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 APOLLO ENTERPRISE SOLUTIONS, INC.

8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA

11 APOLLO ENTERPRISE SOLUTIONS,
 12 INC., a California corporation,

13 Plaintiff,

14 v.

15 LANTERN CREDIT, LLC, F/K/A
 NEW ENGLAND FUNDING
 16 TECHNOLOGIES, LLC, a Delaware
 limited liability corporation; and DOES
 17 1-10, inclusive,

18 Defendant.

Case No. 2:2017-cv-02331-AB-JC

**MOTION TO DISQUALIFY
 GREENBERG TRAURIG, LLP AS
 COUNSEL FOR DEFENDANT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT**

*[Declarations of Rod S. Berman and
 Adrian Gluck in support and
 [Proposed] Order filed concurrently
 herewith]*

Judge: Hon. André Birotte, Jr.
 Date: 10:00 a.m.
 Time: May 15, 2017
 Crtrm.: 7B

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**
2 **PLEASE TAKE NOTICE THAT** on May 15, 2017 at 10:00 a.m. in Courtroom
3 7B, of the above entitled Court located at 350 West First Street, Los Angeles,
4 California 90012, before the honorable Judge André Birotte, Jr., Plaintiff Apollo
5 Enterprises Solutions, Inc., (hereinafter “Apollo” or “Counter Defendant”), will and
6 hereby does move this Court for an order disqualifying Greenberg Traurig, LLP,
7 (“Greenberg”) from representing Defendant Lantern Credit, LLC, f/k/a New
8 England Funding Technologies, LLC (hereinafter “Lantern” or
9 “Defendant/Counterclaimant”) as counsel in this matter.

10 Apollo moves for disqualification pursuant to Civil Local Rule 83-3.1.2
11 and Rule 3-310 of the Rules of Professional Conduct of the State Bar of California.

12 This Motion is made on the grounds that Greenberg previously
13 represented Apollo in the prosecution of the 7,814,005 and the 8,510,214 patents,
14 the validity of which is now being disputed by Greenberg in connection with its
15 current representation of Lantern. In representing Apollo in patent prosecution,
16 Greenberg received highly confidential information, and that representation
17 substantially relates to Greenberg present efforts to invalidate the very patents that
18 were prosecuted by Greenberg on behalf of Apollo. This is unquestionably grounds
19 for disqualification. Apollo respectfully requests that the Court enter an order
20 granting Apollo’s motion and disqualifying Greenberg from representing Lantern in
21 this matter.

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1 This Motion is made following the conference of counsel pursuant to
2 LR. 7-3 which took place on April 3, 2017. This motion is based upon this notice;
3 the accompanying Memorandum of Points and Authorities; the Declarations of Rod
4 S. Berman and Adrian Gluck; the pleadings and papers on file herein; any reply
5 Counter-Defendants may make; and such other and further matters as the Court
6 deems appropriate in connection with this Motion.

7
8 DATED: April 16, 2017

JEFFER MANGELS BUTLER &
MITCHELL LLP
STANLEY M. GIBSON
ROD S. BERMAN
JESSICA P.G. NEWMAN

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13 By: /s/ Jessica P.G. Newman
14 JESSICA P.G. NEWMAN
15 Attorneys for Plaintiff APOLLO
16 ENTERPRISE SOLUTIONS, INC.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 From roughly May 17, 2004 until July 21, 2006, Greenberg represented
4 Apollo in connection with corporate and intellectual property matters. In particular,
5 Greenberg represented Apollo in prosecuting the provisional patent application that
6 would ultimately lead to the issuance of the 7,814,005 (the “‘005” patent) and the
7 8,510,214 (the “‘214” patent). Greenberg has now taken a position that is directly
8 adverse to its former representation of Apollo. Specifically, Greenberg now asserts,
9 as a defense to the breach of contract action filed by Apollo, that the very patents it
10 helped to prosecute are invalid.

