

Defense counsel to wall-off Mr. Bardwell from this matter, Plaintiff's counsel refuses to do so.

The Chandra Law Firm's actions violated the Ohio Rules of Professional Conduct, including Rules 1.6, 1.10, 4.2, 4.3, and 4.4. Each of the above reasons alone supports disqualification of The Chandra Law Firm and these reasons, when combined, fully warrant disqualification. Additionally, Plaintiff should not be permitted to benefit from The Chandra Law Firm's misconduct, including the declarations the Firm obtained from the City's current and former managerial employees.

On February 7, 2018, Defense counsel notified The Chandra Law Firm of their intent to file this Motion, including an overview of the grounds for the Motion and an opportunity to withdraw as counsel on or before February 13, 2018. On February 8, 2018, Mr. Subodh Chandra requested additional information regarding Defendants' grounds for disqualification. Alarming, as part of his February 8, 2018 letter, Mr. Chandra recounted a conversation between Mr. Jon Dileno and him regarding Mr. Bardwell that never occurred -- nor could it have occurred given that Mr. Dileno did not learn of Mr. Bardwell's employment with The Chandra Law Firm and his intimate involvement with this case until months after the two spoke. On February 9, 2018, as a courtesy, Defense counsel provided The Chandra Law Firm a draft of its Memorandum in Support of this Motion and notice that the conversation Mr. Chandra recounted in his February 8, 2018 letter never occurred. Defense counsel also reminded The Chandra Law Firm of their intention to file this Motion on February 14, 2018.

On February 12, 2018, and despite having received a draft copy of Defendants' Memorandum in Support this Motion, Mr. Chandra again sought information regarding Defendants' grounds for disqualification. Defense counsel responded to Mr. Chandra's letter on

February 13, 2018. As of the filing of this Motion, The Chandra Law Firm has not withdrawn.¹

For these reasons and those set forth in the accompanying Memorandum in Support, Defendants move the Court for the following relief:

- A) An Order disqualifying The Chandra Law Firm, in its entirety, from continuing its representation of Plaintiff Sean DeCrane; and
- B) An Order suppressing the declarations The Chandra Law Firm improperly obtained from former Chief Patrick Kelly, former Assistant Chief Mike Darnell, current Battalion Chief Frank Szabo, current Captain Patrick Corrigan, and current Captain Dennis Corrigan.

Respectfully submitted,

Zashin & Rich Co., L.P.A.

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¹ Copies of the correspondence between counsel referenced in this paragraph and the prior paragraph are attached to Exhibit 5 to the accompanying Memorandum in Support, which is a declaration from Mr. Dileno. *See* Ex. 5 at ¶ 8. Mr. Dileno's declaration also attests to the falsity of the alleged conversation Mr. Chandra included in his February 8, 2018 letter. *See* Ex. 5 at ¶ 9.

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2018 the foregoing document was filed via the Court's electronic filing system and will be served on all parties via that system.

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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

SEAN DECRANE,	:	Case No. 1:16-cv-02647-CAB
	:	
Plaintiff,	:	Judge Christopher A. Boyko
	:	Magistrate Judge W. H. Baughman, Jr.
v.	:	
	:	<i>Defendants' Memorandum in Support of</i>
EDWARD J. ECKART, et al.,	:	<i>their Motion to Disqualify The Chandra</i>
	:	<i>Law Firm LLC and to Suppress the</i>
Defendants.	:	<i>Declarations the Firm Improperly</i>
	:	<i>Obtained</i>

INTRODUCTION

Plaintiff brings employment related claims against his former employer Defendant City of Cleveland (“City”) and others. Doc. No. 7 at ¶ 1. When Plaintiff retired from the City, he worked as a Battalion Chief in the City’s Division of Fire. Doc. No. 7 at ¶¶ 3, 339.

The hierarchy of the City’s Division of Fire, from the top down, is Chief, Executive Officer, Assistant Chiefs, Battalion Chiefs, Captains, Lieutenants, and Firefighters. See Ex. 1 (Declaration of E. Eckart) at ¶ 3. The Chief has complete command and control of all personnel within the Division of Fire, which includes approximately 780 individuals. Ex. at ¶ 4.

