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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of:	)	
	)	
GREENS NURSING AND ASSISTED LIVING, LLC, d/b/a THE GREENS TRADITIONAL CARE AND REHABILITATION and KINDRED NURSING CENTERS EAST, LLC,	)	
	)	
Complainants,	)	
	)	Case No. 11-4159-EL-CSS
v.	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, d/b/a THE ILLUMINATING COMPANY,	)	
	)	
Respondent.	)	

COMPLAINANTS GREENS NURSING AND ASSISTED LIVING, LLC D/B/A THE GREENS TRADITIONAL CARE AND REHABILITATION AND KINDRED NURSING CENTERS EAST, LLC'S REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISQUALIFY ATTORNEYS DAVID A. KUTIK, JEFFREY SAKS, MARTIN T. HARVEY, AND THEIR LAW FIRM, JONES DAY

Complainants Greens Nursing and Assisted Living, LLC d/b/a The Greens Traditional Care and Rehabilitation and Kindred Nursing Centers East, LLC ("Complainants") filed their *Motion to Disqualify Attorneys David A. Kutik, Jeffrey Saks, Martin T. Harvey, and Their Law Firm, Jones Day* (the "Motion to Disqualify") on February 8, 2012. Respondent The Cleveland Electric Illuminating Company d/b/a The Illuminating Company ("Respondent") filed a *Memorandum of the Cleveland Electric Illuminating Company in Opposition to Complaints' Motion to Disqualify* (the "Opposition Memorandum") on February 27, 2012. Complainants now take this opportunity to reply to the Opposition Memorandum and to demonstrate why the Opposition Memorandum wholly fails to undermine the proposition that the Commission must disqualify Attorneys David A. Kutik, Jeffrey Saks, Martin T. Harvey, and the law firm of Jones Day (collectively, "Jones Day") from representing Respondent in this action.

I. INTRODUCTION

Claimants remain astonished at how cavalierly Jones Day dismisses its duty of loyalty to Kindred Healthcare, Inc. ("Kindred") and its subsidiaries. As counsel to Kindred and its subsidiaries, Jones Day owed to its client an obligation to act with the utmost good faith and with scrupulous openness, fairness, and honesty. Kindred Healthcare and its subsidiaries placed trust and special confidence in the integrity and fidelity of Jones Day by retaining Jones Day to provide professional legal services at a cost of nearly Three Hundred Fifty Thousand Dollars ($350,000.00) over the course of approximately ten (10) years. Untroubled by professional ethics, and apparently motivated by a hunger for ever larger fees, Jones Day readily abandoned, betrayed, and abused Kindred and its subsidiaries, by representing Respondent against Kindred and its subsidiaries in this action. The Commission must not countenance such misconduct.

II. LAW AND ARGUMENT

Fortunately, the Commission can ignore the Opposition Memorandum for several reasons. First, the Commission must reject Jones Day's characterization of Kindred and its subsidiaries as a "former" client of Jones Day for conflict of interest purposes because Jones Day was actively representing Kindred and its subsidiaries when this action was filed on July 1, 2011. Second, the Commission must reject Respondent's assertion that the Commission may elect not to disqualify Jones Day in the absence of "specific harm" because Respondent is relying upon an obsolete rule. Third, the Commission must reject Respondent's efforts to cloud a proper conflict of interest analysis by directing the Commission to inapposite "evidence" and inapplicable law. Finally, the Commission must reject any notion that Claimants waived their right to seek Jones Day's disqualification because, in the interest of professionalism, Claimants began trying to persuade Jones Day to withdraw consensually as early as December 2011.

A. The Commission Must Reject Respondent's Characterization Of Kindred And Its Subsidiaries As A "Former" Client Of Jones Day For Conflict Of Interest Purposes Because Jones Day Was Actively Representing Kindred And Its Subsidiaries When This Action Was Filed On July 1, 2011.

