

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LBDS HOLDING COMPANY, LLC,

Plaintiff,

v.

ISOL TECHNOLOGY INC.,
MEDIVALLEY INC.,
HEUNG-KYU LEE,

Defendants.

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Civil Action No. 6:11-cv-00428-LED

JURY TRIAL DEMANDED

**NOTICE TO COURT PURSUANT TO TEXAS DISCIPLINARY RULE OF
PROFESSIONAL CONDUCT 3.03 AND UNOPPOSED MOTION TO WITHDRAW AS
COUNSEL FOR PLAINTIFF**

Akin Gump Strauss Hauer & Feld LLP and attorneys Sanford E. Warren, Jr., Lisa S. Gallerano, Ronald Scott Rhoades, Joshua L. Hedrick, Steven Udick, Charles Everingham IV, and James L. Duncan, III (collectively, “Akin Gump”) respectfully provide notice to this Court pursuant to Texas Disciplinary Rule of Professional Conduct 3.03 and ask the Court to allow Akin Gump to withdraw as counsel for Plaintiff LBDS Holding Company, LLC (“LBDS”). Akin Gump recognizes that the timing of its request is unusual, coming as it does after the rendering of a jury verdict in favor of Plaintiff, and while a Motion for Entry of Judgment is pending. However, under the circumstances discussed below, withdrawal is fully justified.

Factual Background

On May 14, 2014, Defendants’ counsel served an Emergency Motion for Sanctions against LBDS under Rule 11 (the “Motion,” which Defendants’ counsel has represented will be

filed in this Court today) setting forth certain allegations about Plaintiff.¹ Defendants allege that LBDS and its principals manufactured and falsified evidence used in this litigation, testified falsely, and committed a fraud upon this Court. Defendants claim Plaintiff's actions tainted this lawsuit and require this Court to set aside the verdict entered against ISOL Technology, Inc. in this case. In accordance with the safe-harbor provision of Rule 11, Defendants afforded Plaintiff an opportunity to review and respond to the allegations in the Motion before filing it with this Court.

Akin Gump reacted swiftly to the allegations in Defendants' Motion. Akin Gump immediately forwarded the Motion to representatives of LBDS and attempted to set up a teleconference to discuss the claims made in that Motion.² After several unsuccessful efforts to speak with Plaintiff on May 14, 2014, Akin Gump partner Sanford Warren participated in a teleconference with LBDS principal (and trial witness) Bert Davis on May 15, 2014.³ Mr. Davis was the only person who spoke to Mr. Warren during the call, although Mr. Davis represented to Mr. Warren that LBDS principals Suresh Reddy, David Tayce, and former principal (and trial witness) Dave Hernon were on that call.⁴ Mr. Davis told Mr. Warren that the allegations in the Motion were "essentially correct."⁵ Specifically, Mr. Davis told Mr. Warren that the "Cerner contract," upon which Plaintiff relied at trial, was not authentic.⁶ According to Mr. Davis, although there had been an actual contract with Cerner Corporation, that contract had been altered and had certain schedules attached to it which were forgeries.⁷ Further, Mr. Davis said

¹ Decl. of Sanford E. Warren, Jr. ("Sanford Decl.") ¶ 3, attached hereto as Exhibit "A."

² *Id.* ¶ 5.

³ *Id.* ¶ 6.

⁴ *Id.* ¶¶ 6-7.

⁵ *Id.* ¶ 7.

⁶ *Id.* ¶ 8.

⁷ *Id.*

that those on the call had set up a fictitious domain name and sent emails from that domain name to create the impression that certain emails, introduced into evidence at the trial of this case, were sent by Cerner Corporation, when in fact they were not.⁸ Mr. Davis told Mr. Warren that these activities began in 2009 during a period of negotiations between Plaintiff and ISOL.⁹ Neither Mr. Reddy, nor Mr. Tayce, nor Mr. Hernon said anything to deny the statements being made by Mr. Davis to Mr. Warren.¹⁰

In light of these statements, Mr. Warren informed Mr. Davis, Mr. Reddy, Mr. Tayce and Mr. Hernon during the May 15, 2014 teleconference and again by letter sent the next day, May 16, 2014, that the Texas Disciplinary Rules of Professional Conduct¹¹ require Akin Gump to call upon each of them, and through them, the Plaintiff, to disclose to this Court the information Mr. Davis revealed to Mr. Warren during the May 15th teleconference.¹² Mr. Warren also advised those on the call orally and through the May 16th letter that, should Plaintiff not promptly disclose this information to the Court, Akin Gump would do so in accordance with the Texas Disciplinary Rules of Professional Conduct.¹³ Mr. Warren further informed all on the call that, in light of Mr. Davis' statement that the allegations in the Motion were "essentially correct," Akin Gump could no longer represent Plaintiff in this matter.¹⁴

Before May 15, 2014, Akin Gump did not know the contract and documents provided by Plaintiff and entered into evidence in this litigation were forgeries and falsifications.¹⁵ Nor did

⁸ *Id.* ¶ 9.

⁹ *Id.* ¶ 10.

¹⁰ *Id.* ¶ 11.

¹¹ This Court's Local Rule AT-2 provides that the standards of professional conduct adopted as part of the Rules Governing the State Bar of Texas serve as a guide governing the obligations and responsibilities of all attorneys appearing in this court.

¹² Warren Decl. ¶¶ 12-13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* ¶ 14.