There are five Battalions within the Division comprised of multiple fire stations and companies. Ex. 1 at ¶ 5. Battalion Chiefs are responsible for the overall operation of their Battalion. Ex. 1 at ¶ 6. Captains are responsible for the individual fire stations and companies within the Battalions and supervise their subordinate lieutenants and firefighters. Ex. 1 at ¶ 7. Both Captains and Battalion Chiefs are responsible for maintaining discipline and staffing and are members of City management whose actions regularly bind the City. Ex. 1 at ¶ 8.

The Chandra Law Firm, through its law clerk Brian Bardwell, spoke with the City’s

former Fire Chief without instructing him not to disclose privileged communications or apprising him that Plaintiff made numerous allegations against him. The Chandra Law Firm, without notifying Defense counsel, also had Mr. Bardwell speak repeatedly with a current City Battalion Chief and current City Captains, including Captain Patrick Corrigan, who Defendants identified in their Initial Disclosures and instructed The Chandra Law Firm to contact through Defense counsel. Less than a year before working for The Chandra Law Firm, Mr. Bardwell interned within the City's Department of Law where he was privy to confidential information, attorney-client communications, and attorney work-product.

The Chandra Law Firm has violated the Ohio Rules of Professional Conduct and, in doing so, gained knowledge and information it cannot ignore or set-aside. Defendants move the Court (1) to disqualify The Chandra Law Firm from its continued representation of Plaintiff in this matter and (2) to suppress the declarations The Chandra Law Firm improperly obtained.

STANDARD OF REVIEW

“The ethical standards prescribed by the Ohio Rules of Professional Conduct govern all attorneys practicing before this Court.” *Lamson v. Munding*, No. 4:08CV1226, 2009 U.S. Dist. LEXIS 37197, *8 (N.D. Ohio May 1, 2009) (Boyko, J.) (*citing* L.R. 83.7(a)). “The Court retains inherent authority to police the ethical conduct of the lawyers who appear before it and to uphold the ethical norms embodied in the Code of Professional Conduct.” *Burton v. Cleveland Hts./Univ. Hts. Bd. of Edn.*, No. 1:17CV300, 2017 U.S. Dist. LEXIS 199864, *4-5 (N.D. Ohio Dec. 4, 2017) (Boyko, J.) (*quoting* *U.S. v. Miller*, 624 F.2d 1198, 1201 (3rd Cir.1980)). A motion to disqualify counsel is the proper method for a party to bring a breach of an ethical duty or conflict of interest to the court's attention. *Hamrick v. Union Twp.*, 81 F. Supp. 2d 876, 878 (S.D. Ohio 2000) (*citing* *Musicus v. Westinghouse*, 621 F.2d 742, 744 (5th Cir. 1980)).

In ruling on a motion to disqualify counsel, the court must consider whether the non-moving party's counsel committed an ethical violation and, if so, whether that ethical violation requires disqualification of counsel. *Cliffs Sales Co. v. Am. Steamship Co.*, No. 1:07-CV-485, 2007 U.S. Dist. LEXIS 74342, *7 (N.D. Ohio Oct. 4, 2007) (citing *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1124 (N.D. Ohio 1990)). “The court has broad discretion in determining whether counsel should be disqualified in ongoing litigation.” *Gould*, 738 F. Supp. at 1124 (citations omitted). Disqualification for an ethical violation is appropriate when there is a “reasonable possibility [that] some specifically identifiable impropriety’ actually occurred, and where the public interest in requiring professional conduct by an attorney outweighs the competing interest of allowing a party to retain counsel of his choice.” *SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp. 2d 863, 865 (S.D. Ohio 2002) (quoting *Kitchen v. Aristech Chem.*, 769 F. Supp. 254, 258 (S.D. Ohio 1991)).

