

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
DOCKET NO. 08-04641

JOHNSON GOLF MANAGEMENT, INC.)
Plaintiff,)
)
v.)
)
TOWN OF DUXBURY, and NORTH HILL)
ADVISORY COMMITTEE, consisting of)
MICHAEL DOOLIN, CHAIRMAN,)
SCOTT WHITCOMB,)
ROBERT M. MUSTARD, JR., MICHAEL)
MARLBOROUGH, ANTHONY FLOREANO,)
MICHAEL T. RUFO, THOMAS K. GARRITY,)
RICHARD MANNING, W. JAMES FORD,)
and GORDON CUSHING (EX OFFICIO),)
CALM GOLF, INC. and CHARLES LANZETTA,)
Defendants,)
)
v.)
)
PILGRIM GOLF, LLC,)
Intervenor.)
)

**DEFENDANT, TOWN OF DUXBURY'S EMERGENCY MOTION TO COMPEL
ANSWERS TO QUESTIONS POSED AT THE DEPOSITION OF WITNESS
ROBERT TROY AND TO PRODUCE E-MAILS BELONGING TO THE TOWN
OF DUXBURY**

The Defendant, Town of Duxbury (the "Town"), asks that this honorable court compel witness Attorney Robert Troy ("Troy") to answer questions posed to him, which he refused to answer at his deposition on the basis of attorney-client privilege, pursuant to Mass.R.Civ.P 37, to order him to produce all e-mails in his possession, custody, and control regarding this matter and to order Troy to pay the defendants all of their counsel fees and costs associated with having to file this Motion and retake the deposition.

I. Troy has no Legitimate Basis to Continue Refusing to Fully Testify at His Court-Ordered Deposition.

Troy is the former Town Counsel for the Defendant, Town of Duxbury. As Town Counsel, he represented the Town in this litigation from its commencement in December 2008 until May 2012, when the Town directed him to withdraw his appearance. At the same time, successor interim Town Counsel Arthur Kreiger filed his appearance for the defendants. The Town has waived all attorney-client privilege that existed between it or its agents and employees and Attorney Robert Troy, with respect to this litigation. Troy is a key material witness as he was involved in every aspect of this procurement process at issue and will testify in the trial.

Attorney Leonard Kesten entered his appearance for the defendants in February 2011. From then until May 2012, Attorney Kesten served as co-counsel with Attorney Troy in the litigation. Since May 2012, Attorneys Kesten and Kreiger have been co-counsel for the defendants. At no time did Attorney Kesten enter into an attorney client relationship with Troy. At no time did Attorney Kreiger enter into an attorney client relationship with Troy. Troy's deposition was noticed by Plaintiff's counsel in March of 2012. It commenced on June 28, 2012 and was continued until September 5, 2012. On this second day, Attorney Kesten began his questioning of the deponent. During this questioning, Troy's counsel objected to multiple questions posed by Attorney Kesten and instructed the deponent Robert Troy not to answer, invoking the attorney-client privilege. See September 5, 2012 Deposition of Robert S. Troy at pages 37-42, 47-48, attached as **Exhibit 1**. The basis for this privilege claim is Troy's allegation that Attorney Kesten had previously agreed to be his counsel for the deposition. When Attorney Kesten posed further questions to the deponent in order to explore the grounds for this privilege claim, such as when and how and the alleged attorney-client relationship began, Attorney Troy

also refused to answer these questions, asserting the same privilege. As set forth within the attached affidavit of Attorney Leonard Kesten, no attorney client relationship has ever existed between Attorney Kesten and Attorney Troy. See September 11, 2012 Affidavit of Attorney Leonard Kesten, attached as **Exhibit 2**. After Attorney Kesten suspended his questioning of Troy, Attorney Kreiger attempted to ask questions. As he had with Attorney Kesten, Troy refused to answer certain questions based on his false assertion that he had an attorney client relationship with Attorney Kreiger. See Exhibit 1 at pages 216-223.

The Town of Duxbury is currently pursuing a malpractice action filed against Troy based on his orchestrating the drafting of the request for proposal and bid award processes that give rise to the instant litigation, as well as Attorney Troy's malpractice in representing the Town in this matter (Town of Duxbury v. Robert S. Troy, PLCV2012-0864 (Plymouth Superior Court)). Attorney Troy has submitted an affidavit in the malpractice action alleging that he entered into an attorney-client relationship with Attorney Kesten at some point on or after March 2012. See Affidavit of Robert S. Troy, Dated August 29, 2012, attached as **Exhibit 3**. Attorney Kesten has attached an affidavit to this motion indicating that Attorney Troy is lying as they never entered into an attorney client relationship. In his affidavit, Troy has likewise claimed that Attorney Kreiger had agreed to be his lawyer for purposes of Troy's deposition. As he had with regard to his claims as to Attorney Kesten, Troy is lying as no such thing had ever happened. See Affidavit of Arthur Kreiger, attached as **Exhibit 4**.

