

STATE OF WEST VIRGINIA, *ex rel.* DARRELL
V. MCGRAW, JR. ATTORNEY GENERAL,

Plaintiff,

v.

GE MONEY BANK

Defendant.

Case No. 11-C-091-N

Hon. David W. Nibert

STATE OF WEST VIRGINIA, *ex rel.* DARRELL
V. MCGRAW, JR. ATTORNEY GENERAL,

Plaintiff,

v.

HSBC BANK NEVADA, N.A. and HSBC CARD
SERVICES, INC.,

Defendants.

Case No. 11-C-093-N

Hon. David W. Nibert

STATE OF WEST VIRGINIA, *ex rel.* DARRELL
V. MCGRAW, JR. ATTORNEY GENERAL,

Plaintiff,

v.

JP MORGAN CHASE & CO. and CHASE BANK
USA, N.A.,

Defendants.

Case No. 11-C-094-N

Hon. David W. Nibert

FILED
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NORTH CAROLINA

ORDER DENYING DEFENDANTS' JOINT MOTION TO DISQUALIFY

On July 16, 2012, Defendants Bank of America Corp. and FIA Card Services, N.A.; Chase Bank USA, N.A. and JPMorgan Chase & Co.; Citibank, N.A. and Citigroup Inc.; Discover Financial Services, Inc., Discover Bank, and DFS Services, L.L.C.; GE Money Bank; and HSBC Bank Nevada, N.A. and HSBC Card Services, Inc. (collectively "Defendants") and the State of West Virginia, *ex rel.* Darrel V. McGraw, Jr., Attorney General ("Attorney General"), appeared, by counsel, for a hearing on Defendants' Motion to Disqualify pursuant to Defendants' interpretation of the West Virginia Government Ethics Act, the West Virginia Rules of Professional Conduct, and alleged limits on the Attorney General's authority. Having read and considered Defendants' Motion to Disqualify Private Counsel Appointed by the Attorney General, Defendants' Memorandum of Law in Support, the State of West Virginia's Response in opposing Defendants' motion, the materials filed by the parties in support of the moving and the opposition papers, relevant portions of the record and pertinent legal authorities, and having heard and considered the argument of counsel during the hearing on this matter, the Court does find, and hereby adjudicates, that for reasons deemed sufficient by the Court, Defendants' Joint Motion to Disqualify Private Counsel Appointed by the Attorney General should be, and hereby is, **DENIED**.

I. FINDINGS OF FACT

1. On August 16, 2011, the Attorney General instituted these actions against the Defendants. The Complaints state a variety of claims alleged to arise under the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq.*

2. Defendants moved to disqualify the Special Assistant Attorneys General who have appeared on the pleadings and who have presented argument on behalf of the State. Defendants filed their motion to disqualify in this Court on April 20, 2012. Broadly stated, Defendants make two arguments. First, Defendants argue that the private attorneys have a contingency fee arrangement and that this alleged arrangement is barred by the West Virginia Governmental Ethics Act, W. Va. Code § 6B-1-1 *et seq.*, and Rule of Professional Conduct 1.7(b). Second,

Defendants argue that the Attorney General does not have the authority to appoint the Special Assistant Attorneys General who have appeared on behalf of the State in these cases.

3. As explained herein, the Court finds that there is no grounds to disqualify counsel and that the Attorney General's Office has acted within its authority in appointing Special Assistant Attorneys General to represent the State of West Virginia in these actions.

A. THE ATTORNEY GENERAL CONTROLS THE LITIGATION.

4. Each Complaint is signed by Frances A. Hughes, Chief Deputy of the Office of the Attorney General. The Office of the Attorney General and Chief Deputy Hughes have appeared on the pleadings and memoranda filed on behalf of the State of West Virginia in these cases. In attendance at the hearing was James M. Casey, a Managing Deputy Attorney General in the Office of the Attorney General.

5. The Court finds that the Attorney General's office is apprised of any and all action taken in the cases, that the Attorney General's office controls tactics and strategy, and that no case could be settled without the oversight and approval of the Attorney General's office. These findings are based on the following:

a. Each Special Assistant Attorney General was retained in this case by an appointment letter signed by Frances A. Hughes, Chief Deputy Attorney General. Each letter states:

You are hereby appointed Special Assistant Attorney General for the purpose of initiating and maintaining an action on behalf of the Attorney General's office for violations of West Virginia's consumer protection and antitrust laws against Discover, Chase and any other credit card companies which sell payment protection, credit card registry or other such ancillary product.

