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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BANCORP BANK, INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC., and INCOMM FINANCIAL SERVICES, INC., Defendants-Below, Appellants/Cross-Appellees, v. RUSSELL S. ROGERS, Plaintiff-Relator-Below, Appellee/Cross-Appellant.	No. 38, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N18C-09-240 PRW CCLD

APPELLEE/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS APPEAL

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TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS

RULES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This action was filed by Russell S. Rogers ("Relator") under Delaware's False Claims and Reporting Act ("DFCRA") alleging violations of Delaware's unclaimed property law ("UPL") and the State has intervened.

This appeal arises from conduct after the complaint was filed, but while the case was under seal, and concerns Relator's counsel's ("Fox") handling of Relator's laptop files following his termination by Defendant Interactive Communications International, Inc. ("ICI" or "InComm"). Because Relator's termination occurred post-complaint and post-reference to the Attorney General, but pre-unsealing of the complaint, the trial court found Relator was "wise to bring his [work laptop] to his already-retained counsel" before returning it to InComm. A1302-03. The trial court further noted that Fox "prudently preserved a copy of [the laptop's] contents." A1303. Indeed, InComm erased its contents to be repurposed. A0462-63.

The trial court's disqualification order stems from Fox's subsequent review of the laptop contents to provide the State with "material" information, pursuant to the DFRCA's requirement that a relator provide material information in his possession to the State. 6 *Del. C.* §1203(b)(2). InComm contends that fifty-five of the documents Fox "viewed" are privileged.

The trial court noted counsel's competing obligations: "[n]o doubt, navigating the ethical snares present in the initial stages of a *qui tam* action is a tall task even

for the most astute and experienced lawyer." Order, 27. And in announcing its ruling, the trial court explained:

> While done – while not done with malice, the Court finds, or even bad faith, indeed the Court does not doubt that counsel was acting with some good intention.

A1306. Nevertheless, the trial court disqualified Fox for "his continued failure to implement remedial action *after* it became apparent he possessed InComm's privileged materials." Order, 31. The court refused to disqualify Fox's firm, Bondurant, Mixson and Elmore, LLP ("Bondurant") and denied InComm's motion for attorneys' fees.

InComm now appeals the trial court's refusal to disqualify Bondurant and award fees. The lower court correctly denied InComm's request to disqualify Bondurant because InComm failed to prove that Bondurant's continued involvement would threaten the integrity of the proceedings. InComm now asks this Court to adopt and retroactively apply a new standard for disqualification that contradicts this Court's prior precedents.

Relator cross-appeals Fox's disqualification. Fox "prudently" preserved the laptop files and his review was done with "good intention." A1303, 1306. While the trial court found that Fox's review process fell short of the court's expectations, commentators and at least one other court have deemed Fox's approach reasonable. Looking to other jurisdictions for guidance, the trial court applied a legal standard

that runs counter to the stringent view required by this Court in *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990). This is dispositive because InComm has not and cannot meet *Infotechnology's* standard; InComm could not identify any use of privileged information in this action, and because InComm never submitted the documents to the trial court for *in camera* review, prejudice cannot be established. Fox's disqualification should be reversed.

SUMMARY OF ARGUMENT

I. RESPONSES TO APPEAL POINTS

1. Denied. The court correctly denied InComm's motion to disqualify Bondurant.

   a. Denied. The trial court considered InComm's allegations, but properly relied on the Special Master's determination that Fox was the only attorney who accessed the privileged information to determine that other Bondurant lawyers were not tainted.

   b. Denied. As movant-below, InComm bore the burden to establish prejudice by clear and convincing evidence. InComm relies on inapplicable authority.

   c. Denied. Delaware law does not require disqualification of an entire firm outside the context of lawyer conflicts.

2. Denied. The trial court correctly denied InComm's motion for fees based on its record-supported finding of no bad faith.

II. CROSS APPEAL

1. The trial court erred in disqualifying Fox.

   a. The trial court applied the wrong standard.

      i. The trial court misapplied rules from other contexts to DFCRA claims.

ii. The trial court applied an outdated standard to the Professional Rules.

b. The trial court's Order is based on unsupported factual findings.

COUNTERSTATEMENT OF FACTS

A. Relator's Employment with InComm, Discovery of Potential UPL Violations, and Retention of Counsel.

Relator Russell Rogers was hired by InComm in June 2012, two years after InComm's relationship with Defendant Bancorp at issue began. *See* B1-B8; A0081 ¶16; A0099 ¶45; A0101 ¶48.

Based on a conversation with the CFO of an ICI affiliate, Relator first became aware of Bancorp's potential liability for failing to report and remit abandoned cardholder balances in the Spring of 2016. A0089 ¶30. After investigating Bancorp's obligations, Relator retained Fox and Bondurant in January 2018. *Id.*; A1118 ¶5. On September 28, 2018, still employed by ICI, Relator initiated this action under the DFCRA. 6 *Del. C.* §§ 1201-1211.

The complaint focuses on certain types of prepaid cards issued by Bancorp; other Bancorp cards are not at issue. A0078-79 ¶12. The Complaint alleges Delaware's UPL requires a Delaware corporation that "holds" unredeemed balances of prepaid (stored value) cards owned by cardholders for whom the corporation has no last-known address to transfer those balances to the State Escheator five years after each cardholder's last use. A0074-75 ¶1. Bancorp allegedly improperly avoided this obligation and Defendants created false and fraudulent records and documents to conceal and avoid Bancorp's obligations, while conspiring to misappropriate the unredeemed funds. A0075 ¶¶2-4.

Pursuant to DFCRA, the Complaint was filed under seal to allow the State time to investigate the claims and consider intervention.

Also as required by DFCRA, specifically 6 *Del. C.* § 1203(b)(2), Fox and Relator submitted material evidence for the State's review on October 15, 2018, providing fifty-two documents comprising 2,416 pages. A1120 ¶9.

B. Termination of Relator's Employment and Preservation of His Laptop.

InComm terminated Relator on October 15, 2018 as part of a reduction in force. A1083 ¶3; A1089-94. This case was still under seal and the State had yet to determine intervention.

Because Relator believed his laptop contained relevant documents, he made the "wise decision" to take it to Fox. A1302-03.

Fox then "prudently preserved a copy of [the laptop's] contents." A1303. That act preserved potential evidence from destruction because InComm, unaware of Relator's sealed complaint, wiped and repurposed the computer. A0463 ¶12. Relator promptly returned the laptop to InComm. A1119 ¶6; A1084 ¶7; A0462 ¶10; A1084 ¶¶5-7; A1112; A1031. Because the case remained under seal, neither Relator nor his counsel could disclose the laptop's preservation with InComm.

C. Fox's Handling of the Laptop Files.

Because Fox received additional information from Relator, he understood Section 1203(b)(2) to require supplementing the information provided to the State

to include "substantially all material evidence" in Relator's possession. A0258 ¶¶9-11; A0954 ¶9. Fox had the laptop files loaded onto the DISCO document review platform so they could be searched. A1119 ¶7.

1. Fox's Searches.

Fox conducted the searches himself. A0258 ¶¶10-11; A0954 ¶¶8-10. He ran general search terms, A1119 ¶7, and quickly reviewed the results, skipping over facially irrelevant documents. A0954 ¶10. When necessary, Fox asked Relator whether a particular program implicated Relator's claims. A0955-56 ¶13; *see* A0078-79 ¶12. Fox's search queries – conducted on eight days in November and December of 2018 and January 2019, A0393-409 – yielded 874 of the 36,648 documents on Relator's laptop. A0384-85.

2. Fox Avoids Reading Privileged Information.

Based on Relator's position at InComm, Fox did not believe the laptop documents were likely to implicate relevant privileged information. A0259 ¶¶14, 15; A0101 ¶¶16, 45, 48. Relator had sent, received, and created documents while functioning in operational roles that were unlikely to contain privileged information. A0259 ¶¶14, 15; *see also* A0081, A0099.

Nevertheless, Fox scanned each document for any indication of privilege, such as law firm letterhead, inclusion of an attorney, or "Privileged" marking.

A0259 ¶16. Fox skipped over and did not read any potentially privileged documents. A0260 ¶16; A1119-20 ¶7.

The trial court, noting specifically that the electronic data reflect multiple "views" and tags applied to documents during his review, found that Fox's efforts to avoid privileged material "falls well below" what the Court expects. *See* Order, 29, 34.

3. Fox Provides Supplemental Information to the State.

Fox identified thirty-two laptop documents (435 pages) for Relator's supplemental provision of information to the State – combined them with twenty-three public documents (forty-three pages) and provided those to the State on January 18, 2019. A1120-21 ¶¶9, 10. None are privileged. *See* A0576-78.

D. The Audit Trail.

DISCO enables attorneys to perform searches, view, code, print, download, and annotate documents and logs a record thereof (the "Audit Trail"). A0382, A0384. The Special Master collected the Audit Trail from the review of the laptop files. A0384.

The Audit Trail has limitations; it does not record the duration of actions or indicate when a document is closed from a "view." A0723-24. Therefore, the time that a document remained open cannot be determined conclusively. *Id.*; A0386 n.9; A0388.

Nevertheless, an estimate of the *maximum* amount of time a document *could* have been visible to a user can be constructed from (1) the timestamp indicated for the Viewdocument" eventType (although it may be earlier than actually opened based on pre-loading), (2) the fact that DISCO pre-loads only one document at a time (while the previous document is open), and (3) the timing of subsequent eventTypes (relating to other documents). *See* A0703; A0755-58; A0960-61 ¶¶7, 8; A0970-73. Such estimations are complicated because the Audit Trail suggests preloaded documents have been "viewed," even if they did not appear on the user's monitor. A0723-24.

1. InComm Claims Privilege Over Fifty-Five Documents Accessed by Fox.

The Audit Trail reviewed by the Special Master identifies all documents to which Fox had access. A0956 ¶17. While a user may configure DISCO to "preview" certain information about a document without actually loading or viewing it (or being logged), (*see* A0389), such information is limited. *See* A0646.

