Ariz. 1993).....	18, 32, 33, 34
<i>Thomas v. Municipal Court</i> , 878 F.2d 285 (9th Cir. 1989) .....	22, 23
<i>Trone v. Smith</i> , 621 F.2d 994 (9th Cir. 1980) .....	<i>passim</i>

<i>Tuscon Women’s Ctr. v. Ariz. Med. Bd.</i> , 666 F. Supp. 2d 1091 (D. Ariz. 2009) .....	30
<i>United States v. Wheat</i> , 813 F.2d 1399 (9th Cir. 1987) .....	17
<i>Westinghouse Elec. Corp. v. Gulf Oil Corp.</i> , 588 F.2d 221 (7th Cir. 1978) .....	11, 12

**STATUTES AND RULES**

15 U.S.C. § 1117 .....	36
15 U.S.C. § 1121 .....	viii
15 U.S.C. § 1125(a) .....	viii
28 U.S.C. § 1291 .....	viii
28 U.S.C. § 1331 .....	viii
28 U.S.C. § 1338 .....	viii
28 U.S.C. § 1367 .....	viii
FED. R. APP. P. 4(a)(1) .....	viii
MODEL R. PROF’L CONDUCT 1.9(a).....	14
ARIZ. R. PROF’L CONDUCT 1.9 .....	17, 22
ARIZ. R. PROF’L CONDUCT 1.9(a).....	14
ARIZ. R. PROF’L CONDUCT 1.10(a).....	15
ARIZ. R. PROF’L CONDUCT 1.10(b) .....	15
Local Rules of Practice, Arizona Dist. Ct. 83.2(e) .....	viii



## **STATEMENT OF JURISDICTION**

The district court had jurisdiction over this case pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1367 and 1338 because the suit arises under the Lanham Act, 15 U.S.C. § 1125(a). The district court entered a final judgment disposing of all claims on May 28, 2010. (ER:2.) ATS filed a timely notice of appeal on June 28, 2010, within thirty days after the entry of final judgment. (ER:1); Fed. R. App. P. 4(a)(1). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## INTRODUCTION

This appeal is about a law firm that violated its duty of loyalty and confidentiality to a former client by switching sides and representing its chief competitor in a matter substantially related to its earlier representation. The parties to the underlying lawsuit – Plaintiff American Traffic Solutions, Inc. (“ATS”) and Defendant Redflex Traffic Systems, Inc. (“Redflex”) – are two leading providers of traffic enforcement services. They provide red light and speed camera enforcement programs in cities and towns throughout the United States and frequently submit rival proposals for government contracts.

In this lawsuit, ATS alleged that Redflex improperly procured traffic enforcement contracts by falsely advertising radars that were not certified by the Federal Communications Commission (“FCC”). Redflex is represented by Greenberg Traurig, LLP (“Greenberg”). However, before this lawsuit was filed, Greenberg represented ATS and its wholly-owned subsidiary Mulvihill Intelligent Control Systems, Inc. (“Mulvihill”) for over two years in contract procurement matters.

The Honorable Frederick Martone denied ATS’s prompt motion to disqualify its former counsel and Greenberg represented Redflex through a week-long trial on the merits (“Redflex I”). Moreover, after months of discovery in this case, Greenberg proceeded to represent Redflex in a separate mirror-image lawsuit

against ATS until Greenberg was finally disqualified by the Honorable Susan Bolton in that action (“Redflex II”). (ER:32.) This Court denied Greenberg’s petition for writ of mandamus. (ER:33.) The district court’s erroneous failure to disqualify Greenberg below requires remand and a new trial.

## **ISSUES PRESENTED FOR REVIEW**

- (1) Did the district court abuse its discretion by denying ATS's motion to disqualify Greenberg, considering that:
  - a. both the court below and another district court have found that ATS and Greenberg had a prior attorney-client relationship,
  - b. undisputed evidence shows that Greenberg received confidential information in connection with that relationship, and
  - c. there is a significant factual overlap between Greenberg's prior attorney-client relationship with ATS and the issues in the underlying lawsuit?
  
- (2) Did the district court abuse its discretion by failing to consider relevant and timely evidence attached to ATS's reply memorandum in support of its motion for disqualification?

## **RULES ADDENDUM**

Pursuant to Circuit Rule 28-2.7, Appellant ATS has included a rules addendum at the end of this brief.

## STATEMENT OF THE CASE

*Nature of the Case:* This case arises from Redflex's use of uncertified radars in obtaining traffic enforcement contracts over ATS's competition. ATS sued Redflex for false advertising under the Lanham Act, tortious interference with business expectancy, and unjust enrichment, alleging that it would have obtained these traffic enforcement contracts but for Redflex's false statements. (ER:5.)<sup>1</sup>

*Course of Proceedings:* In December 2008, ATS filed a motion to disqualify Greenberg, arguing that Greenberg formerly represented ATS in substantially related matters. (ER:6-9.) Redflex submitted a response, ATS filed a reply, and Redflex filed a motion to strike the reply or, in the alternative, a sur-reply. (ER:11-22.) On March 20, 2009, Judge Martone denied the motion to disqualify without oral argument, disregarding ATS's reply evidence. (ER:4.) The case proceeded to trial and on May 27, 2010, the jury rendered a verdict for Redflex. (ER:3.) After trial, Redflex filed a motion for attorneys' fees and non-taxable costs. (R:322.)

*Disposition of the Case:* On May 28, 2010, the court entered a take nothing judgment in favor of Redflex pursuant to the jury's verdict. (ER:2.) On February 28, 2011, the court denied Redflex's motion for attorneys' fees. (R:354.) Both parties appealed and the appeals were consolidated by this Court. (ER:1; R:356.)

---

<sup>1</sup> Appellant's Excerpts of Record are cited as: "ER:[tab] at [page/paragraph]." The Record on Appeal is cited as: "R:[Docket Entry Number] at [page/paragraph]."

## STATEMENT OF FACTS

The central question in this appeal is whether the district court should have disqualified Greenberg from representing Redflex in the underlying false advertising suit brought by ATS – Redflex’s chief competitor and Greenberg’s former client.

**A. In 2003, Greenberg facilitated a strategic partnership between ATS and Mulvihill that culminated in a corporate merger.**

ATS’s relationship with Greenberg began in connection with ATS’s strategic partnership with, and subsequent acquisition of, Mulvihill. Mulvihill is also in the business of providing traffic enforcement services. (ER:7 ¶¶ 2-3.)

