

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

PARKERVISION, INC.,

Plaintiff,

v.

QUALCOMM INCORPORATED,

Defendant.

Civil Action No. 3:11-cv-719-J-37-TEM

QUALCOMM INCORPORATED,

Counterclaim Plaintiff,

v.

PARKERVISION, INC., and
STERNE, KESSLER, GOLDSTEIN & FOX PLLC

Counterclaim Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF QUALCOMM'S
MOTION FOR A PRELIMINARY INJUNCTION

“A firm that cannot represent a party opposing a current client in litigation also cannot help some other firm do the same thing, trying to avoid adversity solely by not making an appearance in court. Put the other way, if the firm would be disqualified if it appeared in court, it can’t avoid disqualification by simply acting only out of court. In some ways, a firm that tries to help out ‘behind the scenes’ can be portrayed in even a harsher light than a firm that appears in court, since the failure to appear can be characterized as a strategic, cynical decision designed to ‘hide’ the conflict.”

David Hricik, Patent Ethics – Litigation 37-38 (Oxford University Press 2010).

Argument¹

Having made what Sterne Kessler’s own ethics expert has described in the above quote from his recent treatise as the “strategic, cynical decision” secretly to represent one client and then try to “hide the conflict,” Sterne Kessler (“SKGF”) cannot avoid disqualification now with half-truths and cagily limited denials. SKGF denies that it has “represented” ParkerVision in this lawsuit. But its denial turns upon a very cramped understanding of “representation,” one rejected by its expert’s opinion that behind-the-scenes assistance is every bit as much representation as formal appearance in court. SKGF finally, albeit implicitly, admits that it prepared a pre-suit infringement analysis for ParkerVision that plainly formed the basis for the filing of the complaint against Qualcomm. This is the very act that SKGF’s ethics expert says is improper and a major reason why Qualcomm will prevail in proving a breach of SKGF’s fiduciary duty of loyalty.

As a fall-back position, SKGF also contends that Qualcomm provided an advance, blanket waiver of this conflict because Qualcomm consented in earlier engagement letters to SKGF’s performing “analysis and opinions” adverse to Qualcomm. Raised for the first time in the opposition to this motion despite many opportunities to articulate it in the past, this position is rejected by two immediately ensuing carveouts for opposing Qualcomm in “litigation concurrent with our representation of Qualcomm.” The negotiation history reflects that both carveouts from

¹ Documents cited herein are attached to the Supplemental Declaration of Alex H. Rogers (“Rogers Suppl. Decl.”), dated December 7, 2011, and the Supplemental Declaration of Joseph E. Lasher (“Lasher Suppl. Decl.”), dated December 7, 2011, which are submitted herewith.

the waiver were inserted at Qualcomm's insistence, to avoid the very type of adverse representation that Qualcomm has now been forced to counter.

The word-parsing and the carefully-crafted denials should stop. Qualcomm never consented to be sued by its own lawyers. That SKGF now, for the first time, relies on a false distinction between overt representation through formal appearance and covert representation behind the scenes demonstrates why a formal Court order is necessary to protect Qualcomm's legitimate interests and to preserve the Court's future ability to order complete relief against this former fiduciary. Qualcomm does not seek to interfere with legitimate, ethical opposition to Qualcomm's inequitable conduct allegations. Qualcomm simply wants to prevent its former lawyers from continuing to act improperly and to prevent ParkerVision from benefiting from that improper conduct. A formal order, precisely defining which interactions between SKGF and ParkerVision may take place while this case is pending, would both protect Qualcomm and allow SKGF and ParkerVision to defend themselves.

I. SKGF's Concurrent Adverse Representation of ParkerVision and Qualcomm Constitutes an Impermissible Conflict of Interest Warranting Immediate Disqualification.

One inescapable conclusion emerges from SKGF's memorandum in opposition to Qualcomm's motion: SKGF helped its client ParkerVision to bring this lawsuit against its other client, Qualcomm. Afforded numerous opportunities to deny that it ever provided such assistance or to explain what it did, SKGF has remained steadfastly silent in this regard. Nowhere in its motion or the accompanying affidavits, despite several other forceful denials,² does SKGF deny the core allegation of Qualcomm's counterclaim, that SKGF helped ParkerVision sue Qualcomm. Even

² For example, the declaration of Robert Sterne, founding partner of SKGF and member of ParkerVision's board of directors, expressly denies Qualcomm's allegation that he failed to recuse himself from the ParkerVision board's consideration of whether to sue Qualcomm. (*See* Dkt. 59 Ex. 17 ¶ 5) (answering for the first time a question Qualcomm has been asking since August). Noticeably absent from SKGF's papers is a similarly unequivocal denial of the allegation that it provided material assistance to ParkerVision in preparing to sue Qualcomm.

at this early stage and before discovery has revealed the full extent and nature of its breaches, it is apparent that Qualcomm will prevail on its claim that SKGF violated its duty of loyalty.