The Commission must reject Respondent's characterization of Kindred and its subsidiaries as a "former" client of Jones Day for conflict of interest purposes because Jones Day was actively representing Kindred and its subsidiaries when this action was filed on July 1, 2011. To begin with, Respondent erroneously looks to the wrong time frame in order to determine whether or not Kindred and its subsidiaries are a "current" or "former" client of Jones Day. The appropriate reference point for evaluating whether or not a conflict of interests exists is the time at which Jones Day commenced representing Respondent adverse to Kindred and its subsidiaries (*i.e.*, July 1, 2011). Lawyers are simply not permitted to abandon one client for a more lucrative engagement. In fact, courts have developed the "hot potato" doctrine for this very purpose. *See Picker Internatl., Inc. v. Varian Assoc., Inc.*, 670 F.Supp. 1363, 1365-66 (N.D.Ohio 1987) ("[a] firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client").[1] Under the "hot potato" doctrine, a lawyer may not, by his or her own actions, convert a "current" client into a "former" client for conflict of interest purposes after the conflict of interest surfaces. In other words, Jones Day cannot transform Kindred and its subsidiaries into a former client (even if Kindred decided never to use Jones Day again because of the law firm's ethical improprieties). Consequently, Respondent's analyses in Section (B)(2) of its Opposition Memorandum are entirely moot as all of those analyses presuppose a former, rather than concurrent, attorney-client relationship. In short, the Commission must recognize that the appropriate reference point for evaluating whether the relationship between Jones Day and Kindred and its subsidiaries is July 2011 rather than February or March 2012.

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[1] Jones Day should be familiar with this decision as it involved a successful motion to disqualify it from a case.

B. The Commission Must Reject Respondent's Assertion That The Commission Has Discretion Not To Disqualify Jones Day In The Absence Of "Specific Harm" Because Respondent Is Relying Upon An Obsolete Rule.

The Commission must reject Respondent's assertion that the Commission has discretion not to disqualify Jones Day in the absence of "specific harm" because Respondent is relying upon an obsolete rule. Whereas Respondent relies upon former DR 5-105, Complainant's motion is based upon current Prof.Cond.R. 1.7(a). Indeed, as explained by one recent Ohio court, absent compliance with Prof.Cond.R. 1.7(a) (which requires, among other things, mandatory ***written*** consent), a trial court "***must grant*** a motion for disqualification." *Carnegie Companies, Inc. v. Summit Properties, Inc.*, 183 Ohio App.3d 770, 2009-Ohio-4655, 918 N.E.2d 1052, ¶ 57 (emphasis added). As noted in *Carnegie,* Prof.Cond.R. 1.7 is "materially different" from its precursor, DR 5-105. *Id.* at ¶ 57. Under former DR 5-105, concurrent representation was permissible as long as it could be done with "equal vigor." *Id.* at ¶ 55. Conversely, Prof.Cond.R. 1.7 is absolute. Under Prof.Cond.R. 1.7, "any directly adverse concurrent representation is sufficient to violate the rule regardless of how vigorously the lawyer may be able to represent both clients." *Id.* Thus, absent consent, disqualification is **mandatory** under Prof.Cond.R. 1.7. *Id.* at ¶ 57. This strict rule is currently in place to protect clients, the public at large, and the integrity of the professional bar. No showing of some other "specific harm" is necessary to trigger disqualification under the current rule.

C. The Commission Must Reject Jones Day's Efforts To Cloud A Proper Conflict Of Interest Analysis By Directing The Commission To Inapposite "Evidence" And Inapplicable Law.