In late 2003, Mulvihill contracted with ATS to provide equipment and services for a traffic enforcement contract with the New York Department of Transportation. (ER:7 ¶ 2; 10 at 2.) As a result, Mulvihill’s former supplier threatened to bring a lawsuit to block Mulvihill from using any ATS product in connection with the New York contract. (ER:7 ¶ 2; 10 at 2.) Mulvihill retained Greenberg to handle the dispute and facilitate a strategic partnership with ATS. (ER:7 ¶ 2.) Greenberg attorney John Mascialino held multiple meetings with officers from both ATS and Mulvihill to discuss, among other things, the companies’ contract procurement efforts in the United States. (ER:10 at 2; 7 ¶ 6.)

The partnership continued throughout 2004. (ER:7 ¶ 3.) ATS provided equipment and services that allowed Mulvihill to obtain public procurement

contracts in New York and Pennsylvania. (*Id.*) During this time, the companies often worked together and shared confidential information with counsel in their efforts to secure additional contracts. (*Id.*) In late 2004, they began negotiations for a corporate merger. (*Id.*) Greenberg was fully aware of the pending acquisition when it entered into an amended retainer letter with Mulvihill in February 2005 to provide ongoing maintenance and services related to a traffic enforcement contract in Philadelphia. (ER:7 ¶ 4; 9.)

One month later, ATS completed its acquisition of Mulvihill and the companies' operations were quickly integrated. (ER:7 ¶ 5; 18 ¶ 3.) Mulvihill is now a wholly-owned subsidiary of ATS.

**B. After the merger, Greenberg was eager to expand its relationship with ATS.**

Greenberg continued to represent both ATS and Mulvihill after the merger and made no distinction between the companies when providing legal services. (ER:18 ¶ 3; 7 ¶ 7.) By May 2005, ATS needed legal assessments concerning red light and speed enforcement issues in a number of key states. (ER:9; 7 ¶ 7.) In this regard, Greenberg attorneys John Mascialino and Sean Reilly traveled to ATS's offices in Scottsdale, Arizona, where ATS's principal officers disclosed "highly confidential and propriety matters" concerning ATS's business goals, field operations, financing, product pricing and other related topics. (ER:7 ¶ 7-8; 16 ¶ 7.) Jim Tuton, ATS's Chief Executive Officer, testified that he revealed confidential



information that “I would never want to be known to a competitor or a competitor’s attorneys.” (ER:7 ¶ 8.)

Within a week after the meeting, Mascialino wrote to Tuton: “It was great meeting the ATS team last week. Sean and I are excited about the growth potential for our business and social relationships.” (ER:9.) Tuton responded with a list of “action items” concerning legal work related to procuring traffic enforcement contracts. (*Id.*) In connection with this list, Tuton promised to provide Greenberg with, among other things: (1) a recent Florida red light camera legal opinion, (2) a list of key states where ATS would require a legal opinion for red light camera and speed camera enforcement, and (3) a list of key points that any legal opinion should cover. (*Id.*) This information was sent to Sean Reilly, Tuton’s primary contact at Greenberg. (ER:19 ¶ 3.)

Tuton testified that during these meetings it was his “expectation and understanding” that Greenberg was acting as counsel to both ATS and Mulvihill. (ER:7 ¶ 8.) Tuton also emphasized: “At no time did Greenberg indicate they were only representing Mulvihill, even after we started discussing confidential ATS matters, and they did not indicate to me that ATS should avoid disclosing confidential information related to ATS.” (*Id.*)

**C. Greenberg continued to provide legal services to ATS and Mulvihill until early 2006.**

Greenberg's relationship with ATS and Mulvihill continued into 2006. (ER:7 ¶ 9.) During this time, Greenberg performed legal services related to public procurement issues and disputes. (*Id.*) These services included: (1) ongoing maintenance and contract-related assistance for Mulvihill's Pennsylvania contract, (2) lobbying efforts on behalf of both Mulvihill and ATS in Pennsylvania, and (3) an opinion letter regarding expanding ATS's traffic enforcement contract in New York City. (ER:7 ¶ 9; 10 at 2.) In particular, Greenberg's work in Pennsylvania encompassed bidding and procurement issues that were similar to the issues involved in the current dispute. (ER:7 ¶ 10.)

Greenberg obtained confidential information from ATS while rendering these services. For example, Greenberg attorney Sean Reilly was involved in the negotiation of a contract with the Philadelphia Parking Authority. (ER:18 ¶ 4.) The negotiations necessitated numerous conference calls with executives from ATS and Mulvihill. (*Id.* ¶ 5.) During these conference calls, ATS disclosed confidential information concerning: (1) the technical operation of its cameras, (2) corporate operations, and (3) strategies for using red light camera contracts to procure contracts for speed cameras. (ER:18 ¶¶ 6-7; 19 ¶¶ 4-6.) Most importantly, ATS specifically revealed its business strategies for procuring contracts over its principal competitor – Redflex. (ER:18 ¶ 8; 19 ¶ 6.)

**D. ATS's former attorney is a shareholder at Greenberg.**

John Mascialino – who never disputed receiving confidential information from ATS and Mulvihill – has been a shareholder in Greenberg since 2003, including the period during which Greenberg represented Redflex in this lawsuit. (ER:16; 6 at 3 n.3.) Sean Reilly was Of Counsel with Greenberg from 2002 until 2006, when he became President and Chief Executive Officer of a government relations firm. (ER:18 ¶ 3.) He has continued to represent ATS since 2003. (*Id.*)

**E. In 2008, Greenberg switched sides and began representing ATS's principal competitor, Redflex.**

Greenberg ended its representation of ATS and Mulvihill in March 2006. (ER:7 ¶ 9.) Then, less than three years later, Greenberg switched sides and began defending ATS's principal competitor – Redflex – against a bid protest filed by ATS. (ER:10.) The protest grew out of competition for a statewide speed enforcement contract in Arizona – the first of its type in the country. (R:330 at 189; ER:10.) Arizona rolled out its program in two stages: a pilot program and a statewide contract. (R:330 at 189.) In both stages, ATS and Redflex were the only qualified bidders to submit proposals and Redflex won both contracts. (R:330 at 194, 197, 200, 203.) ATS's protest of these contract awards was the beginning of a dispute that ultimately led to this lawsuit. (R:330 at 153-54.)

ATS promptly sent Greenberg a detailed letter asking it to withdraw from representing Redflex in the bid protest. (ER:10.) Greenberg refused.

