

November 14, 2023

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John Mellgren  
Administrative Law Judge  
Public Utility Commission of Oregon  
201 High Street SE, Suite 100  
PO Box 1088  
Salem, OR 97308

**Re: UT 125**

Dear Judge Mellgren:

I am writing to follow up on two intertwined gatekeeping issues Qwest raised during the prehearing conference on Nov. 8, 2023: (1) the need for any payphone service providers (PSPs) who are members of NPCC and on whose behalf NPCC claims to seek refunds to be joined as parties in this matter; and (2) the apparent conflict of interest between at least some of those PSPs and NPCC's counsel based on counsel's hostile acquisition of proprietary interests in the PSPs' alleged claims while purporting to represent them at the same time. I am attaching for background and context an October 31, 2017 order of United States District Court Judge Anna Brown in *Communication Management Services, LLC v. Harlow*, No. 12-1923, ECF. No. 279 (D. Or., Oct. 31, 2017), that addresses many of these issues involving the same parties and attorney.

First, the PSPs who are seeking refunds must be made parties to the case. NPCC was never a Qwest customer and cannot seek refunds for itself. Joinder of the PSPs is required for a number of reasons. Oregon Rule of Civil Procedure 26, which applies here by virtue of OAR 860-001-0000(1), requires that "[e]very action shall be prosecuted in the name of the real party in interest." More specifically, ORS 756.500(2) provides that "the commission shall not grant any order of reparation to any person not a party to the proceedings in which such reparation order is made." Further, joinder of the PSPs on whose behalf relief is sought is necessary to ensure they are bound by the final determination by the Commission. It is also required because the Commission's authority is to protect "customers," not associations and not lawyers who have purchased claims from customers. ORS 756.040.

Second, Judge Brown's attached order shows that NPCC counsel Frank Patrick, and perhaps other NPCC counsel, has an irreconcilable conflict with at least one of those PSPs (Davel Communications, Inc. ("Davel")) because he acquired a proprietary interest in Davel's PUC claims. While Mr. Patrick has not disclosed that fact, former PSP counsel Richard Gaines did disclose in this docket that he acquired the refund claims of another dissolved NPCC member,

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NSC Communications Public Services Corporation. *See* Aug. 18, 2023, Letter of Richard Gaines. This conflict of interest would apply to any other PSPs from whom Mr. Patrick has acquired an interest in the alleged refund claims at issue. Thus, as Judge Brown ruled in disqualifying Mr. Patrick from the *Harlow* case, Mr. Patrick must withdraw from this case under Oregon Rules of Professional Responsibility 1.7, 1.8, and 1.16, and OAR 860-001-0310(1).

Third, Judge Brown's attached decision also shows that Davel has been dissolved and no longer has legal capacity to pursue any claims. Qwest's initial research shows many of the other PSPs on whose behalf NPCC and Mr. Patrick purport to act have also been dissolved. Dissolution of a PSP entity may affect its authority to appear before the PUC and to seek refunds as well as its ability to produce evidence to support its allegations. It also affects its lawyers' ability to have an attorney-client relationship with the entity, and raises the question on whose behalf the lawyers profess to act.

For these reasons, Qwest respectfully requests:

1. The Commission should require that counsel for NPCC seek leave to add any surviving PSPs as parties.
  - a. In connection with that, the PSPs should be required to show by declarations that they have legal capacity to seek relief, meaning (i) that their corporate existence is current and uninterrupted and they can lawfully pursue claims, and (ii) that they still own (i.e., they have not sold or assigned) any alleged right to refunds.
2. In order to inform the Commission's decision, counsel should be required to show by declarations that they have authority to act for each of the PSPs under ORS 9.350. This requires them to demonstrate:
  - a. that they have effective attorney-client relationships with these entities, i.e., they have been properly retained and the principals of the PSPs are available to communicate with counsel and to make decisions for the entities; and
  - b. that counsel have no personal financial interests in this matter that create conflicts of interest that would preclude their representation of the PSPs.
3. Further proceedings in this matter should be stayed under ORS 9.350 while this inquiry is pending.

Qwest does not raise these issues lightly. For this matter to proceed lawfully, these important issues must be addressed, and interests of administrative efficiency dictate that they be addressed

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at the outset of this remand proceeding. Qwest would be pleased to provide any additional information or authorities that the Commission may request.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Law Reichman".

Lawrence H. Reichman

LHR:dma

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

COMMUNICATION MANAGEMENT  
SERVICES, LLC, *et al.*,

3:12-cv-01923-BR

Plaintiffs,

ORDER

v.

BROOKS L. HARLOW, Attorney  
at Law,

Defendant.

BROWN, Judge.