11 Greenberg should be disqualified for the following reasons: First,
12 Greenberg’s prior representation of Apollo is substantially related to its current
13 representation of Lantern. Because a substantial relationship exists between these
14 two representations an “irrebuttable presumption arises that [Greenberg] has
15 obtained confidential material to the current representation and ‘the inquiry ends.’”
16 *Asyst Technologies, Inc. v. Empak, Inc.*, 962 F.Supp. 1241, 1242 (N.D. Cal. 1997).
17 Second, the two cases are linked in a rational manner as Bruce Neel, one of the
18 Greenberg attorneys, prosecuted the patent application that led directly to the
19 patents-in-suit. In addition, it is likely that Mr. Neel, since he prosecuted the
20 provisional application, will be a witness in the invalidity matter. Finally,
21 Greenberg’s implementation of an ethical wall is insufficient to cure the ethical
22 conflicts created by its successive representations. As a result, Greenberg must be
23 disqualified.

24
25 **II. FACTUAL BACKGROUND**

26 **A. Greenberg’s Representation of Apollo in Patent Prosecution**

27 Greenberg previously represented Apollo from roughly May 17, 2004
28 until July 21, 2006 and provided extensive legal services related to various corporate

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1 and intellectual property matters. Gluck Decl. ¶2. These services included
 2 preparing patent applications relating to the debt settlement system.” Subsequently
 3 in August of 2004, Greenberg drafted a supplemental engagement agreement in
 4 which it agreed to offer additional services to obtain the broad intellectual property
 5 protection for Apollo's debt settlement system and related intellectual property.
 6 Gluck Decl., Exh. A, p. 177. Bruce Neel and Christopher Darrow were the two
 7 attorneys who primarily worked on the matter for Greenberg. Gluck Decl.¶4.
 8 Although Mr. Darrow no longer works for Greenberg, Mr. Neel still does.

9 As part of its representation of Apollo, Greenberg was engaged in all
 10 aspects of the patent prosecution process for Apollo’s debt settlement system. This
 11 included numerous conversations with Apollo regarding plans for patenting the debt
 12 settlement system. Greenberg also reviewed documents and consulted on issues
 13 concerning the debt system and patentable aspect of the invention. Greenberg also
 14 had discussions regarding patent strategy and prepared and drafted the provisional
 15 patent application that would later lead to the two issued patents. Gluck Decl., Exh.
 16 A, p. 42.

17 After months of preparing the application, Greenberg filed the
 18 Provisional Patent Application on October 19, 2004. Gluck Decl., Exh. B, p.180.
 19 The Provisional Patent Application consists of approximately 100 pages of
 20 drawings, figures, and text that ultimately led to the issuance of the ‘005 and the
 21 ‘214 patents. Gluck Decl., Exhs. C, D. When the ‘005 and the ‘214 patent issued,
 22 both specifically referenced the provisional patent application filed by Greenberg in
 23 Column 1, lines 9-12: “each claim the benefit of U.S. Provisional Patent Application
 24 60/620,131, “Debt Settlement Computer System and Method,” filed Oct. 19, 2004,
 25 all of which are incorporated herein by reference.” Gluck Decl., ¶8, Exhs. C&D.

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1 **B. Apollo Files a Breach of Contract Action Against Lantern**

2 Apollo and Lantern entered into a Master Services Agreement
3 (“MSA”) under which Lantern agreed to pay Apollo for licensing of its debt
4 collection system, TrueCollect service, related technology, copyrights and patents.
5 Subsequently, Lantern failed and refused, and continues to fail and refuse, to make
6 the agreed upon payments. Apollo filed its complaint against Lantern for Breach of
7 Contract, Account Stated and for Services Rendered in the Southern District of the
8 Superior Court of the County of Los Angeles on February 17, 2017.

