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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

McKESSON INFORMATION SOLUTIONS LLC,	)	
Plaintiff,	)	CIVIL ACTION FILE
v.	)	NO. 2006-CV-121110
DUANE MORRIS LLP,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO THE EMERGENCY MOTION FOR INJUNCTION AND DISQUALIFICATION

NOW COMES Duane Morris LLP and submits this Memorandum in Opposition to the Emergency Motion for Injunction and Disqualification filed by McKesson Information Services LLC ("MIS"). For the reasons set forth below, MIS's Motion should be denied, and this matter should be dismissed.

MIS has moved, based on its reading of Rule 1.7 of the Georgia Rules of Professional Conduct (the "Georgia Rules"), for disqualification of Duane Morris as counsel to Nan and Alex Smith in their arbitration against MIS. In a decidedly one-sided and misleading portrayal of the relevant facts, MIS attempts to create a conflict where none exists. MIS goes as far as to claim that Duane Morris, as counsel, are acting as "extortionists," an entirely unfounded and spurious claim.

MIS's moving papers either ignore or gloss over several highly relevant facts, including:

- Duane Morris does not and has never represented MIS;
- Duane Morris does not have and has never had any confidential information of MIS;
- Duane Morris is local counsel for two sister companies of MIS in a completely unrelated bankruptcy matter in Harrisburg, Pennsylvania;
- in connection with that limited representation in Harrisburg, these sister companies expressly agreed that Duane Morris – for the purposes of conflicts – does not represent MIS – and they waived any future conflicts.

In short, MIS claims that because Duane Morris is acting as local counsel in an unrelated bankruptcy matter on behalf of two corporate affiliates of MIS, Duane Morris is conflicted out of any representation against any McKesson entity whatsoever, including against MIS. This position is not well founded.

MIS's Motion illustrates the necessity of the warning contained in Comment 15 to Rule 1.7: "Such an objection [i.e., motion to disqualify by opposing counsel] should be viewed with caution, however, for it can be misused as a technique of harassment." Given the client agreement between Duane Morris and the two sister corporations, MIS's filing of this motion can only been seen as an effort to delay the arbitration proceeding and to put the Smiths to the expense and difficulty of defending their choice of counsel. This misuse of the Court's good offices should be rejected.

I. BACKGROUND

On or about April 27, 2006, two McKesson entities – McKesson Medication Management LLC ("MML") and McKesson Automation, Inc. ("MAI") – retained Duane Morris to act as local counsel in a bankruptcy matter pending in Harrisburg, Pennsylvania (the "Bankruptcy"). MAI and MML are the sister corporations to MIS – the movant in this action. On that same day, Duane Morris transmitted an engagement letter (the "Initial Engagement Letter") to Morris Manning, outside counsel for MML and MAI, and lead counsel in the Bankruptcy. A true and correct copy of the Initial Engagement Letter is attached hereto as Exhibit "A" and incorporated herein.

The Initial Engagement Letter makes clear that the engagement is limited. Duane Morris is acting solely as local counsel and only in the Bankruptcy and not in connection with any other matters. See Initial Engagement Letter at 1. Duane Morris represents only MML and MAI, and not any other McKesson entities. See Initial Engagement Letter at 1, 3. The Initial Engagement Letter anticipates certain potential conflicts and contains a prospective waiver of such conflicts. See Initial Engagement Letter at 3.

Approximately two weeks into the engagement, on or about May 11, 2006, MML and MAI, through their counsel Morris Manning, requested that certain changes be made to the Initial Engagement Letter. The requested changes related

specifically to (a) Duane Morris' billing rate under emergency conditions; (b) payment of a late fee in the event that MML and MAI did not timely pay Duane Morris' monthly invoices; and (c) disclosure of client names.[1]

MML and MAI specifically agreed to the other terms of the Initial Engagement Letter, including the term limiting the representation to the Bankruptcy, the specification of the two entities that Duane Morris represents, the agreement that Duane Morris does not represent any affiliates, subsidiaries, etc., and the prospective waiver. On May 19, 2006, Duane Morris transmitted a second engagement letter (the "Engagement Letter"), agreeing to MML's and MAI's specifically negotiated points. A true and correct copy of the Engagement Letter is attached hereto as Exhibit "B" and incorporated herein.