This matter came before the Court on Defendant Brooks L. Harlow's Motion (#241) for Order to Demonstrate Authority to Act for Davel Communications, Inc., in which Defendant seeks to require Plaintiffs' counsel, Frank Patrick, to establish his authority to represent Plaintiff Davel<sup>1</sup> in this matter.

For the reasons that follow, the Court **DENIES** Defendant's Motion with leave to renew it following the withdrawal of Davel's counsel as directed herein and the filing by new counsel for

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<sup>1</sup> Plaintiffs' Third Amended Complaint lists Phonetel Technologies, Inc., as an "aka" for Davel. In this Order, therefore, references to Davel include Phonetel.

Davel of a Notice of Representation.

### BACKGROUND

#### **I. Procedural History**

Plaintiffs, including Davel, filed their Complaint in this Court on October 25, 2012. Plaintiffs allege Defendant was negligent in his representation of Plaintiffs before the Oregon Public Utilities Commission (PUC), the Federal Communications Commission (FCC), and the courts in Oregon and Washington concerning claims under Oregon law and the Federal Telecommunications Acts asserted by Plaintiffs in those forums.

During the course of discovery in this case Defendant sought production of documents from Davel related to its claims against Defendant. On August 1, 2017, Defendant filed a Motion (#213) to Dismiss Davel or in the Alternative to Compel Production of documents on the ground that Davel did not produce the requested documents.

On August 25, 2017, Davel filed a response to Defendant's Motion to Dismiss/Compel. Patrick, Davel's counsel of record, stated he had "lost communication" with Tammy Martin, Davel's sole officer and director; was "unable to locate" her; and did not know where Davel's files that related to its claim against Defendant were located. Patrick, however, asserted documents related to their claims had been produced by all Plaintiffs,

including Davel, and that he continued to pursue Davel's claims in order to "preserve" them on behalf of Davel and its creditor despite having lost contact with Davel.

On September 6, 2017, Defendant filed this Motion (#241) for Order to Demonstrate Authority to Act for Davel Communications, Inc., pursuant to Oregon Revised Statute § 9.350 to require Patrick to show that he had the authority to act on behalf of Davel.

On September 13, 2017, the Court denied Defendant's earlier Motion to Dismiss Davel. Order (#249). The Court concluded Davel was a Delaware corporation<sup>2</sup> and noted under Delaware law a lawsuit commenced by a corporation could be continued in the name of the corporation even after the corporation was dissolved. The Court, however, granted Defendant's request to compel Davel to produce documents.

On September 23, 2017, Davel filed a Response (#254) to Defendant's Motion for Order to Demonstrate Authority to Act. On October 10, 2017, Defendant filed his Reply (#268) in support of his Motion.

## **II. Factual Background**

On July 26, 2012, Davel's registered agent in Delaware

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<sup>2</sup> In their Third Amended Complaint Plaintiffs state Davel was "incorporated in and a [c]itizen of Ohio which maintained a business office in Ohio at all times material." Davel, however, stated in its Response to Defendant's Motion to Dismiss and to this Motion that it is a Delaware corporation.

resigned. On August 25, 2012, Davel's charter to do business in Delaware was forfeited because Davel did not appoint a new registered agent within 30 days as required by Delaware law.

As noted, Plaintiffs filed their Complaint in this Court on October 25, 2012. Although the record does not provide specific details, at some point Patrick lost contact with Davel's controlling officers. Sometime thereafter the following events occurred:

Patrick located YA Global, a secured creditor of Davel.

Patrick and YA Global agreed Patrick would continue to pursue Davel's claim in this litigation and YA Global would receive an interest in any recovery received on Davel's claim.

Patrick and YA Global agreed Patrick would foreclose his lien for attorneys' fees incurred while representing Davel.

Patrick, through his professional corporation, filed an action against Davel in state court to foreclose his lien.

Patrick's professional corporation obtained a default judgment against Davel. The Default Judgment included a declaration that Patrick's professional corporation obtained all of Davel's rights to pursue Davel's claim in this litigation and in the underlying PUC action and included a money judgment against Davel in the amount of \$375,000, which constituted Patrick's lien for attorneys' fees.

Patrick "purchased" the claims under the Default Judgment at

a public auction and transferred those claims to a limited liability company owned by Patrick and Richard Gaines, Patrick's co-counsel in this matter.<sup>3</sup>

#### **DISCUSSION**

Defendant contends there are reasonable grounds to require Patrick to show that he has the authority to appear as counsel for Davel in this litigation. Defendant asserts Davel forfeited its charter in the State of Delaware and lost its capacity to sue before bringing its claim in this action. Defendant also contends Davel cannot be Patrick's client because Patrick sued Davel in Oregon state court to recover his attorneys' fees; Patrick obtained a judgment against Davel; and now Patrick owns any claim that Davel may have in this action, thereby creating a conflict of interest that requires Patrick to withdraw as Davel's counsel.