The Special Master identified 874 documents Fox accessed. A0385. InComm received copies of these documents and initially claimed that fifty-nine were privileged. *Id.*

The full scope of InComm's allegedly privileged information contained within documents "viewed," however briefly, during the targeted review comprises: (a) tracked changes in at most fifteen draft agreements; (b) portions of nine email

threads; and (c) a single memorandum. Although this information is all derived from InComm's privilege logs and communications with its counsel, the trial court erroneously concluded it was evidence of Fox's extensive review of the documents. *E.g.*, Order, 32.

Thirty-seven of the fifty-nine documents are redlined mark-ups of contracts. Relator was not involved in InComm's internal legal analysis, but was often asked to forward InComm's proposed revisions of agreements to third-party banks. *See* A0088 ¶¶28, 29; A0259 ¶15. InComm later conceded nineteen were shared outside the company and three contained comments from non-lawyers. A0283. InComm redesignated the applicable privilege for eighteen from attorney-client to "common interest privilege" because they were shared with Bancorp. A0822-23. *Compare* A0807-17 *with* A0824-33; A0963-64 ¶19.

Of the thirty-three marked up agreements remaining on InComm's list, eighteen are duplicates, leaving fifteen unique agreements. A0962 ¶15; A0824-33. Of these fifteen, InComm asserts privilege for two based on comments alone, A0825 (Doc. No. 05242); A0827 (Doc. No. 14677); A0828 (Doc. No. 16176), and for another nine, based on comments and edits. A0824-33. Under Bondurant's DISCO settings for Word, however, redlined edits (i.e., tracked changes), would appear, *but not comments*. A0390. Fox therefore could not have seen any of the purportedly privileged comments.

In addition to the draft agreements, InComm has logged one legal memo and twenty-one emails. Of the twenty-one emails, twelve overlap with another email in the same thread. A0824-33; A0964 ¶21. Therefore, the emails listed by InComm represent nine different email threads.

2. Fox's Limited Exposure to InComm's Purportedly Privileged Information.

The Audit Trail provided by the Special Master for the fifty-nine documents InComm initially identified as privileged confirmed Fox was the only person at Bondurant who "viewed" any of them. A0385-86. It also confirmed none were printed or downloaded. *See* A0671. Therefore, any review was limited to an on-screen review in DISCO (for which a "view" would be logged), and such documents could not have been shared any other way. The fifty-nine documents were not specifically targeted. They were "viewed" among other documents yielded by Fox's keyword searches. A0771-93.

The Audit Trail demonstrates that only one of the fifty-nine documents was "viewed" after Relator's January 2019 supplemental provision of information to the State. *See* A0408-09; A0771-93 (Doc. No. 29692). That document had not been viewed previously. A0771-93.

3. The Audit Trail Does Not Indicate Extensive Exposure to the Fifty-Five Documents.

The trial court credited InComm's arguments that the number of "views" and the tagging of some of the fifty-five documents reveals exposure to InComm's privileged information. Order, 29 n.131. But that conclusion is not supported by the Special Master's data.

Fox tagged the memo, "Attorney-Client," and later noted: "Potentially Privileged – Not Reviewed." A0716 (Doc. No. 34016). That tag and note confirm Fox's description of how he avoided reading potentially privileged material. A0259-60 ¶¶16-17; *cf.* Appellants' Br., 10 (citing Order, 27, 32).

InComm asserts that tags and notes require the user to read the document. A0427. But that assumption is contradicted by the Special Master's Report. Tags were applied, and notes entered, at a pace that would not allow for skimming, much less analyzing, many of the lengthy allegedly privileged documents. *See* A0393-409.

4. The Audit Trail Contradicts InComm's Assertion that Any of the Fifty-Five Documents Were "Used."

InComm asserts that "Fox leaned heavily on the 'trove' of laptop files when preparing" to meet with the State. Appellants' Br., 13. In making this argument, InComm references two mark-ups of the Metabank Agreement. *See id.* Fox initially "viewed" and tagged as "Responsive" this forty-nine-page draft agreement

(Document 35124) in a span of eight seconds, as shown in the excerpt from the Special Master's Report below:

fox@bmelaw.com	**Docs/35124**	**ViewDocument**	**2018-12-19T20:41:40.374Z**
fox@bmelaw.com	Docs/32676	TagReviewDocument	2018-12-19T20:41:41.574Z
fox@bmelaw.com	Docs/33036	ViewDocument	2018-12-19T20:41:43.874Z
fox@bmelaw.com	**Docs/35124**	**TagReviewDocument**	**2018-12-19T20:41:44.669Z**
fox@bmelaw.com	Docs/34938	ViewDocument	2018-12-19T20:41:46.443Z
fox@bmelaw.com	Docs/33036	TagReviewDocument	2018-12-19T20:41:48.063Z

A0400 (emphasis added). Fox "viewed" the document again and affixed a note in a span of eleven seconds:

fox@bmelaw.com	**Docs/35124**	**ViewDocument**	**2019-01-13T20:13:17.274Z**
fox@bmelaw.com	Docs/34938	SetNoteReviewDocument	2019-01-13T20:13:20.376Z
fox@bmelaw.com	Docs/35788	ViewDocument	2019-01-13T20:13:22.608Z
fox@bmelaw.com	**Docs/35124**	**SetNoteReviewDocument**	**2019-01-13T20:13:25.908Z**
fox@bmelaw.com	Docs/35935	ViewDocument	2019-01-13T20:13:28.284Z
fox@bmelaw.com	Docs/35788	TagReviewDocument	2019-01-13T20:14:08.517Z

A0401 (emphasis added). The note, "Final version of Meta PMPSA attached as Exhibit to Complaint," explains how Fox concluded, without reading the document, that the draft was not material. Fox "viewed" the document again on January 13, 2019, but tagged another document within twelve seconds. A0401. Finally, Fox "viewed" the forty-nine-page document again for a maximum of nine seconds. A0408.

An earlier draft MetaBank agreement (Document 36373) was marked with the same tag, "Responsive," and the same note as above. Fox's first view and tag of Document 36373 occurred within nine seconds of tagging the previous document:

fox@bmelaw.com		Search	2018-11-23T19:32:38.655Z
fox@bmelaw.com	Docs/35465	ViewDocument	2018-11-23T19:32:43.019Z
fox@bmelaw.com	**Docs/36373**	**ViewDocument**	**2018-11-23T19:32:44.038Z**
fox@bmelaw.com	Docs/35465	DownloadNative	2018-11-23T19:33:04.966Z
fox@bmelaw.com	Docs/35465	TagReviewDocument	2018-11-23T19:35:18.352Z
fox@bmelaw.com	Docs/16648	ViewDocument	2018-11-23T19:35:24.051Z
fox@bmelaw.com	**Docs/36373**	**TagReviewDocument**	**2018-11-23T19:35:27.341Z**
fox@bmelaw.com	Docs/17394	ViewDocument	2018-11-23T19:35:33.006Z
fox@bmelaw.com	Docs/16648	TagReviewDocument	2018-11-23T19:35:50.078Z

A0399 (emphasis added). On December 12, 2018, Document 36373 appeared three times in search results, but Fox "viewed" the forty-eight-page document for a maximum of forty-four seconds, then two seconds and then four seconds:

fox@bmelaw.com		Search	2018-12-12T21:50:14.050Z
fox@bmelaw.com	Docs/35465	ViewDocument	2018-12-12T21:50:21.239Z
fox@bmelaw.com	**Docs/36373**	**ViewDocument**	**2018-12-12T21:50:22.696Z**
fox@bmelaw.com	Docs/16648	ViewDocument	2018-12-12T21:51:02.929Z
fox@bmelaw.com	Docs/17394	ViewDocument	2018-12-12T21:51:06.359Z
fox@bmelaw.com	Docs/21787	ViewDocument	2018-12-12T21:51:27.315Z
fox@bmelaw.com	Docs/16648	ViewDocument	2018-12-12T21:51:28.139Z
fox@bmelaw.com	**Docs/36373**	**ViewDocument**	**2018-12-12T21:51:29.263Z**
fox@bmelaw.com	Docs/35465	ViewDocument	2018-12-12T21:51:30.300Z
fox@bmelaw.com	**Docs/36373**	**ViewDocument**	**2018-12-12T21:51:31.065Z**
fox@bmelaw.com	Docs/16648	ViewDocument	2018-12-12T21:51:33.642Z
fox@bmelaw.com	Docs/17394	ViewDocument	2018-12-12T21:51:35.825Z

Id. (emphasis added). On January 13, 2019, Fox entered the above-referenced note within thirty-five seconds of entering a note on another document. A0400. The document appeared among search results on January 14 and 18, but based on the timestamp data, the maximum times for which the forty-eight-page document could have been viewed were one second; thirty seconds; nine seconds; twenty-nine

seconds; and four seconds. A0401; A0407-08. InComm does not mention the fleeting nature of Fox's "views."

The trial court's Order refers to InComm's argument that Fox's review of the MetaBank draft led to a subpoena to the bank, *see* A1147-50, as "troubling links between strategies employed or inquiries made and the privileged materials reviewed." Order, 37. There is no evidence in the record to support this "finding." InComm failed to submit any of the allegedly privileged documents to the trial court for *in camera* review to determine if anything Fox may have seen is material to this action. The finding also ignores that InComm's agreement with MetaBank (and other banks) is referenced in the Complaint, which was drafted before the laptop files were reviewed. *See* A0110-11 ¶61. And as the Complaint makes clear, what is remarkable about the MetaBank agreement is the *absence* of certain provisions present in the Bancorp agreement, which mask the holder of unredeemed balances. *See* A0108-11 ¶¶59-61.

InComm also asserts Fox came across other "clearly privileged documents" including "email chains with advice from in-house counsel, and law firm mark-ups of InComm's contracts." *See* Appellants' Br., 10. But it is clear from the subject lines on InComm's privilege log that many of the emails are unrelated to this case. *See* A0824-33; A0964-65 ¶22.

Finally, in warning of potential future use of privileged information, InComm also ignores the Special Master's conclusion that none of the fifty-five documents were downloaded or printed. A0393-409; A0671. Thus, the Audit Trail reveals the only occasions the documents were "viewed." For fifty-four of the fifty-five, that means the most recent "view" occurred over four years ago, while the case was under seal. A0393-409. It also confirms Fox's declaration that no privileged documents were used or shared with anyone. Bondurant has not had access to the documents since June 2020, and all copies are now in the hands of the Special Master. A0960. There is no risk of "use" of any of the fifty-five documents in the future.