The Commission must reject Jones Day's efforts to cloud a proper conflict of interest analysis by directing the Commission to inapposite "evidence" and inapplicable law. For instance, Respondent labors under the erroneous notion that if Kindred and its subsidiaries are

treated as separate entities for certain purposes, they must be treated as separate entities for any and all purposes.[2] Along these lines, Jones Day relies upon an affidavit tendered in *McCain v. Kindred Healthcare, Inc.*, Case No. 6:10-cv-6212-SI, 2011 U.S. Dist. LEXIS 140722 (D. Or. Dec. 7, 2011). In that case, Kindred tendered an affidavit in an employment discrimination action that naturally did not involve an analysis of a lawyer's ethical duties in a conflict of interest setting. Courts have routinely rejected the notion that such statements are instructive in a conflict of interest setting. Indeed, the offending law firm in *Travelers Indemnity Co. v. Gerling Reinsurance Corp.*, S.D.N.Y. No. Co. 99 CIV.4413, cited in the instant Motion to Disqualify, attempted the same type of argument without success. (Exhibit L to the Motion to Disqualify).

Respondent's misplaced reliance upon this affidavit is similar to its misplaced reliance upon the doctrine of "piercing the corporate veil"/"alter ego" under *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274 (1993). Opp. Memo. at p. 15. The only inquiry before the Commission is whether Jones Day ran afoul of its ethical obligations when it took up representation of Respondent in this action. Once again, the Commission is not charged with determining whether the corporate veil of Kindred or any of its subsidiaries may be pierced. *Belvedere* and its progeny relate to a third-party's ability to pierce the corporate veil, which is wholly separate from determining the nature and extent of an attorney-client relationship for purposes of identifying any conflict of interest. Respondent's assertion with regard to this issue is nothing more than a distraction aimed at diverting the Commission's attention from the fact that a glaring conflict of interest exists in this case. The corporate

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[2] This is a particularly curious position for Respondent to take in light of the fact that Respondent admits on page 2 of the Opposition Memorandum that FirstEnergy Corp., a parent company of Respondent, retained Jones Day to represent Respondent in this matter. In other words, Jones Day appears to be taking direction in this litigation from a party other than Respondent itself, presumably because Jones Day represents FirstEnergy Corp. and its subsidiaries as a single client just as Jones Day used to recognize that it represented Kindred and its subsidiaries as a single client.

formalities established by Kindred have their own business purposes (tax planning, risk management, etc.) independent of the rules that govern the conduct of lawyers.

The Ohio Rules of Professional Conduct "are rules of reason" and "should be interpreted with reference to the purposes of legal representation and of the law itself." Prof.Cond.R. Preamble, comment 14. "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." *Id.*, comment 17. Here, when Jones Day sought a waiver from Kindred associated with this action, it sent its request to Kindred – not to a particular subsidiary. Likewise, when Jones Day issued its invoices for legal services associated with Kindred and its subsidiaries, it did so to "Kindred Healthcare, Inc." Jones day has not even suggested that it sought an engagement letter from Kindred's specific subsidiaries or treated each project that it performed for Kindred and its subsidiaries as an isolated engagement for a specific subsidiary. Until it would impact its ability to represent Respondent in this action, Jones Day always treated Kindred and all of its subsidiaries as one client.[3]

Of course, any remaining doubt that Jones Day had an existing attorney-client relationship with Kindred and its subsidiaries melts away in light of Jones Day's own admission that it faced a conflict of interest necessitating a waiver:

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[3] Respondent likewise relies heavily upon *Cliffs Sales Company v. American Steamship Company*, 1:07-CV-485, 2007 U.S. Dist. LEXIS 74342 (N.D. Ohio, October 4, 2007). However, Respondent glosses over the fact that the *Cliffs Sales* court found that both a parent and subsidiary were the same for conflict of interest purposes and that a conflict of interest existed pursuant to Ohio Prof. Cond. R. 1.7. Here, too, parent and subsidiary are the same for the purpose of a conflict of interest analysis. While the *Cliffs Sales* court did not require the disqualification of the offending lawyer despite the presence of a conflict of interest, the *Cliff Sales* case involves facts dramatically different from those at hand. In *Cliffs Sales*, the Northern District of Ohio held that the offending law firm's representation of the party seeking disqualification was insufficient to warrant disqualification. Specifically, the law firm subject to the conflict of interest had represented the moving party with regard to one other matter, and the *Cliffs Sales* court determined that did not necessitate disqualification. Of course, this is markedly different from the present case where Jones Day represented Kindred and its subsidiaries for over ten years at a cost of nearly $350,000.00 in attorneys' fees and where Jones Day originally and unqualifiedly acknowledged that it needed the permission of Kindred and its subsidiaries in order to represent Respondent in this case.