Not only has SKGF failed to deny its past breaches of its duty of loyalty, but it has also repeatedly failed to say whether it will assist ParkerVision in this litigation in the future. SKGF's assertions to the contrary (SKGF Br. 1, 10) are false. Not once, from August 16, when Qualcomm first asked, until December 1, the day SKGF filed its opposition to Qualcomm's motion, did SKGF state unequivocally that it would not continue to assist ParkerVision in this litigation. Rather, SKGF has repeatedly dodged Qualcomm's inquiries:

- When Qualcomm first asked SKGF "to confirm that no present or former [SKGF] attorney . . . will devote any time in the future to advising or assisting ParkerVision" in connection with this action, SKGF replied only that it "will not enter [an] appearance or otherwise act as counsel for ParkerVision . . . so long as Qualcomm remain[ed] a firm client." See Lasher Suppl. Decl. Exs. 1, 2. (Emphasis added.)
- After SKGF's unilateral withdrawal from its representation of Qualcomm, Qualcomm again inquired whether "SKGF intend[s] to assist ParkerVision in any way in its litigation against Qualcomm;" SKGF failed to provide any meaningful response to this inquiry, stating only that SKGF "is not representing ParkerVision" in this action. See Lasher Suppl. Decl. Exs. 3, 4. (Emphasis added.)
- Although Qualcomm reiterated its inquiry in another letter, noting that SKGF had not revealed anything about its future intent, Qualcomm received no response from SKGF. See Lasher Suppl. Decl. Ex. 5.

This is not the candor expected of a fiduciary. It was this persistent refusal on the part of SKGF to state unequivocally that it had not assisted ParkerVision, and would not do so in the future, that compelled Qualcomm to name its own law firm as a counterclaim defendant in this lawsuit.

SKGF continues its pattern of carefully parsed language and incomplete denials in its opposition to this motion. Its narrow use of the term "representation" in connection with this litigation requires particularly close scrutiny. SKGF argues that "verifying or conducting an analysis of whether [ParkerVision's] patents are infringed is not representation in litigation." (See SKGF Br. 11.) But in a patent infringement case, such as this one, the infringement investigation

that precedes the filing of the complaint results in the fundamental allegations upon which the litigation is based. This foundational work, which is required to satisfy the requirements of Fed. R. Civ. P. 11, let alone to credibly litigate the case, clearly constitutes representation in litigation, even when it occurs behind the scenes. That SKGF hid its involvement in this case by not appearing on the pleadings does not change the nature of its work. Indeed, when not developing a contrived argument in opposition to this motion, even SKGF acknowledges that pre-suit analysis is an essential aspect of patent litigation. *See* Lasher Suppl. Decl. Ex. 6 (SKGF promotes its litigation services by stating: “SKGF understands the importance of putting the case together properly from the very beginning—the value of due diligence and thorough research upfront, including the nuances that can make or break a case”).

SKGF’s pointed reliance on its not having “drafted” the complaint only highlights its refusal specifically to deny any involvement in performing the infringement analysis upon which ParkerVision’s complaint is necessarily based. (*See* SKGF Br. 10.) Conducting an infringement analysis for one client so that it can sue another for damages and injunctive relief is more substantive and more adversarial than actually drafting a bare-bones complaint (like the one ParkerVision filed). That SKGF draws such upside-down distinctions demonstrates that Qualcomm should not simply accept SKGF’s unenforceable assurances that it will not “represent” ParkerVision, but must continue to seek an order from this Court.

SKGF advances two primary arguments why Rule 1.7 does not require its disqualification. First, SKGF argues that because it “properly withdrew from its representation of Qualcomm” after Qualcomm filed its Counterclaim, the concurrent representation conflict rules do not apply. (SKGF Br. 14.) However, because SKGF’s conflict of interest arose well *before* SKGF’s withdrawal, the propriety of its withdrawal is irrelevant to the determination of which ethical rules govern its conflict. *See Hilton v. Barnett Banks, Inc.*, 1994 WL 776971, at *3 (noting that a lawyer’s conduct is

subject to Rule 4-1.7 “if [the lawyer] has concurrently represented adverse interests at any point during the action”); *Florida Ins. Guar. Ass’n, Inc. v. Carey Canada*, 749 F. Supp. 255, 261 (S.D. Fla. 1990) (“clients who were concurrently represented at any point during the conflict are treated as concurrent clients for purposes of [a] disqualification motion”). Thus, the work that SKGF performed for ParkerVision in connection with this litigation must be analyzed under the stringent standard of Rule 1.7 regarding concurrent adverse representation.³ Contrary to SKGF’s suggestion (see SKGF Br. 16), Qualcomm need not demonstrate that SKGF’s past work for Qualcomm was substantially related to this action.