5. If Fox Was Exposed to Any of the Fifty-Five Documents, He Did Not Deem Them to Be Material.

Fox did not include any of the fifty-five documents in his production to the State, and, therefore, if he read one of these documents, he did not consider it to be material under 6 *Del. C.* § 1203(b)(2) ("Section 1203(b)(2)"). A0955 ¶12.

E. Relator Discloses Possession of Laptop Files in First Interrogatory Responses.

The case remained under seal until the State moved to unseal in May 2019. After service, Defendants moved to dismiss, *see* B9-B22, and all discovery deadlines were stayed until the trial court denied Defendants' motions in February 2020. B23-B29. Following additional pandemic-related delays, B30-B43, Defendants answered the complaint, and discovery began in May 2020.

On June 1, 2020, Relator informed InComm, through verified interrogatory responses, that he had retained files copied from his InComm laptop. A0493-94, No. 4. Relator also produced the documents provided to the State. *See* A0491, No. 1.

F. InComm's Allegations of a Cover-Up Are Speculative Nonsense.

In an attempt to undermine the trial court's finding that Fox did not act in bad faith, InComm argues on appeal that Bondurant engaged in a "no-holds-barred cover-up" and "purged" the laptop files. *See* Appellants' Br., 15-17. False.

Bondurant never "purged" the files. Bondurant archived the files and preserved all metadata, which was gathered and portions of which were provided to the parties and the court. *See* A0383-85. After archiving the data, at *InComm's request*, Bondurant did not restore it. *See, e.g.*, A0530. The archiving began on June 9, 2020. *See* A0708-20. This careful preservation of data offers no evidence of a cover-up.

InComm grasps at straws to create a false impression of sinister intent. Instead of a "valedictory pass through the laptop database," Fox's May searches were to confirm information provided in Relator's upcoming interrogatory responses. *See* A1121-22 ¶10. And, as mentioned above, those searches did not return to any of the 54 documents reviewed previously. The one document logged by InComm as privileged that was "viewed" in May had not been viewed previously.

G. Correspondence Between Counsel.

In June 8, 2020 correspondence regarding the laptop files, InComm initially expressed purported concerns about misappropriated trade secrets, misused confidential information, and computer theft. A0506-08. Although InComm now argues that Bondurant "could easily have predicted that some of [the laptop] documents were privileged," Appellants' Br., 10, its initial correspondence never mentions privilege. Relator's counsel explained the copying of the laptop and the limited access to those files, and rebutted InComm's allegations regarding trade secrets, non-disclosure agreements, and computer theft. A0510-12.

InComm then pivoted, for the first time expressing concerns about privilege on August 28, 2020. Through a subsequent letter, four emails, and two teleconferences, Bondurant provided InComm the following information: (1) dates the laptop files were on DISCO; (2) number of documents opened during the targeted search; and (3) types of information available regarding DISCO access and searches. *See generally* A0525-26; A0532-34; A0539-40; A0545-47; A0552; A0557-59.

H. Procedural History.

InComm sought additional details regarding searches of the laptop files. Bondurant objected to providing such details. Bondurant asked for information regarding the allegedly privileged documents, but InComm refused. A0558-59.

InComm filed a motion for relief and, as a result, the court appointed James Levine as a Special Master to take possession of the files, identify the documents Bondurant had access to, allow InComm to review those documents and identify claims of privilege, and provide information regarding said review. A0634. Bondurant promptly provided the laptop files to the Special Master's firm. A0960.

InComm moved for disqualification of Bondurant, advancing two separate grounds for disqualification: a) Fox's exposure to privileged materials has compromised the integrity of these proceedings and b) Bondurant's alleged misappropriation of InComm's property in violation of Bondurant's ethical obligations and InComm's rights under contract and state law. A0436-37.

The trial court disqualified Fox because of his "failure to use remedial measures to ensure minimization of exposure or use of any potential privileged material, and [his] failure to disclose Bondurant's possession of the privileged (as well as InComm's otherwise confidential or even irrelevant, but proprietary) material for more than a year after the Complaint was unsealed." Order, 30. The trial court held that "Mr. Fox's insistence that the privileged information was not used in the Complaint does not defeat disqualification because while the advantage from that information cannot be precisely determined, a precise determination is not necessary – in these circumstances, such conduct taints the fairness of this proceeding." *Id.*

The trial court declined to disqualify Bondurant, finding Fox was the only attorney who accessed the privileged information. Order, 39. And the court denied InComm's request for fees, finding an absence of bad faith. *See id.* at 40-43.

ARGUMENT

I. THE TRIAL COURT CORRECTLY REFUSED TO DISQUALIFY BONDURANT.

A. Question Presented

Whether the Court correctly denied InComm's motion to disqualify Bondurant after finding that Bondurant's continued participation would not risk disclosure or taint the proceedings. Order, 38-39.

B. Scope of Review

The trial court's evaluation of the record and its fact-intensive determination that Bondurant's continued participation would not taint the proceedings is reviewed for abuse of discretion. *Lingo v. Lingo*, 3 A.3d 241, 243-44 (Del. 2010) ("Determinations of fact and application of those facts to the correct legal standards [] are reviewed for an abuse of discretion."). To the extent InComm's argument raises a question of law, the standard of review is *de novo*. *SmithKline Beecham Pharms. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 447 (Del. 2000).

C. Merits of the Argument

1. The Trial Court Correctly Analyzed Separately Whether Bondurant Should Be Disqualified.

InComm raises new arguments on appeal regarding the standard to determine if a firm must be disqualified where one of its lawyers is. Below, InComm relied primarily on *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 3876199 *(*Del. Ch. Aug. 20, 2008) and acknowledged that the moving party bears the burden to

establish "by clear and convincing evidence that the continued participation of [the firm] would create a similar risk of disclosure of privileged information or threaten the integrity of this proceeding." A0438 (citing *Postorivo passim*); *Postorivo*, 2008 WL 3876199, at *24. In contrast, Appellants do not cite *Postorivo* on appeal. Appellants' Br., iv. Appellants now contend the lower court erred by "improperly placing the burden on InComm to show 'taint.'" *Id.* at 24-25. Appellants' assertion of this new argument on appeal, alone, merits dismissal of their appeal. Del. Supr. Ct. Rule 8.

Following *Postorivo*, the trial court properly evaluated whether Bondurant's continued participation would risk disclosure or taint the proceedings and concluded it would not. Order, 39. Its determination is supported by the record.

The lower court's ruling relied on the Special Master's confirmation that Fox was the only attorney who reviewed the laptop files. *See id.* Ample evidence in the record supports this finding. A0258 ¶11; A0260-61 ¶20; A0394-409 (Appendix to Special Master's Report showing Fox was only BME user who "viewed" any of the fifty-five documents). Nothing contradicts it. Further, during Fox's limited review, none of the fifty-five documents were printed or downloaded. *See* A0671. In June 2020, Bondurant archived the files, making them inaccessible to Bondurant, and all electronic copies of the files were then delivered to the Special Master in January 2021. A0960 ¶¶3, 6.

2. The Trial Court's Findings Preclude Bondurant's Disqualification.

InComm does not challenge the trial court's findings of fact. Appellants' Br., 24. Those findings mandate affirmance.

Relying on cases regarding procedural deadlines,[1] InComm asserts: "whether a lawyer's actions were in bad faith is also relevant to the disqualification decision." Appellants' Br., 29. In doing so, InComm ignores the finding of no bad faith:

> While done – while not done with malice, the Court finds, or even bad faith, indeed the Court does not doubt that counsel was acting with some good intention.

A1306; *see also* Order, 41 ("[Bondurant's] decisions do not rise to the level of bad faith."); Order, 43 ("the Court finds no bad faith in the actions or arguments of [Relator]"). Therefore, under InComm's own argument, Bondurant should not be disqualified.

3. The Rules of Professional Conduct Do Not Require Disqualification.

InComm argues that "one attorney's confidential knowledge is presumptively imputed to others within the firm," and that the burden falls on the firm to rebut that presumption by sharing remedial measures. Appellants' Br., 31.

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[1] *See Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008); *Pulis v. State Farm Fire & Cas. Ins.*, 747 F.2d 863, 868 (3d Cir. 1984); *Wahle v. Med. Ctr. Of Del., Inc.*, 559 A.2d 1228 (Del. 1989).

InComm did not argue for the presumption of taint below. It therefore waived that argument and is precluded from raising it on appeal.

Even if considered by the Court, the argument fails. InComm relies on Delaware Lawyers' Rule of Professional Conduct ("DLRPC") 1.10, which applies to conflicts. There is no conflict here. The Delaware cases cited by InComm all involve conflicts of interest. Appellants' Br., 32, 33 (*citing Acierno v. Hayward*, 2004 WL 1517134, at *6-7 (Del. Ch. July 1, 2004); *Bleacher v. Bose*, 2017 WL 1854794, at *2 (Del. Super. Ct. May 3, 2017); *Madukwe v. Del. State Univ.*, 552 F. Supp. 2d 452, 462 (D. Del. 2008)).

Conflict situations are distinguishable. The rules surrounding conflicts are based on more than just the preservation of confidences; they are based on the fiduciary duty of loyalty to clients. Comment 2 to DLPRC Rule 1.10 explains that "The rule of imputed disqualification … gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm." It further explains,

> [s]uch situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client…

DLRPC 1.10, cmt. 2. The duty of loyalty is not implicated here. The trial court, while acknowledging that vicarious disqualifications often occur in the DLRPC 1.10 context, implicitly rejected application of conflicts rules here, and separately and

correctly determined that Bondurant's continued involvement would not threaten the integrity of the proceeding. *See* Order, 38.

InComm cites to *Richards v. Jain* for the proposition that imputed disqualification may apply outside the context of conflicts. 168 F. Supp. 2d 1195, 1204 (W.D. Wash. 2001). The flaws in the logic of that case are discussed below, but another conflicts case InComm cites illustrates why imputed disqualification under Rule 1.10 should not extend beyond conflicts. *In re Corn Derivatives Antitrust Litigation* explains that Rule 1.9 is a "prophylactic rule to prevent even the potential that a *former client's* confidences and secrets may be used against him," and "importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained." 748 F.2d 157, 162 (3d Cir. 1984). Those concerns have no relevance here.