9
10 **C. Lantern Retains Greenberg to Defend the Apollo Action and**
11 **Apollo Objects**

12 Lantern retained Greenberg Traurig, LLP to represent it in the Apollo
13 action. Upon learning of Greenberg’s representation of Lantern, Apollo directed
14 counsel to request that Greenberg voluntarily withdraw. Gluck Decl., ¶9, Berman
15 Decl. ¶2, Exh. E The letter set forth the nature of the “substantial relationship”
16 between Greenberg’s former representation of Apollo and its current representation
17 of Lantern and demanded that Greenberg withdraw. Berman Decl., ¶2, Exh. E, p. 5.
18 Greenberg refused to withdraw and asserted that “[t]he matters in which Greenberg
19 Traurig represented Apollo are not involved in and are not substantially related to
20 the Lawsuit.” Berman Decl. ¶3, Exh. F, p.9. Greenberg also stated that it had
21 “implemented an ethical screen barring those working on the [present] Lawsuit or
22 otherwise for Lantern from access to information or files relating to [Greenberg’s]
23 prior representations of Apollo and barring Mr. Neel from any access to or
24 involvement in the Lawsuit or for Lantern.” Berman Decl. ¶3, Exh. F, p. 10

25 Subsequently, Lantern filed counterclaims seeking declarations of
26 patent invalidity and non-infringement of the ‘005 and ‘214 patents, which it helped
27 to prosecute. Apollo is seeking to dismiss those counterclaims for lack of subject
28 matter jurisdiction because there is no case or controversy.

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1 **III. GREENBERG CANNOT BE ADVERSE TO APOLLO IN THIS**
2 **MATTER AS ITS FORMER REPRESENTATION OF APOLLO WAS**
3 **SUBSTANTIALLY RELATED TO THE PRESENT CASE**

4 **A. California Law Applies to Issues of Disqualification**

5 This Court’s Civil Local Rule 83-3.1.2 requires that attorneys
6 practicing before the Court “comply with the standards of professional conduct
7 required of members of the State Bar of California and contained in the State Bar
8 Act, the Rules of Professional Conduct of the State Bar of California, and the
9 decisions of any court applicable thereto.” C.D. Cal. Civ. Local Rule 83-3.1.2.
10 These standards include the Rules of Professional Conduct of the State Bar of
11 California (“RPC”), and therefore “the Court applies California law” to questions of
12 disqualifying attorneys based on conflicts of interest. *See Certain Underwriters at*
13 *Lloyd’s, London v. Argonaut Ins. Co.*, 264 F.Supp.2d 914, 918 (N.D. Cal. 2003);
14 *Genentech, Inc. v. Sanofi-Aventis Deutschland GMBH*, 2010 WL 1136478, at *4
15 (N.D. Cal., Mar. 20, 2010, No. C08-04909 SI).

16
17 **B. Legal Standard**

18 **1. The California Rules of Professional Conduct Prohibit**
19 **Adverse Representations in Substantially Related Matters**

20 Rule 3-310(E) of the Rules of Professional Conduct of the State Bar of
21 California states that “[a] member shall not, without the informed written consent of
22 the client, accept employment adverse to the client or former client where, by reason
23 of the representation of the client or former client, the member has obtained
24 confidential information material to the employment.” Cal. Rule Prof’l. Conduct 3-
25 310(E).

26 In essence, this Rule “prevents a former attorney from representing an
27 adverse party when the former attorney possesses confidential information adverse
28 to the former client.” *Genentech*, 2010 WL 1136478, at *4; *All Am.*

1 *Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2008 WL 5484552, at *5 (N.D.
2 Cal. Dec. 18, 2008) (in cases of successive representation, “the chief fiduciary value
3 jeopardized is that of client confidentiality”).

4 When the representation is successive, the party seeking
5 disqualification need only show “a substantial relationship between the subjects of
6 the former and current representations.” *Id.*; *Jessen*, 111 Cal.App.4th at 705.
7 “Where an attorney successively represents clients with adverse interests, and where
8 the subject of the two representations are substantially related, the need to protect
9 the first client’s confidential information requires that the attorney be disqualified
10 from the second representation.” *Malico Inc. v. Cooler Master, Inc.*, 2013 WL
11 12172992 (N.D. Cal., June 4, 2013, No. C 11-4537 RS), at *3 (quoting *People ex*
12 *rel. Dept. of Corps. v. SpeeDee Oil Change Sys., Inc.*, 20 Cal.4th 1135, 1146
13 (1999)).