**F. The district court erroneously denied ATS's pretrial motion to disqualify Greenberg.**

ATS moved to disqualify Greenberg within two months of bringing the underlying lawsuit and before any other substantive motions were filed. (ER:5-6.) Redflex opposed the motion but *never denied* that Greenberg received confidential information relating to ATS's procurement policies and business strategies. (ER:11; 16.) Redflex simply pointed out that Greenberg's past representation of ATS was limited to red light camera contracts. (ER:11 at 6.) Redflex believed this fact was significant because the present dispute involves a radar used only in speed cameras; however, Redflex never explained why this distinction was meaningful and never denied that ATS's procurement policies and procedures were relevant to this lawsuit. (ER:6 at 7; 11 at 3.)

The district court disregarded pertinent evidence attached to ATS's reply memorandum and – choosing not to rely on Redflex's distinction between red light and speed cameras – denied the motion to disqualify on a ground first raised in Redflex's sur-reply. (ER:20 at 5; 4 at 1, 3-4.) The court concluded, in a cursory analysis, that this lawsuit dealt only with Redflex's traffic equipment and, therefore, was not related to the information that Greenberg obtained about ATS's equipment in its past representation:

Even if we assume that red light cameras and speed cameras are related, plaintiff has failed to show that information obtained by Greenberg would materially advance defendants' position in this

action. The current litigation involves claims that Redflex made false or misleading statements regarding the radars used in its speed enforcement cameras. The focus of this action is on the equipment manufactured by Redflex and is not “substantially related” to the work that Greenberg provided for Mulvihill.

(ER:4 at 3-4.) However, the focus at trial was not exclusively on Redflex’s equipment. Rather, ATS’s ability to procure traffic enforcement contracts was vigorously disputed by the parties – just as ATS anticipated in its motion to disqualify. (ER:6 at 7-8.)

**G. Contract procurement issues were hotly disputed at trial.**

ATS brought suit against Redflex for false advertising under the Lanham Act, tortious interference with business expectancy, and unjust enrichment. (ER:5.) ATS alleged that Redflex improperly obtained traffic enforcement contracts in eleven different jurisdictions by advertising radars that were not certified by the FCC. (ER:5 ¶¶ 15-17; R:330 at 88-89.) ATS claimed that it would have procured these coveted contracts in the absence of Redflex’s false advertising. (ER:5 ¶¶ 10, 11, 28, 30, 49; R:330 at 106.)

Contract procurement issues permeated the trial. The evidence suggested:

- Redflex had been trying to obtain FCC certification for its radars for years. (R:331 at 333-46; 332 at 351-76.)
- Redflex illegally imported uncertified radars because it urgently needed these radars to meet its deadlines in the Arizona statewide project. (R:332 at 378-80, 383-86; R:334 at 633-34; R:333 at 519, 527-28; PX174.)

- Redflex falsely advertised that it was in compliance with federal guidelines. (*See, e.g.*, R:330 at 196-97, 204-05; PX81; PX168.)
- Certain types of certification can be a “huge differentiator” in customers’ purchasing decisions and can potentially cause one bidder to win a contract over another. (R:330 at 190-91; 334 at 615-16; PX27.)
- Securing a traffic enforcement contract can result in decades of benefits because there are high barriers to switching vendors. (R:330 at 142-44, 173.)

Despite this evidence, the jury ultimately rendered a verdict for Redflex. (ER:3.)

However, Greenberg’s representation of Redflex prejudiced ATS’s case before the jury even began its deliberations.

**H. The record reveals multiple instances where confidential information was potentially at issue.**

Redflex strongly disputed ATS’s allegations that it was harmed by Redflex’s advertisement of uncertified radars. On cross-examination, Greenberg questioned, among other things, the integrity of ATS’s advertisements, the credibility of ATS’s witnesses, the margin of ATS’s profits, and the ability of ATS to implement successful traffic enforcement programs. Specific examples are set forth below.

*First*, Redflex attacked the accuracy of ATS’s contract proposals, specifically ATS’s representation that “the ATS system is a hundred percent American made.” (ER:23.) During cross-examination, Greenberg questioned Tuton regarding where the components in ATS’s radars were manufactured. (*Id.*) These allegations – during this case – morphed into Redflex II, a full-blown countersuit

in which Judge Bolton finally disqualified Greenberg from litigating against ATS and this Court denied Greenberg's mandamus petition challenging the merits of that decision. (ER:32-33.).

*Second*, Greenberg cross-examined ATS about the characteristics of its ZAX photo enforcement radar. (ER:24.) ATS had been using the ZAX radar since at least 1994, including the period during which Greenberg represented ATS. (*Id.*) Greenberg insinuated on cross-examination that ATS falsely advertised the ZAX radar. (*Id.*) Only several years before, ATS revealed confidential information to Greenberg attorneys about the technical operation of its cameras and its contract procurement efforts. (ER:18 ¶¶ 6-7; 19 ¶¶ 4-6; 7 ¶¶ 3, 6-8.)

*Third*, Greenberg attacked Tuton's credibility, focusing particularly on the extent of his personal experience in certifying radars. (ER:25.) Despite Tuton's twenty years experience in the industry, Greenberg suggested that he did not have sufficient qualifications to testify on the topic of Redflex's FCC certification efforts. (*Id.*) Roughly five years before this thorough cross-examination, Tuton had personally sat down with Greenberg lawyers and revealed highly confidential information about ATS. (ER:7 ¶¶ 7-8; 16 ¶ 7.)

*Fourth*, Greenberg cross-examined ATS about its profit margin on photo enforcement contracts. (ER:26-27.) Again, only several years earlier, ATS sat

down with Greenberg lawyers and revealed confidential information relevant to profitability, including financing and product pricing. (ER:7 ¶¶ 7-8; 16 ¶ 7.)

*Fifth*, Greenberg questioned ATS's ability to implement a successful and profitable traffic enforcement program in Arizona. Redflex lost money on the Arizona statewide contract. (R:330 at 205.) However, Tuton testified to steps and advice that ATS would have given the Arizona Department of Public Safety ("Arizona DPS") to avoid the troubles that Redflex ultimately faced. (ER:28; *see also* R:334 at 639-41.) Greenberg questioned ATS's ability to implement these policies given the Arizona DPS's control over the project. (ER:29.) Additionally, Tuton testified that, if Redflex were not a competitor, its standard pricing would have been substantially higher – an assertion that Greenberg also questioned on cross-examination. (ER:30-31.)