The Town requests that this honorable court compel Attorney Robert Troy to respond to all questions that he refused to answer at his deposition on the basis of attorney client privilege because there has never existed any attorney-client relationship

between Attorney Kesten or Attorney Kreiger and Attorney Troy. The Town requests that the court hold an evidentiary hearing on the issue of whether any attorney client privilege existed between Attorneys Kesten and/or Kreiger and Attorney Troy. The Town further asks this Court to order Troy to pay all attorneys' fees and costs associated with this motion and the retaking of the deposition.

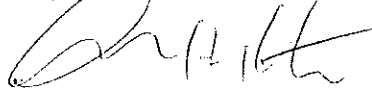
II. Likewise, the Court Should Compel Troy to Fully Comply with Repeated Requests from the Town, His Former Client, for Documents and Town Files to Assist in this Litigation.

In addition, the Defendants ask that this Court order Troy to produce all e-mails and any other documents in his possession regarding this case to the Town of Duxbury. Troy had been Town Counsel throughout the origination of this litigation until this past May, nearly four years. Attorney Kreiger succeeded Troy and became interim Town Counsel after Troy was terminated by the Town in May 2012. Since that time, on various occasions successor Town Counsel has requested, then ultimately, demanded that Troy produce documents from his office concerning this litigation. Although some files were produced, the Town believes that more documents exist in Troy's possession. See Affidavit of Nina Pickering Cook, attached as **Exhibit 5**. Most recently, the Town has demanded that Troy produce all e-mails in his possession regarding this litigation. The defendants attach a chain of e-mails between attorney Nina Pickering-Cook of Anderson & Kreiger LLP and attorneys Robert Gill and William Covino, counsel for Troy, regarding production of the e-mails. See Correspondence Regarding Production of E-Mail, attached as **Exhibit 6**. On September 5, 2012, at his second day of deposition Troy testified that he had reviewed various e-mails in preparation for the deposition. Yet, he has not produced any e-mails whatsoever to his former client.

Wherefore, the defendants ask that this Court determine that no attorney client relationship ever existed between attorneys Kesten and Krieger; to compel Troy to answer all questions at his deposition; to order Troy to produce all e-mails in his possession regarding this matter; and to order Troy to pay all the fees and costs expended by the defendants as a result of having to file this motion and for the costs associated with resuming the deposition.

Respectfully submitted,

Defendant,
Town of Duxbury,
By its attorneys,



Leonard H. Kesten, BBO# 542042
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DATED: September 12, 2012

CERTIFICATE OF SERVICE
I hereby certify that a true copy of
the above document was served
upon the attorney of record for each
other party by mail-HAND ON 9/12/12

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EXHIBITS: 25 - 27

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DOCKET
NO. 08-04641-B

-----X
JOHNSON GOLF MANAGEMENT, INC.,

Plaintiff,

vs

TOWN OF DUXBURY, and
NORTH HILL ADVISORY COMMITTEE,
CONSISTING OF MICHAEL DOOLIN, CHAIRMAN,
SCOTT WHITCOMB, ROBERT M. MUSTARD, JR.,
MICHAEL MARLBOROUGH, ANTHONY
FLOREANO, MICHAEL T. RUFO, THOMAS K.
GARRITY, RICHARD MANNING, W. JAMES FORD,
and GORDON CUSHING (EX OFFICIO)
and CALM GOLF, INC., and
CHARLES LANZETTA,

Defendants
-----X

CONTINUED DEPOSITION OF ROBERT S. TROY,
taken on behalf of the Plaintiff, pursuant to
the applicable provisions of the Massachusetts
Rules of Civil Procedure, before Jessica F.
Story, Certified Shorthand Reporter and Notary
Public in and for the Commonwealth of
Massachusetts, at the offices of Follansbee &
McLeod, LLP, 536 Granite Street, Braintree,
Massachusetts, on Wednesday, September 5, 2012,
commencing at 10:18 a.m.

-----X
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REGISTERED PROFESSIONAL REPORTERS
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CONTINUED DEPOSITION OF ROBERT S. TROY

1 what you said.

2 Q. Here's the question. You and I had a
3 conversation early in this case about the need
4 for you to testify, didn't we?

5 A. I don't know what you're talking about. Early
6 in the case? What is the date of the
7 conversation?

8 Q. When is the first time you and I discussed you
9 being a witness in this case?

10 A. I don't remember.

11 Q. Do you have any idea?

12 A. It was at some point subsequent to the pretrial.

13 Q. The pretrial in November of 2011?

14 A. Yes.

15 Q. And at what point did you inform me that the
16 town manager was not going to waive the
17 privilege and you would not be testifying?

18 MR. GILL: I'm going to object to that.

19 A. I don't remember that.

20 MR. GILL: I'm going to object to that
21 for two grounds. One is I don't think it's
22 likely to lead to relevant evidence in this
23 case.

24 And second of all, you're now getting

1 into conversations between Mr. Troy and his then
2 attorney which are privileged, and that
3 privilege belongs to Mr. Troy.

4 Q. Tell me when I became your attorney.

5 MR. COVINO: Objection.

6 A. You became my attorney when you suggested to me
7 that I was not going to function as the trial
8 counsel but as the witness for the case which
9 was going to give a chronology.

