THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No. 2009-CP-23-7229

Appellate Case No. 2011-202686

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Stevens Aviation, Inc.....Petitioner,

v.

DynCorp International LLC and Science Applications International Corporation,

of whom DynCorp International LLC is,..... Respondent.

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**PETITIONER'S RETURN TO RESPONDENT'S PETITION FOR REHEARING**

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## INTRODUCTION

On March 26, 2014, in Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 756 S.E.2d 148 (2014), this Court held that the Subcontract in question was a requirements contract creating an exclusive relationship between the parties as to C–12 and RC–12 aircraft (and therefore reinstated the lower court's grant of summary judgment on this issue). DynCorp International LLC's ("DynCorp") Rehearing Petition merely rehashes issues already argued before this Court and/or fails to raise any grounds

necessitating rehearing or issuance of a new opinion pursuant to Rule 221(a) of the South Carolina Appellate Court Rules.

DynCorp's first argument, that this Court is without authority to veer from the jurisprudential paths suggested by the litigants, is absurd. That Stevens Aviation, Inc. ("Stevens") may have suggested forty-two times that the trial court's order be fully reinstated does not prohibit this Court from reinstating it in part. Moreover, it is apparent that DynCorp does not put any stock in its own argument. In its briefing before this Court, DynCorp sought only full affirmance of the Court of Appeals' decision. See DynCorp Final Brief, p. 38 ("[f]or the reasons stated herein, this Court should affirm the Court of Appeals"). However, in its current Petition, it will settle for partial affirmance that is more to its liking. See DynCorp Petition, p. 1 ("or failing that, the Court of Appeals should have been affirmed in part").[1] In its remaining arguments, DynCorp misreads this Court's Opinion, the Subcontract and public policy. For example, the contract in the oft-cited Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed.Cir.2000), decision had ten listed subcontractors. This is hardly on all fours with the Subcontract in this case, which involved the singular relationship between Stevens and DynCorp, their course of dealing, and/or their history of having joined together to obtain the Prime Contract from the outset. Finally, DynCorp lifts out from this Court's Opinion a single phrase regarding a single term ("site organizational maintenance") to invent a

[1] Nor does DynCorp account for the 883 reported times between 1891 and 2014 that this Court has reversed a lower court's decision, in part. Among these are dozens of cases involving DynCorp's counsel (*e.g.*, Dickert v. Dickert, 387 S.C. 1, 691 S.E.2d 448 (2010), wherein this Court affirmed $99,000 in attorneys' fees for a wife, but reduced her alimony and excluded the goodwill of her husband's dental practice as a marital asset over the wife's objection.)

supposed factual inaccuracy. However, when viewed in the context of the Opinion and the Subcontract, this phrase is both remarkably accurate and succinct.[2]

## ARGUMENT

As a preliminary procedural matter, Stevens questions whether the Petition for Rehearing was properly filed. Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins"), counsel for DynCorp in this litigation, has a conflict of interest that requires the consent of Stevens before continuing its representation of DynCorp in this matter, which consent it has neither sought nor obtained. At the outset of this matter, Attorney Samuel W. Outten ("Mr. Outten"), then a partner at Stevens' counsel's firm, Womble Carlyle Sandridge & Rice, LLP ("Womble Carlyle"), actively represented plaintiff Stevens in ***this*** litigation. For example, Mr. Outten signed and filed the Summons and Complaint as counsel of record on behalf of Stevens on August 24, 2009, thereby personally affirming "good grounds to support" the allegations of the Complaint. (Complaint; R. 29-41; App. pp. 29-41.) Last month, on April 9, 2014, Mr. Outten finally filed a consent order to be relieved as counsel for Stevens.[3]

In November 2013, Mr. Outten left Womble Carlyle to join the law firm of Nelson Mullins, counsel for DynCorp. Shortly thereafter, counsel for Stevens notified

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[2] To further show this is red herring, Stevens would have (and does now) stipulated, if asked, that it is not seeking extra-contractual rights to perform unrequested/unassigned site organization maintenance at any DynCorp or Government owned locations.

[3] The Court may take judicial notice of the docket in this case, which can be found through the court's website at: http://www.greenvillecounty.org/SCJD/PublicIndex/CaseDetails.aspx?County=23&CourtAgency=23002&Casenum=2009CP2307229&CaseType=V.

defense counsel of the conflict created by Mr. Outten's move to Nelson Mullins.[4] Nelson Mullins took the position that consent of Mr. Outten's former client (Stevens) was not required for it to continue to represent DynCorp in this litigation.