14 **2. A Substantial Relationship Creates an Irrebuttable**
15 **Presumption of Possession of Confidential Information**

16 “Once a substantial relationship is found, an *irrebuttable presumption*
17 arises that the former attorney had confidential information material to the current
18 representation and the ‘inquiry ends.’” *Asyst Technologies, Inc. v. Empak, Inc.*, 962
19 F.Supp. 1241, 1242 (N.D. Cal. 1997) (emphasis added) (quoting *River West, Inc. v.*
20 *Nickel*, 188 Cal.App.3d 1297, 1304 (1987)). In such instances, the attorney’s
21 knowledge is “imputed to all members of the firm and the entire firm is
22 disqualified.” *Id.*

23 Where a substantial relationship exists, there is no requirement of
24 proving “actual possession of confidential information in order to disqualify the
25 former attorney.” *Genentech, Inc. v. Sanofi-Aventis Deutschland GMBH*, 2010 WL
26 1136478, at *4 (N.D. Cal., Mar. 20, 2010, No. C08-04909 SI). As the court
27 explained in *River West*: “If it were otherwise, a weighing process would be
28 inevitable. The rights of the former client would be lined up against those of the

1 new client, perhaps of the detriment of both. The purpose of the substantial
2 relationship test is to avoid such an inquiry.” 188 Cal.App.3d at 1304.

3 In determining whether a matter is substantially related “[c]ourts focus
4 less on the meaning of the words substantial and relationship and look instead at the
5 practical consequences of the attorney’s representation of the former client.” *Malico*
6 *Inc.*, 2013 WL 12172992 at *3. “A substantial relationship exists whenever the
7 subjects of the prior and the current representations are linked in some rational
8 manner.” *Jessen v. Harford Cas. Ins. Co.*, 111 Cal.App.4th 698, 711 (2003)
9 (internal quotations omitted). The *Jessen* court noted that the term “subjects”
10 conveyed “a broader definition than the discrete legal and factual issues involved in
11 the compared representations.” *Id.* at 712. In particular, “successive relationship
12 will be ‘substantially related’ when the evidence before the trial court supports a
13 rational conclusion that information material to the evaluation, prosecution,
14 settlement or accomplishment of the former representation given its factual and
15 legal issues is also material to the evaluation, prosecution, settlement or
16 accomplishment of the current representation.” *Id.* at 713. In this regard, the two
17 matters need “not involve same legal issues or facts” to be substantially related
18 where information from the previous representation could be useful to the current
19 client in its current claim. *See id.* at 712-13 (discussing instances in which
20 successive representations will be deemed substantially related).

21 **3. Disqualification of the Entire Firm is Necessary in a Case**
22 **Challenging the Validity of Patents Where the Former**
23 **Attorney Worked on Prosecuting the Patents**

24 Where a firm previously performed work in prosecuting and obtaining
25 patents at issue, that firm must be disqualified from an action in which the validity
26 of the patent is challenged. *Asyst Technologies, Inc.*, 962 F.Supp. at 1242 (“All
27 courts of which I am aware and which have applied California and Ninth Circuit law
28 have disqualified a law firm that has challenged the validity of a patent one of the

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1 firm’s lawyers prosecuted for a former client”); *see also Sun Studs, Inc. v. Applied*
2 *Theory Assocs. Inc.*, 772 F.2d 1557, 1566-67 (disqualifying a firm seeking to
3 invalidate a patent that it had prosecuted and noting that the Court did “not believe
4 any court would hold that it is within the bounds of propriety to permit law firm to
5 assist a client in obtaining a patent . . . and then to lead the attack against the
6 patent’s validity”).

7 Further, an ethical wall is not sufficient to resolve the conflict as “[t]he
8 established rule in California is that where an attorney is disqualified from
9 representing a client because that attorney had previously represented a party with
10 adverse interests in a substantially related matter that attorney’s *entire firm* must be
11 disqualified as well, *regardless* of efforts to erect an ethical wall.” *Hitachi, Ltd. v.*
12 *Tatung Co.*, 419 F.Supp.2d 1158, 1161 (N.D. Cal. 2006) (emphasis added). In
13 *Hitachi*, the Court noted that even if such walls were permissible in California, they
14 would be insufficient to resolve the ethical conflict created when “[t]he same patents
15 are at issue in both cases.” *Id.* at 1164 (rejecting the argument that creation of an
16 ethical wall obviated the need to disqualify the entire firm of Greenberg Traurig
17 LLP).