LAW AND ARGUMENT

I. THE CHANDRA LAW FIRM SHOULD BE DISQUALIFIED

A. The Chandra Law Firm’s Communications with Former Fire Chief Patrick Kelly Violated Ethical Rules Requiring Disqualification

While lawyers may have ex parte communications with former managerial employees, important boundaries exist under Ohio Rule of Professional Conduct 4.2 (“Rule 4.2”) and the Rules of Professional Conduct that safeguard such communications:

Before interviewing a former employee, a lawyer should disclose his or her identity, and fully explain that he or she represents a client adverse to the corporation. The lawyer also must immediately inform the former employee not to divulge any privileged communications that the former employee may have had with corporate or other retained counsel. Prof.Cond.R. 1.6, 4.4 (lawyers may not use methods to obtain evidence that violate the legal rights of third parties.)

Consequently, a lawyer must endeavor not to solicit information from former employees that the lawyer knows or reasonably knows to be protected by the attorney-client privilege. *See* D.C. Bar Op. 287. Nor may a lawyer communicate ex parte with a former employee who is represented by independent counsel, or if the corporation's lawyer has agreed to provide representation in the matter. *See Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968 (N.D. Ohio 2008).

Finally, Prof.Cond.R. 4.3 requires a lawyer not to give advice to an unrepresented former employee other than advice to seek counsel in the matter. In essence, the rule requires an adverse lawyer contacting a former employee of an opposing corporate party to identify his or her role in the matter, the identity of the lawyer's client and the fact that the witness's former employer is an adverse party to the litigation.

Ex. 2 (Ohio Board of Prof. Conduct, Op. 2016-5) at 4; *see also Davis v. Creditors Interchange Receivable Mgt., LLC*, 585 F. Supp. 2d 968, 979 (N.D. Ohio 2008) (attorneys may contact unrepresented former employees ex parte, but must “inform the former employee not to divulge any communications that the former employee may have had with corporate or other counsel”).

Here, The Chandra Law Firm contacted former Division of Fire Chief Patrick Kelly (“Chief Kelly”) and obtained a declaration from him. *See* Ex. 3 (Declaration of Patrick Kelly); Ex. 4 (Declaration of Patrick J. Kelly) at ¶ 11.¹ During his time working for the City, Chief Kelly “had many privileged communications with the City of Cleveland’s Legal Department and outside attorneys, including Jon Dileno.” Ex. 4 at ¶ 14. Chief Kelly and Mr. Dileno had multiple, privileged conversations about the City’s efforts to outsource to Tri-C training that traditionally occurred at the Fire Training Academy. Ex. 5 (Declaration of J. Dileno) at ¶ 4.

In violation of Rule 4.2, The Chandra Law Firm never instructed Chief Kelly not to disclose his “privileged discussions with either the City of Cleveland’s Legal Department or its outside attorneys” or even bothered to ask if counsel represented Chief Kelly. Ex. 4 at ¶¶ 13, 15. Notably, three of the paragraphs included in the declaration The Chandra Law Firm obtained

¹ Exhibit 3 is the declaration The Chandra Law Firm improperly obtained from Chief Kelly. Exhibit 4 is the declaration Chief Kelly provided Defense counsel.

from Chief Kelly relate specifically to the City's efforts to outsource training to Tri-C. *See* Ex. 3 at ¶¶ 16-18. The Chandra Law Firm also questioned Chief Kelly about his communications with Mr. Dileno, which Chief Kelly innocently disclosed. Ex. 4 at ¶ 16.

In violation of Rule 4.3, as explained in the excerpt above from Exhibit 2, The Chandra Law Firm also provided legal advice to Chief Kelly in that Mr. Bardwell advised Chief Kelly to sign the declaration Mr. Bardwell drafted for him. Ex. 4 at ¶ 17. On the advice of The Chandra Law Firm, Chief Kelly signed the declaration. Ex. 4 at ¶ 17.

In *Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996), the court disqualified the plaintiff's attorneys after they had ex parte contact with the defendants' former employee who had participated in the internal investigation of the plaintiff's employment discrimination allegations. Like here, after this employee left the defendant's employment, he had ex parte contact with the plaintiff's attorneys, who submitted an affidavit from him. *Id.* at 1117. The *Camden* Court found there was "little room for doubt" that the disqualified attorneys: (1) knew the employee had been extensively exposed to "confidential information and documents"; (2) never told the former employee not to disclose the information; and (3) eventually came into possession of privileged information and documents. *Id.* at 1122-23.