Because the case was on appeal with only oral argument left to complete, Stevens agreed to hold this conflict issue in abeyance until after this Court rendered its Opinion, which it did in March 2014. Thereafter, counsel for Stevens again raised the conflict of interest issue with counsel for DynCorp. DynCorp continued in its position that consent was not required and filed its Petition without seeking or obtaining consent for Nelson Mullins to represent DynCorp (either generally in the case or with regard to this Petition). Stevens believes that DynCorp is required to seek its consent before DynCorp may continue to be represented by the law firm of the attorney that filed the Complaint on Stevens' behalf. A recent case from the District of South Carolina is directly on point. In H&C Corporation, Inc. v. Puka Creations, LLC et al., 2013 WL 5597180 (D.S.C.2013) **(copy attached hereto)**, lead counsel for defendant, Mr. St. Clair, left his law firm and moved to the firm representing the plaintiff in that case. When the defendant raised the conflict of interest issue, the plaintiff's firm asserted that it had instituted a screening procedure around Mr. St. Clair, its new partner and former counsel for the defendant, to prevent him "from having any involvement with [the plaintiff's firm's] representation of

[4] Rule 1.10(a), RPC, Rule 407, SCACR (Imputation of Conflicts of Interest) provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9 . . . ." Comment 2 to Rule 1.10 states that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client." Rule 1.9(a), RPC, Rule 407, SCACR (Duties to Former Clients) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same . . . matter . . . unless the former client gives ***informed consent***, confirmed in writing." (emphasis added).

[the plaintiff] in this matter, and from having any conversations with anyone at [the plaintiff's firm] about [the defendants] or the pending litigation." Id. at *1. The court held that, without obtaining consent, the firm acquiring the attorney from its adversary's firm could not continue in the litigation. Id. at *2. In addressing the sufficiency of a proposed screening procedure, the federal court stated that it was obligated to "uphold the South Carolina Rules of Professional Conduct" and that those Rules "do not provide for a screen in this situation." Id.[5]

Beyond the procedural relevancy of this point, Stevens felt compelled to lay out the conflict of interest issue in this Return in order to avoid DynCorp arguing to the trial court below that it has been waived by failing to raise it at the first opportunity after the abeyance for oral argument had expired. To be clear, Stevens is not seeking any advisory Opinion from the Court, and Stevens believes that the denial of the Petition on substantive grounds will make the issue moot as to this appeal, and allow it to be determined by the trial court if and when the issue is so presented.

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[5] The decision also notes the need to be mindful of "strategic" motions for disqualification, Id. at *2, which counsel for Stevens acknowledges can be a valid concern in certain circumstances. Here, however, Stevens is not presently seeking disqualification, only recognition that DynCorp has not followed the Rules and this failure makes its Petition for Rehearing out of order and subject to be disregarded as a procedural matter. Moreover, DynCorp's refusal to seek the required consent (and its failure to inform Stevens of the details of its alleged efforts to protect Stevens before the conflict issue was brought to its attention) raises a concern about the timing and depth of the screening efforts.

Nevertheless, if the Court believes the federal court in H&C Corp. has misstated South Carolina law on this issue of imputed disqualification under the South Carolina Rules of Professional Conduct, Stevens respectfully submits that a footnote in the Order denying the Petition on the substantive grounds might provide an opportunity for clarification.

## I. The Court's Correct Interpretation Of The Subcontract Is Not A Basis For Rehearing Just Because It Varied From Stevens' Interpretation.

In its Petition, DynCorp begins by arguing that because the Court did not interpret the Subcontract in the exact manner advanced by Stevens, its holding is in error, necessitating rehearing. While certainly a novel theory – one cited without any authority in support thereof – it is not a correct one. The mere fact that a court engages in original thought is not grounds for reversal.