It is contemplated that you will advance all expenses associated with the maintenance of this action. Subject to the approval of the court, it is contemplated that you should earn a proper, reasonable and customary fee.

In keeping with the Attorney General's policies and practices, it is anticipated that this office will be kept apprised of any and all actions

taken in this case, and it is anticipated that we will have regular ongoing discussions regarding tactics and strategy.

State of West Virginia's Response to Defendants' Joint Motion To Disqualify Private Counsel Appointed by the Attorney General ("State's Response"), at Ex. 4.

b. Therefore, the appointment letters establish that per the Attorney General's policy and practice, which applies in these cases, the Attorney General's office is apprised of any and all actions and conducts regular, ongoing discussions regarding tactics and strategy. In the face of the documentary evidence, Defendants have failed to prove otherwise. At the hearing, Defendants raised no argument or evidence to demonstrate that this case represents any departure from the Office of the Attorney General's policy and practice of controlling litigation.

c. The experience of this Court and other courts in this State is that the West Virginia Attorney General's Office maintains control over and approves of the litigation strategy and any settlement, notwithstanding the assistance of private counsel who may contribute considerable litigation expertise. Thus, for example, in *State ex rel. McGraw v. Johnson & Johnson*, No. 04-C-156 (W. Va. Cir. Ct. Brooke Cty, March 15, 2006), the court acknowledged the Attorney General's control of the litigation and concluded that "the 'neutrality' at issue is that of the attorney general and staff attorneys assigned to the litigation, because they, not private counsel, decide how the case is handled." (Order, p. 13, filed at Ex. 3 to State's Resp.). Similarly, in *State of West Virginia ex rel. McGraw v. Minnesota Mining & Mfg. Co.*, Judge Copenhaver found that, "the chief deputy attorney general filed, and remains an active participant in, this litigation." 354 F. Supp. 2d 660, 666 n. 6 (S.D. W. Va. 2005).

B. DEFENDANTS' ETHICS ACT AND RULE OF PROFESSIONAL CONDUCT ARGUMENTS MISSTATE THE TERMS OF PRIVATE COUNSEL'S APPOINTMENTS.

6. The Court further finds, based on the appointment letters quoted above, that the Special Assistant Attorneys General do not have "contingency fee" contracts. Rather, it is anticipated that they may earn a proper, reasonable, and customary fee approved by the Court. Based on the undisputed text of the letters, the Court rejects Defendants' assertion that "contingency fee" contracts exist here. Further, there is no showing on this record that the terms of appointment are unethical or that a conflict of interest exists.

7. Independently, Defendants have failed to demonstrate any ethical lapse incident to contingency fee payments or that contingency fee agreements constitute a conflict of interest. There has been no showing that any potential contingency fee payments would violate the Ethics Act or Professional Conduct Rules. This fact has been well recognized:

a. On this issue, Judge Wilson's opinion in the *Visa* litigation is instructive:

[T]he lawyers took the chance to spend their money to prosecute this action on behalf of West Virginians when they were not promised any hourly fee or the reimbursements of their expenses and costs. If they lost this case the West Virginia taxpayers would not have to pay any money – but the lawyers would have lost a substantial amount of money. West Virginians need to understand that we need to provide lawyers with a sufficient incentive to take cases like this to advocate zealously for our interests. When they obtain benefits for us, they need to be adequately compensated. If not, we will no longer have the most qualified attorneys representing us in these important cases.

Letter Opinion, at p. 9, *State ex rel. McGraw v. VISA, U.S.A., Inc.*, CA No. 03-C-511 (W. Va. Cir. Ct. Ohio Cty., Dec. 29, 2008) (filed at Ex. 1 to State's Resp.).

b. In *State ex rel. McGraw v. Bear Stearns & Co.*, No. 03-C-133M (Cir. Ct. Marshall Cty., W. Va. May 6, 2004), Judge Madden rejected the argument that Special Assistants' fee agreements were "at odds with the duties of counsel". Memorandum Order, at p. 3 (filed at Ex. 5 to State's Resp.).

c. Similarly, a California appeals court in a case that declined to disqualify private counsel representing a city observed that there is no inherent superiority of counsel who are paid hourly:

[W]e are troubled by the notion that lawyers are more apt to treat defendants unfairly if they are paid pursuant to a contingency fee agreement, rather than an hourly fee agreement.... [I]t is just as easily argued that a contingency fee lawyer is less likely to pursue meritless litigation, whereas an hourly fee lawyer may have a financial motivation to continue prosecuting litigation discovered to lack merit.