10 Q. So --

11 A. The narrative, as you said.

12 Q. So at that point I agreed to be your lawyer and
13 that I would keep your confidence from the Town
14 of Duxbury. Is that what you're saying?

15 MR. GILL: Wait a second.

16 MR. COVINO: Objection.

17 MR. GILL: Is this -- I'm going to cut
18 this off because you're not getting
19 conversations between lawyer and client, and
20 those are privileged. They are not relevant to
21 this case. We're not going to answer questions
22 of that nature.

23 Q. When did you have private conversations with me,
24 Mr. Troy, without anybody else being there?

1 A. I had a number of private conversations with
2 you.

3 Q. When and where?

4 A. I don't have the detail of all the
5 conversations. We had many conversations. We
6 had e-mail transmissions. We had phone
7 conversations, a number of phone conversations.

8 Q. Okay.

9 A. And we had a number of conversations at various
10 times with and without other people.

11 Q. When did we have private attorney-client
12 conversations? When?

13 A. I just answered that.

14 Q. No, you haven't.

15 A. We had numerous private attorney-client. I was
16 speaking with you because I believed that you
17 were representing me in my capacity.

18 Q. Not the town?

19 A. No.

20 Q. Just you?

21 A. In my capacity as a witness for the town. I was
22 not functioning as counsel.

23 Q. So were all our conversations that we had since
24 that pretrial privileged conversations?

1 MR. COVINO: Objection.

2 A. I leave that for the Court to decide.

3 Q. You were operating under the belief, right, that
4 I was your lawyer and these were private
5 conversations, right?

6 MR. GILL: I'm going -- no. No. I'm
7 going to object because we're going too far now
8 into the privileged area. It is not relevant in
9 any way to this case so I'm going to instruct
10 him not to answer that.

11 Q. Mr. Troy, the meeting we had in my office on
12 April 13th, do you remember that meeting where
13 you brought the files up?

14 A. I do.

15 Q. Was that a privileged conversation?

16 MR. COVINO: Objection.

17 A. Those --

18 MR. GILL: I'm going to cut this off
19 again and instruct you not to answer. This is
20 not relevant in this case.

21 You're only entitled in this case, in my
22 judgment, to ask him what he did to prepare for
23 this deposition. He said that he met with you,
24 he met with Mr. Kreiger, he met with me and

1 Mr. Covino. Now let's move on from that.

2 MR. KESTEN: I just want to know the
3 dates of the meeting, Bob. I'm trying to
4 explore.

5 MR. GILL: Ask him the dates. If he
6 remembers, he'll tell you.

7 Q. Do you have any records of any of these dates?

8 MR. GILL: That's a different question.
9 You said you wanted to know when they were. You
10 want to know that, ask him.

11 MR. KESTEN: Mr. Gill, do not interfere
12 with my deposition. If you're going to object,
13 you can. You can advise him not to answer.
14 Other than that, knock it off.

15 MR. GILL: That's what I'm doing.

16 Q. Mr. Troy, do you have any records of any of the
17 dates of these so-called privileged meetings?

18 A. No records.

19 Q. Do you have any memoranda whatsoever of any of
20 these privileged meetings?

21 MR. COVINO: Objection.

22 MR. GILL: Objection. I will instruct
23 him not to answer.

24 MR. KESTEN: You're instructing him not

1 to answer?

2 MR. GILL: Yes.

3 Q. Mr. Troy, when were you first hired by the Town
4 of Duxbury?

5 A. I believe in 1986.

6 Q. And you've been town counsel ever since until
7 May 4th?

8 A. I believe so.

9 Q. When is the first time you assisted the town in
10 any RFP process or procurement process
11 whatsoever?

12 A. I don't remember.

13 Q. How many had you done? How many had you
14 assisted the town in before this one?

15 A. I don't remember.

16 Q. Any clue?

17 MR. GILL: You're asking him to guess?
18 Are you asking him to guess?

19 MR. KESTEN: I'm not answering your
20 questions.

21 Q. Any clue as to how many?

22 MR. GILL: I'm going to instruct you not
23 to guess or speculate.

24 A. No. I don't know the number but there were not

1 Q. Do you recall that in 2010 you didn't remember
2 that you had put that phrase in?

3 A. Is this a communication that I had with you?

4 Q. No.

5 A. No. I don't know what you're talking about.

6 Q. Do you remember me asking you whether or not,
7 whether you had put that in after Gordon
8 Cushing's deposition?

9 MR. GILL: Objection.

10 A. I'm not waiving a privilege.

11 Q. You think that's a privileged communication?

12 A. I do.

13 Q. At that point I had agreed to represent you?

14 A. Yes.

15 Q. When did I first agree to represent you?

16 MR. GILL: Now wait a minute. I am going
17 to object. I'm going to instruct you not to
18 answer. We're not going down this road.

19 Q. Mr. Troy, you and I were co-counsel in this
20 case, correct?

21 A. At some point.

22 Q. When?

23 A. I don't remember.

24 Q. How did I become involved?

1 A. You became involved at some point after
2 Ms. Ecker was -- entered an appearance, left
3 your firm, I guess. I don't know how you became
4 involved.