> We have been asked by our client, FirstEnergy (CEI), to represent its interest in a pending litigation matter captioned as follows: *Greens Nursing and Assisted Living, LLC dba The Greens Traditional Care and Rehabilitation and Kindred Nursing Centers East, LLC v. The Cleveland Electric Illuminating Company,* Case No. 11-419-E-CSS.
>
> It is our understanding that Greens Nursing and Assisted Living, LLC dba The Greens Traditional Care and Rehabilitation and Kindred Nursing Centers East, LLC are owned, in whole or in part, by Kindred Healthcare. By this e-mail I am seeking a waiver ***to permit*** Jones Day to represent the interests of FirstEnergy in this matter. * * * My partner, David Kutik, in our Cleveland office who I am copying on this e-mail, can provide additional information if necessary.

(Emphasis added). Respondent mischaracterizes this important correspondence in its Opposition Memorandum by claiming that this correspondence was simply Jones Day's attempt to inform Claimants that "* * * FirstEnergy had requested Jones Day's assistance in this proceeding." Opp. Memo. at 3. However, the intent of Mr. King's message was not a benign attempt to advise Claimants' of Respondent's desires. Rather, Jones Day sought a waiver that would "permit" it to proceed with representation of Respondents in this action. In other words, this message was an acknowledgment of a conflict of interest designed to elicit a waiver from its other client, Kindred and its subsidiaries. Put another way, Jones Day attempted to use its role as trusted advisor as a means to coax Kindred and its subsidiaries into granting a waiver.

In a thinly-veiled attempt to obscure the clear purpose of the correspondence, Respondent writes, in the very next sentence of its Opposition Memorandum, that "Mr. King reminded Ms. Young (Claimants' in-house counsel) that Jones Day's work for KHI was limited to 'general labor and employment advice out of our Pittsburgh office.'" *Id.* The obvious intent of this passage from the Opposition Brief is to create the false impression that Jones Day communicated some type of a qualification to its request for a waiver. However, this did not happen. Jones Day acknowledged a conflict of interest and requested a waiver of that conflict without any qualification.

Only after Claimants denied Jones Day's request did Jones Day begin to prevaricate, dodge its obligations to its client, and qualify its position. The correspondence that Jones Day transmitted after being told that Claimants would not sign a waiver was an obvious attempt to create a paper trail that would benefit its position when called to account for its ethical and fiduciary missteps. Despite the impression of temporal proximity implied in the Opposition Memorandum, Jones Day actually sent the electronic mail message containing the self-serving, qualifying language referenced in this passage of the Opposition Memorandum eight days ***after*** it initially sought Kindred's Waiver without qualification. (Exhibits A and D to the Motion to Disqualify). Furthermore, it sent this message seven days ***after*** Kindred declined Jones Day's request for a waiver. The undisputed fact remains that Jones Day acknowledged a conflict of interest and sought a waiver. Only when its client refused to grant that waiver did it start its campaign to fabricate a "record" that it could try to use in connection with the Motion to Disqualify that it must have anticipated.

To subscribe to the absurd position advanced by Respondent in the Opposition Memorandum would require the Commission to believe that lawyers seek waivers of conflicts of interest when no conflicts of interest actually exist. Jones Day is a sophisticated law firm with a global reach. It unquestionably determined that a conflict of interest existed. Acting upon its decision, it then sought a waiver from its client. ***When its client asked if a waiver was <u>needed</u>, Jones Day stated "<u>Yes</u>" to its client.*** (Respondent is conspicuously silent on this point in its Opposition Memorandum.) Evaluating its lawyers' request, Claimants refused to waive the conflict of interest. Jones Day cites to no cases in which the offending lawyer acknowledged the existence of a conflict of interest only to later successfully argue that no conflict of interest exists. This is because lawyers only seek waivers of conflicts of interest when conflicts actually

exist. Otherwise, when a client declines, the lawyer is "stuck" with his or her self-made inconvenient reality.