SKGF also contends (now, for the first time) that any assistance that it may have provided to ParkerVision in developing its infringement case would not have violated its ethical duties because Qualcomm had consented to the conflict. In support of this argument, SKGF points to language in an April 15, 2010 engagement letter executed by SKGF and Qualcomm (the “2010 Engagement Letter”), which SKGF characterizes as a broad conflict waiver. (SKGF Br. 4, 6, 16.) In essence, SKGF contends that the waiver of conflicts stemming from “patent analysis and opinions” is broad enough to include a waiver for behind-the-scenes litigation analysis adverse to Qualcomm. (See SKGF Br. 7, 16.)

To interpret the 2010 Engagement Letter to permit preparatory litigation analysis, SKGF reads the waiver relating to “patent analysis and opinions” to cover what it all but admits it did before ParkerVision filed suit. By doing so, however, it disregards the clear, specific commitment that Qualcomm’s consent “does not extend to concurrent representation of clients adverse to Qualcomm in a litigation concurrent with the firm’s representation of Qualcomm.” (See SKGF Br.

³ Nor is it of any consequence that SKGF withdrew after Qualcomm sued it for its past breaches. SKGF “should not be rewarded for delaying resolution of a conflict issue”—a feat accomplished by hiding the conflict from Qualcomm—“by being accorded a less demanding disqualification standard.” *Merck Eprova AG v. Pro Thera, Inc.*, 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009).

7, 16.) This was a proviso Qualcomm inserted precisely to make clear that it was not consenting to adversity in litigation, one of the most serious ethical conflicts. *See* Rogers Suppl. Decl. ¶ 7. If SKGF had truly believed—which it undoubtedly did not—that the 2010 Engagement Letter included a “Trojan horse” provision undoing Qualcomm’s refusal to waive a litigation conflict, it should have plainly and clearly said so. *See Florida Ins. Guaranty Ass’n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255, 257 (S.D. Fla. 1990) (disclosure letter referring only in general terms to potential conflict insufficient for lack of disclosure of known magnitude of adverse interests at stake). It didn’t. *See* Rogers Suppl. Decl. ¶ 9. And if it had, Qualcomm would have said, “no.” *Id.* That is both because Qualcomm reasonably understood the waiver for “patent analysis and opinions” to apply to the same kind of defensive opinion work—*i.e.*, providing opinions to parties accused of infringement—for which Qualcomm was retaining SKGF, and because Qualcomm had specifically refused to agree to allow its own lawyers to sue it. *Id.*

Nor would acceptance of SKGF’s cramped understanding of the term “representation” alter this conclusion that Qualcomm did not waive the instant conflict. The 2010 Engagement Letter authorizes SKGF to “*oppos[e]* Qualcomm in matters *except* litigation concurrent with our representation of Qualcomm.” (Emphasis added.) Clearly, developing the patent infringement analysis and contentions upon which ParkerVision based its complaint counts as “opposing” Qualcomm in litigation, even if it was not “representation.”⁴ But, of course, that activity *was* legal “representation,” as made abundantly clear by the cases cited in Qualcomm’s opening brief and by the epigraphic quote, *see* above, p. 1, from SKGF’s ethics expert’s treatise on patent ethics.

⁴ Additionally, Qualcomm notes that the engagement letter for the last of the six opinion matters for which it recently retained SKGF was executed on November 17, 2010. If at that time SKGF had already accepted its conflicting representation of ParkerVision, then, even accepting SKGF’s very broad interpretation of the waiver provisions, SKGF’s failure to advise Qualcomm of its conflict renders the purported waiver invalid for lack of informed consent. *See Florida Ins. Guar. Ass’n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. at 259.