In connection with the Bankruptcy engagement, Duane Morris has had limited direct contact with any employee at any McKesson-owned entity and has received little or no confidential information belonging to any McKesson-owned entity. Duane Morris has certainly received no confidential information related to MIS at all. Indeed, Duane Morris has performed approximately only 16 hours of services since the engagement began in April 2006 in connection with the

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[1] Duane Morris has not attached this email because it arguably contains content that would be protected by the attorney-client privilege. If MIS consents to Duane Morris providing this email to the Court so that the Court can fully be apprised of the circumstances, Duane Morris has no objection.

Bankruptcy. Significantly, MML/MAI have yet to pay Duane Morris for any of the firm's invoices for such services.

On July 19, 2006, Duane Morris entered an appearance in the Arbitration as counsel for Nan and Alex Smith (collectively, the "Smiths"). In the Arbitration, the Smiths allege that MIS breached provisions in certain Non-Competition Agreements. Neither MML nor MAI are parties to or involved in any way in the Arbitration. Indeed, in several pleadings and in correspondence in the Arbitration, MIS makes the point, and the Smiths do not dispute, that MIS is the real party in interest in the Arbitration. MIS specifically took the position that MIS, rather than any other McKesson entity, was the party in interest in the Arbitration.

MIS is a completely separate and distinct entity from MML/MAI. MIS is the successor to HBO & Company ("HBOC"), the entity that entered the Non-Competition Agreements with the Smiths. In the context of the Arbitration, Lawrence Kunin, an attorney at Morris Manning and counsel for MIS in the Arbitration, informed Duane Morris that HBOC was acquired in its entirety and has operated as MIS since that time, primarily under the leadership of the same individuals that led and managed HBOC. Based on a review of the Georgia Secretary of State's website, MML, MAI and MIS all have different offices and principal places of business (all located in different states), and there are no common officers. True and correct copies of the respective entities' listings on the

Secretary of State's website are attached hereto as Exhibit "C" and incorporated herein.

On or about July 25, 2006, Attorney Kunin contacted Duane Morris, and stated that, contrary to the terms of the Engagement Letter and contrary to standard principles of corporate governance, McKesson Corporation has a policy whereby essentially the entire family of McKesson companies operate as a single entity for conflicts purposes, that as a matter of policy the McKesson Corporation never waives any potential or actual conflicts, and that "McKesson" believes that Duane Morris is precluded from representing the Smiths in the Arbitration due to its representation of MML and MAI as local counsel in the Bankruptcy. Neither MML/MAI nor their outside counsel, Morris Manning, ever informed Duane Morris of any "policies" regarding representations adverse to other McKesson entities or refusal to waive any conflicts when they agreed to the terms of the Engagement Letter and induced Duane Morris to accept the engagement as local bankruptcy counsel for MML and MAI. Neither MML/MAI nor their outside counsel, Morris Manning, ever informed Duane Morris that they believed the specifically-negotiated prospective waiver provisions to be invalid and unenforceable under any circumstances when they agreed to them in May 2006, yet two months later, they take that very position to disqualify Duane Morris from representing the Smiths in the Arbitration.

II. THERE IS NO LEGAL BASIS FOR DISQUALIFICATION.[2]

Under Georgia Rule 1.7, only two possible scenarios give rise to a conflict: (1) representation of an interest *directly* adverse to a current client under 1.7(a); and (2) representation of an interest *indirectly* adverse to a client under 1.7(b). Georgia Rule 1.7(a) does not apply because MIS is not a client for conflict purposes. Georgia Rule 1.7 (b) simply does not apply because the Smiths are not adverse, directly or indirectly, to MML/MAI given MIS's stated position that MIS is the true party in interest in the Arbitration. Even if the Court did apply Georgia Rule 1.7(b), Duane Morris is plainly in compliance because Duane Morris obtained the consent of MML/MAI and the Smiths. Each of these is discussed in more detail below.

A. Duane Morris Did Not Violate Rule 1.7(a) Because MIS is Not a Client of Duane Morris.

Rule 1.7(a) applies to actual clients of a lawyer, and provides that a lawyer shall not represent an interest adverse to a current client:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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[2] Note 18 to the Preamble, Scope and Terminology section of the Georgia Rules indicates that the Georgia Rules are not the basis of civil liability and do "not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." See Preamble, Scope and Terminology Preamble: A Lawyers Responsibilities, cmt. 18. Thus, Duane Morris is uncertain as to whether MIS may bring this action in the first place.

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or third person or by a personal interest of the lawyer.

Georgia Rule 1.7(a).

Duane Morris' representation in the Arbitration is not adverse to any clients of Duane Morris. As noted above, the Engagement Letter states explicitly in two separate provisions that Duane Morris represents only MML and MAI and not any affiliated companies (i.e., not MIS):

> Because we are not general counsel to [MML/MAI], our acceptance of this engagement does not involve an undertaking to represent [MML/MAI's] interests in any other matter.

