

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss

COURTNEY GILARDI,  
CHARLIE HERZIG, JUDY HERZIG,  
MARK MARKHAM, ANGELIKA MARKHAM  
AND ELAINE IRELAND

Plaintiffs

v.

LINDA TYER, MAYOR OF PITTSFIELD,  
STEPHEN N. PAGNOTTA, CITY SOLICITOR

PITTSFIELD CELLULAR TELEPHONE  
COMPANY D/B/A VERIZON WIRELESS  
FARLEY WHITE SOUTH STREET, LLC

ROBERTA ORSI, BRAD GORDON,  
STEPHEN SMITH, KIMBERLY LORING,  
DR. JEFFREY LEPPPO as they are members  
of and are collectively the  
PITTSFIELD BOARD OF HEALTH

Defendants

SUPERIOR COURT

CIVIL ACTION NO. 2276-CV-00127

**PLAINTIFFS’ MOTION TO DISQUALIFY ALL ATTORNEYS OF THE LAW FIRM OF  
DONOVAN O’CONNOR & DODIG, LLP FROM REPRESENTING ANY OF THE CITY  
OF PITTSFIELD RELATED DEFENDANTS  
AND  
REQUEST FOR HEARING**

Plaintiffs Courtney Gilardi, Charlie and Judy Herzig, Mark and Angelika Markham and Elaine Ireland (collectively “Plaintiffs”) move to disqualify all attorneys of the law firm of Donovan O’Connor & Dodig, LLP (“the law firm”) from representing any City of Pittsfield related Defendant and especially Defendant Pittsfield Board of Health in this matter. As the basis for such request, the Plaintiffs state:

1. This lawsuit was filed on July 28, 2022. All Defendants were served by September 12, 2022. Although more than 20 days have passed since service for each

Defendant, no Defendant has filed a responsive pleading and no attorney purporting to represent any Defendant has made an appearance.<sup>1</sup>

2. Plaintiffs' counsel, however, did receive a letter signed by Buffy D. Lord and Gregory P. Howard under the letterhead of the law firm of Donovan O'Connor & Dodig, LLP (the law firm). See Exhibit 3. This letter is designed to fulfill the requirements of the third sentence in Superior Court Standing Order 1-96, Paragraph 2. These lawyers are clearly purporting to be acting on behalf and implicitly claim to be representing Defendant Board of Health for purposes of this matter.

3. Plaintiffs move to disqualify the firm and all members of the firm from representing any of the Defendants in this matter. Disqualification is required by the Massachusetts Rules of Professional Conduct and G.L. c. 268A § 23(b)(3). The Court must disqualify the law firm for the reasons stated below and in the concurrently-filed Supporting Memorandum. As required by Mass. Sup. Ct. Rules 9A(a)(1) Plaintiffs are also providing exhibits and supporting affidavits evidencing the facts on which this Motion is based.

4. Defendant Stephen N. Pagnotta is the managing partner of the law firm. Plaintiffs' complaint directly asserts that Defendant Pagnotta and the entire firm have disqualifying conflicts of interest that preclude Pagnotta and the entire firm from representing any other party. Complaint ¶¶52, 54-72 and Counts Three and Four.

5. The law firm is attempting to represent the Board of Health to ensure the Board of Health will continue to be deprived of independent counsel who would fully and

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<sup>1</sup> Plaintiffs recognize that the Defendant Board of Health is not required to file an answer until 90 days from service of process under Superior Court Standing Order 1-96, Paragraph 2. Plaintiffs are concurrently requesting a finding of default for the other Defendants.

completely advise it of all its legal options, rights and duties, without regard to whether those may annoy or frustrate the goals and objectives held by other city officials and departments and Defendants Pittsfield Cellular d/b/a Verizon Wireless and Farley White South Street, LLC. The law firm has the incentive to influence how the Board of Health responds to Plaintiffs' claims so that the law firm's own conflicts are minimized if not suppressed notwithstanding the Board of Health's distinct interest in pressing those conflicts so it can finally obtain objective, independent and non-conflicted legal representation.

6. The law firm's effort to represent the Board of Health during the handling of this matter leading up to the merits – despite the fact that one of the principal grounds Plaintiffs assert as a ground for relief is that the law firm is conflicted – will unfairly prejudice the Plaintiffs. It will also give rise to an appearance of impropriety and violate the rules of legal ethics (Sup. Ct. Rule 3.07, RPC Rule 1.7(a)(1) and (2)) and G.L. c. 268A § 23(b)(3).

7. The entire firm has an irreconcilable conflict of interest as between the several city Defendants. The interests of Defendant Tyer may conflict with those of Defendant Pagnotta and the interests of both Defendant Tyer and Defendant Pagnotta conflict with those of the Defendant Board of Health.

