

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF DALLAS,
Plaintiff,

v.

DELTA AIR LINES, INC., *et al.*,
Defendants.

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Civil Action No. 3:15-cv-02069-K

**PLAINTIFF CITY OF DALLAS' EMERGENCY MOTION FOR DISQUALIFICATION
AND BRIEF IN SUPPORT**

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**PLAINTIFF CITY OF DALLAS' EMERGENCY MOTION FOR DISQUALIFICATION
AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, the City of Dallas (the "City"), files this Emergency Motion for Disqualification and Brief in Support (the "Motion"), to disqualify Gibson Dunn and Crutcher, LLP ("Gibson Dunn") and its lawyers from representing defendant Delta Air Lines, Inc. ("Delta") in this civil action, and shows the Court as follows:

I. INTRODUCTION

The firm biography of Gibson Dunn partner, Robert C. Walters ("Walters"), boasts that he "*both represented the City of Dallas before Congress in securing the Wright Amendment Reform Act and as lead counsel in defeating private antitrust litigation stemming from the Act.*" (emphasis added). Despite Walters' previous role¹ in these high-profile, contentious, and complicated matters, and in violation of multiple ethical rules, Walters now proposes to represent defendant Delta — a company that has repeatedly threatened the City with litigation based on positions that directly conflict with the very positions that Walters advanced on behalf of the City approximately ten years ago and that the City asserts in the current lawsuit. Accordingly,

¹ At the time of his prior representation of the City relevant to the instant case, Walters was a partner at Vinson & Elkins, LLP ("V&E"), not at the Gibson Dunn firm.

the Court should immediately disqualify Walters and bar him (and any other Gibson Dunn lawyers who are now at Gibson Dunn but who were at V&E and while at V&E worked Five Party Agreement, WARA, and anti-competitive issues that form the basis for the instant motion) from representing or otherwise providing legal services to Delta in connection with this lawsuit and any other matter stemming from the issues described in the City's Original Complaint.² (ECF 1) Due to the filing of Southwest's Verified Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction Against Delta Air Lines, Inc. ("TRO Application") (ECF 10, 11), and the Court's subsequent order to expedite the parties' briefing regarding the TRO Application (ECF 13), the City respectfully requests that the Court likewise order an expedited briefing schedule for this Motion, hold oral argument on the Motion, and grant the Motion prior to any hearing or decision on any TRO Application or other issue as to which Gibson Dunn represents Delta in order to prevent any further improper involvement by Walters or other disqualified lawyers at Gibson Dunn on this matter.

II. FACTS³

1. The City owns and operates the airport generally known as Dallas Love Field in the City and County of Dallas, Texas, in this district. This lawsuit centers on Delta's demands for permanent accommodation of its flights at that airport under color of the City's obligations to further competition at Love Field under title 49 of the U.S. Code.

² In response to the filing of the City's Original Complaint, Delta has threatened to file a Part 16 DOT administrative complaint against the City "for violations of its federal obligations" in connection with Delta's request for gate accommodation. App. at 0044.

³ For a complete recitation of the lengthy and complicated factual background of this case, the City respectfully directs the Court to paragraphs 26 through 83 of its Original Complaint, (ECF 1), which it incorporates by reference herein.

The Wright Amendment and Its Substantial Repeal

2. In 1980, Congress adopted the Wright Amendment. (Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980)). Under the Wright Amendment, flight operations from Love Field were generally limited to Texas and four adjacent states. In early 2006, after several piecemeal amendments adding states that could be served directly from Love Field, members of Congress suggested that the cities of Dallas and Fort Worth propose a long-term solution to the Wright Amendment's limitations on Love Field flight operations.

3. On or about July 11, 2006, the City of Dallas, the City of Fort Worth, the Dallas-Fort Worth International Airport ("DFW Airport") Board, Southwest Airlines Co. ("Southwest"), and American Airlines, Inc. ("American") entered into an agreement (the "Five Party Agreement"). App. at 0029-0039. The underlying principle of the Five Party Agreement was to resolve the manner in which service could be provided at Love Field in the future. The Five Party Agreement provided that Southwest would obtain preferential use of 16 gates and two other airlines would obtain preferential use of the remaining four gates. Southwest agreed not to operate from DFW Airport unless it surrendered a Love Field gate, up to eight gates, for each DFW gate that it acquired. Flight operations were limited to 6:00 a.m. to 11:00 p.m. and no international flights would originate from Love Field. The number of gates at Love Field would be reduced from the then existing 32 gates to 20. The agreement also stated, "To the extent a new entrant carrier seeks to enter Love Field, [the City] will seek voluntary accommodation from existing carriers" but if an agreement was not reached then the City agreed "to require the sharing of any preferential lease gates, pursuant to the terms of existing lease agreements." App. at 0031.