18 The concerns underpinning disqualification are especially strident in
19 this case given the “significant public ramifications” involved in patent litigation.
20 *Id.* at 1243. In such a context, “[t]he litigants, the court, and the public would have
21 to wonder whether the [attorney’s] loyalty lies with his former client . . . who may
22 well need his help in defending its patents, or to the clients of his current firm.” *Id.*

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1 C. **Greenberg’s Current Representation is Substantially Related to Its**
 2 **Patent Prosecution Work**

3 1. **There is an Irrebuttable Presumption that Greenberg**
 4 **Possesses Confidential Information Material to the Current**
 5 **Representation**

6 On May 18, 2004, Greenberg entered into an Engagement Agreement
 7 with Apollo under which it agreed to represent Apollo regarding a number of
 8 corporate and intellectual property matters, which included “preparing patent
 9 applications for Apollo’s debt settlement system.” Gluck Decl., ¶3, Exh. A, p. 170.
 10 Over the next several months, Greenberg handled every aspect of the filing of the
 11 Provisional Patent Application that would eventually result in the issuance of the
 12 ‘005 and the ‘214 patents.

13 Now, Greenberg, acting directly adverse to Apollo, seeks to assert that
 14 the patents that arose from the patent application it prepared and prosecuted are
 15 invalid. Greenberg’s involvement in the prosecution of the very patents at issue in
 16 this case renders its prior representation of Apollo substantially related to the case at
 17 hand. As such, there is an irrebuttable presumption that it possesses confidential
 18 information material to the current representation necessitating Greenberg’s
 19 disqualification pursuant to Rule 3-310(E). *Asyst Technologies, Inc.*, 962 F.Supp at
 20 1243.

21 In *Asyst*, the court faced with the same issue, began its decision with
 22 the following question and answer: “[m]ay a law firm represent a party challenging
 23 the validity of a patent when two its partners prosecuted the patent for a different
 24 client? I conclude it may not and grant plaintiff’s motion to disqualify.” 962
 25 F.Supp at 1241.

26 Plaintiff, Asyst, filed a complaint alleging that defendants infringed two
 27 of its patents. *Id.* Defendants, represented by Wilson Sonsini, “filed an answer and
 28 counterclaims that, in part, challenge[d] the validity of the patents which Durant and

1 Haynes [two partners at Wilson Sonsini] helped Asyst obtain.” *Id.* Subsequently
2 “counsel for Asyst asked Wilson Sonsini to recuse itself.” *Id.* The firm refused but
3 did “circulate a memorandum instructing its lawyers not to communicate with
4 Durant and Haynes about the litigation.” *Id.* Asyst moved to disqualify. *Id.*

5 In disqualifying Wilson Sonsini, the court reasoned that “[f]ew people
6 are more likely to have confidential information with which to attack the validity of
7 the patent.” *Id.* at 1242. The court concluded that “a substantial relationship
8 between the work of Durant and Haynes performed . . . in prosecuting and obtaining
9 the patents at issue and the work undertaken by their firm, Wilson Sonsini, in
10 challenging the validity of those same patents on behalf of different clients.” *Id.* at
11 1242. Thus, the court ordered Wilson Sonsini “and all attorneys affiliated with the
12 firm” disqualified. *Id.* at 1243.

13 The Court should do the same here. In the course of its representation
14 of Apollo, Greenberg assisted Apollo in obtaining intellectual property protection
15 for Apollo’s debt settlement system. Gluck Decl., Exh. A, p. 5, 42-44, 170, 177. In
16 this capacity, Greenberg was responsible for all aspects of prosecuting the
17 provisional patent application for the ‘005 and ‘214 patents. This included
18 numerous conversations with Apollo regarding plans for patenting the debt
19 settlement system, which included reviewing the patentable aspects of the invention.
20 Greenberg also reviewed documents for the patent application and had numerous
21 discussions regarding patent strategy. In addition, Greenberg prepared and drafted
22 the provisional patent application and filed the provisional application once it was
23 completed. Gluck Decl., Exh. A, p. 42-43.