In summary, the Commission must reject Respondent's efforts to cloud a proper conflict of interest analysis by directing the Commission to inapposite "evidence" and inapplicable law.

D. The Commission Must Reject Any Notion That Claimants Waived Their Right To Seek Jones Day's Disqualification Because, In The Interest Of Professionalism, Claimants Began Trying To Persuade Jones Day To Withdraw Consensually As Early As December 2011.

The Commission must reject any notion that Claimants waived their right to seek Jones Day's disqualification because, in the interest of professionalism, Claimants began trying to persuade Jones Day to withdraw consensually as early as December 2011. Respondent's suggestion that Complainants somehow sat on their rights and strategically waited until after the results of a meter test in January to file a motion to disqualify Jones Day is silly. Jones Day is well aware of the fact that discussions about this conflict of interest were taking place long before any meter test. Only when it became clear that Jones Day was entrenched in its desire to represent Respondent at the sake of its attorney-client relationship with Claimants did Claimants tender their Motion to Disqualify. The authorities cited by Respondent are inapplicable as, among other things, they originated in trial courts and not before this Commission. *Barberton Rescue Mission v. Hawthorn*, Case No. 21220, 2003 Ohio App. LEXIS 1076 (Summit Cty., March 12, 20003); *In re Valley-Vulcan Mold Co.*, 5 Fed. Appx. 396 (6th Cir., 2001). They also involved situations where the at-issue parties had engaged in protracted and substantive litigation prior to a request to disqualify counsel. Here, however, this matter has not yet progressed to an advanced stage of adjudication. The parties have merely engaged in some written discovery. No case management schedule exists, no depositions have been taken, and no other motions were pending with the Commission prior to the filing of the motion to disqualify. Indeed, Respondent

is the party who brazenly opted to file a dispositive motion ***after*** Complainants filed their motion to disqualify. Respondent cannot colorably assert that it had "invested" its resources in that motion to dismiss prior to receiving the Motion to Disqualify when in fact no such motion was filed until much later.[4]

Furthermore, the Commission's own precedent reinforces the idea that the present proceeding is in its infancy. In *Treemasters Tree Service, Inc. v. Verizon North, Inc.*, Case No. 07-77-TP-CSS, Public Utilities Commission of Ohio, the Commission considered a motion to dismiss when Complainant Treemasters Tree Services, Inc. filed its complaint on a *pro se* basis. Respondent Verizon North, Inc. sought a dismissal on the basis that a corporation must be represented by counsel. This Commission, in denying the motion to dismiss, ruled as follows:

> (12) While Verizon is correct that Rule 4901-1-08(A), O.A.C., requires Treemasters, as a corporation, to be represented by an attorney-at-law, this Commission has a longstanding practice of allowing the filing of complaints by non-attorneys, even when the complainants are corporations. We have also permitted those pro se corporate complainants to proceed with their complaints through the settlement conference stage of the proceeding without representation by legal counsel. However, we have historically required that, following a settlement conference, if such a complainant seeks to proceed with its complaint to hearing, then it must be represented by an attorney-at-law. Therefore, because a settlement conference has been held in this case, albeit unsuccessful, if Treemasters seeks to proceed with its complaint, it must retain legal representation and direct its legal counsel to file a notice of appearance and to serve Verizon with a copy of such notice. Failure to retain such legal representation will constitute grounds for dismissal of this complaint.

