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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE

MAR 08 2007

**Deputy Clerk Superior Court
Fulton County, Georgia**

McKESSON INFORMATION
SOLUTIONS, INC.,

Plaintiff,

vs.

DUANE MORRIS, LLP,

Defendant.

CIVIL ACTION

FILE NO. 2006CV121110

**ORDER ON MOTION FOR NEW TRIAL AND TO VACATE
THE PERMANENT INJUNCTION AND TO DISMISS ON THE
GROUNDS THAT THE CONTROVERSY IS NOW MOOT**

The above-styled action came before the Court on the regularly scheduled Civil Motions Calendar on February 27, 2007 on Defendant's Motion for New Trial and to Vacate the Permanent Injunction and to Dismiss on the Grounds that the Controversy is now Moot, having been filed on December 8, 2006. Following oral argument, the motion was taken under advisement for further review by the Court. Having reviewed and considered the arguments of counsel, pleadings and the records as a whole, the Court finds as follows:

FINDINGS OF FACT

By way of background, this matter originally involved an alleged conflict of interest in Defendant's representation of a party adverse to Plaintiff in an arbitration proceeding. Plaintiff McKesson Information Solutions, LLC ("MIS") is the respondent in an arbitration brought by two individuals named Nan Smith and Alex Smith (hereinafter "the arbitration"). The arbitration

is being administered by the American Arbitration Association ("AAA"). The Defendant, Duane Morris, LLP, substituted as lead counsel for Nan Smith and Alex Smith. Defendant was likewise representing two other McKesson subsidiaries, McKesson Automation, Inc. ("MAI") and McKesson Medication Management, Inc. ("MMM") in a separate action. By engagement letter dated April 27, 2006, Defendant Duane Morris, LLP undertook to represent MMM and MAI as local counsel in connection with the bankruptcy matter styled *In re Moshannon Valley Citizens, Inc. t/a Philipsburg Area Hospital*, pending in Bankruptcy Court for the middle District of Pennsylvania, Harrisburg Division (the "bankruptcy"). The April 27, 2006 engagement letter attempts to distinguish between McKesson Corporation's entities and contains a waiver of future conflicts. (See Duane Morris, LLP engagement letter dated April 27, 2006).

MIS, MAI and MMM all share the same parent corporation, McKesson Corporation ("McKesson"). As indicated in the Securities and Exchange Commission's ("SEC") Form 10-Q filing for McKesson Corporation, McKesson Corporation's subsidiaries fall into one of three business segments: Pharmaceutical Solutions, Medical-Surgical Solutions and Provider Technologies. (See Exhibit A of the Verified Complaint; McKesson Corporation Form 10-Q for the quarter ending June 30, 2006, pages 19-23). MIS and MAI are both part of the Provider Technologies segment within McKesson Corporation, which is known by the fictitious name McKesson Provider Technologies ("MPT").

With specific regard to the impending arbitration, in 2005 the Smiths filed a demand for arbitration with the AAA alleging, among other various allegations, that MIS produced products that were derived from their technology under a company owned by Nan and Alex Smith called Care 2000, which was in the business of creating, developing, selling, licensing and leasing to health care providers copywritten software programs containing proprietary patient diagnosis

and/or disease-specific medical care outcome measurement and case management tracking and reporting computer applications. The arbitration is monitored in-house at MPT by attorney Ami Patel and paralegal Kristi Sherrell. Outside counsel is Morris, Manning & Martin, LLP. As previously indicated, the Smiths were represented by Defendant Duane Morris, LLP, who likewise represented MAI and MMM, both part of the parent company McKesson Corporation, in the separate bankruptcy matter pending in Pennsylvania.

