

**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 SOUTHERN DIVISION**

SOUTHERN VISIONS, LLP,	}	
	}	
Plaintiff,	}	
	}	
v.	}	Case No.: 2:18-cv-02039-RDP
	}	
RED DIAMOND, INC.,	}	
	}	
Defendant.	}	

MEMORANDUM OPINION

The Wonder Years was an award-winning comedy-drama broadcast on ABC television from 1988 to 1993. Set in a turbulent time in our nation’s history, the late 1960s and early 1970s, the show portrays the life and perspectives of Kevin Arnold, a typical teenager raised by stereotypical parents in Anytown, USA. In one particular episode, “Dance with Me,” Kevin’s relationship with Lisa Berlini is blossoming (ever since their four-minute phone call). As they joke around together in homeroom, the upcoming school dance is announced over the PA system. Kevin decides it is time to take his burgeoning relationship with Lisa to the next level. So, he asks her to the dance (in the most intimate form of communication known to twelve year olds—by passing a note in class).

To his great glee, Lisa writes “OKAY!” (including a smiley face in the “o”). Kevin cannot believe it. Lisa Berlini, who has “the best smelling head of hair in the seventh grade,” is going to the dance with him; after all, he has it in writing. But soon after the bell rings, as Lisa and Kevin are filing out of class, the taller, cooler Brad Gaines arrives on the scene. To Kevin’s surprise, he asks Lisa to attend the dance with him. And to his dismay, mere minutes after saying yes to Kevin, Lisa accepts Brad’s offer. After Brad smiles and walks off, Kevin, obviously

confused, confronts Lisa: “But you just said you’d go [to the dance] with me.” Lisa is uncomfortable, but puts up a defense: “That was before Brad asked me. . . . I didn’t know he was gonna ask me when I said ‘yes’ to you.”

Red Diamond, Inc., the defendant in this case, may have some sympathy for Kevin. Red Diamond and the law firm Bradley Arant Boult Cummings (“Bradley”) have been to several dances over the years. Over the better part of a decade, from 2009 to 2018, Bradley represented Red Diamond in various small matters from time to time. But on December 23, 2018, Bradley began representing Southern Visions, LLP in this significant patent infringement lawsuit against Red Diamond. Bradley knew that its client Red Diamond objected strenuously to the representation, but, much like Lisa Berlini, it was happy to accept what it doubtless viewed as a substantial upgrade. Three days after saying “yes” to Southern Visions, on December 26, 2018, Bradley withdrew from all matters in which it was representing Red Diamond.

Red Diamond has moved to disqualify Bradley from representing Southern Visions against it in this lawsuit. (Doc. # 76). Among other things, Red Diamond claims Bradley violated Alabama Rule of Professional Conduct 1.7(a), which generally forbids the simultaneous representation of two directly adverse clients, when it began representing Southern Visions in this lawsuit. The court held a hearing on the matter on February 11, 2019. After careful consideration of the parties’ submissions and argument at the hearing, and for the reasons explained below, the court agrees with Red Diamond. Bradley violated Rule 1.7(a) when it began representing Southern Visions, and disqualification is an appropriate sanction for the violation. Red Diamond’s motion to disqualify (Doc. # 76) is accordingly due to be granted.¹

¹ Because the court concludes Bradley should be disqualified for violating Rule 1.7(a), it does not address Red Diamond’s disqualification arguments based on Rules 1.9 and 1.10. Additionally, the court agrees with Bradley that the declaration of J. Douglas McElvy (Doc. # 76-5) is inadmissible under Federal Rule of Evidence 702 because it offers merely legal conclusions, which invade the province of the court and are not helpful to the trier of fact. *See*

I. Background

To provide relevant context, the court first summarizes Bradley's prior representations of Red Diamond and then reviews the circumstances that gave rise to Red Diamond's disqualification motion.

A. Bradley's Prior Representations of Red Diamond

Bradley began representing Red Diamond in January 2009. (Doc. # 76-1 at 1, ¶ 2). At that time, Bradley attorney Ray Gibbons sent a letter to Red Diamond CEO William A. Bowron, Jr. confirming "our engagement as legal counsel to provide general representation" to Red Diamond. (*Id.* at 6). Since 2009, Bradley's work for Red Diamond has been light and sporadic.

In 2011, pursuant to that "general representation" agreement, Red Diamond sought Bradley's assistance during the divorce of Tom Bowron. (*Id.* at 2, ¶ 3). Tom Bowron is the brother of Red Diamond CEO William Bowron and a part owner of Red Diamond. (*Id.*). Because Tom Bowron's ownership interest in Red Diamond was at issue, Red Diamond's financial records were subpoenaed and several Red Diamond executives were deposed. (*Id.*). Bradley attorney Stewart Cox was involved in objecting and responding to the financial subpoenas and representing Red Diamond at the depositions of Red Diamond's CEO William Bowron and its CFO Sherman Pitts. (Docs. # 85-7 at ¶ 3; 76-1 at 2, ¶ 4).