### **STANDARD OF REVIEW**

An order denying disqualification is reviewed for an abuse of discretion. *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980); *Foulke v. Knuck*, 784 P.2d 723, 730 (Ariz. Ct. App. 1989). A district court abuses its discretion if it misperceives the rule of law or fails "to give adequate consideration to the nature and scope of [an attorney's] prior representation." *Trone*, 621 F.2d at 999. "Doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225



(7th Cir. 1978) (citing *Chugach Elec. Ass'n v. United States Dist. Ct.*, 370 F.2d 441, 444 (9th Cir. 1966)).

### **SUMMARY OF THE ARGUMENT**

The district court's cursory analysis of the factual relationship between Greenberg's past representation of ATS and its current representation of Redflex failed to take into account timely and relevant evidence and failed to appreciate or protect the important ethical duties underlying the disqualification rules. In committing these errors, the district court abused its discretion for four independent reasons.

*First*, the district court failed to engage in any analysis of whether the type of information Greenberg received during its past representation of ATS could have been of some value in defending against ATS's claims in this lawsuit. The district court simply noted that this case involves Redflex's equipment – as opposed to ATS's equipment – and thus could not be substantially related to Greenberg's past representation. This Court has repeatedly rejected this type of superficial analysis.

*Second*, a proper inquiry establishes, as a matter of law, that the issues and information pertinent to Greenberg's two representations are closely related and, in some instances, identical. Contract procurement issues, including ATS's ability to procure contract's over Redflex's competition, arose in both of Greenberg's

representations. The duty of loyalty prevents lawyers from switching sides in substantially related cases.

*Third*, the record reveals multiple instances where there is a reasonable probability that Greenberg could have used confidential information obtained during its past representation of ATS to advance Redflex's defense. Redflex delved into matters related to the accuracy of ATS's contract proposals, the components of its cameras, its profit margins and product pricing, and its ability to successfully implement traffic enforcement programs.

*Fourth*, the district court applied an erroneous legal standard to disregard ATS's relevant and timely reply evidence. This evidence directly rebuts arguments raised for the first time in Redflex's response memorandum and underscores the importance of contract procurement matters in both representations. There are no grounds in the record upon which the district court could exclude this evidence and this Court is free to consider it on appeal.

Where the district court abuses its discretion by failing to disqualify opposing counsel, prejudice is presumed. Accordingly, for all of these reasons, this Court should grant ATS its only viable remedy – a new trial.

## ARGUMENT AND AUTHORITIES

### **I. Arizona law governs the disqualification inquiry.**

This Court applies state law in determining matters of disqualification. *In re County of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000); *see also* Local Rules of Practice, Arizona Dist. Ct. 83.2 (e). Thus, the Court is bound to follow the views of the Arizona Supreme Court on disqualification. *In re County of Los Angeles*, 223 F.3d at 995. However, Arizona, like many other jurisdictions, bases its disqualification rules on the Model Rules of Professional Conduct. *Compare* ARIZ. R. PROF'L CONDUCT 1.9(a) with MODEL RULE 1.9(a). Accordingly, courts from a range of jurisdictions have interpreted the same disqualification standard and, when harmonized with Arizona precedent, provide persuasive authority.

### **II. The district court abused its discretion in failing to disqualify Greenberg because disqualification is mandatory when an attorney acts adversely to a former client in a substantially related matter.**

The Arizona ethics rules are direct and unequivocal: “A lawyer who has formerly represented a client in a matter *shall not* thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” ARIZ. R. OF PROF'L CONDUCT 1.9(a) (emphasis added); *Trone v. Smith*, 621 F.2d 994, 1001 (9th Cir. 1980) (“disqualification is required when lawyers change sides in factually related cases”); *Foulke v. Knuck*, 784 P.2d 723, 728-29 (Ariz. Ct. App. 1989). A conflict

on behalf of one lawyer is imputed to an entire firm. ARIZ. R. OF PROF'L CONDUCT 1.10(a); *Trone*, 621 F.2d at 999; *In re Murphy*, 936 P.2d 1269, 1273 (Ariz. 1997). Moreover, even after an attorney leaves a firm, the firm is prohibited from accepting adverse representation in a substantially related matter where any lawyer remaining at the firm has relevant confidential information. ARIZ. R. OF PROF'L CONDUCT 1.10(b).

Thus, disqualification under Rule 1.9(a) is mandatory if a movant: (1) establishes the existence of an attorney-client relationship, and (2) demonstrates that a former representation is “substantially related” to current litigation. *See Foulke*, 784 P.2d at 726-27. ATS satisfied both parts of this test.

**A. The district court properly held that Greenberg had an attorney-client relationship with ATS.**

The court below – like Judge Bolton in *Redflex II* – properly held that Greenberg had a past attorney-client relationship with ATS. (ER:4 at 3; 32.) An attorney-client relationship is proven “by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession.” *In re Petrie*, 742 P.2d 796, 800 (Ariz. 1987); *see also Foulke*, 784 P.2d at 726. The test is subjective, and requires consideration of the circumstances under which confidences were divulged and whether the client believed an attorney-client relationship existed. *See In re Petrie*, 742 P.2d at 801; *Foulke*, 784 P.2d at 726.

Considering these factors, the evidence of an attorney-client relationship is overwhelming. It is undisputed that ATS revealed confidential information to Greenberg in the course of seeking legal advice. (ER:7; 16.) It is also undisputed that ATS subjectively believed it was represented by Greenberg. (ER:7 ¶ 8.) Jim Tuton testified: “[I]t was my expectation and understanding that Greenberg was acting as counsel to both ATS and Mulvihill, since we discussed confidential information related to both parties.” (*Id.*) Furthermore, the evidence suggested that Greenberg believed it was representing ATS. After traveling to ATS’s Arizona offices, Greenberg attorney John Mascialino stated: “It was great meeting the ATS team last week. Sean and I are excited about the growth potential for our business and social relationships.” (ER:9.)

Even assuming that this evidence was not sufficient to support the district court’s finding, ATS also submitted a rebuttal declaration from Greenberg attorney Sean Reilly unequivocally stating: “[B]oth Mulvihill and ATS were my clients.” (ER:18 ¶ 3.) As set forth in Part III below, the district court abused its discretion by excluding this reply evidence and it is proper for this Court to consider it on appeal. Accordingly, for the foregoing reasons, the district court correctly concluded that ATS entered into an attorney-client relationship with Greenberg.

**B. The district court abused its discretion in finding that Greenberg’s past and present representations were not “substantially related.”**

The district court erred in concluding that Greenberg’s past representation of ATS was not substantially related to the underlying lawsuit. Matters are “substantially related” if “they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” ARIZ. R. OF PROF’L CONDUCT 1.9 cmt. 3 (emphasis added). “The relationship is measured by the allegations in the complaint and by the nature of the evidence that would be helpful in establishing those allegations. *Id.* at 1000.