Similar to the former employee in *Camden*, Chief Kelly has intimate, confidential, and privileged knowledge of facts relating to Plaintiff's claims. In fact, Chief Kelly was solely responsible for deciding to bring Plaintiff up on Administrative Charges. Ex. 4 at ¶ 18. These Administrative Charges are a cornerstone of Plaintiff's First Amended and Supplemental Complaint. *See* Doc. No. 7 at ¶ 2 (alleged retaliation includes "concocting false administrative charges" against Plaintiff), ¶¶ 137-160 (regarding the alleged source of the Administrative Charges), ¶¶ 282-290 (regarding the publication of the Administrative Charges), ¶¶ 354-372

(regarding the dismissal of the Administrative Charges), and ¶ 376.d. (claiming again that the Administrative Charges were retaliatory). Furthermore, Plaintiff makes multiple allegations directly against Chief Kelly. *See, e.g.*, Doc. No. 7 at ¶ 118 (Plaintiff requested Chief Kelly’s assistance “dealing with” retaliation and Chief Kelly “did nothing”) and ¶ 223 (same).

Despite these direct allegations against Chief Kelly, The Chandra Law Firm “did not fully explain the lawsuit or the adverse nature” of Plaintiff’s position as compared to the City’s position. Ex. 4 at ¶ 12. The Firm also failed to explain to Chief Kelly Plaintiff’s specific claims against him. The Chandra Law Firm’s disregard for the mandatory safeguards required when speaking to former managerial employees of a represented party resulted in Chief Kelly’s disclosure of confidential information that he likely would not have disclosed but for The Chandra Law Firm’s misconduct. The Chandra Law Firm’s improper communications with Chief Kelly alone warrant disqualification of the Firm.²

B. The Chandra Law Firm’s Communications with City Managerial Employees Violated Ethical Rules Requiring Disqualification

Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

When an organization is the represented party, Rule 4.2 prohibits:

communications with a constituent of the organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter ***or*** has authority to obligate the organization with respect to the matter ***or*** whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

² The Chandra Law Firm also obtained a declaration from former Division of Fire Assistant Chief Mike Darnell. Mr. Darnell has not been deposed, but it is likely the genesis of his declaration is similar to that of the declaration of Chief Kelly, in that The Chandra Law Firm failed to instruct him not to divulge privileged communications.

Rule 4.2, Comment [7] (emphasis added); *see also* Ex. 2 at 2 (communications with managerial employees require the consent of the corporate lawyer).

The Chandra Law Firm knew current Division of Fire Captain Patrick Corrigan (“Captain Corrigan”) was a managerial employee within the City. *See* Doc. No. 7 at ¶ 88 (identifying him as “Captain Patrick Corrigan” in Plaintiff’s First Amended and Supplemental Complaint). In fact, during periods relevant to Plaintiff’s claims, Plaintiff identified Captain Corrigan as the “Acting Academy Chief” (Doc. No. 7 at ¶ 104), at which time, Captain Corrigan was responsible for “[d]ay-to-day operations, timesheets, personnel, the planning of the day...” and was the person in charge at the Fire Training Academy. Corrigan Dep. 23:2-24:5, Dec. 12, 2017.³

In Defendants’ Initial Disclosures, Defendants identified Captain Corrigan as someone “likely to have discoverable information.” *See* Ex. 7 at 2. Defendants also instructed The Chandra Law Firm to contact “City of Cleveland personnel,” including Captain Corrigan through Defense counsel. Ex. 7 at 4. The Chandra Law Firm ignored this instruction and, unsolicited, contacted Captain Corrigan on numerous occasions, without notifying Defense counsel. *See* Ex. 5 at ¶ 5; *see also* Corrigan 19:20-23. The Chandra Law Firm drafted a declaration for Captain Corrigan to sign, which he did. Ex. 8 (Declaration of Patrick Corrigan); Corrigan 10:19-25.

