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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

SIGNATURE MD, INC.,	}	Case No. CV 14-5453-DMG (SSx)
v.	}	<b>ORDER GRANTING MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL</b>
MDVIP, INC.,	}	
Defendant.	}	

On August 18, 2014, Defendant MDVIP, Inc. (“MDVIP”) filed a motion to disqualify the law firm of Duane Morris LLP (“the Morris firm”) from further representing Plaintiff Signature MD, Inc. (“Signature”) in this action (“Motion”). [Doc. # 27.] On September 19, 2014, Plaintiff Signature filed a memorandum in opposition, supported by a declaration and request for judicial notice. [Docs. ## 30, 31, 32.] On September 26, 2014, Defendant filed a reply. [Doc. # 33.] On October 8, 2014, the Court vacated the October 10, 2014 hearing and took the matter under submission.

Defendant MDVIP brings this motion contending that the Morris firm, which represents Plaintiff Signature herein, previously represented MDVIP between 2008 and 2012 and that during that representation, Philadelphia partners of the Morris firm learned

1 confidential and trade secret information from MDVIP that is substantially related to  
2 issues in the present action before this Court.

3 Having carefully reviewed and considered the parties' written submissions, the  
4 Court **GRANTS** the motion to disqualify.

5 **I.**

6 **LEGAL STANDARD**

7 The legal standard governing disqualification of counsel is set forth  
8 below:

9 If there is a substantial relationship between the subject of the  
10 current representation and the subject of the former  
11 representation, the attorney's access to privileged and  
12 confidential information in the former representation is  
13 presumed and disqualification of the attorney from the current  
14 representation is mandatory in order to preserve the former  
15 client's confidences.

16 *Fremont Indem. Co. Fremont General Corp.*, 143 Cal. App. 4th 50, 67 (2006).

17  
18 [S]uccessive representations will be "substantially related"  
19 when the evidence before the trial court supports a rational  
20 conclusion that information material to the evaluation,  
21 prosecution, settlement or accomplishment of the former  
22 representation given its factual and legal issues is also material  
23 to the evaluation, prosecution, settlement or accomplishment of  
24 the current representation given its factual and legal issues.

25 *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698, 713 (2003).

26  
27 Once the moving party in a motion for disqualification  
28 has established that an attorney is tainted with confidential

1 information, a rebuttable presumption arises that the attorney  
2 shared that information with the attorney's law firm. The  
3 burden then shifts to the challenged law firm to establish that  
4 the practical effect of formal screening has been achieved. The  
5 showing must satisfy the trial court that the tainted attorney has  
6 not had and will not have any involvement with the litigation,  
7 or any communication with attorneys or employees concerning  
8 the litigation, that would support a reasonable inference that the  
9 information has been used or disclosed.

10 The specific elements of an effective screen will vary  
11 from case to case, although two elements are necessary: First,  
12 the screen must be timely imposed; a firm must impose  
13 screening measures when the conflict first arises. It is not  
14 sufficient to wait until the trial court imposes screening  
15 measures as part of its order on the disqualification motion.  
16 Second, it is not sufficient to simply produce declarations  
17 stating that confidential information was not conveyed or that  
18 the disqualified attorney did not work on the case; an effective  
19 wall involves the imposition of preventive measures to  
20 guarantee that information will not be conveyed. To avoid  
21 inadvertent disclosures and establish an evidentiary record a  
22 memorandum should be circulated warning the legal staff to  
23 isolate the tainted individual from communications on the  
24 matter and to prevent access to the relevant files.

25 *Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776, 809-10 (2010) (citations,  
26 quotation marks and alterations omitted).

27 With respect to the timeliness element provided in *Kirk*, the Court explained that  
28 "screening should be implemented before undertaking the challenged representation or

1 hiring the tainted individual.” *Id.* at 810 n. 31. As to the required showing that “the  
2 tainted attorney has not and will not have any involvement with the litigation, or any  
3 communication with attorneys or employees concerning the litigation, that would support  
4 a reasonable inference that the information has been used or disclosed,” *id.* at 810, *Kirk*  
5 provides that “[c]learly, every . . . attorney who worked on the related . . . actions, as well  
6 as any other member of the . . . firm whom [the tainted attorney] is claimed to have had  
7 reason or occasion to discuss information obtained from plaintiffs’ counsel should  
8 provide testimonial evidence.” *Id.* at 816 n. 38.

## 9 II.

### 10 DISCUSSION

11 In the current action, Signature alleges that MDVIP is the largest concierge  
12 medicine membership program in the United States having monopoly power in the  
13 market for turn-key concierge medicine membership programs, and that Signature offers  
14 its own turn-key program in competition with MDVIP. (First Amended Complaint  
15 (“FAC”) ¶¶ 7, 9.) [Doc. # 37.] Signature sues MDVIP for antitrust violations contending  
16 MDVIP has abused its dominance in the relevant markets by utilizing anti-competitive  
17 tactics and entering into anti-competitive agreements intended to unlawfully maintain and  
18 expand MDVIP’s monopolies and to preclude Signature and others from competing  
19 against it. (FAC ¶ 11.)