4. In addition, the Five Party Agreement required the parties to “agree to seek the enactment of legislation to allow for the full implementation of this Contract ... amending ... the ‘Wright Amendment’ and ultimately effect its repeal” App. at 0030. The Five Party Agreement further provided that it would become “null and void” if Congress did not enact legislation by December 31, 2006. App. at 0035.

5. On or about July 27, 2006, the City retained the V&E law firm to represent the City in litigation and related matters involving Love Field and the Wright Amendment compromise. App. at 0064-0072, 0086. At the time, Walters was a partner at V&E. App. at 0062-0063, 0095.

6. Thereafter, Walters devoted a significant amount of time advocating for the City with respect to proposed amendments to the Wright Amendment and title 49. Among other things, Walters:

- a. “Stud[ied] various versions of antitrust legislation” App. at 0104.
- b. “Stud[ied] additional cases regarding exemptions and Title 49 application” App. at 0105.
- c. “Review[ed] proposed legislative language regarding federal government enforcement” App. at 0111.
- d. Prepared for, and participated in, numerous telephone conferences and meetings with lobbyists, various senators and other “legislative representatives,” the City’s mayor, and attorneys from the Federal Aviation Administration (“FAA”), Southwest, and American (all three are additional co-defendants here) App. at 0103-0106, 0111-0115.

- e. “Prepare[d] for and participate[d] in...telephone conferences regarding antitrust experts to sign letter to Congress” App. at 0111.
- f. “Draft[ed] letters for Congress regarding Wright Amendment issues” App. at 0111-0112.
- g. Studied and revised proposed Wright Amendment language App. at 0105-0106, 0113-0114.
- i. “Work[ed] with Senator Hutchison’s staff on final revisions to legislation” App. at 0116.
- h. “[W]orked on alternatives to 5(a) formulation” App. at 0115.
- i. “Prepare[d] bullet point memorandum for Senators Hutchison and Cornyn” App. at 0115.
- j. “Redraft[ed] letter from City Council” App. at 0115.
- k. “[S]tud[ied] and revise[d] letter to Congress from mayors and secured clearance of submission of letter to Congress” App. at 0116.
- l. “Prepare[d] script for Congressional record” App. at 0116.
- m. Sent emails “regarding antitrust issues with House Judiciary Committee and Justice Department” App. at 0103.

In less than two months, Walters alone billed more than 117 hours largely related to Wright Amendment issues, resulting in bills to the City exceeding \$55,000 in legal fees associated with his work. App. at 0102-0118.

7. On October 13, 2006, Congress adopted the Wright Amendment Reform Act of 2006 Pub. L. 109-352, 120 Stat. 2011 (2006) (“WARA”). App. at 0013-0017. WARA incorporated and adopted many of the terms of the Five Party Agreement as federal law,

although several other provisions of the Five Party Agreement remain in force as contractual obligations independent of WARA. The statute repealed the Wright Amendment limitations on long-distance domestic flights, with the repeal becoming effective in 2014. App. at 0013. Under WARA, international flights were banned from originating at Love Field and Southwest was barred from operating at DFW Airport unless it gave up a Love Field gate, up to eight gates, for each gate used at DFW. *Id.* The City was required to reduce the 32 existing gates to a total of 20 gates. App. at 0015. WARA also required the City to “determine the allocation of leased gates and manage Love Field in accordance with the contractual rights and obligations existing as of the effective date of [WARA] for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006. *Id.* “To accommodate new entrant air carriers, [the City] shall honor the scarce resource provision of the existing Love Field leases.” *Id.*

8. WARA provided that neither FAA nor the U.S. Department of Transportation (“DOT”) (DOT is also a defendant here) could take action that was inconsistent with the Five Party Agreement or that challenged the legality of any provision of the agreement. *Id.* As noted above, the Five Party Agreement gave the Signatory Airlines, including Southwest, preferential gate rights. WARA also provided that it did not limit FAA, DOT, or other federal agency from enforcing requirements of law or grant assurances that imposed obligations to make Love Field available on a reasonable and nondiscriminatory basis to air carriers seeking to use its facilities *except* that the Act could not be construed to require the City “to modify or eliminate preferential gate leases with air carriers in order to allocate gate capacity to new entrants or to create common use gates, unless such modification or elimination is implemented on a nationwide basis.” App. at 0016.