This Court has long interpreted the “substantial relationship” test to protect two distinct duties to former clients: (1) the duty of loyalty, and (2) the duty of confidentiality. *Trone*, 621 F.2d at 998-1001; *see also United States v. Wheat*, 813 F.2d 1399, 1403 n.1 (9th Cir. 1987); ARIZ. R. OF PROF’L CONDUCT 1.9. The duty of loyalty prevents lawyers from switching sides in substantially related cases. *Trone*, 621 F.2d at 998-99; ARIZ. R. OF PROF’L CONDUCT 1.9. The duty of confidentiality requires lawyers to preserve clients’ “secrets and confidences.” *Trone*, 621 F.2d at 998. Violation of either of these duties requires disqualification.

Thus, the “substantial relationship” test can be satisfied in two different ways. *First*, to protect the duty of loyalty, the substantial relationship test is met if the representations are “interlinked by reason of common factual background.” *Id.* at 998, 1000; *see also Foulke v. Knuck*, 784 P.2d 723, 727 (Ariz. Ct. App. 1989). *Second*, to enforce the duty of confidentiality, a substantial relationship is presumed where there is a “reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation.” *Trone*, 621 F.2d at 998; *see also State v. Hursey*, 861 P.2d 615, 617 (Ariz. 1993).

Here, the district court abused its discretion by failing to adequately analyze the relationship between Greenberg’s two representations under these tests. A proper inquiry establishes, as a matter of law, that Greenberg violated both its duty of loyalty and confidentiality by representing Redflex below.

**1. The district court failed to adequately analyze the relationship between Greenberg’s past and present representations.**

The district court failed to engage in any meaningful analysis of the factual relationship between Greenberg’s past representation of ATS and its current representation of Redflex. The court’s analysis is encompassed in one sentence: “The focus of this action is on the equipment manufactured by Redflex and is not ‘substantially related’ to the work that Greenberg provided for Mulvihill.” (ER:4 at 3-4.) This superficial analysis fails to even consider whether the type of

information – as opposed to the ownership of equipment – at issue in both representations is substantially related.

In its leading case on attorney disqualification, this Court rejected this type of cursory analysis, stating that it “missed the point” of the substantial relationship test. *Trone*, 621 F.2d at 1001. In *Trone*, the plaintiff’s law firm formerly represented the defendant in connection with a proposed stock offering. *Id.* at 996. The representation lasted only one month and the law firm asserted that it received no confidential information. *Id.* at 997. Roughly two-and-a-half years later, the plaintiff brought a securities action against the defendant. *Id.* at 996-97. The district court concluded that the matters were not substantially related because the plaintiff’s complaint did not rely on the prior stock offering as a basis of liability. *Id.* at 1000.

This Court held that the district court’s “inquiry was insufficient and missed the point.” *Id.* It concluded that the district court should have carefully examined the allegations in the complaint to determine whether the type of information sought in the past representation could have been of some value in establishing the truth of the plaintiff’s current allegations. *Id.*; see also *Chugach Elec. Ass’n v. United States Dist. Ct.*, 370 F.2d 441, 443 (9th Cir. 1966) (noting that the district court’s findings did not reach “the heart of the problem” because they failed to account for the fact that the lawyer’s “knowledge of private matters gained in



confidence would provide him with greater insight and understanding of the significance of subsequent events . . . and offer a promising source of discovery”).

Here, as in *Trone*, the district court abused its discretion by failing to analyze the manner in which information obtained in Greenberg’s past representation could be material to the present lawsuit. As set forth below, a careful analysis of Greenberg’s two representations establishes that these matters are substantially related and disqualification is mandatory. *See Trone*, 621 F.2d at 1000, 1002 (concluding that disqualification was required as a matter of law and remanding with instructions to remove counsel); *Chugach*, 370 F.2d at 443-44 (same).

**2. Greenberg violated its duty of loyalty.**

Greenberg’s past representation of ATS and its current representation of Redflex share a common factual background. A proper inquiry establishes, as a matter of law, that the issues and information pertinent to Greenberg’s two representations are closely related and, in some instances, identical.

**a. Greenberg’s past and present representations share a common factual background.**

Greenberg’s past representation of ATS is remarkably similar to its present representation of Redflex. “The substantial relationship test does not require that the issues in the two representations be identical.” *Trone*, 621 F.2d at 1000. It is sufficient if they share a “close relationship.” *Id.*; *see also Foulke*, 784 P.2d at 727

(concluding that the “general subject matter” of a past representation was related to issues in a current lawsuit).

ATS attached ample evidence to its disqualification motion establishing that Greenberg’s past representation dealt with matters related to ATS’s procurement of traffic enforcement contracts. (ER:7 ¶¶ 2-3, 6, 8-10; 8-10.) The face of the complaint establishes that this case dealt with competition between ATS and Redflex for traffic enforcement contracts. The complaint states:

- Redflex and ATS are direct competitors.
- [Redflex] solicits business from customers and potential customers of ATS . . . .
- . . . but for Redflex’s misrepresentations and unfair competition, both the pilot project and the statewide contract would have been awarded to ATS.
- ATS’s proposal was responsive and responsible and but for Redflex’s misrepresentation and illegal bid, ATS’s proposal would have been awarded the contract.
- There existed valid business relationships and expectancies between ATS and the governmental entities that contracted for Redflex’s illegal radars.

(ER:5 ¶¶ 10, 11, 28, 30, 49; *see also* ER:7 at 7; 17 at 4-5.)

Furthermore, the trial transcript establishes that procurement matters were hotly contested and placed Greenberg in the position of challenging the credibility of ATS executives from whom Greenberg formerly obtained business confidences, the ethics of ATS’s advertising policies, and the competency of its services. *See*

*supra* Statement of Facts Parts G, H; (ER:23-31.) This type of disloyalty endangers both “the fact and the appearance of total professional commitment.” *Trone*, 621 F.2d at 998-99; *see also Thomas v. Municipal Court*, 878 F.2d 285, 289 (9th Cir. 1989) (noting that the facts of two representations were “inexorably linked” because an attorney might have to cross-examine his former client about matters related to a past representation); *Okeani v. Superior Court*, 871 P.2d 727, 728-29 (Ariz. Ct. App. 1993) (noting that impeachment of a witness on matters related to a past representation creates a clear conflict of interest). Accordingly, the district court abused its discretion in failing to disqualify Greenberg.