On November 8, 2006, this Court entered an Order disqualifying and enjoining Defendant Duane Morris, LLP from acting as counsel adverse to Plaintiff MIS in the arbitration proceeding brought by the Smiths against MIS. The basis of the Order was that Defendant Duane Morris had a conflict of interest through its concurrent representation of the two related McKesson subsidiaries, MMM and MAI, in the bankruptcy proceeding in Pennsylvania. As the Court previously noted in the November 8, 2006 Order, Defendant Duane Morris, LLP relied upon the engagement letter, through which it attempted to distinguish between the McKesson Corporation's entities and which contained a waiver of future conflicts. The Court found that the future waiver was inadequate and thus invalid as a matter of Georgia law because it was not a knowing waiver that identified the specific adverse clients and details of adverse representation. Because the above representations were concurrent, the Court applied Georgia Rule of Professional Conduct 1.7 to disqualify and enjoin Defendant Duane Morris.

On November 21, 2006, MMM's and MAI's claim in bankruptcy was resolved by an Order Allowing Administrative Claim, Compelling Rejection of Executory Contract Granting Other Relief, entered by the Pennsylvania court on November 21, 2006. On December 6, 2006, Duane Morris sent a letter to Morris, Manning & Martin, LLP, stating that it learned about the November 21, 2006 Bankruptcy Order and that it intended to withdraw as counsel for MMM and

MAI.

On December 8, 2006, Duane Morris filed the instant motion based on the subsequent termination of its concurrent representation of the McKesson entities. Specifically, Duane Morris alleges that as a result of the November 21, 2006 Bankruptcy Order, the Pennsylvania matter was complete and Duane Morris's representation of McKesson terminated. Furthermore, Duane Morris was required to file a motion to withdraw in order to terminate its relationship with McKesson. On December 12, 2006, Duane Morris filed a motion to withdraw in the Pennsylvania bankruptcy court, which was granted on December 14, 2006. Such order terminated Defendant Duane Morris' attorney-client relationship with McKesson. McKesson did not object to or otherwise oppose the motion. Defendant Duane Morris has asserted that its only role in the Pennsylvania bankruptcy case was to assist Morris Manning, the lead counsel for MMM and MAI, as local bankruptcy counsel. Defendant Duane Morris further asserts it had no substantive role in the case, other than advising Morris Manning on local practices.

CONCLUSIONS OF LAW

Defendant Duane Morris asserts that as a result of the termination of its attorney-client relationship with McKesson, Georgia Rule of Professional Conduct 1.9, which is applicable to conflicts of interest with a former client, now applies to this lawsuit. Applying Rule 1.9, Defendant Duane Morris asserts three arguments in support of its motion: (1) the termination of Defendant Duane Morris' attorney-client relationship with McKesson is newly discovered evidence justifying a new trial; (2) because McKesson is now a former Duane Morris client there is no longer a need for the injunction; and (3) because the conflicting representation is concluded, McKesson's claims are moot.

A. **Whether Duane Morris' withdrawal as counsel rendered MAI and MMM "former clients" for conflict-of-interest analysis.**

Plaintiff does not dispute that as a result of the termination of representation MAI and MMM have become "former clients" of Defendant Duane Morris, and any conflict of interest analysis would therefore be governed by Rule 1.9 of the Georgia Rules of Professional Conduct. The parties further agree that under Rule 1.9, which applies a "substantially related" test to the different representations, Defendant Duane Morris would not have a conflict of interest. Rather, Plaintiff relies on the so-called "hot potato" doctrine in support of its argument that the "former-client" analysis of Rule 1.9 does not apply here because the settlement of the claims of MAI and MMM in the bankruptcy case, and Defendant Duane Morris' subsequent withdrawal as their counsel, occurred while the Smiths' case against MIS was pending.

According to the commentary to the ABA's *Annotated Model Rules of Professional Conduct*, "the 'hot-potato' stratagem refers to a lawyer's attempt to drop a client to be free to accept an adverse client who may be more desirable." See *ABA Annotated Model Rules of Professional Conduct*, R 1.9 (5th ed. 2003), 174. The "hot potato" doctrine applies only where a lawyer or law firm *improperly* abandons or terminates the attorney-client relationship without the consent of the former client, and before the completion of the matter for which he has been engaged. The cases cited in the commentary to the ABA's *Annotated Model Rules* involved instances in which "an attorney's unilateral termination of the [attorney-client] relationship" occurred *without the consent* of the client, or instances of "client abandonment" before the completion of the matter for which the attorney was engaged. *Id.* (citing Pioneer-Standard Elecs., Inc. v. Cap Gemini AM., Inc., No. 1:01CV2185, 2002 WL 553460 (N.D. Ohio Mar. 11,

2002) and Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449 (S.D.N.Y. 2000)).