20 Previously, between 2008 and 2012, the Morris firm represented MDVIP in the  
21 case of *Lehigh Valley Physicians Group v. MDVIP, Inc.*, Case No. CV 10-5413-MAM  
22 (E.D. Pa. 2010). In *Lehigh*, MDVIP was sued by a group medical practice for  
23 misappropriation of trade secrets and tortious interference with contractual relationships  
24 that allegedly arose from discussions between MDVIP and Dr. Kender, one of the  
25 medical group’s physicians, by which MDVIP allegedly wrongfully received patient  
26 information for 246 of the medical group’s patients – patients who were possible  
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1 candidates for the concierge medicine practice. (Motion at 24.<sup>1</sup>) In *Lehigh*, MDVIP  
2 counterclaimed for tortious interference with prospective contractual relationship alleging  
3 that Lehigh had interfered with the prospective contractual relationship between MDVIP  
4 and Dr. Kender for the express purpose of preventing Dr. Kender from entering into a  
5 participation agreement with MDVIP.

6 According to the Motion, both the prior and present actions focus on “the process  
7 of recruiting and contracting with physicians to participate in the MDVIP concierge  
8 medicine program.” (Motion at 13.) According to Roy R. Harris Jr., general counsel for  
9 MDVIP, during the course of the Morris firm’s representation of MDVIP in the prior  
10 action, he had discussions with Beatrice O’Donnell and other lawyers of the Morris firm  
11 in which he

12 discussed details of the methods and strategies and procedures  
13 that MDVIP uses not only [sic] to gather patient information  
14 from prospective physician candidates, but also how MDVIP  
15 used third party vendor matrices that MDVIP uses to dissect  
16 those data and how MDVIP then employs those data analyses  
17 in its decision-making process.

18 (Declaration of Roy R. Harris Jr. ¶ 18.) [Doc. # 27-2.]

19 Information MDVIP shared with the Morris firm also included “patient survey data  
20 analyses and strategies used to recruit and contract with physicians” (Harris Decl. ¶ 19)  
21 and “strategic information . . . concerning MDVIP’s overall legal strategies as related to  
22 challenges to its recruitment methods, policies and procedures” (Harris Decl. ¶ 21).

23 Signature alleges that MDVIP has locked competitors out of the concierge  
24 medicine membership program market through unreasonably lengthy exclusive dealing  
25 agreements with physicians and other anticompetitive conduct, including requiring non-  
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27 <sup>1</sup> Page references are to the page numbers inserted in the header at the time the document is filed  
28 in the CM/ECF filing system.

1 disclosure agreements concerning patient satisfaction surveys, imposing a two-year post  
2 termination non-compete restriction on patient advocates, filing baseless lawsuits against  
3 competitors, and misuse of the discovery process to harass physicians and gain  
4 competitive intelligence. (FAC ¶¶ 74-120.)

5 The claim in the former suit was that MDVIP's conduct resulted in a tortious  
6 interference with contractual relationships. The counterclaim in the former suit asserted  
7 that the former plaintiff had interfered with MDVIP's prospective contractual relations,  
8 while the claim in the current suit is that MDVIP's conduct has resulted in precluding  
9 Signature and others from competing against it. As such, both the prior and current  
10 lawsuits focus on MDVIP's practices of recruiting and engaging physicians in its  
11 concierge medicine membership program. Because of this overlap in focus with respect  
12 to the claims of the two lawsuits and the evidence of the information shared by MDVIP  
13 with the Morris firm, the Court finds that "information material to the evaluation,  
14 prosecution, settlement or accomplishment of the former representation . . . is also  
15 material to the evaluation, prosecution, settlement or accomplishment of the current  
16 representation." *See Jessen*, 111 Cal. App. 4th at 713, *supra*.

17 The remaining question to address is, therefore, whether the implementation of an  
18 ethical screen would be sufficient to protect and preserve MDVIP's confidences  
19 disclosed in the former representation. The Court notes that there is some debate  
20 regarding whether to recognize an ethical screen as adequate protection. *See Kirk*, 183  
21 Cal. App. 4th at 798-810. But, even assuming that an ethical screen is adequate, the  
22 Morris firm has failed to make a sufficient showing of an effective ethical screen.

23 With respect to the timeliness element in implementing an ethical screen, i.e., the  
24 requirement that an ethical screen be implemented *before* undertaking the challenged  
25 representation, Plaintiff's evidence is that the screen was implemented on June 18, 2014,  
26 two days *after* the Morris firm was retained by Signature. (Declaration of Sarah M.  
27 Bricknell ¶¶ 4, 8.) [Doc. # 31.] Although a two-day period is very short, Plaintiff  
28 provides no evidence that preventive measures were in place that ensured that no


1 information was disclosed. Indeed, Signature has made no showing that confidential  
2 information was not conveyed by the Morris firm attorneys who worked on the *LeHigh*  
3 case to the attorneys involved in the current litigation. In any event, under the *Kirk*  
4 standard, declarations “stating that confidential information was not conveyed or that the  
5 disqualified attorney did not work on the case” would be to no avail absent  
6 implementation of timely screening measures.

7 **III.**

8 **CONCLUSION**

9 Based on the foregoing, this Court finds that (1) there is a substantial relationship  
10 between the subject of the Morris firm’s current representation and the subject of its  
11 former representation and (2) the Morris firm has failed to establish that an effective  
12 ethical screen was implemented. Accordingly, IT IS ORDERED that Defendant  
13 MDVIP’s motion to disqualify the Morris firm from representing Plaintiff Signature is  
14 GRANTED. Plaintiff Signature shall have 30 days from the date of this Order to submit  
15 a substitution of counsel.

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17 DATED: January 20, 2015

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20 DOLLY M. GEE  
21 UNITED STATES DISTRICT JUDGE  
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