Akin Gump, prior to May 14, 2014, have any reason to question the authenticity of the documents at issue.¹⁶ Finally, Akin Gump did not know that any of the testimony offered by Messrs. Davis or Herndon was untrue.¹⁷

Argument and Authorities

The Texas Disciplinary Rules of Professional Conduct obligate Akin Gump to take measures to remediate Plaintiff's false testimony and disclose Plaintiff's deception to this Court. These circumstances also permit Akin Gump to withdraw as counsel for LBDS in this proceeding.

A. Akin Gump's Duty of Candor to the Court Requires Akin Gump to Disclose Plaintiff's Deception.

Akin Gump now knows that it offered false evidence and testimony into the record of this litigation. Texas Disciplinary Rule of Professional Conduct 3.03, Candor Toward the Tribunal, requires Akin Gump to take remedial measures, including disclosing LBDS' deception to the Court. Rule 3.03 provides:

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

Tex. Disciplinary Rules Prof'l Conduct 3.03(b).

Akin Gump tried to persuade LBDS to correct or withdraw the false evidence in this litigation during the May 15th teleconference and via letter dated May 16, 2014. LBDS has not done so. The Texas Disciplinary Rules of Professional Conduct therefore call upon Akin Gump to disclose the existence of this deception to the Court. *See* Tex. Comm. on Prof'l Ethics, Op. 480, V. 56 Tex. B.J. 705 (1993) (opining that an attorney was required to make a good faith effort

¹⁶ *Id.* ¶ 15.

¹⁷ *Id.* ¶ 16.

to persuade his former client to disclose to a bankruptcy court that certain settlement funds had been directed to a Trust, and not to another creditor as stated previously to the court, and also directing the attorney to disclose that fact to the bankruptcy court without the former client's consent if the lawyers efforts were unsuccessful); *see also* Tex. Disciplinary Rules Prof'l Conduct 1.05(f) ("A lawyer shall reveal confidential information when required to do so by ... Rule 3.03(b) ..."); *id.* at 1.05(c)(8) (permitting a lawyer to reveal confidential information "to the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.").

B. Texas Disciplinary Rules of Professional Conduct Permit Akin Gump's Withdrawal as Counsel for LBDS.

The Texas Disciplinary Rules of Professional Conduct permit Akin Gump to withdraw as counsel for LBDS. LBDS forged documents produced in this litigation, verified those documents, and through its counsel, introduced those documents into evidence in the trial of this case. They also testified falsely to mislead this Court and the jury. In other words, LBDS used Akin Gump's services as counsel to perpetrate a fraud on this Court. Texas Disciplinary Rule of Professional Conduct 1.15(b)(3) permits withdrawal when "the client has used the lawyer's services to perpetrate a ... fraud." *See Hovious v. Hovious*, No. 2-04-169-CV, 2005 WL 555219, at *2-3 (Tex.App.—Fort Worth Mar. 10, 2005, pet. denied) Withdrawal under Rule 1.15(b)(3) is allowed "even though the withdrawal may have a material adverse effect upon the interest of the client." Tex. Disciplinary Rule of Prof'l Conduct 1.15 cmt. 8.

Second, based on the facts in the Motion and subsequent conversation with counsel for Defendants, in addition to the investigation this Court will likely conduct into this matter, it appears that the United States Department of Justice and the Federal Bureau of Investigation are investigating this litigation. Indeed, the Motion attaches a subpoena to defense counsel to testify

before a Grand Jury convened by the United States District Court for the Western District of Missouri, which commands defense counsel to provide copies of a number of documents from this trial, including the trial transcript and any trial exhibits admitted during trial. Akin Gump does not know whether that Grand Jury's investigation relates only to this litigation or is broader in scope.

Texas Disciplinary Rule of Professional Conduct 3.08(b) provides that a lawyer "shall not continue as an advocate" in a pending proceeding "if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client ..." Akin Gump believes that its lawyers may be compelled to testify adversely to LBDS—either in this Court or before the Grand Jury in Missouri—triggering the requirement that Akin Gump withdraw as counsel. Rule 1.15(a)(1) provides that a lawyer "shall withdraw ... from the representation of a client if (1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law ..." The rules therefore require Akin Gump to withdraw as LBDS' counsel.

Finally, withdrawal should be permitted because a conflict of interest exists between Akin Gump and LBDS. Texas Disciplinary Rule of Professional Conduct 1.06, Conflict of Interest, provides:

A lawyer shall not represent a person if the representation of that person ... reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities ... to a third person or by the lawyers or law firm's own interests.

Tex. Disciplinary Rule of Prof'l Conduct 1.06(b)(2). Akin Gump's representation of LBDS is "adversely limited" by Akin Gump's own interests and obligations to follow the Texas Disciplinary Rules of Professional Conduct. Rule 1.15(a)(1), which obligates a lawyer to "withdraw .. from the representation of a client, if the representation will result in violation of

Rule 3.08, other applicable rules of professional conduct or other law,” compels Akin Gump to withdraw as counsel for LBDS.

Based upon the foregoing and with agreement of the Defendants, Akin Gump Strauss Hauer & Feld LLP respectfully requests that the Court allow it to withdraw as counsel for LBDS.

Dated: May 21, 2014

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned certifies that, on May 16, 2014, Akin Gump met and conferred with Jim [James?] Walker, counsel for Defendants, and that Defendants have advised that they are not opposed to the withdrawal of current counsel.

/s/ Sanford E. Warren, Jr. _____
Sanford E. Warren, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 21st day of May 2014, with a copy of the foregoing document via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3). Mr. Davis, as representative of LBDS, and any other counsel of record will be served by email and/or first class mail.

/s/ Sanford E. Warren, Jr. _____
Sanford E. Warren, Jr.