



1 **I. BACKGROUND**

2 In the underlying action, plaintiff brings claims against IITK and various others for breach  
3 of contract, fraud, and misappropriation of trade secrets. Dkt. No. 305, Ex. 1. Since 2009, Orrick  
4 has represented IITK in connection with plaintiff’s claims. Dkt. No. 25. On May 20, 2011, Orrick  
5 approached plaintiff’s counsel with a waiver of conflict so that it could hire Mr. Jeffrey McKenna  
6 to work in Orrick’s Bay Area practice. Dkt. No. 310.

7 Previously, Mr. McKenna worked as a mid-level associate at Skadden, Arps, Slate,  
8 Meagher & Flom LLP (“Skadden”). At Skadden, he participated in the representation of plaintiff in  
9 a wrongful termination suit against her former employer, HT Oil LLP, (the “HT Oil action”) that  
10 included causes of action for violations of the California Labor Code, fraudulent inducement,  
11 negligent misrepresentation, breach of contract, breach of the covenant of good faith and fair  
12 dealing, and defamation. *See* Dkt. No. 305, Ex. 2. These claims stemmed from a fraud allegedly  
13 perpetrated by one of the general partners of HT Oil. *See* Dkt. No. 310, Ex. 2.

14 From July 2007 to September 2007, Mr. McKenna billed 224 hours on plaintiff’s HT Oil  
15 action. Dkt. No. 310, Ex. 2. Although plaintiff and Mr. McKenna did not personally meet while he  
16 worked on the matter, *see* Dkt. No. 382, plaintiff alleges that Mr. McKenna performed extensive  
17 work on the case, including drafting of documentation relating to summary judgment motions,  
18 researching a defamation cause of action and various contractual causes of action, attending  
19 hearings, reviewing depositions, interacting with the chief architect of plaintiff’s litigation strategy,  
20 attorney Jose Allen, as well as reporting directly to him on all matters. *See* Dkt. No. 310, Ex. 2.  
21 Plaintiff also alleges that during this time she “shared information about her technology, its  
22 perceived value, her work with the IITK joint venture, and the impact of that experience on her  
23 career and net worth” with Mr. Allen and his team. *Id.* Plaintiff’s billing records show that Mr.  
24 McKenna performed at least the following specific tasks:

- 25 July 13, 2007 CONFER WITH J. ALLEN RE MSJ OPPOSITION AND  
26 STRATEGY DISUCSSION RE DEPOSITION SCHEDULE...
- 27 August 3, 2007 CONFER WITH J. ALLEN REGARDING STRATEGY...

28 *Id.*

1           Because of Mr. McKenna’s history, plaintiff initially declined to consent to the requested  
2 waiver. However, plaintiff later agreed not to seek disqualification of Orrick on the grounds of Mr.  
3 McKenna’s hiring, provided that Orrick agreed to a suitable ethical wall. On September 30, 2011,  
4 the parties reached stipulation including the following terms:

- 5           (g)     During the pendency of the Current Action (and any subsequent litigation involving  
6 the current dispute between Ms. Farhang and Defendant IITK or its affiliates), in  
7 which Orrick represents IITK and/or its affiliates, Mr. McKenna will not reside in  
8 the same physical office building as Neel Chatterjee, Theresa Sutton, or whichever  
9 attorney is then current lead attorney for the IITK matter.
- 10           (h)     Maintenance of the ethical wall will be monitored by an attorney who (1) does not  
11 reside in the same office as the principal headquarters for the lead Orrick attorneys  
12 responsible for the IITK representation (currently Orrick’s Silicon Valley office),  
13 (2) is not a member of Orrick’s intellectual property practice group.

14           Dkt. No. 323, ¶ 1(g)-(h). Plaintiff indicated that it “would not seek to disqualify Orrick based upon  
15 Mr. McKenna’s employment,” so long as Orrick complied with the agreed upon stipulation. Dkt.  
16 No. 323.

17           After agreeing to the terms of the stipulation, Mr. McKenna was hired in Orrick’s e-  
18 discovery practice group in the firm’s San Francisco office. *See* Dkt. No. 384. Mr. James E.  
19 Thompson, an associate in Orrick’s securities litigation practice group in San Francisco, was  
20 tasked with monitoring the maintenance of the ethical wall.

21           Plaintiff alleges that Orrick has breached the terms of the stipulation by appointing partner  
22 Karen Johnson-McKewan, who works on the same floor of the San Francisco office as Mr.  
23 McKenna, to the role of co-lead, or lead attorney on the IITK matter. Plaintiff grounds this  
24 contention, among other things, on Ms. Johnson-McKewan’s appearance at a February 17, 2012  
25 case management conference, which plaintiff alleges was in fact a Rule 26(f) conference. *See* Dkt.  
26 No. 382. Ms. Johnson-McKewan was also listed as lead attorney when her appearance was entered  
27 by Orrick on the ECF docket. Orrick concedes that Ms. Johnson-McKewan “filled in” for Neel  
28 Chatterjee on occasion, but contends that she was not appointed lead attorney on the matter. *See*  
Dkt. No. 386, Chatterjee Decl. When plaintiff raised the issue of a stipulation violation at the  
February 17, 2012 conference, Ms. Johnson-McKewan informed the court that she was unaware of

1 the stipulation and did not know Mr. McKenna because Orrick’s “San Francisco office is quite  
2 large.” Dkt. No. 382, Ex. C. She advised the court that the parties would meet and confer to  
3 discuss the issue.