Engagement Letter at 1. The Engagement Letter states further:

> This will also confirm our understanding that unless we reach an explicit understanding to the contrary, we are being engaged and will represent [MML/MAI], and not any parent, subsidiary or affiliated entities of [MML/MAI], and that we are not being engaged to represent any officers, directors, members, partners, shareholders or employees of [MML/MAI].

Engagement Letter at 3.

MML and MAI are not parties to the Arbitration, and, by MIS's own admissions, their rights and interests are not at issue in the Arbitration. Indeed,

MIS has taken the position in the Arbitration that MIS, and not any other McKesson entity, is the real party in interest in the Arbitration.

Not surprisingly, this issue has been directly addressed previously. According to the leading opinion by the American Bar Association ("ABA") on this issue, the manner in which Duane Morris identified specific McKesson entities in the Engagement Letter is the preferred method for resolving potential conflicts in the corporate affiliate context before they arise. See ABA Formal Opinion 95-390 (January 25, 1995) at Exhibit "D" ("Clearly, the best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes.").

The ABA also instructs that inquiry into whether a client's affiliates will be treated as clients is, in part, a matter of the lawyer's and client corporation's expectations:

> The client-lawyer relationship is principally a matter of contract, and the contract may be either express or implied. ***Thus, the entities within a corporate family that are to be considered clients may have been expressly identified as clients***, or they may have become entitled to be so treated by reason of the way the representation of one of the members of the corporate family has been handled. ***In addition, it may be one of the terms of the engagement that the corporate client expects some or all of its affiliates to be treated as***

> ***clients for purposes of Rule 1.7*** -- i.e., that the lawyer will not accept engagements that would be prohibited by that Rule if the affiliates were clients.

See id. at 4 (emphasis added).

The parties' expectations are clearly outlined and were specifically negotiated through the Engagement Letter. The Engagement Letter specifies whom Duane Morris does and does not represent, and Duane Morris does not represent MIS. When negotiating the Engagement Letter, MML and MAI did not inform Duane Morris that they would expect Duane Morris to consider as its client a sister company. Therefore, the parties clearly expected that Duane Morris represented only the corporations specified in the Engagement Letter, not MIS.

MIS does not actually address the clear language in the Engagement Letter providing that MIS is not a client of Duane Morris. Instead, MIS asks the Court to interpret the Engagement Letter in a way that is directly in conflict with its explicit terms. See Complaint at ¶ 34. The critical language is clear – "unless we reach an explicit understanding to the contrary, we are being engaged and will represent [MML/MAI], and not any parent, subsidiary or affiliated entities of [MML/MAI]." MIS takes the unbelievable position that this language actually means that Duane Morris represents MIS, but that MIS does not have to pay Duane Morris. See id. MIS therefore concludes that Duane Morris has accepted a *per se* representation of all McKesson entities under its internal fictitious business segment "McKesson

Provider Technologies" ("MPT"), even though the parties never agreed to this obligation and the Engagement Letter makes no mention of MPT.

In addition to being in stark contrast with the parties' stated expectations, MIS' assertion that Duane Morris has accepted a *per se* representation of all the McKesson-affiliated companies was flatly rejected in the very case that MIS relies on, Ramada:

> In seeking disqualification of the attorneys, the defendant urged a prophylactic rule which would disqualify attorneys who had represented any affiliated corporation of a party. This proposal was based on the idea that when two corporations are subject to common ownership and control, any injury or risk to one will necessarily cause injury or risk to the other. The [Pennwalt] court rejected this prophylactic rule: "Vigorous advocacy cannot change the fact that [the sister corporation] is a corporate entity distinct from [the defendant] and [the parent]."

Ramada Franchise System, Inc. v. Hotel of Gainesville Assoc., 988 F. Supp. 1460, 1464-65 (N.D. Ga. 1997) (*quoting* Pennwalt Corp. v. Plough, 85 F.R.D. 264 (D. Del. 1980)).

The Ramada court did not announce a clear rule of law for determining whether a sister corporation is a "client" for disqualification purposes but looked to the facts and circumstances of the representation. Ramada, 988 F. Supp. at 1465. The Ramada court, however, noted that other courts have observed the reality that

the co-subsidiary relationship is "more attenuated than that of a parent corporation and its subsidiary." Id.