**b. Greenberg’s past and present representations involve an identical issue.**

Although ATS has no burden to meet such a stringent standard, Greenberg’s continued representation of Redflex is particularly egregious because Greenberg’s past and present representations encompass an identical issue. “[K]nowledge of specific facts gained in a prior representation that is relevant to the matter in question ordinarily will preclude such representation.” ARIZ. R. OF PROF’L CONDUCT 1.9 cmt. 3; *see also Emle Indus., Inc. v. Glen Raven Mills, Inc.*, 478 F.2d 562, 571-72 (2d Cir. 1973) (disqualifying counsel where past and present representations addressed an identical issue); *Thomas v. Municipal Court*, 878 F.2d 285, 289 (9th Cir. 1989) (holding that disqualification was required where an issue relevant to a past representation was raised defensively in a present lawsuit).

ATS submitted rebuttal evidence establishing that Greenberg obtained information regarding ATS's ability to procure traffic enforcement contracts *over Redflex's competition*. (ER:18 ¶ 8; 19 ¶ 6; *see also* 7 ¶¶ 6, 8-9.) As set forth in Part III below, the district court abused its discretion in failing to consider this significant rebuttal evidence. Greenberg never denied that it obtained this information. (ER:16.) The core of this lawsuit dealt with competition between ATS and Redflex for traffic enforcement contracts and events at trial confirmed the importance of these issues. (ER:5 ¶¶ 10, 11, 28, 30; R:330 at 125-26; *see also* Statement of Facts Parts G, H.) Accordingly, because Greenberg's past and present representations concerned identical issues, the district court abused its discretion in failing to disqualify Greenberg. *See Emle Indus., Inc.*, 478 F.2d at 571-72; *Thomas*, 878 F.2d at 289.

### **3. Greenberg violated its duty of confidentiality.**

In addition to its duty of loyalty, Greenberg also violated its duty of confidentiality. If there is a "reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation, a substantial relationship between two cases is presumed." *Trone*, 621 F.2d at 998. A former client has no duty to reveal the precise secrets and confidences it disclosed. *Chugach Elec. Ass'n v. United States Dist. Ct.*, 370 F.2d 441, 444 (9th Cir. 1966); *Foulke*, 784 P.2d at 728. Requiring disclosure "would place former clients in a

‘Catch-22,’ requiring that they divulge the very same confidences and secrets which they seek to protect, disclosure of which is, in part, the reason for the discomfort of having a prior attorney represent an adversary.” *Foulke*, 784 P.2d at 729; *see also Chugach*, 370 F.2d at 444.

In this case, Greenberg never has disputed that it received confidential information from ATS. (ER:11; 16.) ATS presented evidence that Greenberg obtained confidential information related to: (1) procurement efforts, (2) business goals, (3) financing, (4) product pricing, and (5) field operations. (ER:7 ¶¶ 3, 6-9.) ATS also presented rebuttal evidence establishing that Greenberg obtained confidential information concerning: (1) corporate operations, (2) the technical operation of its cameras, (3) strategies for using red light camera contracts to procure speed camera contracts, and (4) business strategies for procuring contracts over Redflex’s competition. (ER:18 ¶¶ 6-7; 19 ¶ 4-6; *see infra* Part III.)

These categories overlap with issues raised at trial. Redflex delved into matters related to the accuracy of ATS’s proposals, the components of its cameras, its profit margins and product pricing, and its ability to successfully implement traffic enforcement programs. *See supra* Statement of Facts Part H; (ER:23-31.) Accordingly, there is a reasonable probability that confidences could have been used to materially advance Redflex’s defense. *See Otaka, Inc. v. Klein*, 791 P.2d 713, 719 (Haw. 1990) (holding that a lawyer’s “strategy sessions” with his former

client enabled him learn the former client's management philosophy and to acquire confidences relevant to a current dispute); *Chugach Elec. Ass'n v. United States Dist. Ct.*, 370 F.2d 441, 443 (9th Cir. 1966) (noting that a lawyer's "knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events . . . and offer a promising source of discovery"); *Analytica Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267 (7th Cir. 1983) (concluding that confidential information concerning a defendant's profitability, sales prospects, and general market strength was potentially germane to the liability and damages issues of an anti-trust suit). For these reasons, the district court abused its discretion in failing to disqualify Greenberg.

**4. Redflex's counter-argument fails to withstand scrutiny.**

Redflex failed to address the foregoing issues raised in ATS's disqualification motion. (ER:11.) Instead, Redflex attempted to sidestep these issues by arguing that Greenberg's past representation of ATS was limited to red light camera contracts. (ER:11; 16 ¶ 12.) Redflex argued that this fact was significant because the present dispute involves a radar used only in speed cameras. (ER:11 at 3.) However, this distinction is irrelevant for purposes of disqualification. Redflex's argument completely ignores a crucial factor: the relevance of contract procurement issues to both of Greenberg's representations. (ER:6 at 6-8.)

Furthermore, the distinction itself is faulty. ATS's original evidence established that Greenberg received information pertinent to speed cameras during its past representation. (ER:9 ("My action items from the meeting on Friday were to send the following documents to you: . . . A list of key States where we would require Legal Opinions for . . . Speed Camera enforcement.")) ATS and Redflex are in the general photo enforcement business. (R:330 at 84, 173.) ATS established that the majority of the contracts they compete for, including contracts at issue in this case, involve both red light and speed functions. (ER:17; 18 ¶ 8; 19 ¶ 6; R:330 at 156-57; R333 at 464; PX20, 24, 33, 41 at 20, 49 at 60949, 47, 106, 115, 158 at 60934.)

In contrast, Redflex presented no evidence that there was a meaningful distinction between Greenberg's legal work on red light as opposed to speed cameras. (ER:11, 16.) Nor did Redflex present any evidence that the information Greenberg received – as opposed to the legal advice it gave or the governmental relations activities it conducted – was limited to red light camera contracts. (*Id.*) In fact, in light of the evidence attached to ATS's disqualification motion, Redflex could not have done so. (ER:9.)

Even assuming that this evidence were insufficient to rebut Redflex's artificial distinction, ATS submitted a reply affidavit from former Greenberg attorney Sean Reilly establishing: "For the purposes of providing legal services, we

understood that there was no distinction between red light and speed camera contracts and we observed no distinction between the two.” (ER:18 ¶ 6.) ATS also presented unrefuted evidence that: (1) its cameras had the technical ability to provide both red light and speed functions, and (2) in the course of Greenberg’s work, ATS disclosed strategies for using red light contracts to obtain speed contracts. (ER:18 ¶¶ 6-7; *see also infra* Part III.)