By repeatedly contacting Captain Corrigan, The Chandra Law Firm violated Rule 4.2, as Captain Corrigan has both the authority to obligate the City with respect to this matter and his acts or omissions related to this matter may be imputed to the City. *See* Ex. 1 at ¶¶ 7-8; Rule 4.2, Comment [7]. That Plaintiff sought a declaration from him demonstrates Captain Corrigan’s authority and relevance to this matter. In fact, Plaintiff references Captain Corrigan throughout

³ Excerpts from Captain Corrigan’s deposition transcript are attached as Exhibit 6. Defendants refer to Captain Corrigan’s deposition transcript throughout as “Corrigan __:__.”

his First Amended and Supplemental Complaint. *See, e.g.*, Doc. No. 7 at ¶¶ 88, 104, 149, 173, 244, 271, and 395.

Battalion Chief Szabo also has the authority to obligate the City and his acts or omissions may be imputed to the City. Ex. 1 at ¶ 6 and ¶ 8. Similar to Captain Corrigan, The Chandra Law Firm, unsolicited, contacted current Battalion Chief Frank Szabo (“Battalion Chief Szabo”) and obtained a declaration from him. Ex. 10 (Declaration of Frank Szabo); Szabo Dep. 6:3-7:16, Dec. 12, 2017.⁴ Prior to contacting Battalion Chief Szabo, The Chandra Law Firm did not notify Defense counsel. Ex. 5 at ¶ 5.⁵

Rule 4.2 also applies to any employee whose admissions are admissible against the employer as admissions of a party opponent under Fed. R. Evid. 801(d)(2)(D). *Institutform of N. Am., Inc. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622, 625 (S.D. Ohio 1991) (citing *Pearce v. E. F. Hutton Group, Inc.*, No. 86-0008, 1987 U.S. Dist. LEXIS 13236 (D.D.C. 1987)). Both Captain Corrigan and Battalion Chief Szabo act as agents of the City (Ex. 1 at ¶ 8), and Plaintiff may use their statements as an exclusion to hearsay under Fed. R. Evid. 801(d)(2)(D).

When determining whether disqualification is warranted because of a violation of Rule 4.2, the court should consider “1) the client's interest in being represented by counsel of its own choice; 2) the opposing party’s interest in a trial free from prejudice due to disclosures of confidential information; and 3) the public’s interest in the scrupulous administration of justice.” *Kitchen*, 769 F. Supp. at 258 (quoting *Meat Price Investigators Assoc. v. Spencer Foods, Inc.*, 572 F.2d 163, 165 (8th Cir.1978)). The overall inquiry is whether the improper communication

⁴ Excerpts from Battalion Chief Szabo’s deposition transcript are attached as Exhibit 9. Defendants refer to Battalion Chief Szabo’s deposition transcript throughout as “Szabo ___:___.”

⁵ The Chandra Law Firm also obtained a declaration from current Captain Dennis Corrigan. Captain Dennis Corrigan has not been deposed, but it is likely that the genesis of his declaration is similar to that of the declarations of Captain Corrigan and Battalion Chief Szabo. The Chandra Law Firm did not contact Defense counsel before improperly speaking with Captain Dennis Corrigan and obtaining a declaration from him. Ex. 5 at ¶ 5.

resulted in prejudice that “is likely to infect future proceedings.” *Maple Heights v. Redi Car Wash*, 51 Ohio App.3d 60, 61, 554 N.E.2d 929 (8th Dist. Cuyahoga 1998); *see also Spivey v. Bender*, 77 Ohio App.3d 17, 22, 601 N.E.2d 56 (6th Dist. Lucas 1991) (overall inquiry is whether the improper communication “undermined the integrity of trial court proceedings”).

The Chandra Law Firm’s extensive communications with Captain Corrigan, and to a lesser extent Battalion Chief Szabo, warrants the Firm’s disqualification. The Chandra Law Firm’s improper communications with these managerial employees negatively impacts Defense counsel’s relationship with them and undermines the integrity of the proceedings. *See State v. Byrd*, 6th Dist. Lucas No. L-12-1276, 2013-Ohio-3949, ¶¶ 19-20 (6th Dist. Sept. 13, 2013) (court affirmed the disqualification of a lawyer whose improper contact with a represented party tainted the forthcoming trial, reasoning, in part, that the contact interfered with the individual’s relationship with his attorney).