InComm, again relying on conflict cases, asserts "knowledge of 'playbook information'" is a "'basis for disqualification' of the *entire firm*." Appellants' Br., 33. While lawyers learn this type of information from representing a client, they are unlikely to be gleaned from brief exposure to fifty-five documents. Of course, the trial court couldn't make that determination here because InComm never submitted the documents for review.

A failure to comply with the Rules of Professional Conduct, by itself, is not grounds for disqualification as this Court has made clear. The DLRPC "may not be

applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs." *Infotechnology*, 582 A.2d at 216. The Rules "do not contemplate a non-client third party's enforcement of conflicts matters. The *only exception* being when that party *proves* a personal detriment or misconduct which *taints the fairness of the proceeding*." *Id.* at 219. While *Infotechnology* involved a conflict, its requirement that a non-client must prove a taint to the fairness of the proceeding should be read to apply generally to all the Rules.[2] And contrary to InComm's arguments, *see* Appellants' Br., 41-42, litigation involving the State is no different. Otherwise, such litigations become "extra-disciplinary proceedings" contrary to this Court's mandate. InComm argues for such an extradisciplinary proceeding here.

4. Incomm Has Failed to Demonstrate Prejudice by Clear and Convincing Evidence.

InComm falls far short of the clear and convincing standard. InComm merely speculates that a disqualified attorney such as Fox "may unintentionally transmit information," and "knowledge of 'playbook information'" and that is "'a basis for disqualification' of the entire [Bondurant] firm." *Id.* at 33.

[2] Even in the conflicts arena, *Infotechnology* requires a showing of prejudice to the movant. 582 A.2d at 221. Mere violation of the DLRPC is not sufficient.

a. Incomm Failed to Establish Prejudice by Failing to Prove the Materiality of the Documents at Issue.

"A movant for disqualification must have evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice." *Unanue v. Unanue*, 2004 WL 602096, at *2 (Del. Ch. Mar. 25, 2004); *Hendry v. Hendry*, 2005 WL 3359078, at *2 (Del. Ch. Dec. 1, 2005). "Vague and unsupported allegations are not sufficient to meet this standard." *Unanue*, 2004 WL 602096, at *2 n.17. InComm's failure to prove what critical knowledge or "playbook information" Bondurant possibly could have learned from Fox's brief encounter with the documents over four years ago leaves a glaring gap.

As the trial court recognized, in considering disqualification, "the 'prejudice' inquiry turns on 'the significance and materiality of the privileged information to the underlying litigation.'" Order, 25. "Access [alone] to inconsequential information does not support disqualification." *Id.* InComm makes broad, conclusory assertions that Bondurant gained insight into sensitive topics, but InComm has failed to provide any evidentiary support for that, much less prove it by clear and convincing evidence. Moreover, without reviewing the documents, the court cannot possibly know whether critical knowledge could have been learned.

The situation here is simple. There are a maximum of fifty-five documents that allegedly contain privileged material – much fewer if duplicates are removed. These documents easily could have been tendered by InComm for *in camera* review

to determine their relevance or significance here. While InComm mentioned *in camera* review in a footnote, A0425 n.3, it elected not to submit the documents. InComm has thus chosen to proceed without submitting these documents in support of a motion on which it bears a clear and convincing burden of proof. InComm has opted instead to rely on an argument that *any* exposure to their confidential information requires disqualification, regardless of whether it is consequential (or even privileged). That is not the standard under Delaware law.

Litigants regularly seek *in camera* review in such situations. For example, in *Richards*, a case heavily relied upon by InComm (and the trial court), the court noted that the documents at issue were relevant and privileged after a "careful *in camera* examination." 168 F. Supp. 2d at 1207. And in *U.S. v. Adams*, the court, after conducting an *in camera* review of the documents, noted that a privileged memorandum reviewed by the prosecution team did not provide information not otherwise available. 2018 WL 6991106, at *26 (D. Minn. Sept. 17, 2018). Therefore, the court held that exposure to that document did not cause prejudice. *Id.*

This Court requires a litigant seeking to disqualify counsel to demonstrate by clear and convincing evidence that the conduct of opposing counsel has prejudiced his or her rights. *Id.* at *25. InComm has failed to meet that burden.

b. Lack of Notice Does Not Warrant Bondurant's Disqualification.

The trial court recognized that providing notice to InComm of the copy of the laptop files was not possible until the seal was lifted. Order, 29. Fox's disqualification was based on the failure to notify InComm after the seal was lifted. But any delay in providing notice did not cause prejudice to InComm.

The Seal was lifted in May 2019, and Defendants were served in June 2019. Once discovery commenced, Relator disclosed having a copy of the documents in response to InComm's first interrogatories.

Significantly, during the time frame noted above, no one at Bondurant "*returned to*" any of the fifty-five documents. The only document identified as privileged by InComm opened by Fox during this time period was Document 29692, which, based on InComm's privilege log, is an irrelevant email regarding a cardholder agreement for a card that was never launched. It was potentially viewed twice on May 31, 2020 once for a maximum of eleven seconds, and then the second time for no more than thirty seconds. A0408-09. These facts do not establish prejudice for not receiving notice between May 2019 and June 2020.

5. The Alleged Conduct of Bondurant Does Not Authorize its Disqualification.

InComm argues disqualification of the entire Bondurant firm is required because of ethical breaches in the failure to notify InComm, the failure to implement

remedial efforts, and "Bondurant's after-the-fact misrepresentations." Appellants' Br., 25. None of these arguments support disqualification.

a. Incomm Attempts to Make Arguments of Misconduct That Were Not Made Below.

In arguing that Bondurant made misrepresentations to the court, InComm asserts that "'violation of [an attorney's] duty of candor to the court' weighs heavily in favor of disqualification." *Id.* at 29. InComm's argument relies on a Fifth Circuit case that does not actually involve disqualification of counsel. In that case, *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, a *qui tam* action was dismissed because of misconduct committed by a lawyer who sought to proceed as a relator *pro se* against his former client. 642 Fed. Appx. 373 (5th Cir. 2016). Among the ethical violations noted by the court were the duty of loyalty to former clients and the duty of candor under American Bar Association Model Rule of Professional Responsibility 3.3(a), which the court found the attorney relator had violated in representations to another court. *Id.* at 378 n.6. As InComm did not seek disqualification based on Rule 3.3 below, it cannot now raise this argument on appeal.

In any event, as described more fully in Section I.C.2., *supra*, Bondurant did not breach any duty of candor. And the trial court found no bad faith in "the actions or arguments" of Bondurant. *See* Order, 43. Rule 3.3 provides no basis for disqualification here.

b. Incomm Ignores the Nature of This Case.

InComm goes to great pains to make Bondurant's actions sound sinister while failing to acknowledge the unique aspects of whistleblower law and litigation.

The DFCRA, like its federal counterpart (the False Claims Act ("FCA")), establishes procedures that differ from typical civil litigation. These differences emanate from the statutory purpose of encouraging insiders to report fraud against the government and a *requirement* that a relator disclose "substantially all material information" in the relator's possession while the action is under seal.

i. A Relator's Counsel Must Collect and Share Documents with the Government in "Secret."

The United States Department of Justice explained its view of the proper application of the FCA to a relator's document collection and production efforts:

> It has long been understood that "the purpose of the *qui tam* provision of the Act is to encourage those with knowledge of fraud to come forward." *Neal v. Honeywell*, 826 F. Supp. 266 (N.D. Ill. 1993), *aff'd*, 33 F3d 860 (7th Cir. 1994) (citing H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)). The statute assumes that individuals who become *qui tam* relators possess and are willing to disclose to the government inside evidence of fraud – whether in the form of documents or other information – that their employers or other potential FCA defendants would rather that relators not disclose to the government. In fact, in order for relator to proceed with an FCA action, the FCA requires that relators disclose to the United States alone "substantially all material evidence and information the party possesses," 31 U.S.C. § 3730(b)(2) … *United States ex. rel. Green v. Corp.*, 59 F.3d 953, 964 (9th Cir. 1995).

Submission of the United States as *Amicus Curiae* in Support of Relator's Motion to Dismiss Counterclaims (ECF 102), *U.S. ex rel. Grandeau v. Cancer Treatment Ctrs. Of Am.*, 99-C-8287 (N.D. Ill. Apr. 2, 2004).

The United States further explained that the FCA requires that relators provide such information and evidence to the government "in secret":

> Not only does the FCA contemplate that the relators will share evidence with the government, but also that they will do so in secrecy. … "The purpose of these provisions is to 'protect the Government's interest in government matters,' by enabling the government to investigate the alleged fraud without 'tip[ping] off investigation targets' at a 'a sensitive stage.'" *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 743 (D.C. Cir. 1998) (quoting S. Rep. No. 99-345, at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289).

Id. at 7-8; *see also Am. Civil Liberties Union v. Holder*, 652 F. Supp. 2d 654, 666 (E.D. Va. 2009) (rejecting a First Amendment challenge to the FCA's seal requirement based on the government's "significant and compelling interest" in preserving secrecy investigations into fraud against the government).

ii. A Relator May Collect and Share Documents with the Government That Are Covered By a Confidentiality or Non-Disclosure Agreement.

Contractual restrictions on disclosure and requirements to return property have been addressed in connection with the FCA. As a general matter, federal courts recognize a public policy exception to such restrictions.

For example, in *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033 (C.D. Cal. 2012), relators copied documents from their work hard drives in violation of confidentiality agreements. They then used those documents to support an FCA claim. *Id.* at 1035. The employer sought to exclude the documents because they were obtained in violation of a confidentiality agreement. *Id.* at 1038. The district court disagreed, citing the "strong public policy in favor of protecting whistleblowers who report fraud against the government." *Id.* at 1039. Significantly, the court added:

> Such an exemption is necessary given that the FCA requires that a relator turn over all material evidence and information to the government when bringing a *qui tam* action.

Id; *see also United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009); *Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d at 773.

iii. Copying the Laptop Files Does Not Warrant Bondurant's Disqualification.