In sum, Redflex failed to set forth any meritorious ground for concluding that Greenberg’s past and present representations are not substantially related and, for all the foregoing reasons, Greenberg should be disqualified.

**III. The district court abused its discretion by disregarding relevant evidence.**

As noted previously, ATS submitted reply evidence that the district court erroneously disregarded despite the fact that the district court ultimately denied the motion to disqualify on grounds raised for the first time in Redflex’s sur-reply. (ER:4; 20 at 5.) Although the evidence attached to ATS’s original disqualification motion is sufficient standing alone to establish that the district court abused its discretion in failing to disqualify Greenberg, ATS’s reply evidence removes any remaining doubts. *See supra* Part II. In disregarding this evidence, the district court applied an erroneous legal standard. Furthermore, under the proper standard, the record reveals no grounds upon which the court could exclude it.



**A. The district court based its decision on an erroneous legal standard.**

The district court applied an improper legal standard in excluding evidence attached to ATS's reply memorandum. A reply memorandum may contain additional evidence refuting arguments raised in the opposing party's response. *See Miller v. CMG Worldwide Inc.*, 454 F.3d 975, 979 n.1 (9th Cir. 2006) (noting that the district court properly admitted reply evidence that refuted arguments raised in the nonmovant's response); *Braggs v. Arpaio*, 373 Fed. Appx. 680, 681 (9th Cir. 2010) (same); *see also Peters v. The Lincoln Elec. Co.*, 285 F.3d 456, 476-77 (6th Cir. 2002).

The district court erroneously relied on a rule of appellate briefing that prohibits an appellant from raising new issues for the first time in a reply brief. (ER:4 at 1-2) (citing *Gadda v. State Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th Cir. 2007)). But the case law makes a distinction between trial court and appellate briefing for good reason. Briefing before the trial court fleshes out unexplored issues and evidence. In contrast, the factual record on appeal is fixed and all issues already have been argued to a final decision.

At a minimum, this Court should remand for the district court to apply the correct standard. *Doe v. Reed*, 586 F.3d 671, 676 (9th Cir. 2009) ("A district court abuses its discretion if it bases its decision on an erroneous legal standard."). However, remand is unnecessary because, under the proper legal standard, the

district court had no discretion to disregard ATS's evidence. *See Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261-62 (9th Cir. 2010).

**B. ATS submitted proper rebuttal evidence.**

ATS's reply evidence directly rebutted Redflex's responsive arguments. "[R]eply affidavits that respond only to the opposing party's brief are properly filed with the reply brief." *Peters*, 285 F.3d at 476-77; *Miller*, 454 F.3d at 979 n.1. In its response, Redflex made three misleading assertions. First, Redflex stressed purported differences between red light and speed cameras. (ER:11 at 3-4; 16 at ¶ 12.) Second, Redflex asserted that Greenberg partner John Mascialino never received certain documents referenced in a June 2005 e-mail. (ER:11 at 3; 16 at ¶ 8.) Third, Redflex implied that Greenberg did not believe it was representing ATS. (ER:16.) ATS submitted two reply declarations that rebut these specific and discrete points:

**The Reilly Declaration:** Sean Reilly, a former Greenberg attorney, rebutted Greenberg's artificial distinction between red light and speed cameras. (ER:18 ¶¶ 6-8.) In doing so, Reilly reinforced a point critical to the district court's erroneous determination that this case dealt only with Redflex's equipment. Reilly stated: "ATS disclosed strategies for using the red light contracts to procure additional contracts for more services, including services related to speed cameras. . . . ATS disclosed confidential information to me concerning ATS's business strategies for procuring the contracts over Redflex's competition." (*Id.* ¶¶ 7-8.) Reilly also unequivocally stated: "[B]oth Mulvihill and ATS were my clients." (*Id.* ¶ 3.)

**The Tuton Declaration:** Jim Tuton also rebutted Redflex's artificial distinction between red light and speed cameras and, in the process,

reinforced the relevance of ATS's procurement policies in the present case. Tuton stated: "I disclosed ATS's strategies for using the red light contracts to procure additional contracts for more services, including services related to speed cameras. . . . I disclosed confidential information to Greenberg Traurig lawyers concerning ATS's business strategies for procuring contracts over Redflex's competition." (ER:19 ¶¶ 5-6.) Furthermore, Tuton rebutted Mascialino's misleading assertion by clarifying that he sent the referenced documents to Sean Reilly, his primary contact at Greenberg. (ER:9; 19 ¶ 3; 16 ¶ 8.) These documents addressed ATS's need for legal opinions on red light and speed camera contracts in key states, information that ATS could use in its procurement efforts. (ER:9.)

Because ATS's declarations rebut issues raised in Redflex's response, the district court abused its discretion in failing to consider ATS's reply evidence. *See Miller*, 454 F.3d at 979 n.1; *Peters*, 285 F.3d at 476-77.

**C. There is no ground in the record for refusing to consider ATS's evidence.**

Even assuming that ATS's declarations exceed the scope of rebuttal evidence, the district court nonetheless abused its discretion in failing to consider them. A district court has discretion to allow a movant to present new issues and evidence in a reply. *See Lane v. Dep't of the Interior*, 523 F.3d 1128, 1140 (9th Cir. 2008); *Tuscon Women's Ctr. v. Ariz. Med. Bd.*, 666 F.Supp.2d 1091, 1102 (D. Ariz. 2009). The district court failed to exercise its discretion by erroneously concluding that reply evidence is categorically prohibited. (ER:4 at 1-2); *Miller v. Hambrick*, 905 F.2d 259, 262-63 (9th Cir. 1990) ("A district court's failure to exercise discretion constitutes an abuse of discretion.").

Moreover, even if the district court were to exercise its discretion, “review of the record discloses no ground on which the district court could deny [ATS] relief.” *Cal. Med. Ass’n v. Shalala*, 207 F.3d 575, 579 (9th Cir. 2000). ATS filed its motion to disqualify well over a year before this case went to trial. (ER:5-6; R:330 at 1.) When the district court considered the motion, the parties had completed all of their original and supplemental briefing and no requests for additional time were pending. (ER:4 at 1.) Thus, consideration of ATS’s reply evidence would have caused no delay in the resolution of the case, advanced the development of important ethical issues, and prevented any possible misuse of confidences in preparing Redflex’s defense of this case and Redflex’s complaint against ATS in Redflex II (in which Judge Bolton properly disqualified Greenberg).