4 The parties have been unable to resolve this dispute. Orrick has since moved Mr. McKenna  
5 from the seventh floor of Orrick’s San Francisco office to the ninth floor. *See* Dkt. No. 389,  
6 Thompson Decl. Plaintiff now argues that Orrick should either (1) remove Ms. Johnson-McKewan  
7 from representation of IITK in this matter (and all related matters) as long as she is principally  
8 located in San Francisco<sup>1</sup> or (2) remove Mr. McKenna from the Bay Area if both Orrick’s Silicon  
9 Valley office and San Francisco office remain involved in the instant action. Alternatively,  
10 plaintiff seeks disqualification of Orrick should Orrick fail to comply with the above conditions or  
11 if the court deems the current circumstances sufficient to constitute a violation of the State Bar  
12 Rules of Professional Conduct.

## 13 II. DISCUSSION

14 At the outset, the court notes that it is not expressing an opinion as to whether Mr.  
15 McKenna possesses confidential information as a result of his participation in the representation of  
16 plaintiff while he worked at Skadden, or whether a substantial relationship exists between the  
17 instant action and plaintiff’s previous action against her former employer. Although the parties  
18 devote a great deal of attention in their papers to these issues, plaintiff’s primary purpose in filing  
19 the instant motion appears to be ensuring Orrick’s compliance with the stipulation agreement.  
20 Accordingly, the court narrows its discussion to two issues: (1) whether Ms. Johnson-McKewan is  
21 “lead attorney” on the IITK matter, and (2) if so, whether Orrick has complied with the stipulation  
22 by moving Mr. McKenna from the seventh floor of the firm’s San Francisco office, where Ms.  
23 Johnson-McKewan resides, to the ninth floor.

24 “Lead attorney” is not defined in the stipulation. The stipulation is also ambiguous as to  
25 whether there can be only one “lead attorney” or multiple lead attorneys. The purpose of the  
26 stipulation seems to be preventing interaction between Mr. McKenna and *any* Orrick lawyer with

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28 <sup>1</sup> Orrick maintains that Ms. Johnson-McKewan splits her time between Orrick’s San Francisco and  
Silicon Valley offices, though she spends most of her time in the San Francisco office. *See* Dkt.  
No. 388, Johnson-McKewan Decl.

1 policy-making authority, which suggests that there could be more than one “lead attorney.”  
2 Furthermore, the stipulation states that “maintenance of the ethical wall will be monitored by an  
3 attorney who does not reside in the same office as the... *lead Orrick attorneys*...” Dkt. No. 323, ¶  
4 1(h) (emphasis added), suggesting that there can be more than one lead attorney. As such, the court  
5 finds that the stipulation allows for more than one “lead attorney,” and now turns to Ms. Johnson-  
6 McKewan’s involvement in the case.

7 It is undisputed that Ms. Johnson-McKewan appeared at a February 17, 2012 case  
8 management conference on behalf of IITK. *See* Dkt. No. 383, Ex. C. In leading to that appearance,  
9 Theresa Sutton emailed plaintiff’s counsel about setting a date for a Rule 26(f) conference, noting  
10 that “the Rule 26 conference is a good opportunity to discuss a solution before the parties begin  
11 unbridled discovery. We should attempt to find a time to conduct such a meeting.” Dkt. No. 383,  
12 Ex. D. Further, Ms. Sutton stated in another email, “We are amenable to setting up a Rule 26(f)  
13 conference in February...” *Id.* The February 17, 2012 conference was the first date the parties  
14 appeared before the court after these emails. *Id.* at Ex. C. The parties discussed the discovery  
15 schedule at this conference and Ms. Johnson-McKewan was present and addressed the court on  
16 behalf of IITK. *Id.* “The conferring and planning that is mandated by [Rule] 26(f) and by ADR  
17 Local Rule 3-5 must be done by lead trial counsel for each party.” Civil L.R. 16-3. Orrick contends  
18 that the conference was not intended to be a Rule 26(f) conference, but just a status conference.  
19 Whether the February 17, 2012 conference was a Rule 26(f) conference or not, the court finds it  
20 clear that only a person with policy-making authority would have participated at the conference.

21 Additionally, the court notes that Ms. Johnson-McKewan was listed as lead attorney on the  
22 Official Court Document Filing System (“ECF”). Orrick contends that a secretary “accidentally”  
23 designated her as lead attorney for the case. While the court certainly appreciates secretarial  
24 mishaps, Ms. Johnson-McKewan’s designation as lead attorney, along with her purported lack of  
25 knowledge of the stipulation is indicative of Orrick’s somewhat *laissez-faire* approach to  
26 complying with the stipulation.

27 Accordingly, for the purposes of this stipulation, the court finds that Ms. Johnson-  
28 McKewan has assumed the role of “lead attorney.”