Upon his termination, Relator provided his laptop to his counsel. The trial court noted this was a wise decision. Relator's counsel made copies of the files that had been saved to the laptop by Relator during his employment. And as Relator's counsel anticipated, InComm deleted the files when repurposing the computer. A0462-63.

Significantly, other than the thirty-two non-privileged documents provided to the State pursuant to 6 *Del. C.* § 1203(b)(2), none of the documents were disclosed to anyone or used for any other purpose. *See U.S. ex rel. Cieszynski Lifewatch Servs., Inc.*, 2016 WL 2771798, at *4 (N.D. Ill. May 13, 2016) (applying public policy exception where whistleblower took documents for no reason other than to support FCA claim and no documents were given to anyone other than counsel and the government).

c. Incomm Uses Selective and Out-Of-Context References to Suggest Additional Misconduct.

InComm accuses Relator's counsel of stonewalling and a cover-up. And in a lengthy footnote at the conclusion of its brief, InComm accuses Bondurant of dishonesty and changing its story. But those accusations ignore important facts surrounding counsel's correspondence. InComm's initial correspondence complained of misappropriation of trade secrets. A0506. Relator's counsel responded by promptly archiving the documents and restricting any access. A0517. Relator's counsel then promptly responded to a multitude of questions about the documents (to which it no longer had access). Now, InComm accuses Relator's counsel of misrepresenting information in its earliest correspondence. As one example, InComm selectively quotes Bondurant's first letter, ignoring that it disclosed Fox's recollection of skipping over a document on law firm letterhead. *See* Appellants' Br., 17; A0526.

InComm also refers to a letter from Relator's counsel arguing it is Bondurant's admission that "the cat is out of the bag" and the entire Bondurant firm is tainted: "In addition to the practical impossibility of identifying all 'who may have accessed or been made privy to [Interactive Communications International, Inc.'s (ICI's)] privileged and confidential materials. …" But InComm ignores the conclusion of that sentence, "before the Special Master provides the metadata for the documents that ICI has logged." A0855-60. This was not the admission of firmwide involvement or taint. Instead, it simply recognized the metadata was required to confirm who had accessed the documents at issue. Of course, the Special Master confirmed that only Fox had that access.

InComm asserts that refusal to disclose the search terms Fox used is part of Bondurant's cover up. That ignores both the trial court's refusal to order disclosure of the search terms, A0610-11, and the offer made by Relator's counsel on June 25, 2021:

> [I]f the Defendants are willing to agree, as they did with document tags and document notes, that disclosure of the actual search terms used by Mr. Fox that yielded one or more of the 59 documents does not constitute a waiver of any additional privilege or work product, we would be willing to consent to the production of the search terms …

A0752. InComm refused to agree. A0760.

The trial court correctly found no bad faith in Bondurant's actions or positions. Order, 43. None of InComm's allegations of misconduct warrant disqualification.

6. Incomm's Arguments for Bondurant's Disqualification Hinge on the Trial Court's Erroneous Decision to Disqualify Fox.

InComm's arguments that the trial court erred in refusing to disqualify Bondurant hinge on Fox's disqualification, essentially contending that Fox's disqualification requires disqualification of the entire firm. For the reasons set forth in the cross-appeal, *infra*, which are incorporated here, the trial court erred in disqualifying Fox. This is yet another reason that disqualification of Bondurant is not appropriate.

II. THE TRIAL COURT CORRECTLY DENIED INCOMM'S REQUEST FOR FEES.

A. Question Presented

Whether the trial court appropriately exercised its discretion when it denied InComm's request for attorneys' fees. Order, 40-43.

B. Scope of Review

The denial of attorneys' fees under the bad faith exception to the American Rule is reviewed for abuse of discretion. *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010).

C. Merits of Argument

The trial court did not abuse its discretion in refusing to award fees. This Court has held that "[w]hen an act of judicial discretion is at issue, the appellate court 'may not substitute its own notions of what is right for those of the trial judge, if [that] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Id.* The trial court's ruling was neither arbitrary nor capricious.

The bad faith exception to the American Rule is limited to extraordinary cases, and the movant must demonstrate by clear evidence that the party from whom the fees are sought acted in "subjective bad faith." *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014).

Here, the trial court specifically found "no bad faith in the actions or arguments … in addressing this specific disqualification issue." Order, 43. And in announcing its ruling, the trial court further explained:

> While done – while not done with malice, the Court finds, or even bad faith, indeed the Court does not doubt that counsel was acting with some good intention.

A1306. For the reasons set forth above, this finding is not arbitrary. *See* Section I.C.2.

Although InComm characterizes the award of the costs of the special master as a partial award of fees, the trial court reviewed that request under a different standard. *See* Order, 42. Indeed, that award was based on an earlier motion and the trial court's reservation of a ruling to apportion those costs. A0624-65.

III. THE TRIAL COURT ERRED IN DISQUALIFYING FOX AND REVOKING HIS PRO HAC ADMISSION.

A. Question Presented

Whether the trial court erred in disqualifying Fox and revoking his *pro hac* admission in the absence of clear and convincing evidence that Fox's conduct prejudiced the proceedings. Order, 26-38; B87-B91.

B. Scope of Review

Issues of law require de novo review. *Infotechnology*, 582 A.2d at 218. "Normally in exercising our sole and exclusive jurisdiction over matters affecting governance of the Bar, our review is *de novo*." *Id.* at 218.

C. Merits of Argument

The trial court erred in disqualifying Fox (and revoking his *pro hac vice* admission) for the failure to use remedial measures to minimize exposure to potential privileged material, and failure to disclose Bondurant's possession of the material after the case was unsealed. Order, 30. The absence of on-point Delaware authority forced the trial court to look to other jurisdictions for guidance. But the court erred when it drew from cases based on withdrawn or superseded authority and formulated a standard that does not conform to this Court's direction in *Infotechnology*.

Importantly, *Infotechnology* requires proof of prejudice by clear and convincing evidence. InComm did not meet this burden. The trial court found that "what exactly Mr. Fox gleaned and incorporated from viewing those privileged

documents can never be fully determined." *Id.* at 29. But while the uncertainties surrounding the Audit Trail, discussed above, prevent an exact re-creation of Fox's exposure, a demonstration of what prejudice was possible did not occur because InComm chose not to submit the fifty-five documents for *in camera* review in support of its motion. The absence of these documents from the record prevents any finding of materiality.

Although Fox did not meet the trial court's expectations regarding the handling of the laptop files, his approach was not prohibited by the DLRPC, nor was it an unreasonable approach in the context of Relator's statutory obligation to provide material information to the State while the case was under seal. Fox took steps to avoid privileged material, and no privileged information has been, or can be, used in this action.

1. The Trial Court Erred in Finding That Fox's Actions and Continued Participation Will Adversely Affect the Integrity of the Proceedings.

Infotechnology holds that "the burden of proof must be on the non-client litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings." *Infotechnology*, 582 A.2d at 221. "Absent misconduct which taints the proceeding, thereby obstructing the orderly administration of justice, there is no independent right of counsel to challenge another lawyer's alleged breach of the Rules outside of

a disciplinary proceeding." *Infotechnology*, 582 A.2d at 221; *see also* DLRPC Preamble, n. [20] ("…violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation … [and] the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."). Although *Infotechnology* dealt with lawyer conflicts, its holding has been extended to other alleged violations of the DLRPC. *See Crumplar v. Super. Ct. ex rel. New Castle Cnty.*, 56 A.3d 1000, 1009 (Del. 2012) ("Absent conduct that prejudicially disrupts the proceeding, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct.").

a. The Trial Court Erred in Applying an Incorrect Legal Standard.

In evaluating prejudice, the trial court held that "[a] direct cause-effect type prejudice finding … is not required." Order, 21. The trial court based this conclusion on its reading of this Court's opinions in *Hunt* and *Hurley*. *See id.*; *Hunt v. Court of Chancery*, 2021 WL 2418984, at *4-6 (Del. June 10, 2021); *In re Hurley*, 2018 WL 1319010, at *1-2 (Del. Mar. 14, 2018). The trial court read *Hurley* to authorize sanctions if it finds "'the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice'" or "'adversely affect[s] the integrity of the proceeding' in any consequential way." Order, 21.

Delaware law requires more to disqualify opposing counsel. On a motion for disqualification, the movant bears the burden of proving prejudice by clear and convincing evidence. *Infotechnology*, 582 A.2d at 221. This Court's holding in *Hunt* explains that when the evidence does not prove "an actual impact on the administration of justice," or where there is a "lack of clear evidence showing … an impact on the administration of justice," the trial court is not the venue for enforcing the Rules of Professional Conduct. *See* 2021 WL 2418984, at *6. *Infotechnology* requires clear and convincing evidence of prejudice to movant's rights. 582 A.2d at 221.

i. The Trial Court Applied a Lesser Burden That Is Inconsistent with Delaware Law.

The less stringent nature of the trial court's standard is revealed by its application. The court refused to require evidence of any traceable harm or prejudice prior to imposing sanctions. *See* Order 20. As the trial court explained, "while the advantage from [the fifty-five documents] cannot be precisely determined, a precise determination is not necessary – in these circumstances, such conduct taints the fairness of this proceeding." *Id.* at 30.

The trial court focused on the conduct that it deemed inappropriate. *Id.* at 31 ("Though federal guidance says exposure alone isn't enough to warrant disqualification, surely Fox was acutely aware of the potential of privileged materials lurking among the tens of thousands of documents.") Its order provides

little discussion about prejudice or impact on the proceedings. *See id.* at 36-38. And, as discussed, *infra*, Section I.C.4, the trial court had no evidence from which to conclude that InComm had met its burden to prove prejudice. The trial court's order thus imposed a less stringent standard for the movant's burden than what this Court's precedent requires. In *Infotechnology*, this Court explained:

> [T]he burden of proof must be on the non-client litigant to prove by clear and convincing evidence … how the [misconduct] will prejudice the fairness of the proceedings.

582 A.2d at 221. The standard applied by the trial court is not consistent with this directive.

ii. The Trial Court Relies on Superseded Authority.