5 Q. No. I said when.

6 A. I don't know that.

7 Q. You don't know that?

8 A. I don't remember the dates, no.

9 Q. Okay. Do you remember my appearance in the
10 pretrial?

11 A. I do.

12 Q. Was I your lawyer then?

13 MR. COVINO: Objection.

14 MR. GILL: Objection. We're not going
15 down this road. This is appropriate in the
16 other case if you want to pursue it there. It's
17 not in this case.

18 MR. KESTEN: Well, are you going to go
19 ahead and advise him not to answer?

20 MR. GILL: I will.

21 MR. KESTEN: I just want to make sure the
22 judge sees it, so let's put it on the record.

23 MR. GILL: That's fine.

24 Q. (By Mr. Kesten) Mr. Troy, do you recall after

1 do that.

2 MR. KREIGER: I am and you can.

3 MR. GILL: And I will save you the
4 trouble and say we're not going to answer them.
5 It's Mr. Edge's turn as far as we're concerned.
6

7 EXAMINATION BY MR. KREIGER:

8 Q. Mr. Troy, I just want to ask you about one
9 topic. At the beginning of your questioning by
10 Mr. Kesten in response to a question about your
11 deposition preparation you said that you had
12 been prepared by him and you also said you had
13 -- in that answer that you had been prepared by
14 me.

15 Do you recall that answer?

16 A. I do.

17 Q. When do you believe I prepared you for your
18 deposition?

19 A. When I was at your office during the several
20 occasions I was there you told me you were going
21 to prepare me for the deposition. You asked me
22 to give the information that I gave you, and I
23 gave it to you freely understanding that you
24 were going to be representing me.

1 And I even went to the point of telling
2 you that --

3 MR. GILL: Let's not get into the
4 privileged --

5 THE WITNESS: Okay.

6 MR. GILL: -- communication. Do you have
7 anything else?

8 Q. When were those meetings in my office?

9 A. I don't recall the date. I don't have the date
10 with me.

11 Q. Are you referring to the date in April when you
12 and Craig Jordan brought up the files?

13 A. Yes.

14 Q. April 25th and 26th?

15 A. I don't know the dates. I don't have the dates
16 with me.

17 Q. Any other dates?

18 A. I believe that I was at your office three times
19 or four times. I'm not sure. I don't have the
20 dates.

21 Q. The second two times, the third and fourth times
22 were with Mr. Gill and others?

23 MR. GILL: I'm going to interrupt here.
24 There is no relevance.

1 MR. KREIGER: He has testified in this
2 deposition that I prepared him. I'm cross
3 examining him on that testimony.

4 MR. GILL: Why is that relevant to any
5 issue in this case?

6 MR. KREIGER: It's relevant -- you know,
7 I don't even have to answer that.

8 MR. GILL: We're not going to answer
9 questions unless you give an explanation. I'm
10 trying to be reasonable but I can't be
11 reasonable without an explanation.

12 MR. KREIGER: The relevance to this case
13 is his understanding my role as town counsel,
14 his role as now former town counsel but then
15 town counsel and witness in this case.

16 MR. GILL: Why is that relevant to any
17 claims made by Johnson?

18 MR. KREIGER: It's relevant. His role in
19 the case is relevant to the town's liability. I
20 am defending the town.

21 MR. GILL: What the conversations were
22 between you and the town are, it seems to be in
23 no way relevant to the Johnson Golf course claim
24 against the town.

1 Obviously we know there are relevant
2 other issues pending between you and your client
3 and Mr. Troy, but they're not in this case so
4 we're not going to do it in this case.

5 MR. KREIGER: Okay. I'm responding to --

6 MR. GILL: The second point is that Len
7 represents the same client that you have. He
8 asked the questions. We had a conversation
9 about this before. I do not think that the town
10 has the right to have two lawyers ask questions
11 of the same witness in the same deposition.

12 That's particularly true when you were
13 sent out e-mails to all of you folks asking how
14 long you were going to be. You didn't
15 communicate that you were going to take any
16 time, so it seems to me that the fact that you
17 changed your mind since we filed our motions is
18 pretty good proof that these questions are
19 asked, not having to do with this case, but to
20 have to do with the other issues.

21 MR. KREIGER: I'm not even going to
22 respond to any of that.

23 MR. GILL: If you have any questions that
24 go to the merits of the Johnson Golf case, ask

1 them, but I want to ask you how long it's going
2 to take because Mr. Edge has indicated he's got
3 questions and he's entitled to ask them.

4 MR. KREIGER: My questions would have
5 been done by now. My questions --

6 MR. GILL: So you've got less than five
7 minutes worth of questions?

8 MR. KREIGER: Yes, which I told Mr. Edge.
9 I told him I have five to ten minutes.

10 MR. GILL: You didn't tell me.

11 MR. KREIGER: I understand that.

12 Q. (By Mr. Kreiger) Do you recall that the third
13 and fourth times you were in my office you were
14 with Mr. Gill and/or others?