Davel contends Defendant does not have standing to raise the issues asserted in its Motion for Order to Demonstrate Authority to Act for Davel. Davel also contends it has the capacity to bring this action against Defendant, that Patrick was required under ethical obligations to continue to pursue the claims on behalf of Davel, and that Patrick has continuously represented

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<sup>3</sup> Gaines is not listed as counsel of record on this Court's docket nor in the caption of any pleadings filed by Plaintiffs.



Davel in this matter without objection.

**I. Defendant has standing to raise the issue of counsel's authority to act.**

Davel argues Defendant does not have standing to challenge Patrick's authority to represent Davel.

Oregon Revised Statute § 9.350 provides:

**Challenge of attorney's authority to appear for adverse party.** The court or judge thereof may, on motion of either party and on showing reasonable grounds therefor, require the attorney for an adverse party to prove the authority under which the attorney appears, and until the attorney does so, may stay all proceedings by the attorney on behalf of the party for whom the attorney assumes to appear.

This statute provides the basis for Defendant to seek a determination of counsel's authority to represent Davel, and, accordingly, the Court concludes Defendant has standing to raise this issue.

**II. Davel has the capacity to sue Defendant.**

Defendant contends Davel lacked the capacity to bring this action because its charter was forfeited in Delaware. In response Davel asserts Delaware law allows a corporation's existence to continue with respect to any lawsuit by or against the corporation initiated within three years after the corporation expires or is dissolved.

**A. The Law**

Federal Rule of Civil Procedure 17(b)(2) provides the

determination of a corporation's capacity to sue or to be sued is based on the law of the state in which it was organized. As noted, Davel is a Delaware corporation, and, therefore, Delaware law controls this issue.

8 Delaware Code § 136(b) provides:

After receipt of the notice of the resignation of its registered agent, . . . the corporation for which such registered agent was acting shall obtain and designate a new registered agent to take the place of the registered agent so resigning . . . . If such corporation, being a corporation of this State, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall declare the charter of such corporation forfeited.

A charter may be reinstated if a new registered agent is appointed. 8 Del. C. § 312(d)(2).

8 Delaware Code § 278 provides:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such

action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

**B. Analysis**

Defendant contends forfeiture of a corporation's charter is different than dissolution. Because Davel lost its charter, Defendant contends Davel also lost its capacity to sue.

Defendant relies on *Manney v. Intergroove Tontrager Vertiegs GMBH*, No. 10 CV 4493, 2011 WL 6026507 (E.D.N.Y., Nov. 30, 2011), to support his position that Davel is unable to bring this action. In *Manney* the district court held a Delaware corporation that had forfeited its charter could not bring an action in New York. Pursuant to New York law, the authority granted to a foreign corporation to do business in New York "shall continue so long as [the corporation] retains its authority to do such business in the jurisdiction of its incorporation . . . ." *Id.*, at \*8. Even assuming the foreign corporation had applied for and was granted an application to do business in New York, the court noted it could not bring an action in New York under New York law because the corporation was not in good standing in Delaware. Here Defendant does not cite any similar requirement under Oregon law.

In *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, the Eighth Circuit applied Delaware law and held the

defendant who had lost its charter but was not dissolved could be sued even though the government's complaint was not filed until more than three years after forfeiture. 810 F.2d 726, 747 (8th Cir. 1986). The Eighth Circuit agreed with the district court that "a corporation with a forfeited charter is not completely dead for all purposes, but merely in 'a state of coma,' during which it is still subject to suit." *Id.* at 746 (citing *Ross v. Venezuelan-American Independent Oil Producers Ass'n*, 230 F. Supp. 701 (D. Del. 1964), and *Wax v. Riverview Cemetery Co.*, 41 Del. 424 (Super. Ct. 1942)). Although the Eighth Circuit distinguished between forfeiture of a charter and dissolution, the court noted a corporation with a forfeited charter was "still subject to suit" under Delaware law because under Delaware law a corporation, "whether they expire by their own limitation or are otherwise dissolved," continues their corporate existence.

It is, nonetheless, unclear whether a corporation such as Davel has the capacity to assert claims that it may have in the Oregon courts. Defendant has not cited, and the Court has not found, any controlling authority that definitively answers that question. The Court, however, concludes it need not resolve this issue immediately because, as explained below, the Court finds a sufficient conflict of interest exists that requires Davel's current counsel to withdraw from his representation of the

corporation in this action.<sup>4</sup>

**III. Patrick has a conflict of interest that requires his withdrawal as counsel for Davel.**

Defendant contends Patrick must have "severed" the attorney-client relationship with Davel because he sued Davel to foreclose his lien for attorneys' fees and, therefore, created a personal conflict of interest that is not allowed under Oregon ethical rules.