9. Further, WARA provided that the Five Party Agreement “and any actions taken by the parties to such contract that are reasonably necessary to implement its provisions, shall be deemed to comply in all respects with the parties’ obligations under title 49, United States Code.” App. at 0016.

WARA Litigation

10. Several lawsuits were filed against the City in connection with the Five Party Agreement and WARA. App. at 0061, 0064, 0082. V&E, while Walters remained a V&E partner, represented the City in those cases, and Walters took the lead in the federal court antitrust case styled, *Love Terminal Partners, L.P. et al. v. City of Dallas, Texas et al.*, Cause No. 3:06-CV-01279 (N.D. Tex.) (“*Love Terminal Partners*”). App. at 0061-0072, 0082, 0086, 0095; *see also Love Terminal Partners* (ECF 33 at 3).⁴ The plaintiffs in that case held leasehold interests in land located at Love Field on which a passenger terminal was situated, and they brought antitrust claims against the City and others, alleging “that defendants engaged in an illegal conspiracy to allocate markets between horizontal competitors—American and Southwest—ultimately resulting in a contractual commitment by Dallas to demolish the LTP Terminal, and enactment of [WARA].” *Love Terminal Partners* (ECF 110 at 2). According to the plaintiffs, “the lynchpin of [the Five Party Agreement] is the undertaking...to eliminate gate capacity at Dallas Love Field.” *Love Terminal Partners* (ECF 1 at 2). The plaintiffs further characterized the Five Party Agreement as “a wildly pernicious and anti-competitive arrangement...to limit air carrier operations and consumer choices for air travelers in North Texas.” *Love Terminal Partners* (ECF 1 at 13). Judge Fitzwater granted the defendants’ second motion to dismiss, which disposed of the case. *Id.* at 1.

⁴ The City respectfully requests that the Court take judicial notice of the filings in *Love Terminal Partners*.

11. Walters was actively involved in the preparation of the City's motion to dismiss briefing in *Love Terminal Partners*. App. at 0119-0136. Significantly, in that briefing, Walters and others argued, among other things, that "defendants' actions after enactment of [WARA] are compelled by Congress, and therefore cannot give rise to antitrust liability." *Love Terminal Partners* (ECF 33 at 1-2). In his role as advocate for the City, Walters also stated in dismissal briefs:

- a. "As Congress recognized, its enactment of [WARA] will greatly benefit not only the citizens in the Dallas-Fort Worth area, but also millions of consumers throughout the nation who use Love Field and the Dallas-Fort Worth International Airport. The legislation has and will continue to promote airline competition in North Texas, thus enabling consumers to save hundreds of millions of dollars in air fares each year." *Love Terminal Partners* (ECF 33-2 at 8).
- b. "Significantly, Section 5(a) [of WARA] mandates Dallas to reduce the number of gates at Love Field from 32 to 20, and requires Dallas to determine the allocation of leased gates and manage Love Field in accordance with [the Five Party Agreement] entered into by the parties." *Id.* at 12.
- c. "[WARA] further provides that the FAA may not take any actions inconsistent with [the Five Party Agreement] or challenge the legality of its provisions." *Id.* at 13-14.
- d. "[WARA] also compels the City of Dallas to (a) reduce the number of gates at Love Field to 20; (b) allocate those gates and manage Love Field in accordance with [the Five Party Agreement]; and (c) enforce provisions of the existing Love Field leases, including leases with American and Southwest." *Love Terminal Partners* (ECF 58 at 13).

12. In addition, Walters point to the deletion of an antitrust savings clause originally included in the bill that would eventually become WARA as a sign of “clear Congressional intent to confer immunity on the defendants for performing [the Five Party Agreement] under Congressional mandate.” *Love Terminal Partners*, ECF 58 at 29-30.

13. Walters also engaged in settlement negotiations on behalf of the City in *Love Terminal Partners*, including preparing for, attending, and presenting at mediation. App. at 0138, 0140-0141.

14. Walters’ online firm biography on the Gibson Dunn website emphasizes his representation of the City in connection with WARA and in *Love Terminal Partners*. App. at 0095. In 2008, Walters left V&E and subsequently joined the Gibson Dunn law firm, where Walters currently works and serves as Partner-in-Charge of the firm’s Dallas office. App. at 0095. In his firm biography, which appears on Gibson Dunn’s website, Walters highlights that he “*both represented the City of Dallas before Congress in securing the Wright Amendment Reform Act and as lead counsel in defeating private antitrust litigation stemming from the Act.*” App. at 0095. (emphasis added).