In this civil action, Stevens generally seeks to enforce/recover on its contractual rights to perform subcontract work on three categories of government aircraft: C-12 aircraft, RC-12 aircraft and UC-35 aircraft. The trial court found the Subcontract unambiguously created an exclusive requirements contract relationship between the parties as to all three categories, and entered summary judgment to that effect. On appeal before this Court, Stevens defended the trial court's judgment and argued that, in each of the three categories, the Subcontract created an exclusive requirements contract relationship. DynCorp argues that the Court had no legal basis to find an exclusive requirements contract as to two of the categories of aircraft because counsel for DynCorp was able to count forty-two times where Stevens argues that it is entitled to a finding of exclusivity as to each of the three categories. Whether that number is correct or not, DynCorp cited no instances in which Stevens argued that the three categories must rise or fall as one for purpose of summary judgment.[6]

[6] If the contract related to a cake and the three categories were flour, eggs and sugar, then perhaps DynCorp would have a point (*e.g.*, without eggs, adding water would just make paste). However, in the instant dispute, it is clear that the categories of aircraft are easily separable for purposes of the Court's Opinion. (See Complaint, ¶¶ 20, 21; R. 34; App. p. 34.)

This Court and other courts in South Carolina have faced similar arguments. In McMaster v. Strickland, 322 S.C. 451, 472 S.E.2d 623 (1996), the appellant argued that once the special referee found specific performance unwarranted, it had to dismiss the action because the plaintiff did not expressly seek damages as an alternative. This Court (C.J. Toal) found that the factual allegations of the complaint and the request for "such other or further relief as the Court deems just and proper" was sufficient to allow an award of general damages. Id. (citing Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S.E. 878 (1930)); see also Smith v. Smith, 386 S.C. 251, 263, 687 S.E.2d 720, 726-27 (Ct.App.2009) ("[b]y claiming entitlement to child support based upon the guidelines and including a prayer for general relief, Mother's pleadings were sufficient for the family court to decide whether deviation from the child support guidelines was appropriate"). In the present civil action, Stevens also generally sought "all other relief which the Court deems just and proper." (Complaint; R. 41; App. p. 41.) In addition, Stevens repeatedly only sought recovery for all the RC/C-12 and UC-35 aircraft "covered by the Army Contract." Id. This Court, like the trial court, found, as a matter of law, that all of the C-12 and RC-12 aircraft were "covered by the Army Contract" and fell within an exclusive Subcontract requirements relationship between the parties. Stevens Aviation, 756 S.E.2d at 154. As for the UC-35 aircraft, that will have to be determined at trial; however, the fact that this Court did not include this category in its Order reinstating summary judgment does not mean that reinstating summary judgment, in part, was thereby erroneous as a matter of law.

The remainder of DynCorp's argument regarding the scope of the Court's contract interpretation merely presents the same tired arguments from its prior briefs

under a different heading. Throughout this litigation, both Stevens and DynCorp have consistently taken opposite positions with regard to the interpretation of the Subcontract. Stevens has argued that the Subcontract establishes an exclusive relationship with DynCorp as to all C-12, RC-12 and UC-35 aircraft. DynCorp, on the other hand, has argued that the Subcontract establishes no obligation to send any aircraft to Stevens for any service and maintenance. A court is not limited to simply rubber stamping an interpretation of a contract advanced by one of the parties before it. Rather, "[w]hen the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). When the language of a contract is unambiguous – as the Court found here, see Stevens Aviation, 756 S.E.2d at 154 – "[t]he court's duty is to enforce the contract made by the parties" at the time of contracting. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Thus, the language of a contract itself determines its force and effect, not the after-the-fact adversarial interpretation of the parties.

With these rules of construction in mind, this Court interpreted what it found to be "the unambiguous language of the Subcontract," establishing "an exclusive relationship between the parties as to C-12 and RC-12 aircraft covered by the Prime Contract." Stevens Aviation, 756 S.E.2d at 154.

DynCorp next makes a puzzling comparison of this Court's partial reinstatement of the trial court's grant of summary judgment for Stevens with its criticism of the Court of Appeals' inappropriate *sua sponte* grant of summary judgment for DynCorp. This point was argued *ad nauseam* by both parties throughout the entire appellate process.

Obviously, the critical factual difference is that Stevens moved for summary judgment on the Subcontract before the trial court. DynCorp did not. Beyond that, DynCorp simply refuses to accept the legal conclusions reached by the Court, which is no basis for a rehearing petition.

Accordingly, DynCorp's arguments are without merit and the Petition should be denied.