II. SKGF Should Be Enjoined From Further Representation of ParkerVision in Connection with This Litigation.

A. Qualcomm Has Standing to Seek Injunctive Relief.

Seeking to enable SKGF to continue breaching its fiduciary duties, ParkerVision contends that “there is no actual case or controversy involving SKGF’s representation of ParkerVision in this litigation” because SKGF “repeatedly and unequivocally” represented that it “is not representing and will not represent ParkerVision in this litigation.” (PV Br. 1.) However, SKGF has never, prior to the filing of its opposition to Qualcomm’s motion, stated unequivocally that it will not represent ParkerVision in this litigation in any way, including behind the scenes. In the absence of such a commitment, the limited commitment SKGF now makes not to “represent” ParkerVision in this case does not afford Qualcomm with the provisional relief it seeks. SKGF’s past breaches of fiduciary duty make it appropriate for Qualcomm to seek injunctive relief preventing further breaches by SKGF and mitigating damages to Qualcomm. *See Merrill, Lynch, Pierce, Fenner, & Smith Inc. v. Kurgis*, 2008 U.S. Dist. LEXIS 89362 (M.D. Fla. Oct. 23, 2008) (enjoining a financial advisor’s further breaches of fiduciary duty).

In a similar, “me too” vein, ParkerVision argues that SKGF’s belated and limited assurances render this motion moot. However, “[i]t is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotation omitted). This principle also applies where a plaintiff seeks injunctive relief, unless “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *U.S. v. Concentrated Phosphate Export Assn., Inc.*, 383 U.S. 199, 203 (1968). Here, the opposite is true; SKGF’s carefully limited denials and concessions indicate a desire to continue the wrongful behavior behind the scenes. SKGF’s self-serving statement that it does not intend to represent ParkerVision prospectively is insufficient to deprive the Court of

jurisdiction: such an unenforceable, unverifiable promise leaves SKGF “free to return to [its] old ways.” See *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183-84 (11th Cir. 2009) (“To defeat jurisdiction . . . defendants must offer more than their mere profession that the conduct has ceased and will not be revived.”).

B. Qualcomm Has Satisfied the Requirements for a Preliminary Injunction.

For the reasons set forth here and in its opening brief, Qualcomm has demonstrated that there is a substantial likelihood that it will succeed on the merits of the claims for breach of fiduciary duty and breach of contract that underlie its request for injunctive relief. SKGF’s arguments to the contrary are based on an erroneous interpretation of the ethics rules and a gross mischaracterization of the 2010 Engagement Letter. To the extent that SKGF invokes its motion to dismiss Qualcomm’s underlying claims, Qualcomm notes that SKGF’s motion has been mooted by its Amended Answer and Counterclaims, filed on December 2, 2011. (See Dkt. 62.) In particular, Qualcomm’s amended pleadings identify additional, concrete harms that Qualcomm has suffered as a proximate result of SKGF’s misconduct. (See Dkt. 60 ¶¶185-86) (alleging, for example, that Qualcomm has been harmed because it paid SKGF fees for work performed during the period of concurrent representation, and because it lost the value of such work). These allegations are sufficient to state a claim for breach of fiduciary duty.⁵

Further, the harm that Qualcomm will suffer if SKGF is not enjoined from representing ParkerVision in connection with this litigation—especially behind the scenes—will be irreparable. Contrary to SKGF’s contention that Qualcomm has not identified sufficiently any confidential information that could be used to Qualcomm’s disadvantage in this litigation (SKGF Br. 18), it is

⁵ See *White v. Roundtree Transport, Inc.*, 386 So. 2d 1287,1289 (Fla. D.C.A. 3d. 1980) (attorney who simultaneously represented two clients with conflicting interest was not entitled to receive fee for representation of second client); *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (to the extent a client is entitled to disgorgement of fees, it need prove only that the attorney breached his duty of loyalty, not that the breach proximately caused an injury).

clear that the confidential information acquired by SKGF attorneys during the prosecution of Qualcomm's many patents, including the direct conversion patent, and its opinion work, could be used materially to benefit ParkerVision in this litigation. Qualcomm is not required to disclose the confidential information that it seeks to protect. See *Papyrus Technology Corp. v. New York Stock Exchange, Inc.*, 325 F. Supp. 2d 270, 277 (S.D.N.Y. 2004) (an aggrieved client need not choose between "revealing its confidences . . . or else refraining from moving to disqualify, thereby running the risk that its adversary will use its confidences against it in the litigation").

The balance of hardships is inclined sharply towards Qualcomm. To the extent that SKGF alleges any cognizable injury resulting from the requested injunction—which it does not—it is clearly outweighed by the harm to Qualcomm that would result absent such an order. Indeed, by suggesting that it is willing to commit not to further represent ParkerVision in connection with this litigation, SKGF appears to concede, at least in part, that the relief sought by Qualcomm would not harm either SKGF or ParkerVision, unless, of course, it intends to continue its behind-the-scenes support of ParkerVision.