Delta’s Demand for Accommodation and Current Circumstances

15. The City has lease agreements running through 2028 with Southwest, United Airlines, Inc. (“United”), and American for the preferential use of the 20 gates at Love Field and for the use of other airport facilities.⁵ Southwest currently allows Delta to operate under a gate use agreement. However, Delta’s latest temporary permission to use gate slots for which

⁵ Southwest, United, and American are sometimes collectively termed the “Signatory Airlines” because they have signed leases for Love Field.

Southwest claims preferential lease rights expires on July 6, 2015.⁶ Delta has requested, but not received, permanent accommodation of its flights at Love Field.

16. DOT is the parent agency of the FAA (DOT and FAA, together are the “Federal Agencies”). The Federal Agencies regulate many facets of Love Field operations. Among other things, under the authority of title 49, U.S. Code, DOT enforces competition standards for Love Field and other airports and the FAA administers monetary grants to Love Field and other airports. In addition, FAA has authorized the City to collect passenger facility charges (sometimes called “PFCs”) from departing Love Field passengers to help finance Love Field improvements. These Federal Agencies have told the City that the City’s title 49 responsibilities to foster competition require the City to provide long-term gate accommodation to Delta at Love Field gates leased by Southwest regardless of Southwest’s plans to uses the gates, at least if those plans were announced after Delta’s gate request. The Federal Agencies further state that this accommodation must last for as long as Delta maintains the same pattern of service regardless of Southwest’s future gate use plans.

17. The Federal Agencies’ directions to the City are in two letters. On December 17, 2014, DOT General Counsel sent the Dallas City Attorney the first letter which established DOT’s position on Delta’s gate accommodation request and instructed the City how to handle that request (“First DOT Letter”). App. at 0005-0007, 0049-0051. On June 15, 2015, DOT General Counsel sent a Dallas Assistant City Attorney a second letter incorporating the First DOT Letter by reference, and elaborating and expanding on several provisions of the First DOT Letter (“Second DOT Letter”) (the First DOT Letter and the Second DOT Letter, collectively, the “DOT Letters”). App. at 0009-0012, 0052-0055. The Second DOT Letter, among other

⁶ Delta is currently refusing to vacate its space at Love Field even after the license agreement with Southwest terminates on July 6, 2015. ECF 12 at App. 027-28. Additionally, Delta is continuing to accept flight reservations for its current flight schedule at Love Field for flights after July 6, 2015. *Id.* at App. 030.

things, explicitly asserted that the City's aviation grant eligibility for Love Field would be conditioned on compliance with the views expressed in the First DOT Letter.

18. Delta, through its counsel, has repeatedly expressed its full support of the DOT letters and its adoption of the Federal Agencies' legal interpretations and guidance. App. at 0043-0044, 0056. In his June 19, 2015 e-mail to a Dallas Assistant City Attorney, Walters wrote, "[T]he City is obligated under its Competition Plan for Love Field and under federal law, *as reflected in DOT's letters to the City of December 17, 2014 and June 15, 2015*, to support Delta's entitlement to operate its current and planned flights." App. at 0056 (emphasis added). Walters also stated that "Delta does not seek rights at Love Field beyond those confirmed by DOT" and that "the City is obligated to support [DOT's] position." *Id.* On the same date, Kenneth Quinn ("Quinn"), another attorney representing Delta, similarly relied on the DOT Letters, accused the City of "*engaging directly in anticompetitive, collusive conduct*" and "breach[ing] its federal obligations, including to prevent unjust discrimination and the grant of an exclusive right at [Love Field]," and notified the City of Delta's intent to file a Part 16 complaint unless the City grants Delta the requested accommodation. App. at 0043-0044. Neither of the DOT Letters addresses WARA, which sets forth legal obligations for the operations of Love Field by which the federal government and others must comply.

