

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

BGT GROUP, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 2:07-cv-816-FtM-34DNF
	)	
VULCAN CAPITAL MANAGEMENT,	)	
INC., ET AL.,	)	
	)	
Defendants.	)	

**DECLARATION OF JAMES H. NEALE IN SUPPORT OF MOTION  
FOR LEAVE TO WITHDRAW AS ATTORNEYS FOR DEFENDANTS.**

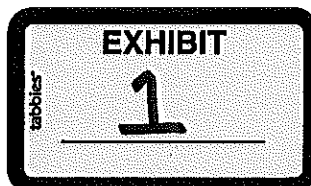
JAMES H. NEALE declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a partner in the firm of Fulbright & Jaworski, L.L.P. (“Fulbright”), attorneys for Defendants in the above-captioned action (the “Action”). I have personal knowledge of the facts set forth herein and submit this Declaration, in support of the motion of Fulbright and the firm of Grant Fridkin Pearson Athan & Crown, P.A. (“Grant Fridkin”), brought on by Order to Show Cause, for an Order as follows:

- (i) Pursuant to Local Rule 2.03 and Disciplinary Rule 4-1.16(b) of the Florida Rules of Professional Conduct, permitting Fulbright and Grant Fridkin to withdraw as counsel for all Defendants; and
- (ii) Granting Defendants 30 days within which to obtain substitute counsel.

**A. Background**

2. This Action was commenced on or about November 14, 2007 in the Circuit Court Collier County, Florida, and was removed to this Court on or about December 13, 2007. Gregory N. Woods, initially of the firm Porter Wright Morris & Arthur LLP and later of the Grant Fridkin firm, appeared on behalf of all Defendants. On January 4, 2008, I was admitted *pro hac vice* to appear for Defendants, as was my associate Erica N. Reed.



3. On or about January 11, 2008, Defendants moved to dismiss the Complaint and/or transfer the Action as to all or certain defendants for lack of personal jurisdiction or, in the alternative, to dismiss the tort claims alleged in the Complaint for failure to state a claim upon which relief can be granted. Plaintiff opposed the motion on February 1, 2008 and on April 25, 2008, pursuant to leave of Court granted on April 16, 2008, Defendants filed their Reply in further support of their motion to dismiss or transfer. That motion remains *sub judice*.

4. Reserving all rights as to the Court's lack of jurisdiction and the insufficiency of the claims alleged against them, Defendants participated in the filing of a Case Management Report on February 19, 2008 and in the conduct of certain discovery thereafter, including the review and production of documents to Plaintiff and the service of document requests upon Plaintiff, consistent with the Court's Case Management and Scheduling Order (**Exhibit 1-A** hereto), which was entered on or about February 19, 2008.

5. The Fulbright and Grant Fridkin firms now respectfully seek to withdraw from their representation of Defendants for the following reasons:

**B. Defendants Have Not Made ANY Payments to Fulbright.**

6. First, Defendants have failed and refused to pay *any* of Fulbright's invoices for services rendered and expenses incurred in this Action.

a. Defendants engaged Fulbright in December 2007 to represent them in this Action pursuant to engagement letters that provided, among other things, that Defendants "shall be jointly and severally responsible for payment of our fees and expenses," that they would "make full payment within 30 days of receiving our statement" (*id.* at 9), and that, should Defendants fail to meet their payment obligations, Fulbright "may withdraw from the Representation and pursue collection of our account" (*id.*). Copies of those engagement letters are available for *in camera* inspection at the Court's request.

b. Since our engagement, Fulbright has billed Defendants more than \$114,000 for professional services rendered and expenses incurred in this Action. The summary pages of our recent invoice to Defendants, showing the amounts billed on all invoices, is Exhibit **1-B** hereto.

c. Since they engaged Fulbright, Defendants have not paid Fulbright even *one dollar* toward our fees and disbursements in any matter in which we represent them. Defendants repeatedly acknowledged the validity of our bills and promised to pay them. Then Defendants simply failed to make any such payment at all.

**C. Defendants Conduct Has Created Irreconcilable Differences With Fulbright.**

7. In June 2008, having received no payment from Defendants since they engaged us, I advised Defendants that Fulbright would likely have to withdraw from representing them in this Action and the BGT Action. At that point Messrs. Graham and Davis met with me and my partner, Robert Owen, who is head of litigation in our New York office. Graham and Davis convinced us not to withdraw at that time from representing Defendants, based upon evidence of certain purported contracts and sources of revenue they represented would enable them to pay our current bills and provide us with a substantial retainer by July 31, 2008. This arrangement was memorialized in a June 20, 2008 letter agreement, which is available for *in camera* inspection at the Court's request.