Priceline, Inc. v. City of Anaheim, 180 Cal. App. 4th 1130, 1148-49 (2010).

8. Defendants' Ethics Act and Rules of Professional Conduct arguments depend on the supposition that contingency fee arrangements pose an unethical and unprofessional conflict of interest, but Defendants have made no showing of why or how this would be the case. The Court rejects these arguments as unfounded.

C. THE ATTORNEY GENERAL'S AUTHORITY TO APPOINT SPECIAL ASSISTANT ATTORNEYS GENERAL HAS LONG BEEN RECOGNIZED IN WEST VIRGINIA.

9. Defendants in the *Capital One* litigation before this Court repeatedly sought to disqualify private counsel appointed by the Attorney General. Most recently, the defendants in that case sought an extraordinary writ before the Supreme Court of Appeals of West Virginia. After the issue was briefed before the appellate court, the court denied the writ on November 22, 2011.

State of W. Va. ex rel. Capital One Bank, N.A. v. The Honorable David W. Nibert, Judge of the Circuit Court of Mason County, No. 11-1401 (W. Va. Nov. 22, 2011) (Ex. 12 to State's Resp.).

10. Other courts have upheld the West Virginia Attorney General's authority to appoint special assistant attorneys general. Specifically:

a. *State ex rel. McGraw v. Johnson & Johnson*, No. 04-C-156 (W. Va. Cir. Ct. Brooke Cty., March 15, 2006) (rejecting lack of "neutrality" argument, finding no deprivation of due process, and concluding that defendants lacked standing), *petition denied*, No. 062154 (W. Va. Jan. 10, 2007) (filed at Exs. 3, 14, to State's Resp.).

- b. *State of West Virginia v. Steptoe & Johnson, PLLC*, No. 02-C-47M (W. Va. Cir. Ct. Marshall Cty., April 3, 2003) (rejecting defendants' challenge to the Attorney General's authority to appoint special attorneys general to prosecute the action on behalf of the State of West Virginia) (filed at Ex. 13 to State's Resp.).
- c. *State ex rel. McGraw v. Bear Stearns & Co.*, No. 03-C-133M (W. Va. Cir. Ct. Marshall Cty., May 6, 2004) (explaining that the court in *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002) declined to declare the practice of using outside counsel unconstitutional and denying Defendants' Motion to Disqualify the Attorney General's Retained Private Counsel) (filed at Ex. 5 to State's Resp.).
- d. *State of West Virginia ex rel McGraw v. Minnesota Mining & Mfg. Co.*, 354 F. Supp. 2d 660, 666 n.6 (S.D. W.Va. 2005) ("defendants ... assert the attorney general has improperly employed private, special assistants here to pursue civil penalties. They contend the special assistants have a prohibited personal stake, based upon their contingent-fee agreement, in the outcome of what is in essence a prosecution.... [T]he pleadings and briefing disclose private counsel have not been turned loose in a prosecutorial capacity with an improper motive. Rather, the chief deputy attorney general filed, and remains an active participant in, this litigation.").
- e. *State ex rel. McGraw v. Capital One Bank*, Nos. 05-C-71 and 05-C-72 (W. Va. Cir. Ct. Lincoln Cty., Sept. 22, 2005) (rejecting defendants' *ultra vires* act argument and rejecting objection to the appearance of Special Assistant Attorney General) (filed at Ex. 8 to State's Resp.).
- f. *State ex rel. McGraw v. Visa U.S.A., Inc.*, No. 03-C551 (W. Va. Cir. Ct. Ohio Cty., Dec. 29, 2008) (awarding fees) (filed at Ex. 1 to State's Resp.).

11. Defendants have failed to demonstrate that the counsel whom they seek to disqualify represent a departure from the Special Assistant Attorney General appointments that historically have been accepted in this State. The Court finds that the Attorney General retains ultimate control over the representation and that private counsel's appointments do not in any way impair the fulfillment of the Attorney General's duties as chief legal officer.

II. CONCLUSIONS OF LAW

A. DEFENDANTS' ETHICS ACT AND RULE OF PROFESSIONAL CONDUCT 1.7 ARGUMENTS ARE REJECTED.

1. Defendants argue that the Special Assistant Attorneys General have "contingency fee agreements" that violate the Ethics Act, including W. Va. Code §§ 6B-2-5(b)(1), 6B-2-5-(d)(3).