In response Patrick appears to contend he was required to pursue Davel's claims in order to comply with his ethical obligation to continue to represent a "missing client" and to avoid any "adverse effect" on the interests of that client. Patrick also argues he was unable to "identify the appropriate entity and its management" for the purpose of obtaining direction on how to proceed, and, therefore, he took his actions with the "consent, agreement and blessings" of YA Global, Davel's secured creditor.

**A. The Law**

Oregon Rules of Professional Conduct (RPC) 1.7 prohibits a lawyer from representing a client "if the representation involves a current conflict of interest." RPC 1.7 provides a conflict of interest exists if:

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<sup>4</sup> If new counsel appears on behalf of Davel, Defendant may renew this issue and supplement its existing arguments with any additional definitive authorities or analysis.

(1) the representation of one client will be directly adverse to another client; [or]

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RPC 1.8 prohibits a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of litigation [that] the lawyer is conducting" except the lawyer may acquire "a lien authorized by law to secure the lawyer's fee or expenses."

RPC 1.16 provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

\* \* \*

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

\* \* \*

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

\* \* \*

or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

**B. Analysis**

Although RPC 1.8 authorizes a statutory lien for attorneys' fees, Defendant contends it prohibits foreclosing on the lien to acquire a proprietary interest in the action that the lawyer is conducting for the client. Defendant relies on the holdings of courts in New Jersey and Nevada and ethics opinions from Arizona and Los Angeles to support his position. Defendant, however, does not cite, and this Court has not found, any such authority in Oregon.

Patrick relies on RPC 1.16 to support his assertion that he was required to continue his representation of Davel and not to "abandon the case" in order to avoid any adverse effect on Davel's interests. Patrick also argues "efforts to withdraw would have appropriately been denied had [he] been candid with the [C]ourt about what he had discovered after being unable to contact [Davel's] prior representative." The Court disagrees.

At the time that Patrick lost contact with Davel's representative, he should have moved to withdraw from continuing to represent Davel, particularly in light of his statements in response to Defendant's discovery requests that he was unaware of the location of Davel's records. By continuing his

representation, agreeing with a secured creditor of Davel to pursue Davel's claims, foreclosing his lien for attorneys' fees, obtaining a judgment against Davel, and purchasing Davel's claims at auction, Patrick created, at the least, a potential conflict of interest between himself and Davel because of "his personal [financial] interest" in this action.

On this record, therefore, the Court concludes Patrick is required to withdraw from his representation of Davel. To the extent that Patrick or any entity owned by him asserts ownership of Davel's interests in this matter, the Court also concludes Patrick<sup>5</sup> has a conflict of interest prohibiting his representation of such entity.

Accordingly, the Court concludes Patrick does not have authority to continue his representation of Davel in this matter and, therefore, he must withdraw from representing Davel.

#### CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#241) for Order to Demonstrate Authority to Act for Davel Communications, Inc., with leave to renew it following the

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<sup>5</sup> As noted, Gaines is not reflected as counsel of record for Davel in this matter. He is, however, an owner/partner in the limited liability company formed by Patrick to "hold" the claims under the Default Judgment that Patrick "purchased" at a public auction. The Court, therefore, concludes Gaines also would have a conflict of interest in representing Davel in this matter.

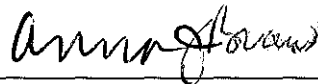


withdrawal of Davel's Counsel and the filing by new counsel for Davel of a Notice of Representation. Accordingly, the Court concludes Patrick does not have the authority to act for Davel, and Patrick is required to withdraw from representation of Davel.

The Court **DIRECTS** Patrick to give notice of his withdrawal to Davel Communications, Inc., and to any other entity associated with or that may assert an interest in Davel or its claim in this matter. The Court also **DIRECTS** Patrick to advise Davel that it may not continue to prosecute this action without counsel pursuant to LR 83-9(b), that it is required to obtain new counsel, and that such new counsel must file an appearance in this matter **no later than November 13, 2017**. If new counsel does not file an appearance by the date indicated, the Court will dismiss Davel as a party to this action. If new counsel does appear and Defendant wishes to renew its Motion for Order to Demonstrate Authority to Act for Davel, Defendant may file that renewed Motion after full conferral with new counsel.

IT IS SO ORDERED.

DATED this <sup>31<sup>st</sup></sup> day of October, 2017.



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ANNA J. BROWN  
United States Senior District Judge