15 A. I believe so.

16 Q. We didn't do any deposition preparation those
17 days, right?

18 A. No. Well, except that you asked questions, but
19 no.

20 Q. But you didn't answer any questions?

21 A. No.

22 Q. We didn't have a substantiative discussion about
23 the case, right?

24 A. You're correct.

1 Q. About the depositions?

2 A. Yes, you are.

3 Q. Those are the four times you were ever at my
4 office, correct?

5 A. That's correct.

6 Q. The first of those four times was the first time
7 you and I had ever met?

8 A. Yes, it is.

9 Q. I believe it was the first time we had ever
10 spoken?

11 A. I believe so.

12 Q. Or communicated? All right. Okay. And have
13 you ever received any written indication of an
14 attorney-client relationship between us?

15 MR. GILL: I'm going to put this to an
16 end.

17 MR. KREIGER: Either instruct him or
18 don't. I don't want another speech.

19 MR. GILL: I'm going to give one.

20 MR. KREIGER: Then do it. I know why.
21 You said it six times.

22 MR. GILL: No. I have another reason,
23 too. You know the answers to these questions
24 because the communications were between the two

1 of you.

2 MR. KREIGER: Any lawyer at a deposition
3 is entitled to get the witness' testimony even
4 though the lawyer knows the answer.

5 MR. GILL: This has nothing to do with
6 this case. I'm going to instruct him not to
7 answer in this case. You will be able to ask
8 him about all of these at a properly noticed
9 deposition in the other case at an appropriate
10 time.

11 MR. KREIGER: You've also moved to
12 disqualify him in the other case and that,
13 coupled with the tactic of not letting him
14 answer in this case is an attempt to deprive the
15 town of the ability to get Mr. Troy's
16 deposition. Either instruct him --

17 MR. GILL: If you'd like to talk about
18 how you can depose him in the other case, you
19 have not approached me about that at all. I'm
20 instructing him not to answer that question in
21 this case now today.

22 MR. KREIGER: All right.

23 MR. GILL: It is now 3:30.

24 MR. KREIGER: Bob, we would have been

1 done long ago. You're taking up David's time
2 and blaming us. Just cut it out. Let me just
3 ask that question again so it's clean and you
4 can instruct him.

5 Q. (By Mr. Kreiger) Do you have any written
6 indication from me, and by that I mean a letter
7 or e-mail, of an attorney-client relationship
8 between us?

9 MR. GILL: Objection. It calls for, I
10 think, privileged information and judgments of
11 law, so I'm going to instruct him not to answer.

12 MR. KREIGER: Okay. Thank you.

13
14
15 EXAMINATION BY MR. EDGE:

16 Q. Mr. Troy, you've testified quite a bit today
17 about the steps you took during the Johnson Golf
18 litigation, advice you gave to your client, the
19 town.

20 Is it fair to say that everything you've
21 testified to today refers to acts you did on
22 behalf of the Town of Duxbury?

23 A. As opposed to what? I don't understand the
24 question.

2

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS.

Superior Court

Docket No. 08-04641

JOHNSON GOLF MANAGEMENT, INC.)
Plaintiff,)
)
v.)
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TOWN OF DUXBURY, and NORTH HILL)
ADVISORY COMMITTEE, consisting of)
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SCOTT WHITCOMB,)
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CALM GOLF, INC. and CHARLES LANZETTA,)
Defendants,)
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v.)
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PILGRIM GOLF, LLC,)
Intervenor.)
)

AFFIDAVIT OF LEONARD H. KESTEN

1. My name is Leonard H. Kesten and I am an attorney.
2. In early 2011, I was retained by the Massachusetts Interlocal Insurance Association (MIIA), the insurer for the Town of Duxbury to represent the defendants in this action.
3. I filed my appearance in this case in February of 2011 and have represented the defendants since then.

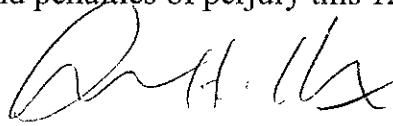
4. At the time that I filed my appearance, then Town Counsel, Robert Troy was also representing the defendants.
5. In early 2012, I became concerned that Attorney Troy had been providing inaccurate information to the client as well as to the court during the course of this litigation.
6. In March of 2012, plaintiffs' counsel noticed the deposition of Attorney Troy.
7. I informed plaintiffs' counsel that the Town could not guarantee Troy's appearance at the deposition so that he needed to subpoena him. He did so.
8. I did not discuss the possibility of representing Troy at his deposition with Troy.
9. I never agreed to represent Troy at his deposition.
10. By March of 2012, I had concluded that Troy had made materially false statements to the Selectmen and to this Court during this litigation.
11. I have had no private meetings with Troy in 2012 and I do not recall any private meetings in 2011.
12. There were Town of Duxbury officials present during all my meetings with Troy with two exceptions.
13. On January 18, 2012, I traveled to Attorney Troy's Office in Sandwich with attorney Evan Ouellette of my firm for the purpose of picking up documents for an unrelated matter and discussing with Attorney Troy the status of an unrelated case involving another client. We left Attorney

Troy's Office to meet with a client in Barnstable in this unrelated matter then returned to Attorney Troy's office to pick up photocopies of the documents that his office had made for us. I recall briefly discussing the Johnson Golf litigation with Attorney Troy on this day and it is my memory that Attorney Ouellette was not present for that discussion. At no time during this meeting did Troy and I discuss his deposition or the possibility that I would represent Troy.