These arguments are rejected first because as a factual matter the private lawyers whom Defendants seek to disqualify have not entered into contingency fee contracts with the State.

2. Second, the Court is aware of no case, and Defendants cite none here, in which the Ethics Act has been applied so as to disqualify counsel. The statute focuses instead on such issues as receipt of valuable gifts for the performance of official duties, § 6B-2-5(c); personal or family interests in public contracts, § 6B-2-5(d); confidential information, § 6B-2-5(e); and prohibited representation, § 6B-2-5(f). The purpose of these laws is:

The Act establishes administrative, civil and criminal penalties for state government employees and officials who “exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who seek to benefit narrow economic or political interests at the expense of the public at large. . . .” W.Va. Code, 6B-1-2 [1989]. *See generally*, W. Va Code, 6B-2-5 [1995], 6B-2-10 [1995].

State ex rel. McGraw v. West Virginia Ethics Comm'n, 200 W. Va. 723, 726-727, 490 S.E.2d 812, 815-16 (1997). Here, the Special Assistant Attorney General appointments were made to advance the interests of “the public at large” by securing for the State legal representation, in addition to counsel who draw a salary from the State and control the litigation.

3. Clearly, the Ethics Act was not intended to divest this Court of authority to approve a reasonable attorney fee. Receiving reasonable, court-approved compensation for professional services rendered is neither “private gain” nor “the profits or benefits of a contract” as those terms are used in the Ethics Act, W. Va. Code §§ 6B-2-5(b)(1), 6B-2-5(d)(3). To interpret these phrases as referring to compensation for work on behalf of the State would be to read the Act too broadly. Under this reading, it would conceivably be an ethics violation for a State employee to negotiate the terms of his or her own compensation. This interpretation of the statutory language is overbroad and unsupported by any relevant jurisprudence.

4. Nor have Defendants properly interpreted West Virginia Rule of Professional Conduct 1.7. As a beginning point, the Rules of Professional Conduct are not to be invoked as procedural weapons against opposing counsel:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantial legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

W. Va. R. Prof. Conduct, Preamble, Scope.

5. Specifically, disqualification motions claiming alleged conflicts of interest "should be viewed with extreme caution". *Garlow v. The Honorable Paul Zakaib, Jr.*, 186 W. Va. 457, 462, 413 S.E.2d 112, 117 (1991); *see also* W. Va. R. Prof. Conduct 1.7, comment on "Conflict Charged by an Opposing Party".

6. Rule 1.7(b) provides:

b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

W. Va. Prof. Cond., Rule 1.7(b).

7. Defendants have made no showing that any counsel to appear in these cases on behalf of the State has breached the Code of Professionalism, has any limiting responsibilities to another client or third person, or labors under any impairment of loyalty. As opposed to demonstrating

any relevant facts, Defendants argue that the fee agreements standing alone create a conflict of interest. To the contrary, the agreements state that counsel will receive a reasonable fee approved by this Court. Defendants cite no authority to support the theory that court-approved fees are somehow unprofessional or disloyal. The cases cited in Defendants' memorandum of law address the irrelevant issue of misconduct by prosecutors during criminal prosecutions.

8. The case law does nothing to advance Defendants' interpretation of Rule 1.7. "Rule 1.7 was adopted to ensure an attorney's loyalty to a client and preclude the attorney from undertaking the simultaneous representation of another client with interests that are actually or potentially adverse to the existing client without both clients' knowledgeable consent." *Barefield v. DPIC Cos.*, 215 W. Va. 544, 556-557, 600 S.E.2d 256, 268-69 (2004).

9. The Supreme Court of Appeals of West Virginia has explained that, "**Rule 1.7 does not apply unless there are two actual clients.**" *In re James*, 223 W. Va. 870, 876, 679 S.E.2d 702, 708 (2009) (emph. in orig.). Here, there is only one client at issue, the State of West Virginia.