In this case, there is no evidence that MMM or MAI responded to Defendant Duane Morris' letter of December 6, 2006, informing its clients that Duane Morris had completed what was expected of the firm as local counsel, and that the firm intended to withdraw as their counsel in the bankruptcy proceeding. Neither MMM nor MAI filed an objection to Defendant Duane Morris' December 12, 2006 Motion to Withdraw. The Court finds that the Order of the bankruptcy court granting Defendant Duane Morris' motion for leave to withdraw, dated December 14, 2006, is *res judicata* as to any issues that might have been raised concerning alleged abandonment or improper withdrawal, and establishes that Defendant Duane Morris did not improperly terminate or prematurely abandon its attorney-client relations with MMM and MAI.

To be sure, the lack of a response from MMM and MAI to Defendant Duane Morris' letter of December 6, 2006, notifying them of Duane Morris' intention to withdraw, is evidence of *consent*, especially when considered in the light of their subsequent failure to file an objection to Duane Morris' Motion to Withdraw. Even in the absence of a court order, such as the order of the bankruptcy court in this case, an attorney-client relationship ends "at [the] point that client and lawyer contemplated would be the end of [the] relationship." Lawful withdrawal renders the representation "former" for conflict purposes. See Id. at 175 (citing Restatement (Third) of the Law Governing Lawyers § 132, cmt. c). Although MMM or MAI, or Morris Manning as their primary attorney, could have objected to the motion to withdraw, they did not do so and the motion was granted on December 14, 2006.

These facts, all of which occurred after the entry of this Court's November 8, 2006 Order, establish that Defendant Duane Morris' withdrawal from its former representation of MMM and

MAI was not improper and was effective to render Defendant Duane Morris' representation "former" for purposes of Rule 1.9, and further forecloses any argument that Defendant Duane Morris dropped MMM and MAI like "hot potatoes."

The case law on which Plaintiff relies is distinguishable from the present case. In Snapping Shoals, the existing client opposed the termination of its attorney-client relationship and intervened as a party in support of a motion to disqualify its counsel on the ground that they had abandoned their client before preparing a written settlement agreement. See Snapping Shoals Elec. Mmbrshp. Corp. v. RLI Ins. Corp., No. 1:05CV1714, 2006 WL 1877078, at *1 (N.D. Ga. July 5, 2006) (client intervened in case to assert duty of loyalty). The Court in Snapping Shoals makes clear that ethical responsibilities owed *to the current client* prevented the law firm from "choosing to jettison" that client. *Id.* at *2. The Snapping Shoals case, on which Plaintiff relies most heavily, highlights the crucial distinction between an attempt by a law firm to withdraw before the completion of the matter for which it had been engaged, and the facts of this case, in which Defendant Duane Morris only withdrew after (1) the claims had been settled and a settlement agreement had been *signed* (unlike Snapping Shoals), (2) the settlement had been approved by order of the bankruptcy court, (3) Duane Morris had given MMM and MAI written notice that its engagement had been completed and it intended to withdraw, and (4) an order was entered by the bankruptcy court without objection, granting Defendant Duane Morris leave to withdraw as counsel for MMM and MAI.

In this case, the Court concludes that Defendant Duane Morris' representation of MAI and MMM was terminated in a lawful and appropriate manner. Defendant Duane Morris terminated its relationship with its clients at the logical end of a successful representation, after its clients had agreed to settle their claims. Defendant Duane Morris' proper and unopposed

withdrawal thus converted the existing clients, MMM and MAI, into former clients for conflict purposes. And, as previously stated, the parties agree that under “former client” analysis no conflict exists.