Finally, as noted in Qualcomm's opening brief, entry of an injunction in this case would promote, not disserve, the public interest because the bar, and the public at large, have an interest in seeing the ethical duties of the Rules of Professional Conduct enforced.

C. The Scope of the Proposed Injunction Is Appropriate.

Qualcomm does not, as SKGF contends, seek an order that would preclude the SKGF attorneys who are accused of misconduct before the PTO from discussing with counsel for ParkerVision the facts and circumstances surrounding the alleged fraud. (SKGF Br. 13.) Qualcomm's proposed order seeks only to enjoin SKGF "from providing legal advice and services to [ParkerVision]." (Dkt. 38 Ex. 1.) Thus, Qualcomm seeks to preclude SKGF from offering

ParkerVision the kind of assistance that it is forbidden from providing under the ethical rules governing current client conflicts of interest, not to impede its ability to defend itself in this case.

To assuage SKGF's (unfounded) concerns that an injunction would somehow impede its ability to defend itself against Qualcomm's allegations of inequitable conduct while protecting Qualcomm from SKGF's providing the very kind of behind-the-scenes assistance to ParkerVision that necessitated this motion, the Court should enter a more detailed preliminary injunction. By clearly defining which interactions between SKGF and ParkerVision are proscribed and which are permissible, the Court may provide both parties with the protections they seek, and preserve its own ability to order full relief. Accordingly, Qualcomm submits herewith a revised proposed order that would (1) enjoin SKGF and those acting in concert from providing legal advice or legal or technical analysis of any kind to ParkerVision in connection with this action; (2) enjoin counsel for ParkerVision in this action from reviewing materials relating to this action prepared by SKGF other than the patents-in-suit and the prosecution histories therefor; and (3) enjoin any person who has reviewed such materials from participating as counsel for ParkerVision in this action or assisting in the prosecution of this action against Qualcomm. These protections are required to protect Qualcomm from further harm caused by SKGF's past breaches of its fiduciary duty of loyalty, and to enjoin further breaches of that duty. Additionally, the proposed order preserves SKGF's right to defend itself, by providing that ParkerVision may communicate with SKGF attorneys in connection with trial or deposition testimony by those attorneys, so long as such communications not refer to Qualcomm or its products.

Conclusion

For the foregoing reasons, Qualcomm respectfully requests that this Court enter a preliminary injunction in the form attached hereto as Exhibit A enjoining SKGF from further representation of ParkerVision in connection with this litigation.

December 7, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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Exhibit A

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Defendants.*

[PROPOSED] STIPULATION AND ORDER

WHEREAS Defendant, Counterclaim Plaintiff Qualcomm Incorporated (“Qualcomm”) has moved for a preliminary injunction pursuant to Fed. R. Civ. P. 65 and Local Rule 4.06;

WHEREAS upon consideration of the motion, the accompanying declarations and all exhibits thereto, the Court holds that the requirements for the entry of a preliminary injunction are satisfied and that Qualcomm’s motion should be granted;

IT IS HEREBY ORDERED that Qualcomm’s motion for a preliminary injunction is granted pending a trial on the merits; and it is further

ORDERED that Sterne Kessler and those acting in concert are enjoined from providing legal advice, legal or technical analysis, or services of any kind to ParkerVision in connection with this action or in any other manner adverse to Qualcomm's interests;

ORDERED that counsel for ParkerVision in this action shall not seek or review materials relating to this action prepared by Sterne Kessler other than the patents-in-suit and the prosecution histories therefor;

ORDERED that no person shall participate as counsel for ParkerVision in this action or assist the prosecution of this action against Qualcomm if such person has reviewed materials relating to this action prepared by Sterne Kessler other than the patents-in-suit and the prosecution histories therefor, or if such person has had substantive oral or written communications with present or former Sterne Kessler lawyers concerning Qualcomm, its products or services, or the patent infringement claims and defenses to be litigated in this Action; and

ORDERED that, notwithstanding the foregoing, counsel for ParkerVision in this action may communicate orally with current or former members or employees of Sterne Kessler solely in connection with in-person preparation for, or the offer of trial or deposition testimony by, such current or former member or employee of Sterne Kessler, provided that such communications may not refer to Qualcomm, its products or services.

Dated: _____

Roy B. Dalton, Jr., U.S.D.J.