10. Defendants have failed to cite any case in which West Virginia Rule of Professional Conduct 1.7 has been interpreted to mean that a contingency fee undermines counsel's duty of loyalty. Defendants are demanding an extension of the Rule beyond both its text and its historic application. Such a construction, however, is forbidden by the Supreme Court of this State:

[T]his rule is aimed at conflicts of interest arising where the lawyer is simultaneously representing two actual clients whose interests are adverse.... [T]his Court has been reluctant to extend the requirements of Rule 1.7 beyond the clear language of the rule. In *Lawyer Disciplinary Board v. Artimez*, 208 W. Va. 288, 540 S.E.2d 156 (2000), we refused to hold that Rule 1.7 prohibitions were applicable in a case where the attorney was having an affair with his client's spouse. While the relationship itself was condemned by this Court, there was no violation of this rule because the client's wife was not an actual client, and therefore, there was no conflict of interest between two actual clients.

Likewise, in the case of *Committee on Legal Ethics v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (1993), we held that Rule 1.7(b) did not apply in the case where the attorney had been discharged from representation and subsequently

sued his client for the return of his personal effects when the attorney left a house he rented from his former client.

James, supra, at 876-877, 679 S.E.2d at 708-09.

11. In keeping with the legal authority cited above, the Court has appraised the exhibits filed by the parties in support of and in opposition to Defendants' disqualification motion, and the Court hereby **FINDS** and **CONCLUDES** that no violation of the Ethics Act or Rules of Professional Conduct is implicated by the appointments; therefore, the Court concludes that *Defendants' Motion to Disqualify Private Counsel Appointed by the Attorney General* based on alleged violations of the West Virginia Government Ethics Act and the West Virginia Rules of Professional Conduct must be and is hereby **DENIED**.

B. DEFENDANTS' ULTRA VIRES ACT ARGUMENTS ARE REJECTED.

12. Defendants' argument that the Attorney General's Office lacks authority to appoint private counsel is irreconcilable with the long-standing practice and interpretation of the Attorney General's powers. "A contemporaneous and long-standing legislative construction of a constitutional provision is entitled to significant weight[.]" *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 31, 569 S.E.2d 99, 107 (2002) (cit. om.).

13. The Supreme Court of Appeals of West Virginia held in *Burton* that, "pursuant to Article VII, Section 1 of the West Virginia Constitution, the Attorney General of the State of West Virginia is the State's chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities." *Burton*, at 31-32, 569 S.E.2d at 107-08. The court found that the employment and use of lawyers who are not direct employees of the Attorney General was not *per se* or facially unconstitutional considering "the long-established statutes, practice, and precedent recognizing" such use of counsel. *Id.* at 40, 569 S.E.2d at 116. *Burton* briefly addressed the retention of private law firms who are not state employees, and declined to find the practice unconstitutional or otherwise illegal:

[W]e make brief mention of the issue of the use by State entities of lawyers who are not state employees... including the hiring of private law firms to represent such entities in litigation, sometimes at substantial fees. The scope and

propriety of such practice was not fully developed or addressed in the instant case, but the general principles enunciated herein are applicable to the employment of private lawyers by State entities, both for consultation and particularly for representation before tribunals. Specifically, to the extent that such a practice conflicts with the provisions of W.Va. Code, 5-3-2, which discourages that practice without the consent of the Attorney General, or operates to prevent the Attorney General from fulfilling his constitutional role as the State's chief legal officer, as discussed herein, it is arguably statutorily and constitutionally offensive.

Burton, at 40 n.25, 569 S.E.2d at 116 n.25.

14. Thus, if the Attorney General consents to the representation and it does not impair fulfillment of his duties as chief legal officer, the use of outside counsel is constitutionally and statutorily permissible pursuant to the Supreme Court of Appeals of West Virginia's opinion in *Burton*. The Court finds that the Attorney General has acted consistently with his powers as described in the *Burton* decision.

15. West Virginia Code § 5-3-3, titled "Assistants to attorney general," provides that, "The attorney general may appoint such assistant attorneys general as may be necessary to properly perform the duties of his office[.]" W. Va. Code § 5-3-3 (emph. supp.). The Attorney General has properly exercised this authority with regard to the appointments here.

16. Defendants argue that West Virginia Code §46A-7-102(1)(f) does not authorize the Attorney General to appoint Special Assistant Attorneys General. This argument was considered and rejected in *Capital One. State ex rel. McGraw v. Capital One Bank*, Nos. 05-C-71 and 05-C-72 (W. Va. Cir. Ct. Lincoln Cty., Sept. 22, 2005) (order filed at Ex. 8 to State's Resp.). The *Capital One* defendants unsuccessfully objected to the Special Assistant Attorney General appointed in that case on the grounds that, allegedly, "West Virginia Code § 46A-7-102(1)(f) authorizes the Attorney General to delegate his powers and duties only to 'qualified' personnel 'in his office' and that Mr. Giatras cannot be delegated by any authority by the Attorney General because he is not 'qualified personnel in [the Attorney General's] office.'" *Id.* at 3. The Circuit Court ruled that, "it is clear that by Mr. Giatras' appointment as a 'Special Assistant Attorney

General' by the Attorney General's Office he has become 'qualified personnel' within the meaning of the authorizing provision of [Section 46A-7-102(1)(f)]." *Id.* at 5.