Courts elsewhere, applying the same disqualification standard to Rule 4.2 violations, likewise disqualify lawyers who engage in prejudicial ex parte communications and suppress improperly obtained statements. In *Shoney’s, Inc. v. Lewis*, 875 S.W.2d 514 (Ky. 1994), the Kentucky Supreme Court disqualified a lawyer who questioned a general manager and relief manager of a restaurant that was a represented party. In reaching its conclusion, the court reasoned that “the witnesses interrogated were high level employees of a represented party, a fact of which Herr’s counsel was fully aware.” *Shoney’s*, 875 S.W.2d at 516. The Court also suppressed the statements counsel improperly obtained. *Id.* The Chandra Law Firm has engaged in nearly identical conduct here by questioning current City managers Captain Corrigan and Battalion Chief Szabo and obtaining declarations from them, which the Court should suppress.

Defendants identification of Captain Corrigan in their Initial Disclosures and instruction to contact him through Defense counsel, at a minimum, should have caused The Chandra Law Firm to notify Defense counsel before speaking with Captain Corrigan, especially given that Plaintiff knew Captain Corrigan was a managerial employee. Doc. No. 7 at ¶¶ 88, 104. Additionally, much of Plaintiff's First Amended and Supplemental Complaint, relates to the happenings at the Fire Training Academy. *See* Doc. No. 7. During relevant times, Captain Corrigan served as the person in charge of the Academy and its personnel. Corrigan 23:2-24:5. The Chandra Law Firm's extensive communications with Captain Corrigan – a represented party – is a second and separate reason to disqualify the Firm.

C. The Chandra Law Firm's Use of Law Clerk Brian Bardwell Violated Ethical Rules Requiring Disqualification

The Chandra Law Firm is no stranger to the City, as its founding member Subodh Chandra was the City's Law Director from 2002-2005. While Mr. Chandra worked for the City some years ago, The Chandra Law Firm's use of law clerk Brian Bardwell on this case is far too close in time to Mr. Bardwell's internship within the City's Department of Law, which concluded less than a year before The Chandra Law Firm hired him, and in nature to Mr. Bardwell's activities interning for the City.

A conflict of interest under the Rules of Professional Conduct is a basis for disqualifying opposing counsel. *See Green v. Toledo Hosp.*, 94 Ohio St.3d 480, 484, 764 N.E.2d 979 (Ohio 2002). Rule of Professional Conduct 1.10, Comment [4] addresses conflicts arising from the employment of non-lawyers – such persons “ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.” “The primary

purpose of disqualification is to protect confidentiality of information, even if the information is only potentially involved in the current action.” *Lamson*, 2009 U.S. Dist. LEXIS 37197 at *15 (quoting *Morford v. Morford*, 85 Ohio App. 3d 50, 57, 619 N.E.2d 71 (Ohio App. Ct. 4th Dist. 1993) (further citations omitted)).

In cases involving confidential information and perceived potential conflicts of interest, “the interests of the profession and the system of justice must prevail over . . . subjective determinations.” *Reason v. Wilson Concrete Prods.*, 119 Ohio Misc.2d 94, 99, 774 N.E.2d 784 (C.P. Montgomery 2002).

In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances “with hair-splitting nicety” but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing the appearance of impropriety, it is to resolve all doubts in favor of disqualification. . . . Neither is the court to consider whether the motives of counsel in seeking to appear despite his conflict are pure or corrupt; in either case the disqualification is plain.

Id. (quoting *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359, (S.D. W.Va. 1995), which quoted *United States v. Clarkson* 567 F.2d 270, 273, fn. 3 (4th Cir., 1977)).

During the summer of 2016, Mr. Bardwell interned in the City’s Public Records Section of its Department of Law. Ex. 11 (Declaration of K. Roberson) at ¶ 3. The City tasked Mr. Bardwell with reviewing 2015 public records requests to determine which requests were open, closed, and the response status. Ex. 11 at ¶ 4. To do so, Mr. Bardwell needed to access the City’s Public Records Log, which tracks the City’s public records requests and responses. Ex. 11 at ¶ 5. The Public Records Log includes attorney opinions and communications regarding the status of responses, including whether the City is legally obligated to respond to particular requests. Ex. 11 at ¶ 6. The City took measures to protect its confidential and privileged communications by having Mr. Bardwell execute a Confidentiality Agreement. *See* Ex. 12.