Infotechnology signaled a shift in the way Delaware courts decide motions to disqualify. As one commentator noted, "[a]fter *Infotechnology*, doubts are resolved against, rather than in favor of disqualification." Matthew F. Boyer, *In the Wake of Infotechnology: Stricter Scrutiny of Attorney Disqualification Motions*, 22-WTR DEL. LAW. 16, 22 (2004-05). Yet, in formulating its legal standard, the trial court relied on pre-*Infotechnology* case law and cases based on superseded or withdrawn standards.

The trial court noted that "'doubts [in some scenarios] are to be resolved in favor of disqualification.'" Order, 12. A case cited by InComm below, *Gieder v. Waxman*, 1983 WL 21397, (Del. Ch. Sept. 16, 1983), see A0438, illustrates the

source of this standard. *Gieder* is based on the proposition that a trial court must enforce the ethics rules simply to vindicate the integrity of the bar—even when the violation did not affect the proceedings. 1983 WL 21397, at *5. *Gieder* relies on the 1980 edition of Corpus Juris Secundum, 7A C.J.S. *Attorney & Client* § 158(b) (1980), which justifies the rule as "the proper exercise of [the Court's] supervisory power over members of the bar and with a view of preventing appearance of impropriety." *See Gieder*, 1983 WL 21397, at *5. This is the opposite of this Court's direction in *Infotechnology*, 582 A.2d at 216 ("[T]he Rules may not be applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs.").

The trial court also cited *Sun Life Assurance Co. of Canada v. Wilmington Savings Fund Society. See, e.g.*, Order, 33 n.143. In that conflicts case, the Superior Court noted in dicta that disqualification may be appropriate to avoid "even the appearance of impropriety." *See* 2019 WL 6998156 (Del. Super. Ct. Dec. 19. 2019), *vacated by* 2021 WL 1343670 (Del. Super. Ct. Apr. 12, 2021). That statement has its roots in the superseded ABA Model Code of Professional Responsibility. *See Sun Life Assurance Co.*, 2019 WL 6998156, at *7 n.65 (quoting *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978)) (considering a conflict under the Code of Professional Responsibility, we have held that *a court may disqualify an attorney for failing to avoid even the appearance of impropriety* … Indeed, the courts have gone so far as

to suggest that *doubts* as to the existence of an asserted conflict of interest *should be resolved in favor of disqualification*.") (emphasis added). Similarly, *Postorivo*, relied upon by the trial court, *see* Order, 35, applies the "appearance of impropriety" standard. 2008 WL 3876199, at *21 (holding "their actions at least create the appearance of violating the Rules of Professional Conduct").

The "appearance of impropriety" standard is not the law of Delaware. Where the standard is referenced in more recent cases, tracing the citations reveals a common root in the superseded ABA Model Code. There, Canon 9 provided that "[a] lawyer should avoid even the appearance of professional impropriety." But there is no similar provision in the Model Rules upon which Delaware's current standards are based. As a result, "[u]nder the Model Rules, the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit." *Waters v. Kemp*, 845 F.2d 260, 265 (11th Cir. 1988); *see also Alexander v. Primerica Hldgs., Inc.*, 822 F. Supp. 1099, 1114 (D.N.J. 1993) (cited by the trial court, Order, 12 n.58, and relying on case involving Code of Professional Responsibility, *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791(2nd Cir. 1983)).

The trial court relies on *Richards*. *See* Order, 36 n.154. *Richards* relies on cases applying these rules in formulating its standard for disqualification. *See Richards*, 168 F. Supp. 2d at 1200 (citing *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F.Supp. 712, 728 (D. Conn. 1991) ("While the court is reluctant

to disqualify counsel, this appears to be one of those 'unusual situations' where the *appearance of impropriety* is clearly sufficient to warrant so drastic a remedy.") (emphasis added); *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1083 & n.5 (S.D.N.Y. 1989) (noting "any doubt is to be resolved in favor of disqualification" and equivalent of Canon 9 in New York Code); *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055, 1066 (W.D. Wash. 1999) ("[T]he Court should resolve any doubts in favor of disqualification."); *Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc.*, 639 F.Supp. 282, 285 (N.D. Cal. 1986) ("[T]he standards for disqualification embody … Canon 9, which provides that *an attorney must avoid even the appearance of impropriety*.") (emphasis added).

Relying on cases applying superseded or withdrawn authority yields results that are inconsistent with the principles announced in *Infotechnology*. That is what happened here.

iii. The Trial Court Rejected a Standard Applied Elsewhere Requiring Use to Establish Prejudice.

The trial court rejected a requirement of proof of actual use to establish prejudice. *See* Order, 36. But the vast majority of disqualification cases outside the conflict-of-interest context involve instances where counsel "used" privileged material by, for example, referencing a privileged document in the pleadings. *See, e.g.*, *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 2013 WL 2278122, at *2 (C.D. Cal. May 20, 2013); *Maldonado v. N.J. ex rel. Admin. Office of Courts-Prob. Div.*,

225 F.R.D. 120, 125 & n.4 (D.N.J. 2004); *see also Raymond v. Spirit AeroSystems Holdings, Inc.*, 2017 WL 2831485, at *5 (D. Kan. June 30, 2017); *Harris Davis Rebar, LLC v. Structural Iron Workers Local Union No. 1*, 2019 WL 447622, at *2 (N.D. Ill. Feb. 5, 2019) (noting privileged document cited in pleading in related action).

In other cases counsel used a privileged document as an exhibit in a deposition. *See, e.g.*, *Furnish v. Merlo*, 1994 WL 574137, at *9 (D. Or. Aug. 29, 1994); *see also Postorivo*, 2008 WL 3876199, at *12 (involving use of documents in improper witness interviews of former employees).

And in other cases, counsel quoted a privileged document in a complaint, or attached a privileged document to a motion. *See, e.g.*, *Mayorga v. Ronaldo*, 2021 WL 4699254, at *2 (D. Nev. Oct. 6, 2021).

What all these cases have in common is that prejudice was established, at least in part, by use or attempted use of privileged information. In *United States ex rel. Thomas v. Duke University*, the Middle District of North Carolina pointed to the absence of any such evidence of use in refusing to disqualify counsel. *See* 2018 WL 4211372, at *6 (M.D.N.C. Sept. 4, 2018) ("Moreover, Duke has not cited to any statements in the Amended Complaint or otherwise where Virginia counsel made use of purportedly privileged information, much less inappropriate use.")

In declining to follow the authority noted above in requiring some type of demonstrable use of privileged information to establish prejudice that would authorize disqualification, the trial court relied solely on *Richards v. Jain*. *See* Order, 36 n.154. As described in more detail in Section III.C.1, *Richards* is based on withdrawn and superseded authority. *See Kyko Global, Inc. v. Prithvi Info. Solutions, Ltd.*, 2014 WL 2694236, at *2 (W.D. Wash. June 13, 2014) (describing *Richards* as "a case applying an old version of the model ethical rules and an outdated ABA opinion.") But even in *Richards*, the movant submitted certain documents at issue for *in camera* review, something InComm opted not to do here.

iv. There Is No Evidence of Use in This Case.

Relator has not "used" any of the documents over which InComm claims privilege. And, because Relator's counsel never printed or downloaded the documents at issue and no longer maintains a copy thereof, Relator cannot use the documents in the future. *See* A0393-409; A0671.

InComm concedes that there is no evidence of use in this case. A1147-50. And while the trial court mentioned "troubling links" between the documents and "strategies employed" in the litigation, Order, 36-37, because the trial court never saw the fifty-five documents, there is absolutely no evidence to support such a finding. The trial court also overlooks that agreements with other banks were referenced in the complaint, drafted before review of laptop files. *See* A0110-11

¶61. Subpoenas to those banks cannot, therefore, be considered clear and convincing evidence of prejudice.

b. There Is No Evidence of Prejudice in This Case.

More than an absence of evidence of use, there is absolutely no evidence from which the trial court could determine that Fox's actions prejudiced InComm's rights. Even in the context of conflicts, "[a] movant for disqualification must have evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice." *Unanue*, 2004 WL 602096, at *2. The Court of Chancery denied a motion to disqualify, for example, where "the movants' briefs do not identify any way that the alleged violation will prejudice these proceedings." *In re Rehab. of Indem. Ins. Corp., RRG*, 2014 WL 637872, at *2 (Del. Ch. Feb. 19, 2014) ("[T]he movants' counsel's assertion that Nutter knows 'more than he thinks or is willing to admit' embodies the very definition of a 'vague and unsupported allegation.'"). A demonstration of prejudice requires evidence; unsupported assertions do not suffice. *Nat'l Union Fire Ins. Co. of Pitt., Pa v. Stauffer Chem. Co.*, 1990 WL 140438, at *1 (Del. Super. Ct. Sept. 13, 1990). Yet InComm offers no evidence of actual prejudice; only speculative arguments.

InComm does not connect anything that Fox may have seen to anything that would prejudice its ability to defend this case. InComm offers no evidence to explain the advantage to be gained from this information. Indeed, InComm did not tender

any of the documents the court for an *in camera* review to assess whether the information that could have been seen by Fox is actually privileged and has the potential to prejudice InComm in this case.

Access to inconsequential information does not support disqualification. *In re Examination of Privilege Claims*, 2016 WL 11164791, at *2 (W.D. Wash. May 20, 2016), *report and recommendation adopted*, 2016 WL 8669870 (W.D. Wash. July 22, 2016); *see also Nesselrotte v. Allegheny Energy, Inc.*, 2008 WL 2890832, at *7 (W.D. Pa. July 23, 2008) ("[T]he Court's review of the [privileged] documents indicates that they fall far short of a 'blue print' to Plaintiff's case, with some documents bordering on the irrelevant. As such, Defendants have not (and will not) experience 'substantial prejudice.'"); *cf. Preston v. City of Oakland*, 2015 WL 577427, at *2 (N.D. Cal. Feb. 11, 2015) (denying motion to disqualify counsel who had obtained privileged material of former employer from client but did not stop review, disclose, and return the documents). InComm has failed to prove that the fifty-five documents are consequential.

Instead, the trial court presumed prejudice based on InComm's generalized arguments, pointing to a memo (on which Fox noted: "Potentially Privileged – Not Reviewed,"), A0716 (Doc. No. 34016)), an email chain relating to "Amida Care," a healthcare card program that clearly falls outside the scope of this action, *compar*e A0829 *with* A0078-79 ¶12, A0965-65 ¶¶21-22, and to issues supposedly gleaned

from purportedly privileged information in red-lined draft agreements (for which Fox could not see the appended comments).