Those sealed deposition transcripts, submitted by Red Diamond for the court's *in camera* review (Doc. # 86), show that Bradley received certain confidential, nonpublic information about Red Diamond during the course of this representation. The information includes, broadly, information about Red Diamond's board of directors, director fees, distributions to owners, ownership interests in the company, shareholder voting rights, audits, facilities, income, loans

Commodores Entm't Corp. v. McClary, 879 F.3d 1114, 1128-29 (11th Cir.) (2018). Bradley's motion to strike that declaration (Doc. # 84) is therefore due to be granted. The court has not considered the declaration in ruling on Red Diamond's motion to disqualify.

and guarantees, family trusts, corporate structure, operating divisions, annual reports, customer identities, company expenses, employee salaries, charitable giving, and other financial information including debt, liabilities, total cost of goods sold, and total sales.

In March 2014, Red Diamond engaged Bradley to advise it on employee benefit matters, including the company's retirement and welfare benefit plans. (Docs. # 76-1 at 2, ¶ 6; 85-5 at ¶ 3). Bradley attorney David Joffe was principally responsible for handling these matters. (Doc. # 85-5 at ¶ 3). Over the four years (2014-2018) that Joffe provided occasional advice to Red Diamond about employee benefit matters, he billed only 26.5 hours for a total of \$10,295. (Doc. # 85-5 at 3, ¶ 6).

In December 2014, Red Diamond engaged Bradley to advise it on tax matters. (Doc. # 76-1 at 2, ¶ 5). Bradley attorney Bruce Ely was principally responsible for this representation, and he handled three tax matters for Red Diamond. In the first matter, Ely provided Red Diamond advice about a pending tax audit by a private auditing company. (Doc. # 85-3 at ¶ 3). That matter concluded in 2015. (*Id.*). In the second matter, which occurred in 2017, one of Red Diamond's tax officers was a witness in a proceeding before the Alabama Tax Tribunal relating to a state audit of one of Red Diamond's vendors. (*Id.* at ¶ 4). Bradley billed 13.25 hours to Red Diamond on this matter. (*Id.*). Finally, Ely also billed fifteen minutes to Red Diamond in 2018 for his review of Red Diamond's coffee-maker lease agreement for potential Alabama rental tax issues. (*Id.* at ¶ 3).

Finally, in February 2016, Red Diamond engaged Bradley attorney Ethan Tidmore to represent it in various debt collection matters. (Doc. # 76-1 at 3, ¶ 7). These matters involved restaurants, food marts, or day cares that had purchased food supplies from Red Diamond on credit and then defaulted on payment. (Doc. # 85-4 at ¶ 4). None of these debts exceeded

\$25,000, and most were under \$5,000. (*Id.* at ¶ 5). Some of these debt collection matters remained pending when Red Diamond filed its motion to disqualify. (Doc. # 76-2 at 2, ¶ 4). As recently as December 12, 2018, Tidmore met for lunch with Red Diamond’s Vice President of Finance to discuss the status of these matters. (*Id.* at ¶ 5; Doc. # 85-4 at ¶ 14).

At the outset of most of the engagements described above, Red Diamond signed an engagement letter purporting to provide Red Diamond’s prospective consent to Bradley undertaking future representations of other clients “in any matter that is not substantially related” to Bradley’s work for Red Diamond, “even if the interests of such clients in those other matters are directly adverse” to Red Diamond, and “even if such representations would be simultaneous.” (Doc. # 76-1 at 10, 15, 26). Bradley did not advise Red Diamond to seek independent legal counsel about these advance conflict waivers, and Red Diamond did not seek independent counsel about the waivers. (Doc. # 76-1 at 1-4).

B. The Current Dispute

In September 2018, one of Red Diamond’s competitors, Southern Visions, filed a major patent infringement action against it in the Northern District of Georgia. (Doc. # 1). Southern Visions claims one of Red Diamond’s products -- a device for simultaneously brewing and sweetening tea -- infringes several of Southern Visions’ patents. (*Id.* at 5-17). The action was transferred to this court on December 11, 2018. (Doc. # 58).

On December 18, 2018, Bradley attorney Matthew Lembke received a call from one of Southern Visions’ owners, Paul Stewart. (Doc. # 85-2 at ¶ 4). Stewart told Lembke that, in light of the transfer to this court, Southern Visions planned to hire a lawyer in Birmingham to work on this case and that Lembke was under consideration. (*Id.*). Lembke responded that he would need to check for potential conflicts. (*Id.*).

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