## II. This Court Properly Concluded That The Subcontract Establishes An Exclusive Relationship Between The Parties.

DynCorp next argues that the decision Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed.Cir.2000), cited by the Court for the general proposition that "a services or supply contract must fit into one of three forms," supports a finding that the Subcontract is not an exclusive requirements contract. Stevens Aviation, 756 S.E.2d at 152 (citing Ace-Federal). This argument fails for two reasons. First, it merely rehashes arguments made in prior briefing before this Court that were expressly rejected in the Court's Opinion. Second, Ace-Federal is readily distinguishable from the present case and fails to provide support for DynCorp's position.

In its prior briefing, DynCorp claimed that Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed.Cir.1998), established a fourth form of services or supply contract, to wit: a purchase order pricing structure contract. This Court rejected such an assertion, holding that "Coyle's plainly did not approve such a contract. To the contrary, the Coyle's decision made clear the contract at issue there was not enforceable." Stevens Aviation, 756 S.E.2d at 152 n.1. DynCorp further incorrectly claimed that Coyle's overturned the general rule of contract interpretation favoring finding a contract when reasonable over finding no contract. As summarized by the court in Torncello v. United

States, 681 F.2d 756 (Ct.Cl.1982), "[c]ourts are to 'assume that the parties intended that a binding contract be formed,' and '[t]hus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract.'" Stevens Aviation, 756 S.E.2d at 152 (quoting Torncello). Again, this Court rejected DynCorp's "no contract" argument, noting that "the Coyle's holding does not extend that far and only rejected the extreme reading of Torncello as requiring a court to interpret an otherwise unenforceable contract as a requirements contract." Stevens Aviation, 756 S.E.2d at 152 n.1. Thus, a court should find (as this Court did here) a requirements contract over no contract only when that is a legitimate "'choice of alternative interpretations.'" Id. (quoting Torncello, 681 F.2d at 761).

Further, Ace-Federal, like Coyle's, involved a starkly different set of underlying facts that differentiates it from the present case. In Ace-Federal, the government expressly contracted with ten companies for transcription and court reporting services. Id. at 1330. Like in Coyle's, the Ace-Federal court found nothing in that contract related to ten suppliers which supported a finding of exclusivity as to one of the ten. Under these particular facts, application of the Torncello rule of "saving the contract" by finding an exclusive, requirements contract was simply not among the reasonable alternative interpretations. Id. at 1332. This differs starkly from the Subcontract in the present case, where Stevens was the only subcontractor with which DynCorp contracted for the maintenance and service work at issue. Further, as this Court correctly held, the Subcontract unambiguously indicates the intent to establish an exclusive relationship

between the parties as to C-12 and RC-12 aircraft. See Stevens Aviation, 756 S.E.2d at 153-54.

Accordingly, this Court properly recognized that Ace-Federal, like Coyle's, did not support DynCorp's argument that the Subcontract was not an exclusive, requirements contract, thus the Petition should be denied.

## III. DynCorp's Claim That The Court Misunderstood Portions Of The Subcontract Is Without Merit.

DynCorp next asserts that the Court misunderstood the meaning of several terms in the Subcontract, namely "site organizational maintenance." Specifically, DynCorp argues that the Court erroneously concluded that the Subcontract required Stevens to perform ***all*** site organizational maintenance work on C-12 and RC-12 aircraft, regardless of the location of the aircraft or the circumstances surrounding the work. However, such a contention is a grossly inaccurate reading of this Court's Opinion and lacks substance or merit.

Pursuant to the ***Prime Contract***, DynCorp was normally responsible for all site organizational maintenance[7] at the home base of a plane. For example, minor maintenance issues, such as a broken light, would normally be handled by DynCorp personnel at the physical base site for the aircraft (*e.g.*, Wright Patterson Air Force Base).

[7] Site organizational maintenance is expressly described in the Subcontract as "lower level" maintenance to the "Depot Level Maintenance" performed at the specialized Depot by Stevens. (Subcontract, p. 6; R. 48; App. p. 48.) The "Depot Level Maintenance" definition addresses three types of maintenance: depot maintenance and "lower level" maintenance, including site organizational maintenance and intermediate maintenance. To put it in familiar car maintenance parlance, site maintenance would be what an owner does in his garage (*e.g.*, changing the oil, replacing windshield wipers, changing bulbs, etc.); intermediate maintenance would be what the local body shop does (*e.g.*, rotating tires, replacing brake pads, etc.); and depot maintenance would be what the car dealer does (*e.g.*, warranty work, cylinders, drive-train, etc.).