17. For these reasons, and those apparent from the record, the Court hereby **FINDS** and **CONCLUDES** that the appointments are proper exercises of the Attorney General's authority pursuant to West Virginia Code §§ 5-3-3, 46A-7-102(1)(f) and the constitutional and statutory power interpreted and described by the *Burton* court; therefore, the Court concludes that *Defendants' Motion to Disqualify Private Counsel Appointed by the Attorney General* based on allegations of *ultra vires* appointments must be and is hereby **DENIED**.

C. INDEPENDENTLY, DEFENDANTS LACK STANDING TO DISQUALIFY THEIR OPPOSING COUNSEL.

18. The Court finds that Defendants lack standing to object to the Attorney General's selection of counsel.

19. In order to have standing:

First, the party . . . [attempting to establish standing] must have suffered an 'injury-in-fact'-- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Findley v. State Farm Mut. Auto Ins. Co., 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (cit. om.). In the *Johnson & Johnson* litigation, the court ruled that defendants objecting to the Attorney General's use of private counsel had not suffered an injury-in-fact so as to satisfy *Findley's* standing requirement. *Johnson & Johnson Order*, p. 13 (filed as Ex. 3 to State's Resp.).

20. Here, too, the Court finds that divesting the Attorney General of his authority to direct the State's legal representation could not redress any concrete, particularized, actual, and non-conjectural injury of Defendants. Defendants have shown no invasion of any protected interests arising from the fact that their opposing counsel includes Special Assistant Attorneys General.

21. The Court notes the opinion in *Commonwealth v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267 (Pa. 2010), holding that a private law firm engaged under a contingency fee arrangement was not disqualified. The court explained that a party-opponent does not have standing to object to the identity of his opposing counsel:

[I]t is difficult to see how a party-opponent in active litigation with the Commonwealth could be said to have a substantive, direct and immediate interest in the authority or identity of the legal representation the Commonwealth has chosen. This is true in legal matters generally: one's opponent generally cannot dictate the choice of otherwise professionally qualified counsel.

8 A.3d at 277.

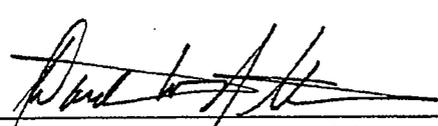
22. For the reasons outlined above, the Court denies the motion as unwarranted as a matter of fact and law. Independently, the Court **FINDS** and **RULES** that Defendants lack standing to challenge the Attorney General's selection of counsel.

CONCLUSION

WHEREFORE, as the Special Assistant Attorneys General have been duly appointed to assist the Attorney General's Office, which retains ultimate control over the litigation and potential settlements, and there being no showing of any ethical violation, professional lapse, or *ultra vires* act, the Court hereby **ORDERS** and **ADJUDGES** that *Defendants' Joint Motion to Disqualify Counsel Appointed by the Attorney General*, for the reasons articulated above and apparent from the record, must be and hereby is **DENIED**.

It is further **ORDERED** that the Clerk of this Court shall send certified copies of this Order to all counsel of record.

Entered this 15 day of August, 2012.


Honorable David W. Nibert, Judge
5th Judicial Circuit

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IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.* DARRELL
V. MCGRAW, JR. ATTORNEY GENERAL,

Plaintiff,

v.

DISCOVER FINANCIAL SERVICES, INC.
DISCOVER BANK, DFS SERVICES, L.L.C.,
and ASSURANT, INC.

Defendants.

Case No. 11-C-086-N

Hon. David W. Nibert

STATE OF WEST VIRGINIA, *ex rel.* DARRELL
V. MCGRAW, JR. ATTORNEY GENERAL,

Plaintiff,

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BANK OF AMERICA CORPORATION and FIA
CARD SERVICES, N.A.

Defendants.

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Hon. David W. Nibert

STATE OF WEST VIRGINIA, *ex rel.* DARRELL
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Plaintiff,

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CITIGROUP INC. and CITIBANK, N.A.

Defendants.

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