“When the same attorney represents both the former and current client there is an un rebuttable presumption that the attorney gained confidential information.” *Lamson*, 2009 U.S. Dist. LEXIS 37197 at *16. The same presumption should apply to Mr. Bardwell who worked within the City’s Department of Law less than a year before he went to work for The Chandra Law Firm.⁶ In 2015, The Chandra Law Firm submitted more than ten public records requests to the City. Ex. 11 at ¶ 7. Additionally, in 2015, Plaintiff’s former attorney submitted a public records request directly related to this matter about which The Chandra Law Firm subsequently filed a Complaint with Writ of Mandamus with the Ohio Supreme Court. *See* Ex. 13. The City and The Chandra Law Firm litigated this Complaint into October 2017 (*see* Ex. 14) and while Mr. Bardwell worked for The Chandra Law Firm. At the time Mr. Bardwell interned for the City, Plaintiff’s 2015 public records request was open and included on the Public Records Log Mr. Bardwell accessed and reviewed, as were the other numerous public records requests submitted by The Chandra Law Firm. Ex. 11 at ¶ 8.

During his internship at the City, Mr. Bardwell also became privy to other confidential information material to Plaintiff’s claims, including, but not limited to, how long it typically takes the City to respond to public records requests, the Department of Law’s involvement with the requests, and the manner in which the City processes them. Ex. 11 at ¶ 9. This information is related directly to Plaintiff’s claim that the City retaliated against him by “failing to fully or timely respond to a public records request for records that tend to support [Plaintiff’s] assertions...” Doc. No. 7 at ¶ 376.n.

Immediately upon learning of Mr. Bardwell’s internship at the City, Defense counsel

⁶ It is unclear when exactly Mr. Bardwell began working for The Chandra Law Firm. During Captain Corrigan’s deposition on December 12, 2017, despite Mr. Bardwell sitting next to Plaintiff’s counsel, Plaintiff’s counsel could not state when Mr. Bardwell started working for The Chandra Law Firm beyond “this summer.” Corrigan 73:5-18.

raised its concerns with The Chandra Law Firm. Eckart Dep. 121:9-123:21, Nov. 21, 2017 (attached as Ex. 15); Ex. 5 at ¶ 6. On December 4, 2017, Defense counsel asked The Chandra Law Firm to wall-off Mr. Bardwell, as it continued its investigation, and inquired into what steps The Chandra Law Firm took to “vet Mr. Bardwell’s time and experience interning for the City against [its] firm’s litigation against the City.” Ex. 5 at ¶ 6. In response, The Chandra Law Firm offered zero details as to its actions to vet Mr. Bardwell and continued to refuse to wall-off Mr. Bardwell. Ex. 5 at ¶ 7. During Captain Corrigan’s deposition on December 12, 2017, which Mr. Bardwell attended, Defense counsel again objected to Mr. Bardwell’s involvement in this case and reserved the right to raise the issue with the Court. Corrigan 72:9-20.

At an absolute minimum, The Chandra Law Firm should have screened off Mr. Bardwell, but even that may have been insufficient to avoid disqualification, as non-lawyers who have acquired confidential information are held to similar standards to those applicable to attorneys – they must be screened out of matters in which they have a conflict of interest, and imputed disqualification may be required where screening would not be effective. *See MMR/Wallace Power & Industrial, Inc. v. Thames Assoc.*, 764 F. Supp. 712, 725 n.19 (D. Conn. 1991) (“The fact that [the conflicted employee] was not an attorney is irrelevant to the court’s consideration of his ability to assist Plaintiff’s counsel in the preparation for litigation” and “it cannot be seriously disputed that [he] possessed confidential and privileged information”); cf. *In re Tevis*, 347 B.R. 679, 693 (9th Cir. 2006) (“A communication with a nonlawyer employee of a law firm can also give rise to a disqualifying conflict of interest, especially where confidential information is disclosed”); *Lamb v. Pralex Corp.*, 333 F. Supp. 2d 361, 364, 46 V.I. 213 (D.V.I. 2004) (“a trial court has the authority, in a litigation context, to disqualify counsel based on the conduct of a nonlawyer assistant that is incompatible with a lawyer’s ethical obligations,” and “such

disqualification may be imputed to the entire law firm”); *Rodriguez v. Montalvo*, 337 F. Supp. 2d 212, 218 (D. Mass. 2004) (“if a non-lawyer paralegal established a confidential relationship with a client, that relationship may be imputed to the attorney supervisor and consequently to the firm as a whole”).