If site organizational maintenance issues (*e.g.*, a broken light) were noted on planes after they had been sent to a Stevens Depot facility for an Aircraft Condition Inspection ("ACI") or "Strip and Paint" work, the ***Subcontract*** provided that Stevens could perform such work at its facility, subject to written instruction by DynCorp to do so. Specifically, the Subcontract (Over and Above Maintenance) provides:

> Both Parties recognize that at times it will be beneficial for work that would have normally been performed at the site by site personnel to be accomplished at [Stevens'] facility. [Stevens] is not authorized to proceed with such efforts without written authorization from [DynCorp].

(Subcontract, p. 16; R. 58; App. p. 58.) The Court recites this provision in its Opinion, 756 S.E.2d at 154, in conjunction with its delineation of "site organizational maintenance" under the Prime Contract ("normally") from "site organizational maintenance" under the Subcontract (identified by/requested of Stevens during ACI or Strip and Paint Depot Level Maintenance). Id. (emphasis added) ("the Subcontract's description of ***that*** work is instructive . . .").

Having failed to create a substantive basis for re-opening the Court's Opinion, DynCorp now attempts a semantic basis by suggesting the Court's reference to all site organization maintenance somehow invades the site organizational maintenance reserved to the Prime Contract. DynCorp does this by cherry picking and isolating words from a paragraph that expressly admits it is merely repeating the above delineation from the Subcontract itself, but this time "[i]n other words." By this admonishment of "[i]n other words," the Court's Opinion expressly requires that the two portions must be read

together, which DynCorp abruptly ignores.[8] Granted, any document is made more clear if every pronoun is replaced with its corresponding proper noun, but that does not make the version with the pronouns unclear. In the same way, references in this paragraph of the Opinion to "that work," "such work" and "these provision" might be more clear if replaced with "the limited site organizational work identified in conjunction with ACI and 'Strip and Paint' work under the Subcontract," but that does not make this Court's Opinion unclear or in need of revision. As held by the Court, "the site organizational work" of the "Subcontract" is beyond that which "would have normally been performed at the site" (pursuant to the Prime Contact) and is done by Stevens "at Stevens' facility" as "Over and Above Work," "subject to DynCorp's instructions." Stevens Aviation, 756 S.E.2d at 154. By definition, this is work that needs to be done, as the Court states, at a "special location – Stevens' facility" and "Stevens is to perform all ***such*** work required by DynCorp." Id. (emphasis added). Putting semantics aside, there is no substance to this argument and the Petition should be denied.

DynCorp next attacks the Court's Opinion for allegedly misunderstanding the nature of ACI and "Strip and Paint" work to be performed by Stevens under the Subcontract. For ACIs, the Statement of Work provides:

> [Stevens] shall provide ***all*** labor, services, equipment, tools, facilities, tooling, lubricants, excluding engine oil, direct and indirect parts and material, fuel, and strip and repaint services required to perform all the requirements [set forth in the Statement of Work].

[8] Not to mention the clarity achieved by reading the entire Opinion as a whole. See Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 355-56, 594 S.E.2d 888, 897 (Ct.App.2004) ("Reading the trial court's order as a whole, the reasons for the injunction and the acts it intends to proscribe are amply clear.").

(Subcontract, p. 22; R. 64; App. p. 64 (emphasis added).) For "Strip and Paint" work, the Statement of Work continues:

> [Stevens] shall provide ***all*** labor, services, facilities, equipment, and direct and indirect parts and materials required to strip and completely repaint aircraft (for other than ACI requirements, at the direction of [DynCorp].

(Subcontract, p. 22; R. 64; App. p. 64 (emphasis added).) Similar to site organizational maintenance work, the Court correctly concluded that, based on the above provisions of the Subcontract, Stevens was to perform ***all*** such work, albeit subject to DynCorp's instructions.[9]

Finally, DynCorp attempts to cobble together an explanation of why a contract that supposedly did not obligate it to send a single aircraft – ever – to Stevens would include a termination clause and cure provisions. Like the rest of its arguments, this one falls short. As the Court noted in its Opinion, to interpret the Subcontract as not creating an exclusive relationship would render the termination provisions superfluous. There is no need for cure notices or the formal termination of the contract if DynCorp "could effectively unilaterally terminate the contract at any time by choosing to not send additional aircraft to Stevens." Stevens Aviation, 756 S.E.2d at 153-54.