In other words, this Commission denied the utility's motion to dismiss because the complainant had until after the settlement conference to secure counsel. This clearly indicates that this Commission deems the activities that occur in a case before a settlement conference differently from the activities that occur after the settlement conference. In other words, the settlement

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[4] Frankly, the timing of Respondent's motion to dismiss is highly suspect. Complainants can only presume that filing the belated motion to dismiss after Respondent had already moved to disqualify Jones Day was Jones Day's way of attempting to maximize the fees that it could charge to FirstEnergy Corp. before that spigot is turned off by the Commission.

conference is an important date in the evolution of a case before this Commission. Here, this case is still in its functional infancy as the parties participated in a settlement conference only in October 2011. Granting Claimants' Motion to Disqualify will not unduly prejudice Respondent given the early stage of this action.[5]

III. REQUEST FOR AN EVIDENTIARY HEARING

Claimants have requested that the Commission conduct a hearing relative to the issues raised in its Motion to Disqualify and, now, Respondent's Opposition Memorandum. Predictably, Respondent (and Jones Day) are attempting to avoid a hearing on these issues. Despite Respondent's hollow opposition, Claimants again ask that the Commission schedule a hearing so that they might confront their lawyers with respect to this important matter and to provide the Commission with an opportunity to hear the testimony of those most familiar with this unfortunate situation. Jones Day is in an ongoing violation of its ethical and fiduciary duties to Claimants and the facts of this case necessitate an evidentiary hearing at the Commission's earliest possible convenience after some time for discovery.

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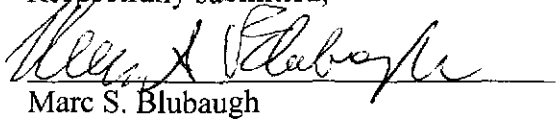
[5] Finally, the Commission must reject Respondent's peculiar suggestion that ***Claimants*** seek to delay this proceeding. That assertion is not only false but illogical. Claimants are the parties attempting to obtain relief from the Commission, and the relief ultimately obtained by Complainants in court will dwarf any payment obligation to Respondent. In other words, delay prejudices ***Claimants*** rather than Respondent. Nevertheless, Claimants are willing to bear the prejudice of delay in order to procure Jones Day's disqualification in light of Jones Day's betrayal of its duty of loyalty to Kindred and its subsidiaries. Respondent's admonition to "move this case along" is nothing more than faux urgency designed to divert the Commission from the central issue of Jones Day's ethical misconduct. Complainants have paid substantial utility bills under protest and are eager to have the Commission establish a scheduling order as soon as the Commission rules upon the pending motions.

IV. CONCLUSION

As set forth in Complainant's original motion, Rule 1.7 of the Ohio Rules of Professional Conduct categorically prohibits a lawyer from representing one client against another client without obtaining the consent of both parties. However, in complete disregard of this rule, Jones Day audaciously decided to represent Respondent in this case despite the fact that Jones Day also represented Kindred and its subsidiaries in other matters at the same time. Fortunately, the Commission can ignore Respondent's Opposition Memorandum for several reasons. First, the Commission must reject Jones Day's characterization of Kindred and its subsidiaries as a "former" client of Jones Day for conflict of interest purposes because Jones Day was actively representing Kindred and its subsidiaries when this action was filed on July 1, 2011. Second, the Commission must reject Respondent's assertion that the Commission has discretion not to disqualify Jones Day in the absence of "specific harm" because Respondent is relying upon an obsolete rule. Third, the Commission must reject Jones Day's efforts to cloud a proper conflict of interest analysis by directing the Commission to inapposite "evidence" and inapplicable law. Finally, the Commission must reject any notion that Claimants waived their right to seek Jones Day's disqualification because, in the interest of professionalism, Claimants began trying to persuade Jones Day to withdraw consensually as early as December 2011. For these reasons, and those stated in its original motion, Claimants respectfully requests that the Commission disqualify Jones Day as counsel for Respondent in this action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following by regular U.S. mail, postage prepaid, this 8th day of March, 2012, to:

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