19. At no time did Walters obtain consent from the City to act as counsel for Delta in this litigation. App. at 0001-0002, 0056. The City did consent to Walters representing Delta in the lengthy discussions preceding the litigation in reliance on Walters' representation that his sole role was to attempt to achieve a compromise among the parties – which has been the City's goal all along. *Id.* That consent did not extend to any role in any litigation over gate rights that might ensue if negotiations failed, and the City reserved all rights as to litigation objections. *Id.*

20. The City has repeatedly urged Walters not to represent Delta in this litigation based on his conflict of interest arising from his prior representation of the City. *Id.* He has declined those requests and advised the City that he intends to represent Delta in the instant action. *Id.*

III. ARGUMENTS AND AUTHORITIES

21. “A district court is *obliged* to take measures against unethical conduct occurring in connection with any proceeding before it.” *In re Am. Airlines, Inc.*, 972 F.2d 605, 611 (5th Cir. 1992) (emphasis in original). A motion to disqualify counsel “is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court.” *Id.* “Courts are required to address such motions because if they do not, conflicts may not be addressed at all, and it is the Court’s ‘business’ and ‘responsibility’ to address such conflicts.” *Hill v. Hunt*, No. 3:07-CV-02020-O, 2008 WL 4108120, at *2 (N.D. Tex. Sept. 4, 2008) (citing *In re Am. Airlines*, 972 F.2d at 611). “Unethical conduct does not have to threaten to taint proceedings to make disqualification proper.” *Id.*

A. Legal Standard

22. “When considering motions to disqualify, courts should first look to the local rules promulgated by the local court itself.” *In re ProEducation Int’l, Inc.*, 587 F.3d 296, 299 (5th Cir. 2009). The Local Rules of this Court state that a presiding judge may take any appropriate disciplinary action against a member of the bar for, among other things, unethical behavior, which is defined as “conduct undertaken in or related to a civil action in this court that violates the Texas Disciplinary Rules of Professional Conduct.” N.D. Tex. Civ. R. 83.8(b), (e). However, the Texas Rules are not the sole authority governing a motion to disqualify. *In re Am. Airlines*, 972 F.2d at 610. “Disqualification cases are governed by the ethical rules announced

by the national profession in light of the public interest and the litigants' rights.” *Id.* The Fifth Circuit has recognized the American Bar Association Model Rules of Professional Conduct (the “Model Rules”) as the national standard to consider in reviewing motions to disqualify.” *U.S. ex rel. S. Rock, Inc. v. Precision Impact Recovery, LLC*, No. 3:10-CV-1924-K, 2011 WL 609902, at *2 (N.D. Tex. Feb. 14, 2011) (citing *In re Am. Airlines*, 972 F.2d at 612). Thus, it is necessary to analyze both the Texas Rules and the Model Rules in this case. *See Precision Impact Recovery*, 2011 WL 609902, at *2.

B. Walters’ Proposed Ethical Violations

1. *Attorney-Client Relationship*

23. A party seeking to disqualify opposing counsel on the grounds of current and/or former representation must first establish that an actual attorney-client relationship existed between the party and the attorney he or she seeks to disqualify. *See In re Corrugated Container Antitrust Litig.*, 659 F.2d 1341, 1345 (5th Cir. 1981) (abrogated on other grounds by *Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984)); *Precision Impact Recovery*, 2011 WL 609902, at *3. When an attorney-client relationship is established, the relation generally terminates once the purpose of the employment is completed, absent a contrary agreement. *Simpson v. James*, 903 F.2d 372, 376 (5th Cir. 1990).

24. Here, it is beyond dispute that an attorney-client relationship existed between the City and Walters. In July 2006, the City hired V&E to represent it in litigation and related matters involving Love Field and the Wright Amendment compromise, and Walters admits that he “represented the City of Dallas before Congress in securing [WARA] and as lead counsel in defeating private antitrust litigation stemming from the Act.” App. at 0061, 0064, 0082, 0086, 0095. As such, the City is Walters’ former client.

2. *Applicable Ethical Rules*

25. ABA Model Rule 1.9 and Texas Disciplinary Rule of Professional Conduct 1.09⁷ (“Texas Rule 1.09”) govern conflicts of interests with former clients. “Despite small linguistic differences, ‘the two codes produce the same result in application.’” *Precision Impact Recovery*, 2011 WL 609902, at *2 (citing *In the Matter of: Proeducation Int’l, Inc.*, 587 F.3d 296, 301 (5th Cir. 2009) (comparing Texas Rule 1.09 and Model Rule 1.9)). Under both rules, “a lawyer may not represent a party in a manner adverse to a former client in the same or substantially similar matter as the former representation” without prior consent.⁸ *Precision Impact Recovery*, 2011 WL 609902, at *2. Thus, in addition to establishing the existence of an actual attorney-client relationship, a party seeking disqualification for a violation of these ethical rules must show that (1) there is a substantial relationship between the former and present representations and (2) that the parties are adverse. *See Precision Impact Recovery*, 2011 WL 609902, at *3.

a. **Substantial Relationship**

26. “[A] substantial relationship may be found only after the moving party delineates with specificity the subject matters, issues and causes of action common to prior and current representations and the court engages in a painstaking analysis of the facts and precise application of precedent.” *In re Am. Airlines*, 972 F.2d at 614. “[T]he subject matter does not need to be ‘relevant’ in the evidentiary sense to be ‘substantially related.’” *Id.* at 623. “It need only be akin to the present action in a way reasonable persons would understand as important to the issues involved.” *Id.* “Once it is established that the prior matters are substantially related to the present case, the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation.” *Id.* at 614.