Accordingly, DynCorp's Petition is without merit and should be denied.

[9] It is interesting that DynCorp tries to make an issue of the Court's incorporation of the "Aircraft" definition in the Statement of Work into the various provisions quoted herein, while at the same time, freely incorporating the definition of "Site" into "site organizational maintenance" throughout its arguments in section III of the Petition. (See DynCorp Petition, pp. 12-15.)

## CONCLUSION

For the reasons set forth above, DynCorp's Petition fails to raise any grounds necessitating rehearing and/or issuance of a new opinion pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, and should be denied.

Respectfully submitted,

Michael J. Bogle /Hgm/ with express permission by MTC

Keith D. Munson (SC Bar # 13400)
Email: kmunson@wcsr.com
Michael J. Bogle (SC Bar # 71125)
Email: mbogle@wcsr.com
Womble Carlyle Sandridge & Rice, LLP
550 S. Main Street, Suite 400
Greenville, SC 29601
Telephone: (864) 255-5412
Fax: (864) 239-5480

*Counsel for Petitioner Stevens Aviation, Inc.*

Dated: May 20, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
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RECEIVED
MAY 20 2014
S.C. Supreme Court

Opinion No. 4857 (S.C. Ct. App. filed July 27, 2011)

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on May 20, 2014, a copy of the attached Petitioner's Return to Respondent's Petition for Rehearing was served on the following parties by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

William S. Brown, Esq.
Lane W. Davis, Esq.
Nelson Mullins Riley & Scarborough
104 South Main Street/Ninth Floor
Greenville, SC 29601

C. Mitchell Brown, Esq.
Michael J. Anzelmo, Esq.
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211

Keith D. Munson /signed by MTC with express permission
Keith D. Munson (SC Bar # 10400)

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United States District Court,
D. South Carolina,
Florence Division.

H & C CORPORATION, INC., Plaintiff,
v.
PUKA CREATIONS, LLC and
Robert Puka, Defendants.

No. 4:12–cv–00013–RBH. | Oct. 11, 2013.

**Attorneys and Law Firms**

William Y. Klett, III, Nexsen Pruet Jacobs and Pollard, Columbia, SC, for Plaintiff.

Perry Reed Clark, Perry R Clark Law Offices, Palo Alto, CA, Sarah Day Hurley, Turner Padget Graham and Laney, Greenville, SC, for Defendants.

**Opinion**

**ORDER**

R. BRYAN HARWELL, District Judge.

*1 Before the Court is Defendant's Motion to Disqualify Counsel (ECF No. 41). Plaintiff filed a Response in Opposition to the Motion, and Defendant filed a Reply. The matter is ripe for disposition. [1]

Plaintiff H & C Corporation, Inc., filed this copyright infringement action on January 3, 2012, represented by William Y. Klett, III, of Nexsen Pruet Jacobs and Pollard law firm in Columbia, South Carolina. Defendants filed an answer on November 21, 2012, after the court granted their motion to set aside default. Defendants were represented by Sarah Day Hurley and Timothy D. St. Clair of Turner, Padget, Graham & Laney law firm in Greenville, South Carolina. On April 22, 2013, attorney St. Clair filed a Motion to Withdraw as Counsel on the basis that he was no longer with the firm and that Ms. Hurley would continue to represent the defendants. The court granted the motion on April 24, 2013. On May 10, 2013, the court granted a motion to appear *pro hac vice* by Perry Reed Clark on behalf of the defendants.

The Declaration of Mr. Clark indicates that Mr. St. Clair served as lead counsel for the defendants in the case and that he "was involved in substantial and confidential discussion about this case with defendants and was part of virtually all communications between defendants' California counsel and the Turner Padget law firm, including both telephone calls and emails." (ECF No. 41–2, p. 2). The affidavit further indicates that Mr. St. Clair was involved in settlement discussions regarding the case. The affidavit states that Mr. St. Clair became a partner with Nexsen Pruet on April 15, 2013 and that he never personally contacted the defendant parties regarding his move to another firm. Finally, the affidavit avers that Mr. St. Clair now works with attorney Sarah Kanos, who defendants contend has "day-to-day responsibility for this matter." (*Id.*, p. 3). Ms. Kanos is not an attorney of record in the case.