Significantly, none of the documents InComm claims to be privileged were deemed material under 6 *Del. C.* § 1203(b)(2), provided to the State, shared with Delaware counsel, or printed, downloaded, or viewed by other lawyers at Bondurant. *See* A0576-78; A0671; A0258 ¶¶10-11.

Even if Fox had read privileged information, limited exposure to privileged information is a common occurrence in modern civil litigation. For example, in certain cases, the Court of Chancery recommends a model "quick-peek stipulation" that recognizes the likelihood of disclosure of privileged information. And such limited exposure does not provide a reason for disqualification.

Even in the more stringent conflict-of-interest context, a movant cannot establish prejudice where there is no use of information and the information to which counsel had access in his or her prior representation is information known to the client. For example, in *Unanue* and *IMC Global, Inc. v. Moffett*, 1998 WL 842312, at *1 (Del. Ch. Nov. 12, 1998), the Chancery Court refused to disqualify counsel where their clients had access to the opposing parties' confidential information as a function of their past work for the opposing party. That is the situation here. All of the laptop files had been seen by Relator in the course of his work for InComm. This distinguishes this case from those in which privileged information was obtained

from non-parties. *See, e.g.*, *Postorivo*, 2008 WL 3876199; *Mayorga*, 2021 WL 4699254; *Raymond*, 2017 WL 2831485; *Harris*, 2019 WL 447622; *Burt Hill, Inc. v. Hassan*, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010); *Arnold v. Cargill, Inc.*, 2004 WL 2203410 (D. Minn. Sept. 24, 2004).

InComm has failed to establish prejudice under any legal standard.

Finally, focusing specifically on the issue of notice, the trial court held that Relator should have notified InComm of its possession of copies of the laptop files when the seal was lifted, instead of in response to interrogatories. Even if that were a correct view of the ethical standards, InComm suffered no actual prejudice in the time between the unsealing of the case and Relator's discovery responses. Because discovery had not yet commenced, the DISCO platform was largely dormant. The Audit Trail reveals that only one document for which InComm claims privilege was "viewed" in this time period, and that it had not been "viewed" previously. None of the fifty-four documents accessed in Fox's search to provide information to the State were "viewed" after January 2019. A0408-09. InComm, therefore, cannot establish prejudice resulting from any delay in notification.

The trial court's Order also overlooks the nature of a DFCRA claim. As one treatise explains, because a whistleblower must provide material information before a case is unsealed, defendants in such cases are aware that their information has likely been shared with the government, and defendants typically serve

"comprehensive document requests shortly after the unsealing of the lawsuit," to learn "how much information the relator has." JAMES B. HELMER, JR., THE FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 682 (ABA, 8th ed. 2021). This leading treatise further explains:

> The defendant frequently uses the documentary discovery phase to criticize the employee-relator for securing copies of allegedly proprietary and trade secret information for a purpose adverse to defendant's interest. The defendant's arguments in this regard are difficult to accept because they elevate the relator's so-called duty of loyalty to the company above the relator's duty to report fraud against the government. This conspiracy of silence that the defendant seeks to maintain via assertions of proprietary and confidential trade secret information is precisely what the *qui tam* provisions of the FCA are designed to overcome.

Id. at 682-83.

2. The Trial Court Erred in Finding That Fox's Conduct Warranted the Extreme Remedy of Disqualification.

To disqualify counsel, a trial court must find by clear and convincing evidence that counsel has violated the DLRPC or engaged in litigation misconduct so extreme as to warrant disqualification. While the trial court disagreed with how Fox sought to comply with Relator's statutory responsibilities, it noted that his actions were not taken in bad faith or with malice. A1306. The trial court held that two things warranted the sanction of disqualification here: 1) the handling of potentially privileged information after recognizing such information may be present in the

laptop files, and 2) the delay in providing notice to opposing counsel after the seal was lifted. Order, 30.

Although Relator's counsel may have fallen short of what the trial court expected in these circumstances, the legal burden for disqualification of counsel is high. InComm has not met that burden here.

a. The Trial Court Applied an Incorrect Standard.

Prior to discovery, Relator's counsel was not required to provide notice that Relator's former files had been copied under the DLRPC. DLRPC Rule 4.4(b) is limited to instances of inadvertent disclosure. *See* DLRPC, Rule 4.4(b) & cmt. 2; *see also* ABA, Formal Op. 11-460 (2011).

Cases applying Rule 4.4(b) to other situations generally rely on now-withdrawn ABA Opinions. (Nos. 92-368 and 94-382). *See Arnold*, 2004 WL 2203410, at *10; *Richards*, 168 F. Supp. 2d at 1200-01; *Mt. Hawley Ins. Co. v. Feldman Prod. Inc.*, 271 F.R.D. 125, 131 (S.D. W.Va. 2010) (holding the court will disregard cases that cite to withdrawn opinions). And a primary case relied upon by the trial court, *U.S. ex rel. Frazier v. IASIS Healthcare Corp*, 2012 WL 130332 (D. Ariz. Jan. 10, 2012), *see, e.g.*, Order, 22-24, relies on an Arizona Ethics Opinion, Ariz. Ethics Op. No. 01-04 (Mar. 2001), which, in turn, relies heavily on now-withdrawn ABA Opinion No. 94-382.

Now-withdrawn ABA Formal Opinion 94-382 required a lawyer receiving materials of an adverse party to notify opposing counsel. But that rule was withdrawn by Formal Opinion 06-440 (2006). Such a withdrawal signifies the ABA's view that the Opinion no longer reflects the requirements of ethical conduct. ABA Formal Opinion 06-440 explains: "if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply," and lawyers who are the intentional recipient of such materials are "therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules." While the ABA Rules and Opinions make clear that other legal requirements may apply, there is no requirement of notice in this situation under the DLRPC.

The trial court relies on an order of the Chancery Court to find that notice was required. Order, 35 (citing *Postorivo*, 2008 WL 3876199, at *18). *Postorivo*, "reasoning analogously to the inadvertent production situation addressed in Rule 4.4(b)," concluded that in the circumstances of that case, counsel had a duty to notify opposing counsel so that they could take corrective measures. *See id.* But *Postorivo* did not find that counsel had violated the Rules of Professional Conduct. *See id.* at *20.

Postorivo turned on a fact-intensive finding of litigation misconduct. *See id.* at *20. There, attorneys for a purchasing entity had access to the opposing party's

privileged materials in files obtained through an asset purchase agreement and from former seller employees. Despite a clear dispute and seller's requests for return of its privileged documents, purchaser's counsel proceeded to review those materials and ask seller's former employees for documents without warning them not to disclose privileged communications. Vice Chancellor Parsons held that, "[i]n these circumstances," purchaser's counsel had a duty to notify opposing counsel about the documents. *See id.* at *18.

The circumstances of *Postorivo* differ materially from the circumstances of this previously sealed *qui tam* action. Counsel there accessed all of seller's files and solicited privileged information from seller's control group while the parties' lawyers had been communicating about the return of privileged information. Sanctioned counsel provided evasive answers while simultaneously reviewing and collecting privileged information and intimidating witnesses. As a result, the court found that sanctioned counsel had engaged in gamesmanship, rather than a good faith effort to deal with a complicated situation. *See id.* at *19.

In contrast, Fox complied with his several legal and ethical obligations in handling the laptop files. Fox was obligated to preserve evidence, but he was precluded from notifying InComm of the need to preserve it because this action remained under seal. Therefore, he imaged the laptop files before Relator returned it. Had Fox not imaged the laptop, the files would have been destroyed. In addition,

Relator was required by statute to provide the State all material evidence in his possession. Fox's approach to balancing of the foregoing obligations was reasonable.

The significant distinctions between the situation in *Postorivo* and the situation here should preclude imposing a notice requirement on Fox. As the Eleventh Circuit has held, district courts must rest their disqualification decisions on the violation of specific Rules of Professional Conduct, not on a code of conduct known to the court for which the attorney has no notice. *See Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553 (11th Cir. 1997).

b. Fox's Approach to the Review Was Reasonable.

Fox's approach to reviewing the laptop files was similar to the approach suggested by at least two commentators and the search methodology held not to unduly prejudice the defendant in *Adams*, 2018 WL 6991106. And while Fox's conduct fell short of the trial court's expectations, his actions should not be judged with 20/20 hindsight. *See Thomas*, 2018 WL 4211372, at *6 n.15.

Fox correctly viewed the obligations of providing information to the State under Section 1203(b)(2) as continuing. *See* A1119 ¶7. As one commentator explained with regard to its federal counterpart, 31 U.S.C. § 3730(b)(2), "typically a relator will have access to various types of evidence and information that he or she should preserve and produce to the government with the initial disclosure statement,

as well as on an ongoing basis." Suzanne E. Durrell, *Relator's Role in False Claims Act Investigations: Towards a New Paradigm,* WHISTLEBLOWER LAW COLLABORATIVE, at 8 (emphasis added) (presented at 2012 American Bar Association National Institute on the Civil False Claims Act and *Qui Tam* Enforcement). Another commentator has noted that "relators *must supplement* the [Section 3730(b)(2) Statement of Material Evidence] with any new information or documents after submitting the initial [statement]." Joel D. Hesch, *The False Claims Act Creates a 'Zone of Protection' that Bars Suits Against Employees Who Report Fraud Against the Government,* 62 DRAKE L. REV. 361, 418 (2014) (emphasis added) (hereafter "Hesch"). *See also* 6 *Del. C.* § 1203(b)(2) (requiring service of material evidence pursuant Rule 5 (as well as Rule 4) of the Superior Court Rules, which governs service subsequent to complaint).

Therefore, having filed a complaint under the DFCRA, Relator had a statutory obligation under Section 1203(b)(2) to provide the State with "substantially all material evidence the private party possesses." Putting the laptop files on a shelf and not attempting to locate material evidence was not an option. To meet this statutory obligation, Fox proceeded with his search.

Rule 4.4 of the DLRPC requires that "[i]n representing a client, a lawyer shall not … use methods of obtaining evidence that violate the legal rights of [a third]

person." Fox reasonably harmonized this obligation with the requirements of Section 1203(b)(2) and the secrecy requirements of DFCRA and the seal order.