Redflex failed to raise any meritorious ground for disregarding ATS’s reply evidence. Redflex accused ATS of attempting to “sandbag” Greenberg with the Reilly declaration. (ER:20 at 3.) However, Redflex failed to explain how it was prejudiced. (*Id.*) Reilly was a former Greenberg attorney and his involvement was raised in Redflex’s response memorandum. (ER:16 at ¶ 7.) Redflex did not seek an extension of time to respond, to depose Reilly, or to submit a counter-declaration. (ER:20.) Moreover, Redflex submitted a sur-reply asserting new grounds for denying the motion for disqualification – grounds upon which the district court

ultimately relied despite its claim to the contrary. (ER:20 at 5; 4 at 3-4.) Accordingly, there is no basis in the record for disregarding ATS's reply evidence.

**D. ATS suffered prejudice from the district court's improper exclusion of evidence.**

ATS's rebuttal declarations bear directly on the district court's erroneous decision to deny the disqualification motion. When reviewing the effect of erroneous evidentiary rulings, this Court begins "with a presumption of prejudice." *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005). Here, Redflex cannot rebut that presumption. As set forth above, the reply declarations correct misleading assertions in Redflex's response and reinforce key points – particularly, Greenberg's acquisition of information relevant to ATS's contract procurement efforts. (ER:18 ¶¶ 6-9; 19 ¶¶ 3-6; *see also* ER:7 ¶¶ 3, 6-10.) In light of the substantial overlap between procurement issues in Greenberg's past representation of ATS and procurement issues in the present lawsuit, the district court's failure to consider the evidence attached to the reply memorandum cannot be considered harmless.

**IV. ATS is entitled to a new trial.**

When a law firm represents a client in a substantially related matter, "a new trial is the only plausible remedy." *State v. Hursey*, 861 P.2d 615, 619 (Ariz. 1993). As the Arizona Supreme Court has emphasized, "[t]he mere fact of confidential communications in the prior relationship is enough to presume prejudice to the

defendant, because justice and the law must rest upon the complete confidence of the public and to do so they must avoid even the appearance of impropriety.” *Id.* (internal quotations omitted); *see also Norman v. Norman*, 970 S.W.2d 270, 274-75 (Ark. 1998) (remanding for a new trial where the district court abused its discretion in failing to disqualify the plaintiff’s counsel and noting “the rules do not require a finding of prejudice”); *City of Whitewater v. Baker*, 299 N.W.2d 584, 588-89 (Wis. Ct. App. 1980) (concluding that a new trial was the “only viable remedy” for the trial court’s failure to disqualify opposing counsel despite the fact that review of trial transcript “reveal[ed] no particularly damaging information about [the movant] which an attorney would not otherwise discover”); *Morford v. Morford*, 619 N.E.2d 71, 76 (Ohio Ct. App. 1993) (“Professionalism does not contemplate a ‘no harm, no foul’ standard of practice.”).

The rule of presumed prejudice is based on sound policy. *First*, a movant “should not be forced to attempt to prove that there was an actual indiscretion or impropriety. Evidence of such conduct, being under the control of [opposing counsel], would be well-nigh impossible for a [movant] to bring forth.” *Hursey*, 861 P.2d at 619. As the Second Circuit has observed, the subtlety of possible uses can be difficult, if not impossible, to identify:

Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. . . . The dynamics of litigation are far too

subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.

*Emle Indus., Inc.*, 478 F.2d at 571-72.

*Second*, if a movant "were required to show prejudice he might, in some cases, be forced to disclose a confidential communication he made to his former lawyer." *Hursey*, 861 P.2d at 619; *cf. Foulke v. Knuck*, 784 P.2d 723, 729 (Ariz. Ct. App. 1989) ("we do not believe specific harm must be established to justify disqualification where there has been a violation of [Rule] 1.9(a)"). ATS should not be put to this choice. However, ATS has identified specific places in the trial transcript where Greenberg conducted examinations on topics with respect to which Greenberg received confidential information. *See, supra*, Statement of Facts Part H; (ER:23-31.) This evidence reinforces the presumption of prejudice and demonstrates that ATS is entitled to a new trial.

The application of the ethics rules is admittedly harsh. However, neither Redflex nor Greenberg is free of responsibility for the result. As one Arizona court of appeals has noted: "[The attorney] continued to render legal services after she and her client were fully aware that the appropriateness of the representation was being contested. Both counsel and client proceeded at their own risk." *Foulke*, 784

P.2d at 729-30. Accordingly, this Court should disqualify Greenberg and remand for a new trial in this case.

### **CONCLUSION AND PRAYER**

For the foregoing reasons, ATS respectfully requests that the Court reverse the final judgment rendered against ATS, order that Greenberg be disqualified from representing Redflex in any further proceedings, and remand this case for a new trial.

Respectfully submitted,

HAYNES AND BOONE, LLP

*/s/ Lynne Liberato*

---

Lynne Liberato

Mark Trachtenberg

Polly Graham

1221 McKinney, Suite 2100

Houston, Texas 77010-2007

Telephone: (713) 547-2000

Telecopier: (713) 547-2600

- and -

Michael D. Myers

Randy J. McClanahan

Robert H. Espey, II

MCCLANAHAN MYERS ESPEY, L.L.P.

3355 West Alabama, Suite 210

Houston, Texas 77098

Telephone: (713) 223-2005

Telecopier: (713) 223-3664

Attorneys for Appellant,  
American Traffic Solutions, Inc.



## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, ATS states that this appeal is related to consolidated appeal No. 11-15519 styled *Redflex Traffic Systems, Inc. v. American Traffic Solutions, Inc.*, in which Redflex challenges the trial court's denial of its application for attorneys' fees and non-taxable costs pursuant to § 35(a) of the Lanham Act, 15 U.S.C. § 1117.

**CERTIFICATE OF COMPLIANCE**  
**[FED. R. APP. P. 32(a)]**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,335 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman font.

*/s/ Mark Trachtenberg*

\_\_\_\_\_  
Mark Trachtenberg

Attorney for Appellant

American Traffic Solutions, Inc.

Dated: April 25, 2011.

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 25, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*/s/ Mark Trachtenberg* \_\_\_\_\_

Mark Trachtenberg

# **Addendum**

## **RULES ADDENDUM**

### **Arizona Rules of Professional Conduct:**

**Rule 1.9 (a):** “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”

**Rule 1.10 (a):** “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

**Local Rules of Practice, Arizona Dist. Ct., Rule 83.2:** “The ‘Rules of Professional Conduct,’ in the Rules of the Supreme Court of the State of Arizona, shall apply to attorneys admitted or otherwise authorized to practice before the United States District Court for the District of Arizona.