14. On April 13, 2012, I met with Troy in my office. Also present was attorney Evan Ouellette of my firm and Attorney Craig Jordan of Troy Wall Associates, Mr. Troy's firm.
15. At this meeting, I informed Mr. Troy that he should obtain representation to deal with potential ethical issues arising out of his actions in this case, I also advised Attorney Jordan that he should obtain independent representation.
16. At this meeting, Attorney Troy gave me differing versions of his memory of actions he had taken related to this case.
17. I indicated to Attorney Troy that I had concluded that he was lying to me and that I expected to be testifying at proceedings against him in the future about the conversation that we were then having.
18. At the end of the conversation, Attorney Troy asked me if I would be "preparing" him for his deposition.

19. I put my arm around his shoulder and told him that I believed he needed psychiatric help and a lawyer.
20. That is the only discussion I have ever had with Attorney Troy regarding the possibility of assisting him in preparing for his deposition.

Signed under the pains and penalties of perjury this 12th day of September, 2012.

A handwritten signature in black ink, appearing to read "L.H. Kesten", written over a horizontal line.

Leonard H. Kesten

3

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2012-0864-A

TOWN OF DUXBURY
Plaintiff

v.

ROBERT S TROY
Defendant

AFFIDAVIT OF ROBERT S. TROY

I, Robert S. Troy, being sworn, deposes and states as follows:

1. I am a member in good standing of the bar of the Commonwealth of Massachusetts and I have been in good standing since my admission in 1974. I am a Partner at Troy Wall Associates.
2. I have personal knowledge of the facts contained herein.
3. In approximately September 2008, the Town of Duxbury issued a request for proposal ("RFP") to obtain public bids for the management of the North Hill Golf Course. During the RFP process, I served as counsel for the Town of Duxbury ("Town").
4. A disappointed bidder, Johnson Golf Management, Inc. ("Johnson"), believed that they should have been awarded the public contract. Johnson filed a lawsuit entitled *Johnson Golf Management, Inc. v. Town of Duxbury, et al.*, Middlesex Superior Court C.A. No. 2008-04641-B ("Underlying Action"). I served as counsel for the Town in the Underlying Action for over two years.
5. During the Underlying Action, Attorney Kesten and Kreiger entered appearances on behalf of the Town. I subsequently withdrew my appearance on May 4, 2012.

6. Prior to my withdrawal, I understand that Attorney Kesten and/or his office scheduled or coordinated my deposition with Plaintiff's Counsel for April 23, 2012.

7. Attorney Kesten asked me if I would be a witness for the Town.

8. In March 2012, I received notice of my deposition. I contacted Attorney Kesten via telephone and asked him if he would prepare me for, and represent me at, my deposition if it was taken. Attorney Kesten agreed and we met on two occasions for two lengthy meetings.

9. Based on Attorney Kesten's promise to represent me, I revealed my personal confidences regarding the Underlying Action to Attorney Kesten. I revealed confidential information and personal opinions about my involvement in the Underlying Action, my handling of the litigation, and my thoughts on settlement. I further provided an evaluation of the Plaintiff's claims, the possible defenses, the RFP process, and my work-product. I fully answered Attorney Kesten's questions at these meetings.

10. In turn, Attorney Kesten provided advice and guidance about my deposition, the Underlying Action, and the possible ramifications of my services in the Underlying Action. Attorney Kesten discussed what portions of my testimony I should focus on emphasizing and deemphasizing during my deposition.

11. Prior to revealing my confidences at both meetings, Attorney Kesten never advised me that he was only representing the Town, our communications were not confidential, he would not protect my interests, the Town did not intend to indemnify me in the Underlying Action if necessary, or that the Town may seek remuneration from me. In order to gain my trust, he had assured me that he never has, and never will, attempt to deceive me.

12. Based on my discussions with Attorney Kesten, his promise, and his prior affirmative statement that he would not deceive me, I believed at both meetings that Attorney

Kesten was jointly representing the Town and me in a united defense against Johnson's allegations. I believed that we had an attorney-client relationship, Attorney Kesten would protect my interests, my confidences, and that my communications with Attorney Kesten were privileged. I never would have been so candid about my work product or personal opinions with Attorney Kesten at either meeting had I known that he was not representing me or would represent the Town in an adverse action.

13. After our preparation, I understand that Attorney Kesten and/or his office cancelled my deposition. Attorney Kesten advised me of the cancellation and further advised me that he would coordinate a new date.

14. Attorney Kreiger was also counsel for the Town. I asked Attorney Kreiger if he would also prepare me for and represent me at my deposition. I expressed my concerns regarding proper representation and told Attorney Kreiger I trusted him. Attorney Kreiger agreed to represent me and we met on at least two occasions for two lengthy meetings.