⁷ Reprinted in Tex. Gov’t Code, tit. 2, subtit. G, app. A, Art. 10, § 9.

⁸ Notably, Model Rule 1.9 requires *written* consent.

27. Here, Walters claims that there is no “overlap” between the work he previously performed for the City and the work he is currently doing for Delta because the former focused on antitrust issues and the latter focuses on the question of “whether and how the City must follow a federal agency’s 2014-2015 action under the Federal Aviation Act concerning forced accommodation at Love Field.” App. at 0056. On the very same day, however, another Delta attorney directly accused the City of “*engaging directly in anticompetitive, collusive conduct*” and “breach[ing] its federal obligations, including to prevent unjust discrimination and the grant of an exclusive right at [Love Field].” App. at 0043-0044 (emphasis added).

28. As demonstrated by his timekeeping entries, Walters played an integral role in the passage of WARA and became intimately familiar in the course and furtherance of his representation of the City with the antitrust issues (like Delta’s) that were raised or could have been raised during the legislative process. *See Motion* ¶ 6, *supra*. Moreover, in *Love Terminal Partners*, the antitrust case Walters defended on behalf of the City, the plaintiffs (like Delta) asserted that the City had “engaged in an illegal conspiracy to allocate markets between horizontal competitors—American and Southwest” and that the Five Party Agreement was “a wildly pernicious and anti-competitive arrangement...[designed] to limit air carrier operations and consumer choices for air travelers in North Texas.” *See Motion* ¶ 10, *supra*. As defense counsel for the City, Walters argued that WARA and the Five Party Agreement (the same legal authorities Delta now seeks to ignore in favor of the positions expressed in the DOT Letters) operate to protect the City from antitrust liability; the City makes the same claims in this lawsuit. *See Motion* ¶¶ 11, 16-18, *supra*; *see, e.g.*, Original Complaint, (ECF 1), at ¶¶ 8, 15, 32, 34-37. Because the crux of Delta’s current complaint regarding its accommodation request is steeped in

antitrust law, which is inextricably intertwined with his work for the City, Walters' previous representation of the City is substantially related to his current work for Delta.

b. Adversity

29. The adversity element of ABA Model Rule 1.9 and Texas Rule 1.09 is likewise satisfied. *See U.S. ex rel. S. Rock, Inc. v. Precision Impact Recovery, LLC*, No. 3:10-CV-1924-K, 2011 WL 609902, at *3 (N.D. Tex. Feb. 14, 2011). Walters attempts to argue that no adversity exists because "Delta seeks the right to operate at Love Field under federal law, as reflected in DOT's letters to the City, and the City is obligated to support that position." App. at 0056. However, Delta has blatantly accused the City of "anticompetitive, collusive conduct" and explicitly threatened to file a Part 16 complaint unless the City grants Delta the requested accommodation immediately. App. at 0044. Delta clearly opposes the relief requested in the City's Complaint for judicial clarification, instruction, and protection for the City's actions on Delta's gate accommodation requests. Delta demands that the City act immediately without judicial imprimatur.

30. In addition to these attacks on the City, Delta—through its counsel—continues to advocate positions which directly conflict with the very positions that Walters advanced on behalf of the City approximately 10 years ago and that the City asserts in the current lawsuit. Here, the City has requested declaratory judgment as to the following:

- a. The Airlines claim competing and conflicting rights based on federal law, including WARA and title 49. *See* Original Complaint, ¶ 15 (ECF 1, ¶ 15)
- b. The City claims the right under WARA not to be required to limit Signatory Airlines' preferential gate rights at Love Field to accommodate other air carriers when the accommodations will unduly interfere with the Signatory Airlines' flight

schedules regardless of the limits imposed by the DOT Letters because the limits on such City's rights imposed by the DOT Letters directly conflict with the express terms of WARA.