Rather than screen Mr. Bardwell, The Chandra Law Firm turned him loose. Mr. Bardwell, less than a year removed from his internship within the City’s Department of Law where he had access to matters directly related to this case, has been deeply involved in this case, retrieving numerous declarations from multiple current and former City managerial employees. *See, e.g., Ex. 3, Ex. 8, and Ex. 10.*

When a non-attorney employee of a party-litigant, who has been exposed to confidential information, later becomes employed by the opposing party in that litigation, the court must hold an evidentiary hearing and determine whether the evidence supports a presumption that the information has been disclosed to the current employer. *Green*, 94 Ohio St.3d at 484. “Analysis of imputed disqualification starts with presumption that attorneys and [nonattorneys] who work together share confidences”. *Richards v. Jain*, 168 F. Supp. 2d 1195, 1204 (W.D. Wash. 2001) (entire law firm disqualified because a paralegal reviewed privileged documents) (citations omitted). “As defined by the Ohio Rules of Professional Conduct ‘confidential information is broader than simply that information covered by the attorney-client privilege and covers all ‘information relating to the representation.’” *Lamson*, 2009 U.S. Dist. LEXIS 37197 at *14 (*citing* Rule 1.6(a)).

The full extent of Mr. Bardwell’s knowledge of confidential and privileged City business is unclear. What is clear is that his exposure to confidential and privileged information while interning for the City conflicted him from assisting The Chandra Law Firm with this case. That

The Chandra Law Firm allowed him to work on this matter is a third and separate reason warranting the Firm's disqualification.

II. THE COURT SHOULD SUPPRESS THE IMPROPERLY OBTAINED DECLARATIONS

Plaintiff should not benefit from The Chandra Law Firm's violations of the Rules of Professional Conduct. As such, the Court should suppress and prohibit Plaintiff from using the declarations The Chandra Law Firm obtained from Captain Patrick Corrigan, Captain Dennis Corrigan, Battalion Chief Szabo, Chief Kelly, and Assistant Chief Mike Darnell.

CONCLUSION

The bell cannot be rung. For the above reasons, Defendants request that the Court disqualify the entirety of The Chandra Law Firm from representing Plaintiff in this matter and suppress the declarations the Firm improperly obtained.

Respectfully submitted,

Zashin & Rich Co., L.P.A.

s/ David R. Vance

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2018 the foregoing document was filed via the Court's electronic filing system and will be served on all parties via that system.

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Attorneys for Defendants

DECLARATION OF EDWARD J. ECKART, JR.

I, Edward J. Eckart, Jr., declare under penalty of perjury that the following is true and correct:

1. I am over the age of 18 and have personal knowledge of the facts included herein.
2. Since 2011, I have worked for the City of Cleveland (“City”) as an Assistant Safety Director. The Chief of the City’s Division of Fire reports to me.
3. The hierarchy of the City’s Division of Fire, from the top down, is Chief, Executive Officer, Assistant Chiefs, Battalion Chiefs, Captains, Lieutenants, and Firefighters.
4. The Chief has complete command and control of all personnel within the Division of Fire, which includes approximately 780 individuals.
5. There are five Battalions within the Division of Fire comprised of multiple fire stations and companies.
6. Battalion Chiefs are responsible for the overall operation of their Battalion.
7. Captains are responsible for the individual fire stations and companies within the Battalions and supervise their subordinate lieutenants and firefighters.
8. Both Captains and Battalion Chiefs are responsible for maintaining discipline and staffing, and are members of City management whose actions regularly bind the City. At times, both Captains and Battalion Chiefs act as agents for the City.

FURTHER DECLARANT SAYETH NAUGHT.

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

Executed on February 12, 2018



EDWARD J. ECKART, JR.

EXHIBIT

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