On April 22, 2013, James Long, Esquire, General Counsel for Nexsen Pruet, sent a letter to counsel for the defendants informing them that Mr. St. Clair had joined Nexsen Pruet and that "Nexsen Pruet has instituted a screening procedure to screen Tim St. Clair and Patti Weaver from having any involvement with Nexsen Pruet's representation of H & C in this matter, and from having any conversations with anyone at Nexsen Pruet about Puka Creations, LLC, or Robert Puka or the pending litigation." (*Id.*, p. 4). On June 6, 2013, Mr. Clark sent a letter to Mr. Long informing him that Defendants would move the Court for an order disqualifying Nexsen Pruet on the basis of imputed disqualification.

This court has a "duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar." *In re Asbestos Cases,* 514 F.Supp. 914, 925 (E.D.Va.1981) (citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.,* 518 F.2d 751, 757 (2nd Cir.1975); *Latham v. Matthews,* Nos. 6:08–cv–02995–JMC, 6:08–cv–03183–JMC, 2011 WL 52609, at * 2 (D.S.C. January 6, 2011). The South Carolina Code of Professional Responsibility sets forth the ethical standards for South Carolina attorneys who practice in this Court. *See* Local Civil Rule 83.I.08 and RDE Rule IV DSC. The moving party has the burden of proving that the opposing party's counsel should be disqualified. *Donaldson v. City of Walterboro Police Dept.,* No. 2:06–cv–02492–PMD, 2008 WL 906707 (D.S.C. March 31, 2008). "Because disqualification is such a drastic remedy, courts must 'avoid overly-mechanical adherence to disciplinary canons at the expense of litigants' rights freely to choose their counsel ... and ... [must] remain mindful of the opposing possibility of misuse of disqualification motions for

strategic reasons.' " *Id.* at *1, citing *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir.1992).

*2 South Carolina ethical Rule 1.10 "Imputation of Conflicts of Interest" provides in subsection (a) that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.10. Here, Mr. St. Clair and Mr. Klett are associated in the Nexsen Pruet firm, and Mr. St. Clair would be prohibited by Rule 1.9 [2] from representing the plaintiff due to his previous representation of the defendant. Here, Puka has not waived the conflict. Therefore, it would appear that Nexsen Pruet is disqualified from representing the plaintiff.

Nexsen Pruet contends that it has put in place a screen between Mr. St. Clair and the rest of the firm. However, South Carolina's ethical rules do not provide for a screen in this situation. While Rule 1.10 allows programs providing legal services to avoid imputed disqualification by screening lawyers from conflicting matters within the office, this rule however applies only to public defenders, legal services organizations, and similar programs. Comment 9 to Rule 1.10 specifically states: "Paragraph (e) applies only to programs of the type delineated and does not authorize screening by private law firms to avoid imputed disqualification." Nexsen Pruet relies upon ABA Model Rule 1.10. However, that rule has not been adopted in South Carolina. [3]

As noted by Judge Duffy in *Donaldson,* "the court acknowledges that granting this Motion to Disqualify deprives the Plaintiff of his chosen counsel and increases the length of time this case will remain pending. However, the court is mindful of its responsibility to uphold the South Carolina Rules of Professional Conduct ..." 2008 WL at *4.

The Court therefore grants [41] Motion to Disqualify Nexsen Pruet law firm. The deadlines in the case are stayed for ninety (90) days to allow time for the plaintiff to obtain new counsel.

**AND IT IS SO ORDERED.**

Footnotes

1 Under Local Rule 7.08, "hearings on motions may be ordered by the Court in its discretion. Unless so ordered, motions may be determined without a hearing."

2 Rule 1.9(b) provides: "A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing."

3 In an article entitled "Screening to Avoid Conflicts of Interest–What, When, and How?", 21 S.C. Lawyer 10 (Sept.2009), Professor Nathan M. Crystal states: *"Screening when a disqualified lawyer joins a new firm under revised ABA Model Rule 1.10(a)—not yet adopted in South Carolina.* In February the ABA adopted revisions to Model Rule 1.10(a) allowing a firm that hires a disqualified lawyer to avoid disqualification by screening the disqualified lawyer. Under the previous version of Rule 1.10, if the lawyer who joined the firm actually possessed confidential information about an adverse party of the new firm, then the firm would be disqualified from handling the case, and screening would not remove the disqualification. Critics of the old rule argued that it unnecessarily limited the ability of lawyers to change firms without providing significant protection to clients."

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