- c. The City claims the right under WARA to decline to mandate accommodation of gate use requests from any air carrier to the extent that granting the request would unduly interfere with the flight schedules of any Signatory Airlines regardless of the limits imposed by the DOT Letters, because the limits on such City's rights imposed by the DOT Letters directly conflict with the express terms of WARA.
- d. The City claims eligibility under the authority of WARA for Airport Improvement Program (AIP) grants from the FAA under 49 U.S.C. § 47107, regardless of the disqualification for such grants imposed by the DOT Letters so long as the City provides gate access to preferential gates at Love Field in accordance with WARA.
- e. The City is protected by WARA from DOT and FAA interference with its compliance with the Five Party Agreement and the leases for Love Field of the Signatory Airlines, except that DOT could interfere with the Signatory Airlines' preferential gate rights if it did so on a nationwide basis.
- f. The City is protected by WARA from any obligation to modify its Love Field lease with Signatory Airlines that arguably might arise from the threat in the Second DOT Letter to the City's AIP grants because the circumstances of DOT's threat are not based on a review of the lease as required to trigger the lease modification requirement, and DOT has already reviewed and approved the City's

competition plan, which incorporates the lease's scarce resource terms and WARA codifies those lease terms as well.

- g. If the City is obligated to mandate the terms of gate accommodations at Love Field, it is permitted by WARA to include in those terms an amount of compensation from the requesting air carrier to the accommodating Signatory Airline that include consideration of the Signatory Airline's indirect costs including amounts actually paid by the Signatory Airlines for the use of gates and fair market values of gates, despite the prohibition against such considerations in the DOT Letters.

31. In advocating Delta's view that the DOT Letters trump WARA and the Five Party Agreement, Walters flatly contradicts many of the statements he made in defense of the City in the *Love Terminal Partners* litigation, such as:

- a. "Significantly, Section 5(a) [of WARA] ... requires Dallas to determine the allocation of leased gates and manage Love Field in accordance with [the Five Party Agreement] entered into by the parties." *Love Terminal Partners* (ECF 33-2 at 12).
- b. "[WARA] further provides that the FAA may not take any actions inconsistent with [the Five Party Agreement] or challenge the legality of its provisions." *Id.* at 13-14.

32. "[WARA] also compels the City of Dallas to (a) reduce the number of gates at Love Field to 20; (b) allocate those gates and manage Love Field in accordance with [the Five Party Agreement]; and (c) enforce provisions of the existing Love Field leases, including leases with American and Southwest." *Love Terminal Partners* (ECF 58 at 13). And by adopting the contents of the DOT Letters, Walters also implicitly challenges his previous assertion on behalf of the City that the "enactment of [WARA] will greatly benefit not only the citizens in the

Dallas-Fort Worth area, but also millions of consumers throughout the nation who use Love Field and the Dallas-Fort Worth International Airport. The legislation has and will continue to promote airline competition in North Texas, thus enabling consumers to save hundreds of millions of dollars in air fares each year.” *Love Terminal Partners* (ECF 33-2 at 8).

33. Based on the foregoing, it is indisputable that the City on one hand, and Walters on behalf of Delta on the other, are adverse.

c. Lack of Consent

34. Because (1) an attorney-client relationship previously existed between the City and Walters, (2) the matters in which Walters represented the City are substantially related to his current representation of Delta, and (3) their interests are adverse, a conflict of interests has arisen. *See* MODEL RULES OF PROF’L CONDUCT R. 1.9; TEX. DISCIPLINARY R. PROF’L CONDUCT 1.09; *U.S. ex rel. S. Rock, Inc. v. Precision Impact Recovery, LLC*, No. 3:10-CV-1924-K, 2011 WL 609902, at *2-*3 (N.D. Tex. Feb. 14, 2011) (Kinkeade, J.). Under such circumstances, the ethical rules require the former client to consent to the new adverse representation. *Id.* Notably, Model Rule 1.09 requires written consent. *See* MODEL RULES OF PROF’L CONDUCT R. 1.9.

The facts establish that Walters never obtained verbal or written consent from the City to act as litigation counsel for Delta in connection with any matters arising from Delta’s accommodation request. App. at 0001-0002, 0056. Indeed, Walters acknowledges that the City raised the issue several months ago, and objected at that time. App. at 0056. Yet Walters continues to represent Delta in contravention of his ethical obligations to the City. App. at 0001-0002, 0056.