15. Based on Attorney Kreiger's promise, I again revealed my personal confidences. I provided him with my personal thoughts and private opinions regarding my involvement in the Underlying Action, the potential defenses, liability, damages, settlement, and my work product. I answered Attorney Kreiger's questions and in turn received his guidance.

16. Prior to revealing my confidences at both meetings, Attorney Kreiger never advised me that he was only representing the Town, our communications were not confidential, he would not protect my interests, the Town did not intend to indemnify me if necessary, or that the Town may seek remuneration from me.

17. At both meetings, Attorney Kreiger told me that he was representing Town and me in the Underlying Action in a united defense. As a result, I believed that Attorney Kreiger

was representing me as my attorney and would represent me at my deposition in the Underlying Action. I believed that my communications with Attorney Kreiger were privileged and my interests would be protected. I never would have been so candid had I known that Attorney Kreiger was not representing me or intended to file an adverse action.

18. Upon information and belief, all of the information provided to Attorney Kreiger was provided to Attorney Kesten and the Town and all information provided to Attorney Kesten was provided to Attorney Kreiger and the Town.

19. In May 2012, after I retained new counsel from Peabody & Arnold, LLP, Attorney Kreiger continued to try to prepare me for my deposition.

20. Accordingly, based on my explicit requests for assistance, Attorney Kesten and Kreiger's expertise in municipal litigation, Attorney Kesten and Kreiger's statements, and Attorney Kesten and Kreiger actually providing me with the requested assistance on at least four different occasions, I believed that they were representing me when I revealed my personal confidences about the Underlying Action. I am appalled to learn that after requesting and receiving their assistance on facts relevant to the Underlying Action that they sued me on the very factual predicate that I sought their assistance.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 27th DAY OF AUGUST, 2012.



Robert S. Troy, Esq.

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COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS.

Superior Court
Docket No. 08-04641

JOHNSON GOLF MANAGEMENT, INC.)
Plaintiff,)
)
v.)
)
TOWN OF DUXBURY, and NORTH HILL)
ADVISORY COMMITTEE, consisting of)
MICHAEL DOOLIN, CHAIRMAN,)
SCOTT WHITCOMB,)
ROBERT M. MUSTARD, JR., MICHAEL)
MARLBOROUGH, ANTHONY FLOREANO,)
MICHAEL T. RUFO, THOMAS K. GARRITY,)
RICHARD MANNING, W. JAMES FORD,)
and GORDON CUSHING (EX OFFICIO),)
CALM GOLF, INC. and CHARLES LANZETTA,)
Defendants,)
)
v.)
)
PILGRIM GOLF, LLC,)
Intervenor.)
)

AFFIDAVIT OF ARTHUR KREIGER

I, Arthur Kreiger, state under oath as follows:

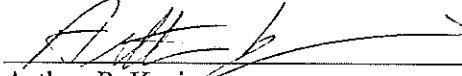
1. I am a partner at Anderson & Kreiger LLP. I am interim Town Counsel for the Town of Duxbury and have represented the Town in this case since approximately April 24, 2012. I have personal knowledge of the matters set forth in this Affidavit.
2. Former Town Counsel Robert Troy represented the Town in this case until he withdrew and I appeared on May 3. I have never represented Mr. Troy personally regarding this case or any other matter.
3. The first time I met Mr. Troy was on April 25, 2012. He and former associate Craig Jordan brought 3-4 boxes of files regarding this case (as well as files regarding other cases on which I was succeeding Mr. Troy as counsel for the Town) to my office and described the case to me. They returned the following morning, April 26, and continued that description (and that of the other cases).

4. As counsel for the Town, I never agreed to represent Mr. Troy as a separate client. Nor could I ethically have done so under the State Ethics Act, G.L.c. 268A, regardless of whether his position was aligned with the Town's or not. We discussed my preparing him for and representing him at his deposition as I would prepare and represent any other Town employee or representative at his or her deposition. However, at all times the Town, not Mr. Troy, was my client. I never said or did anything that could possibly have given an experienced town counsel such as Mr. Troy the impression that I would represent him separate from the Town in the same case.

5. On May 22, the plaintiff Johnson Golf resumed its request to take Mr. Troy's deposition, which it had noticed in March but not pursued. He retained Peabody & Arnold to defend him at the deposition and otherwise (according to them). I tried to meet with Mr. Troy to prepare him for his deposition, with Peabody & Arnold present if they chose. I finally met with Mr. Gill, Mr. Troy and each of their associates at my office on May 29. However, Mr. Gill refused to let Mr. Troy answer any questions about this case except upon conditions that I found utterly unreasonable and rejected. I learned no information from Mr. Troy at that meeting.

6. I have never met or spoken with Mr. Troy other than as counsel for the Town in this case, and I have never obtained any information from him that could be considered confidential from the Town (or that he called confidential at the time).

Signed under the penalties of perjury this 12th day of September, 2012.



Arthur P. Kreiger

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS.