8. Defendants did not make the payments they had promised. In August 2008, Mr. Davis continued to assure me that one of the contracts was in the final throes of approval and would be funded very shortly. That did not occur.

9. Toward the end of August, I began a series of email and oral communications with Defendants – principally with Mr. Davis – concerning their payment of Fulbright's bills and promised retainer, along with the bills and retainer of the Grant Fridkin firm in this Action. Those communications largely concerned Defendants' assurances that yet another

overseas contract was about to provide them with the funding needed to make their promised payments to Fulbright and Grant, Fridkin. Throughout those communications, which continue even now, Defendants have repeatedly advised us that the necessary funds would be coming within a matter of days, and yet when each appointed time has come, the funds have not been available for various purported reasons. The conclusion has become inescapable that this latest purported funding source was as ethereal as the ones that preceded it. A compilation of relevant email communications between Fulbright and Defendants is available for *in camera* inspection at the Court's request.

10. We have learned of an October 5, 2007 arbitration award against defendant Vulcan Capital Management, which recounted certain "tactics" of Defendants in dealings with another unpaid provider of professional services, which resembled Defendants' dealings with Fulbright. *See Exhibit 1-C* hereto at 8-9.

11. We have also learned of an Order dated August 22, 2008, permitting the law firms of Greenberg Traurig, LLP and Roetzel & Andress, LPA, to withdraw from representing defendant Vulcan Advanced Mobile Power Systems, LLC and other affiliated entities in an action entitled *Adams v. Vulcan Energy Solutions, LLC*, et al., Case No. 3:07cv310/MCR/EMT (N.D. Fla.) (the "*Adams Action*"). The withdrawal was based upon Defendants' nonpayment and failure to cooperate with their counsel. A copy of the Order is Exhibit **1-D** hereto, and a copy of counsel's affidavit describing Defendants' conduct in *Adams* is Exhibit **1-E** hereto.<sup>1</sup>

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<sup>1</sup> The Order in the *Adams Action* permitted defendants 30 days to obtain substitute representation, and provided that failure to do so will result in entry of default against defendants. *See Exh. D* at 3-4. Thereafter, on September 25, 2008, following defendants' failure to appear by substitute counsel, the Florida district court entered an order of default against defendants. *See Exhibit 1-F* hereto.

12. Based on the foregoing, the trust and confidence that is necessary in a relationship between lawyer and client has been impaired, and irreconcilable differences have arisen between Fulbright and Grant Fridkin on one hand and Defendants on the other.

**D. Defendants Have Failed To Cooperate With Fulbright and Grant Fridkin.**

13. Defendants have failed to respond when requested by counsel for their cooperation in this Action. In particular, we have requested Defendants' assistance in responding to certain of Plaintiff's discovery demands and otherwise investigating the facts of the case. Although Defendants repeatedly promised to provide the requested information, they failed to do so. Accordingly, our ability to respond to Plaintiffs' discovery demands was impaired

**E. Withdrawal Will Not Cause a Continuance or Delay the Action.**

14. Our withdrawal will not significantly prejudice Plaintiff. Nor will it result in a continuance or delay. Plaintiff has already agreed to extend the discovery deadline from December 19, 2008 until January 31, 2009 and we have moved the Court for such extension. That extension will not affect the dispositive motion deadline, nor the scheduled start of trial, which is set by the Scheduling Order for the trial term beginning July 6, 2009.

15. To facilitate transition to substitute counsel, Fulbright will make available its files and electronic document repository notwithstanding any attorneys' lien that would otherwise attach, and we will provide reasonable cooperation to substitute counsel in the formulation of supplemental responses to outstanding discovery demands.

16. Consistent with Local Rule 2.03(c), we notified Defendants in writing on several occasions in September and October 2008, more than ten days before filing this motion, of our intention to withdraw if they did not make the promised fee and retainer payments.

WHEREFORE, for the reasons set forth above, Fulbright & Jaworski, L.L.P. respectfully requests entry of an Order granting the relief requested on this motion.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 14th day of November, 2008.

/s/ James H. Neale  
James H. Neale

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