"As one commentator has noted in the context of documents, 'the FCA contemplates and condones gathering and producing documents prior to service of the complaint and the beginning of formal discovery.'" *Thomas*, 2018 WL 4211372, at *6 n.13 (quoting Hesch at 418). And that commentator, in discussing "one of the roles of *qui tam* counsel" – "to screen documents for privilege before producing them to the DOJ," – notes that relator's attorney, who is an officer of the court and bound by ethical rules, serves as the safeguard of a defendant's privilege. Hesch at 407; *see also id.* at 405 n.223 ("One role of *qui tam* counsel is to review documents for privilege. Hence, the *qui tam* attorney should review documents provided by a relator for privilege prior to producing documents to the DOJ. Upon locating a privileged document, the best practice is to stop reading the privileged document and return it to the relator.") He notes that *qui tam* counsel "will assist in flagging potentially privileged documents and refrain from using them." *Id.* at 407. No privileged documents have been used here.

While the benefit of 20/20 hindsight allows for suggestions of different methods for performing a search, InComm has identified no requirement that counsel utilize any particular screening system. *See Thomas*, 2018 WL 4211372, at *6 n.15 ("There were additional appropriate actions Virginia counsel could have

taken … such as seeking guidance from the Court. … However, the availability of other appropriate alternative options does not mean Virginia counsel violated ethical obligations, and counsel's actions are not judged with 20/20 hindsight.")

Notably, Fox's search was similar to that of a team of prosecutors in *Adams*, 2018 WL 6991106, at *1. As a result of a warrant seeking an attorney's emails, Yahoo! produced to prosecutors a flash drive containing thousands of the defendant's emails. *Id.* at *4. The criminal defendant in *Adams* filed a motion to disqualify the prosecution team, arguing that they had deliberately intruded on confidential communications he had with several attorneys about matters related to the indictment. *Id.* at *8. That motion was denied.

In *Adams*, the government was not able to remove all privileged information from the document set that it loaded onto the Relativity platform and reviewed with search terms but it chose not to use a "taint team." *Id.* at *8. The lead investigator testified that her standard practice, if she came upon potentially privileged information, was to "stop reviewing the document, memorialize its location, contact the AUSA assigned to the case to advise them of this concern, and continue reviewing other emails." *Id.* at *8.

Much like the Audit Trail in this action, the court in *Adams* analyzed logs showing timestamps of activity in the document review platform. *See id.* at *9. The Relativity log in *Adams* had some issues similar to what the Special Master

explained about the Audit Trail here, and as a result, the court in *Adams* noted that it "cannot determine that the record conclusively establishes that any particular view lasted a specific duration," but it found that "it is more likely than not that the Relativity user's exposure to the [privileged documents] is demonstrated by the duration between document views shown in the Relativity logs." *Id.* at *10. Although the court noted in *Adams* that members of the prosecution team were exposed, sometimes repeatedly, to certain privileged communications, it did not disqualify counsel. *Id.* at *9.

The exposure to privileged material in *Adams* was significantly greater than any exposure Fox could have had. For example, a draft privileged email and attached spreadsheet in *Adams* were viewed on multiple occasions; unlike any of the fifty-five documents here, the email in *Adams* was printed twice and the attached spreadsheet was viewed three times, once for 2:08. *Id.* at *12. Other privileged material was printed, *id.* at *14, and also unlike the case here, "some of the allegedly privileged communications … were shared among members of the prosecution team." *Id.*

In *Adams*, the court concluded,

> [T]he alleged intrusions into Mr. Adams attorney-client relationships were generally quite brief and circumscribed. As such, members of the prosecution team who were exposed to privileged information did not have sufficient opportunity to become so familiar with the materials they viewed that those communications would

> likely influence the government's case against Mr. Adams during the investigation or at trial.

Id. at *25.

The trial court ruled that Fox failed in his ethical obligations by failing to ensure that he would not return to a document again. Order, 31-32. But that ignores the nature of electronic searches. It also ignores that a majority of the documents logged by InComm (34) were "viewed" only once. A0965 ¶22.

The trial court's Order does not credit the fact that Fox noted that he did not review the memo, and subsequent "returns" were very brief. But Fox's approach is confirmed by the Audit Trail. Again, the only legal memorandum in this case was tagged, "Attorney-Client." A0716 (Doc. No. 34016). And when, a month later, the document was included in the results of another search, Fox noted, "Potentially Privileged—Not Reviewed." *Id.* (Doc. No. 33341). Although the document appeared in the results of two subsequent searches on January 18, 2019, the maximum amount of time the document could have been open was thirteen and four seconds, respectively. A0406; A0408.

In *Adams*, the court found the defendant was not prejudiced despite the prosecutors' review of multiple privileged documents. For example, one memo was identified by an attorney as privileged, but not removed from the database, and an inspector came across the memo four times in her review. *Adams*, 2018 WL 6991106, at *10. Another four-page draft memo was encountered in *Adams*, when

an attorney clicked on it seven times in one day for the estimated durations of (1) one minute thirty-three seconds; (2) one minute fifty-four seconds; (3) nine seconds; (4) seven seconds; (5) four seconds; (6) one second and (7) four seconds; he later "viewed" the document three more times for (1) five seconds; (2) eleven seconds; (3) seven seconds, and (4) thirty seconds. *Id.* at *11.

While Fox "viewed" some documents more than once, as in *Adams*, the Audit Trail shows that almost all (if not all) of the repeat "views" were very brief. Fox's description of his search explains this. He relied on combinations of search terms to locate documents material to the action. A0953 ¶5. If interrupted during a work session, Fox ran the same search term(s) again in his next session, and clicked through the resulting documents to get back where he left off. *Id.* This process resulted in a large number of "views" recorded in the Audit Trail that were almost immediately followed by a "view" or action involving another document. *See Adams*, 2018 WL 6991106, at *10 ("Other view entries …. similarly suggest that the user was quickly clicking between documents and moving on to other entries in the Relativity database in a comparably short span.")

Fox's search (a) limited the total number of laptop files to which he was exposed and (b) likely limited the number of potentially privileged documents to which he was exposed. InComm is complaining of exposure to fifty-five of the 36,648 files on the laptop. That is less than 0.16 percent.

With regard to tags and notes, InComm asserts "in all events, the user must read the document before applying a tag." A0427. That assertion, which served as the lynchpin of InComm's argument for disqualification, is wrong. In addition to the memo's notation, discussed above, other data confirms the inaccuracy of InComm's assertion. The short timeframe of the "views" of the MetaBank Agreement are set forth in Section D of the Counterstatement of Facts, *supra*. As another example, the time in which the fifty-three-page draft agreement with Sutton Bank that InComm referenced in briefing to the trial court (Document 34152), *see* A0425, was "viewed" and tagged twice, "Non-Responsive" and "Ask Client" (prior to the viewing and tagging of other documents), was a maximum of one minute thirty-one seconds. A0396; A0717. And as shown in Appendix A to the Special Master's January 7, 2022 Final Report (A0393), in that same time period, Fox viewed at least two other documents and tagged another. A0396 (Doc. No. 34152). Then, almost a month later, on January 14, 2019, Document 34152 was identified by a search and "viewed" for a maximum of seven seconds before another document was viewed. A0401.

There is no way Fox could skim, much less analyze, a fifty-three-page agreement in the combined one minute thirty-eight seconds this document (theoretically) could have been open.

A duplicate of this fifty-three-page agreement, Document 35156, was also tagged "Non-Responsive" and "Ask Client" on November 21. A0396; A0717. Fox performed those actions and moved on to another document within seventeen seconds:

fox@bmelaw.com	Docs/32604	TagReviewDocument	2018-11-21T21:33:00.037Z
fox@bmelaw.com	**Docs/35156**	**ViewDocument**	**2018-11-21T21:33:02.659Z**
fox@bmelaw.com	Docs/34301	TagReviewDocument	2018-11-21T21:33:08.674Z
fox@bmelaw.com	Docs/34301	TagReviewDocument	2018-11-21T21:33:09.341Z
fox@bmelaw.com	Docs/32626	ViewDocument	2018-11-21T21:33:12.045Z
fox@bmelaw.com	**Docs/35156**	**TagReviewDocument**	**2018-11-21T21:33:15.486Z**
fox@bmelaw.com	**Docs/35156**	**TagReviewDocument**	**2018-11-21T21:33:16.244Z**
fox@bmelaw.com	Docs/17840	ViewDocument	2018-11-21T21:33:19.135Z
fox@bmelaw.com	Docs/32626	TagReviewDocument	2018-11-21T21:33:22.493Z

A0396-97. The fifty-three-page document again appeared in search results on January 14, 2019 when Fox could have viewed it for a maximum of six seconds before viewing the next document.

fox@bmelaw.com	Docs/34301	ViewDocument	2019-01-14T01:36:05.750Z
fox@bmelaw.com	**Docs/35156**	**ViewDocument**	**2019-01-14T01:36:06.037Z**
fox@bmelaw.com	Docs/32626	ViewDocument	2019-01-14T01:36:10.769Z
fox@bmelaw.com	Docs/15815	ViewDocument	2019-01-14T01:36:12.396Z

A0401. The foregoing examples demonstrate that where documents were "viewed" again, such returns were extremely brief.

While the trial court disagreed with the way Fox approached the need to search the laptop files while avoiding potentially privileged information, his approach was consistent with what commentators suggest, and his search was strikingly similar to what a federal court deemed to cause no prejudice. For these

reasons, Fox's conduct cannot be held to be so unreasonable or so egregious as to warrant disqualification.

CONCLUSION

Appellants' appeal should be denied and the lower court's decisions to not disqualify Bondurant or award fees should be affirmed. Appellees' cross-appeal should be granted, and the lower court's disqualification of Fox should be reversed.

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Dated: May 10, 2023

CERTIFICATE OF SERVICE

I, Bruce E. Jameson, do hereby certify on this 10th day of May, 2023, that I caused a copy of Appellee/Cross-Appellants' Answering Brief on Appeal and Opening Brief on Cross Appeal to be served by eFiling via File and ServeXpress upon the following counsel of record:

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