In Ramada, the court found that a sister company was a "client" for disqualification purposes because the companies shared the same headquarters, had the same corporate principals and were serviced by the same legal department. 988 F. Supp. at 1465. The Ramada court, however, also discussed Apex Oil Co., Inc. v. Wickland Oil Co., 1995 Dist. LEXIS 6398 (E.D. Cal 1995), in which the opposite outcome was reached when the companies had mostly different management and senior officers and had different principal places of business and mailing addresses. The outcomes in Ramada and Apex are consistent with the guidance offered by the ABA:

> [W]hole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing all the others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer's client.

See ABA Formal Opinion 95-390 (January 25, 1995) at 6.

The current situation is much closer to the facts of Apex than Ramada. Morris Manning stated earlier in the Arbitration that MIS is managed and led by

the former HBOC leadership, not other McKesson personnel. In addition, the information on the Georgia Secretary of State's website shows that all three McKesson entities at issue have different offices and principal places of business (all located in different states: California, Pennsylvania and Minnesota) and that there are no common officers among them. Based on these facts and the parties' expressly-negotiated understanding that Duane Morris does not represent any McKesson entity other than MML and MAI, MIS is not a "client" for disqualification purposes. Thus, Rule 1.7(a) is not applicable.[3]

B. Duane Morris Has Not Violated Rule 1.7(b) Because Duane Morris Has Obtained the Requisite Waivers.

Georgia Rule 1.7(b) provides that a lawyer may represent an interest that is indirectly adverse to his client, if the clients so consent:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by

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[3] While MIS makes certain claims regarding McKesson Corporation's internal workings, we have no way to probe the veracity of such claims at this time. These claims, however, appear to be contradicted by McKesson Corporation's corporate filings.

> the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent.

Georgia Rule 1.7(b).[4]

MIS has admitted in the Arbitration that it is the only "McKesson" party in interest in the Arbitration. Thus, because MML/MAI are not parties of interest in the Arbitration, Rule 1.7(b) does not apply. MIS has made no showing whatsoever as to why this representation is indirectly adverse to MML and MAI. The Engagement Letter, which explicitly excludes any representation by Duane Morris of MIS, simply does not and cannot apply to MIS. Even if the Court were to find that Georgia Rule 1.7(b) applies, then Duane Morris is in compliance because both MML/MAI and the Smiths have given their consent.

The Engagement Letter, which governs Duane Morris' relationship with MML and MAI, contemplates situations where there is an indirect conflict. By the Engagement Letter, MML and MAI specifically have waived future indirect conflicts:

> Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to [MML/MAI] while we are representing [MML/MAI]. We understand that [MML/MAI have] no objection to

[4] Georgia Rule 1.7(b)(1) – 1.7(b)(3) is plainly satisfied, and that MIS appears to argue that only Rule 1.7(b)(4) is in question.

> our representation of parties with interests adverse to [MML/MAI] and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to [MML/MAI].

Engagement Letter at 3. As discussed above, the Arbitration is not substantially related to Duane Morris' 16 hours of unpaid services as local counsel in the Bankruptcy. Indeed, there is no relation at all.[5] Accordingly, even if the Court were to determine that a conflict existed, the prospective waiver clause by its terms applies, and MML and MAI have waived that conflict.

MIS argues in the face of contrary authority that prospective waivers, such as the one in the Engagement Letter, are never enforceable. See Complaint at ¶ 32. That position, however, simply does not represent the state of the law today. For example, the Restatement (Third) of the Law Governing Lawyers states clearly that a prospective waiver is effective against clients such as McKesson Corporation, sophisticated purchasers of legal services, *particularly if they are represented by outside counsel* in giving consent to the waiver. See Restatement (Third) of the Law Governing Lawyers § 122 cmt. D (2000) (Exhibit "E") (prospective general waivers are effective if "the client possesses sophistication in

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[5] MIS's argument that the Bankruptcy and the Arbitration are related is frivolous. Duane Morris has simply acted as local counsel to file pleadings in a bankruptcy matter in which MML/MAI seek payment for a lease of computer equipment. In the Arbitration, Nan and Alex Smith seek relief resulting from MIS's breach of an Asset Purchase Agreement with the old HBOC corporate entity.

the matter in question and has had the opportunity to receive independent legal advice about the consent"); ABA Ethics Opinion 05-436 (Exhibit "F") ("if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, *e.g.*, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation").

In addition, the Engagement Letter was negotiated and performed (at least by Duane Morris) in Pennsylvania, which has also adopted rule 1.7. The explanatory comments to Pennsylvania's Professional Conduct Rule 1.7 are in accord with the Restatement:

> [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

Explanatory Note 22 to Pennsylvania Rule of Prof. Conduct 1.7, 42 Pa. C.S.A. (Exhibit "G").