B. Based on the changed circumstances, the injunction should be vacated, and the case dismissed.

A new trial may be granted in any case where *any* material evidence *relating to new and material facts* is discovered after the rendition of a verdict. See O.C.G.A. § 5-5-23. In this instance, however, a new trial is not necessary since the issue can be resolved as a matter of law based on the present documentary record. To this extent, the law is clear that the Court, at any time during the pendency of the litigation, may enter an injunction or *modify its terms upon proof of changed circumstances.*” See Mathis v. Durham, 269 Ga. 753, 754-55 (1998). When the factual circumstance necessitating the injunction ceases to exist, the Court should not continue the injunction. See Conner v. Conner, 269 Ga. 112, 114 (1998) (finding that the court abused its discretion in continuing an injunction after the need dissolved and stating that “[t]he continuing of injunctions rests in the sound discretion of the judge, but is a power to be prudently and cautiously exercised and not to be resorted to except in clear and urgent cases. There must be some vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy.”).

In evaluating the injunction, the Court must be mindful of the strong interest in protecting the Smiths’ right to the counsel of their choice. As the Court of Appeals explained in Piedmont Hospital, Inc. v. Reddick, 267 Ga. App. 68 (2004):

The right to counsel is an important interest which requires that any curtailment of the client’s right to counsel of choice be approached with great caution.

Disqualification not only curtails a client's right to counsel of choice, but results in expense and delay that are costly both to the client and to the administration of justice.

Id. at 76.

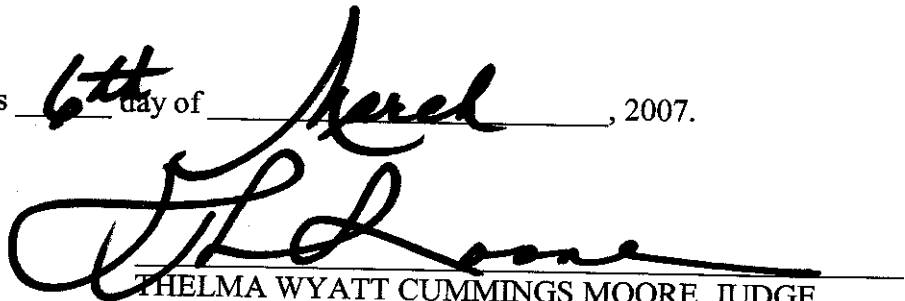
Thus, because the Court's prior November 8, 2006 Order was based on the fact that Defendant Duane Morris' representation of the Smiths was *concurrent*, and because Duane Morris' representation of MMM and MAI has been terminated properly by an order of the bankruptcy court without objection from either of Duane Morris' former clients, or their attorneys, Morris, Manning & Martin, injunctive relief is no longer necessary or appropriate under the Rules of Professional Conduct. In addition, Plaintiff's Complaint only challenges Defendant Duane Morris' *concurrent* representation of the Smiths and MMM/MAI (See Complaint, ¶¶ 37, 42), and Plaintiff agrees that no conflict exists under Rule 1.9. Because there is no concurrent representation, the state of affairs challenged by Plaintiff has ceased to exist, and its claims are moot. See Chastain v. Baker, 255 Ga. 432, 433 (1986) ("A moot case is one which seeks to determine an abstract question which does not arise upon *existing* facts or rights.").

As such, the basis for the injunction in the present case has been eliminated, and the injunction is unjustified. To further this extent, the Court finds that to bar an attorney from representing a client who may have some distant interest in conflict with another current or former client, especially in an era of flourishing companies and multi-office law firms, is inherently unreasonable.

CONCLUSION

For all of the above reasons, the Defendant's Motion for New Trial and to Vacate the Permanent Injunction and to Dismiss on the Ground That the Controversy is now Moot is hereby **GRANTED**. The permanent injunction entered by the Court on November 8, 2006 is hereby **VACATED**, and Plaintiff's claims are **DISMISSED AS MOOT**.

SO ORDERED this 6th day of April, 2007.



THELMA WYATT CUMMINGS MOORE, JUDGE
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

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