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and GORDON CUSHING (EX OFFICIO),)
CALM GOLF, INC. and CHARLES LANZETTA,)
Defendants,)
)
v.)
)
PILGRIM GOLF, LLC,)
Intervenor.)
)

AFFIDAVIT OF NINA L. PICKERING-COOK

I, Nina L. Pickering-Cook, state as follows:

1. I am an attorney at the law firm of Anderson & Kreiger LLP. Along with Arthur Kreiger, I have represented the Town of Duxbury in this case since May 2012. I have personal knowledge of the matters set forth in this affidavit.
2. When we took over this case from Robert Troy, former Town Counsel, in May 2012, we requested all files concerning the case from him and his office. Although we understand that he has produced most of those files, he has not confirmed that he has produced all of them.
3. In addition, Mr. Troy has refused to produce any email correspondence, which the Town needs in order to complete discovery and prepare for trial, which is scheduled to begin on October 1.

4. Since July 2012, I have sought those emails from Mr. Troy and his counsel, Peabody & Arnold. Attached to this affidavit is some of my email correspondence with William Covino, which is an example of my attempts to obtain such discovery.

5. The Town has waived its attorney-client privilege with Mr. Troy regarding this case. Mr. Troy has no basis from withholding them from his former client, the Town.

Signed under the penalties of perjury this 12th day of September, 2012.


Nina L. Pickering-Cook

Nina Pickering Cook

From: Nina Pickering Cook
Sent: Tuesday, September 11, 2012 9:30 AM
To: 'Leonard Kesten <lkesten@bhpklaw.com> (lkesten@bhpklaw.com)'
Cc: 'eouellette@bhpklaw.com'; Arthur Kreiger
Subject: FW: Retrieval of Town Documents

For the emergency motion to compel. There was no response to my most recent email.

From: Nina Pickering Cook
Sent: Friday, August 17, 2012 11:56 AM
To: 'William R. Covino'
Cc: Arthur Kreiger; Robert T. Gill
Subject: RE: Retrieval of Town Documents

Will:

Thanks for the response. You are correct that we are mostly concerned with his emails at this point. After years of handling discovery requests including e-discovery, however, I strongly disagree that asking one person to search their email account for relevant files on one case is a "herculean task" or remotely burdensome. I am confident a court would agree. There are easy search terms that can be employed, then the emails can be transmitted en mass for a (in this case) quick privilege review.

Please provide me with (1) the search parameters being used; (2) the privilege being asserted, if any; and (3) the timeframe in which we can expect to receive these documents.

Nina

From: William R. Covino [<mailto:wcovino@peabodyarnold.com>]
Sent: Friday, August 17, 2012 11:48 AM
To: Nina Pickering Cook
Cc: Arthur Kreiger; Robert T. Gill
Subject: RE: Retrieval of Town Documents

Nina,

As you know, Attorney Troy previously provided your office with a copy of his file. The only documents that appear to be at issue are his emails. Although emails were generated, no independent file was created to categorize the emails. Going through each and every email he has sent over the last four years is a herculean task and expecting him to have this done for you within two weeks is unduly burdensome. This is especially true where the relevant emails with Town Hall and Town Officials, if any, are already in possession of the Town.

Regardless, and in an attempt to comply with your request, Attorney Troy is in the process of going through his emails and producing them to my office. Once we review them, we will produce them to you.

Best,

Will Covino

From: Nina Pickering Cook [<mailto:npickeringcook@AndersonKreiger.com>]
Sent: Thursday, August 16, 2012 4:06 PM
To: Robert T. Gill

Cc: William R. Covino; Arthur Kreiger
Subject: RE: Retrieval of Town Documents

Bob:

It has now been over two weeks and not only has your client not provided us with these documents, but you have not even responded to our request as to whether he will do so voluntarily. Is there a problem? I am assuming that you are well aware of the case law and ethics opinions which hold that the lawyer's files containing work for which he was paid by the client belong to that client.

Nina

From: Nina Pickering Cook
Sent: Monday, July 30, 2012 9:08 AM
To: 'Robert T. Gill'
Cc: William R. Covino
Subject: RE: Retrieval of Town Documents

Thanks, Bob.

From: Robert T. Gill [<mailto:RGill@peabodyarnold.com>]
Sent: Monday, July 30, 2012 9:00 AM
To: Nina Pickering Cook
Cc: William R. Covino
Subject: Re: Retrieval of Town Documents

Nina,

I took Friday off but will look into the situation and let you know.

Bob

Sent from my iPhone

On Jul 26, 2012, at 6:13 PM, "Nina Pickering Cook" <npickeringcook@AndersonKreiger.com> wrote:

Hi Bob:

In an effort to comply with the Town's obligations in the *Johnson Golf* case, we need the Town's records and files that Bob Troy has at his office and on his computer. To be thorough, we need him to turn over all files concerning the North Hill RFP matter and subsequent litigation. This includes all emails and any other electronic documents. Where there is no longer any attorney client privilege or work product protection (as between Troy and the Town) on this matter, we do not see any valid reason for Troy to continue to object to providing us with these documents.

Please let me know by noon on Monday, July 30th whether he will do so.

Nina

Nina L. Pickering-Cook

ANDERSON & KREIGER LLP
One Canal Park, Suite 200
Cambridge, MA 02141
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f: 617.621.6636
www.andersonkreiger.com



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