8. The law firm (through individual lawyers within the law firm, including Defendant Pagnotta) has represented all of these Defendants in the past and has specific knowledge that could be used to the detriment of any Defendant no matter who it represents.

9. There is no evidence that either Defendant Tyer or Defendant Board of Health have given informed consent in writing waiving the conflict. *C.f.*, Sup. Ct. Rule 3:07, R.P.C. Client-Lawyer Relationship, Rule 1.7(b)(4).

10. Defendant Pagnotta has already admitted that he and his firm cannot “provide competent and diligent representation to each affected client.” *C.f.*, Sup. Ct. Rule 3:07, R.P.C. Rule 1.7(b)(1). Further, the representation is prohibited by law. See G.L. c. 268A § 23(b)(3), (c)(1).

11. At least one and perhaps several attorneys of the law firm will be witnesses in this matter. Among them are, *inter alia*, Defendant Stephen N. Pagnotta, Buffy D. Lord, and Stephen F. Narey.<sup>2</sup> This means that the entire firm is prohibited from acting in a representative capacity for any party. The prohibition of an attorney both testifying and acting as an advocate in Sup. Ct. Rule 3:07, R.P.C. Rule 3.7 also applies to all other attorneys in the law firm. See Rule 3.7, Comment 5; See also. *Byington v. City of Boston*, 37 Mass.App.Ct. 907, 908, 640 N.E.2d 115 (1994) (discussing former Rule 3.7 and Canon of Ethics DR 5-101(b)). Rule 3.7(b) provides that a lawyer may act as an advocate in a trial in which another attorney in the lawyer's firm is likely to be called as a witness **unless** the lawyer is precluded from the representation by Rule 1.7 or Rule 1.9 of the rules of Professional Conduct. See also. RPC 1.10(a) (imputed disqualification of all lawyers associated in a firm from representing a client when any one of them alone would be prohibited from representing the client by virtue of RPC 1.7, 1.8, or 1.9). Since Defendant Pagnotta is barred from representation under RPC 1.7 his entire firm is also disqualified.

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<sup>2</sup> Plaintiffs reserve the right to seek testimony from additional firm members if needed after discovery has been conducted.

12. The Board of Health has directly indicated that it wants counsel other than Defendant Pagnotta and his law firm. See Exhibits 5, 6. In this respect, therefore, the law firm is not the “counsel of their choice.” Further, none of the Defendants should have been able to “choose” representation by the law firm for this case since the conflict issue is at the heart of the case.

13. It was clear from the face of the complaint that a firm member – Stephen N. Pagnotta – is a named defendant. The averments gave plenty of notice that a primary basis for two of the four causes of action were his and the law firm’s conflicts. The law firm knew or should have known that one or more firm members were likely going to be witnesses.<sup>3</sup> Under these circumstances the firm should have refused representation. The Plaintiffs are not here “depriving” anyone of counsel of their choice; the law firm is trying to deprive the Plaintiffs and the Court of testimony from essential witnesses by injecting itself into a matter where their participation as counsel is clearly barred.

14. The law firm can only act as counsel for Defendants if one of the exceptions to Rule 3.7 applies. Exceptions 1 and 2 do not apply in this situation, as the law firm members’ testimony will directly relate to contested issues in the current proceeding and do not involve fees. Exception 3 similarly does not apply since the Board of Health has been seeking separate and different counsel for several months, so granting this motion will benefit, not cause any hardship to, the Board of Health..

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<sup>3</sup> Plaintiffs intend to depose Pagnotta, Buffy D. Lord and perhaps other firm members.

**CONCLUSION**

The law firm and each of its members (especially Defendant Pagnotta and Buffy D. Lord) suffer fatal conflicts of interest and will be essential fact witnesses. The Court must disqualify them.

WHEREFORE the Plaintiffs request that the Superior Court disqualify the law firm of Donovan O'Connor & Dodig from representing any Defendant in general and especially Defendant Pittsfield Board of Health.

Respectfully Submitted,

<p><u>/s/Paul Revere, III</u> Paul Revere, III (BBO #636200) Law Offices of Paul Revere, III 226 River View Lane Centerville, Massachusetts 02632 (508) 237-1620</p>	<p>Pro Hac Vice Motion Filed Simultaneously <u>/s/ W. Scott McCollough</u> W. Scott McCollough (pending <i>pro hac vice</i>) McCollough Law Firm PC 2290 Gatlin Creek Rd. Dripping Springs, Texas 78620 512.633.3498 Email <a href="mailto:wsmc@dotLAW.biz">wsmc@dotLAW.biz</a></p>
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Attorney for Courtney Gilardi, Charlie Herzig, Judy Herzig, Mark Markham, Angelika Markham, and Elaine Ireland

Date: October 6, 2022