24 In light of this work, Greenberg cannot be permitted to represent a
25 client that now seeks to invalidate the very patents it helped obtain. *Asyst*
26 *Technologies, Inc.*, 962 F.Supp. at 1242. Therefore, these two matters are
27 substantially related and Greenberg must be disqualified. *Id.*

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1 For these same reasons, it is not necessary to show that Greenberg
 2 possesses confidential information. *Malico, Inc.*, 2013 WL 23273992, at *4 (“[t]he
 3 courts of California have recognized the dangers of the swearing matches that would
 4 result if they required *actual* knowledge of material confidential information,
 5 tear[ing] aside the protective cloak drawn about the lawyer-client relationship”). In
 6 this instance, “[a]ccess to such information is presumed, and it is imputed to all of
 7 the lawyers at the firm.” *Id.* Further, as the Court in *Asyst Technologies Inc.* noted,
 8 “[f]ew people are more likely to have confidential information with which to attack
 9 the validity of a patent than the lawyers who prosecuted it.” *Id.* Greenberg must be
 10 disqualified for this reason alone.

11 **2. Even Without Lantern’s Counterclaims, the Two Matters are**
 12 **Substantially Related such that Greenberg Must be**
 13 **Disqualified.**

14 Even in the absence of Lantern’s Counterclaims these two matters are
 15 substantially related such that Greenberg must be disqualified. *Jessen*, 111 Cal.App.
 16 4th at 713. Mr. Neel’s extensive communications with Apollo regarding not only its
 17 patenting strategy, but also its broader intellectual property strategies provided
 18 Greenberg access to “information material to the evaluation, prosecution, settlement
 19 or accomplishment of [its] current representation” of Lantern. *Jessen*, 111 Cal.App.
 20 4th at 713. In this capacity, Greenberg would have had access to information
 21 regarding “matters which would be useful to [Lantern] in pressing its current claim,
 22 including the ‘identify of all the key decision makers,’ the ‘litigation philosophy’
 23 and the ‘organizational structure’ of [Apollo], [and] the ‘financial impact of pending
 24 . . . claims’” such that it must necessarily be disqualified from the present matter.
 25 *See id.* (citation omitted).

26 Further, given his role in prosecuting the original provisional patent
 27 application, Mr. Neel is a likely witness, and it may be necessary for Apollo to take
 28 his deposition to respond to arguments that the patents are invalid. The two matters

1 are therefore linked in a “rational matter” demonstrating that a substantial
2 relationship exists between the two, even if the Court were to dismiss Lantern’s
3 patent counterclaims. *Id.* at 712. Thus, Greenberg must be disqualified for this
4 reason as well.

5 **3. Greenberg’s Establishment of an Ethical Wall is Insufficient**
6 **to Cure the Conflict Created by Its Successive**
7 **Representations**

8 Mr. Neel represented Apollo in a substantially related matter. This
9 necessitates not only his disqualification, but also the disqualification of the entire
10 firm. *Hitachi*, 419 F.Supp.2d at 1161. Greenberg’s establishment of an ethical wall
11 is insufficient to render its representation of Lantern acceptable. *Id.* The law is well
12 established that such ethical walls are insufficient to cure the ethical conflict created
13 by successive representations involving substantially related matters. *Id.* (where an
14 attorney is disqualified “that entire firm must be disqualified as well, regardless of
15 efforts to erect an ethical wall”).

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff and Counter-Defendant Apollo
3 Enterprise Solutions, Inc. respectfully requests that the Court disqualify Greenberg
4 Traurig, LLP from representing Defendant and Counterclaimant Lantern Credit,
5 LLC.

6 DATED: April 16, 2017

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MITCHELL LLP
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11 By: /s/ Jessica P.G. Newman
12 JESSICA P.G. NEWMAN
13 Attorneys for Plaintiff APOLLO
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