35. In an attempt to prevent disqualification, Walters might be trying to assert that the City waived its objection to his representation of Delta by “sanctioning [his] involvement”

during the past year. App. at 0056. To the contrary, by filing this Motion within a week of filing its Original Complaint, and before Walters or Delta appeared in this lawsuit, the City took immediate action to disqualify Walters at its first realistic opportunity, after repeated notice to Walters and to Delta. As the Fifth Circuit explained in *In re American Airlines, Inc.*:

It is not clear that the vitality of [the disciplinary machinery of the state and federal bar] is relevant to the judicial duty of the federal courts to clean its own house. Policy aside, it is equally uncertain that the disciplinary boards have performed this role. Clients and fellow attorneys have little incentive to file formal complaints with disciplinary boards, and the evidence suggests that they in fact do not. This is especially true in cases of alleged conflicts of interest. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 827–28 (1992); Note, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1496–1500 (1981). To a very large extent, unless a conflict is addressed by courts upon a motion for disqualification, it may not be addressed at all. More to the point, it is our business—our responsibility.

972 F.2d 605, 611 (5th Cir. 1992). Since the Fifth Circuit has made clear that a “district court is *obliged* to take measures against unethical conduct occurring in connection with any proceeding before it,” and that “a motion to disqualify counsel is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court,” Walters cannot credibly argue that the City was dilatory in seeking his disqualification and therefore waived the conflict of interests. See *id.* (emphasis in original).

3. *Other Factors*

36. “There can be *exceptional* circumstances where a clear impropriety will not determine the outcome of a motion to disqualify, such as where an attorney shows some social interest to be served by the representation that would outweigh a public perception of impropriety.” *Hill v. Hunt*, No. 3:07-CV-02020-O, 2008 WL 4108120, at *15 (N.D. Tex. Sept. 4, 2008) (citing *In re Dresser Indus., Inc.*, 972 F.2d 540, 544-45 (5th Cir. 1992)) (emphasis added). “In determining whether disqualification is appropriate, a court should consider whether a

conflict has the appearance of impropriety in general or a possibility that a specific impropriety will occur, and the likelihood that public suspicion from the impropriety outweighs any social interest which will be served by the lawyer's continued participation in the case." *am*, 2008 WL 4108120, at *15 (citing *In re Dresser Indus., Inc.*, 972 F.2d at 544 and *Horaist v. Doctor's Hosp. Opelousas*, 255 F.3d 261, 266 (5th Cir. 2001)).

37. The passage of WARA was a very high-profile event that received significant media coverage and impacted not just Dallas residents but the traveling public as a whole. Walters was instrumental in crafting and obtaining passage of WARA. He also defended the City in a federal antitrust lawsuit stemming from WARA. For Walters to now attack the City in connection with Delta's gate accommodation request—another related, high-profile matter—implies that there may be some truth to the allegations that the City has acted in an anticompetitive manner with respect to Love Field and, at a minimum, would reinforce the public's general mistrust of the legal profession. These harms outweigh Delta's interest in retaining Walters as its attorney, particularly since it already has another set of outside attorneys, *i.e.*, Kenneth Quinn and the Pillsbury Winthrop Shaw Pittman LLP firm, already working on this matter. The actual and apparent impropriety created by Walters' continuing representation of Delta must cease immediately.

IV. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the City requests that the Court hold oral argument on Plaintiff City of Dallas' Emergency Motion for Disqualification, and with or without oral argument grant the City's motion in its entirety, disqualify Robert C. Walters (and any other lawyers who are now at Gibson Dunn but who were at V&E and while at V&E worked on the Five Party Agreement, WARA, and anti-competitive issues that form the basis for the

instant motion), and bar those attorneys from (1) representing Delta in connection with litigation to which the City is a party as to Delta's gate accommodation request and (2) consulting with Delta's counsel of record in any matter relating to its gate accommodation request. The City also requests that the Court grant its motion before the Court hears argument or decides any other issue and that the Court grant the City such other relief as the Court finds just.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF DALLAS, TEXAS

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ATTORNEYS FOR PLAINTIFF, CITY OF
DALLAS

CERTIFICATE OF CONFERENCE

I certify that on June 22, 2015, I conferred via telephone with Robert Walters who represented that he was acting as counsel for Defendant Delta, the only other party affected by the relief sought herein, in an effort to resolve the dispute described above without Court action. An agreement could not be reached, and Mr. Walters indicated that he and Delta opposed the relief requested by the above motion. Therefore, the matter is submitted to the Court for determination.

s/ Peter B. Haskell
PETER B. HASKEL

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2015, I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the Northern District of Texas using the electronic case filing system of the Court. Service on all attorneys of record who are Filing Users will be automatically accomplished through Notice of Electronic Filing.

s/ Peter B. Haskell
PETER B. HASKEL