The current situation is the exact situation discussed in the Restatement, the ABA Opinion and Explanatory Rules, all of which provide that a prospective waiver is valid and enforceable. MML/MAI are large corporations with

sophisticated legal counsel. As noted above, MML and MAI reviewed and revised the Engagement Letter and specifically negotiated particular provisions in the Engagement Letter. MML/MAI's recent statements to Duane Morris that it has a policy of not waiving any conflicts demonstrate that MML/MAI understand what a waiver of conflicts means. MML/MAI employed outside counsel in negotiating the Engagement Letter and agreed to the prospective waiver. Thus, MIS' position that MML/MAI could not make a knowing waiver is unsupportable and contrary to current law and teachings on conflict issues.

MIS cites to the Worldspan, L.P. v. The Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1360 (N.D. Ga. 1998), which pre-dates Georgia's adoption of the Rules of Professional Conduct in 2001, for the proposition that the prospective waiver in the Engagement Letter is unenforceable under certain circumstances. In Worldspan, the United States District Court for the Northern District of Georgia held that a prospective waiver was unenforceable under particular circumstances. Importantly, the circumstances in Worldspan were different than the current circumstances in several critical respects: (1) in Worldspan, there was evidence that the client objected to the prospective waiver (here, the Engagement Letter was negotiated by MML's and MAI's counsel without objection to the prospective waiver); (2) the prospective waiver in Worldspan pre-dated the alleged conflict by six years (here, the time difference is less than two months); (3) in Worldspan, the

law firm had engaged in significant representation of the client (not 16 hours as local counsel); and (4) in Worldspan, the party moving for disqualification was the actual client of the firm it sought to disqualify (here, MIS explicitly is not the client). None of the critical factors relied upon by Judge Moye in reaching his finding regarding the prospective waiver are present in the current case. Therefore, the reasoning and outcome of the Worldspan case are not applicable.

Judge Moye did not reach his decision in Worldspan lightly, and, in doing so, he warned against a rigid, parochial application of conflict standards:

> The Court has previously noted that the local Rule which it is enforcing refers both to the Standards of Conduct of the State Bar of Georgia and also the decisions of this Court interpreting those standards. ***The Court, however, must make sure that its interpretations are consistent with the mainstream of current legal thought, and therefor looks to decisions from other jurisdictions by which it is bound and which it finds persuasive.***

Worldspan, 5. F Supp 2d at 360 (emphasis added) (noting also the importance of the ABA's rules and opinions and the Restatement (Third) of the law governing lawyers). Ironically, MIS disregards the very authority that Judge Moye described as helpful and persuasive in asking that this Court apply the Worldspan case to achieve the exact rigid result that Judge Moye warned against.

C. MIS's Allegations That Duane Morris Is Extorting MML and MAI Are Spurious.

In light of the foregoing, MIS's attacks on Duane Morris as being "extortionists" are baseless. As an initial matter, MML and MAI have apparently

repudiated their express obligations under the Engagement Letter by instituting or at least approving of this motion to disqualify. MML and MAI, moreover, have failed to pay any money that is owed to Duane Morris. Finally, Duane Morris would not have undertaken a local counsel role for MML and MAI had they not agreed to the terms of the Engagement Letter.

Under these circumstances, it is entirely appropriate for Duane Morris to request MML and MAI to either (a) live up to their contractual commitments in the Engagement Letter or (b) find different counsel. But for MIS to claim that this constitutes "extortion" is baseless, particularly under the circumstances where MIS is using a motion to disqualify as a procedural weapon to harass the Smiths.

III. CONCLUSION

As The Honorable Charles A. Moye foresaw, less than three years after his decision in Worldspan was published, the law did change, and Georgia adopted the Georgia Rules of Professional Conduct. Importantly, the very sources that Judge Moye proclaimed as critical in understanding these new rules – the ABA's opinions, the Restatement and guidance from other jurisdictions – compel the inescapable conclusion that MML/MAI should be bound by the agreement it signed at the advice of their outside counsel. MML/MAI understood precisely what their obligations and rights were when they negotiated and agreed to the

Engagement Letter. They should not be permitted to disavow the obligations that they freely accepted only two months ago.

IV. ATTORNEY'S FEES

Duane Morris is entitled to its costs and fees incurred in connection with this matter because MIS' claims are baseless and MIS has caused Duane Morris and the Smiths unnecessary trouble and expense.

Respectfully submitted, this 21st day of August, 2006.

DUANE MORRIS LLP

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