EFiled: Jun 09 2023 04:48PM EDT
Filing ID 70120970
Case Number 38,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BANCORP BANK, N.A.; INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC.; and INCOMM FINANCIAL SERVICES, INC.,	)	No. 38, 2023
Appellants/ Cross-Appellees,	)	On Appeal from: The Superior Court of the State of Delaware, C.A. No. N18C-09-240 PRW CCLD
v.	)	
RUSSELL S. ROGERS,	)	
Appellee/ Cross-Appellant.	)	

APPELLANTS' REPLY BRIEF ON APPEAL AND CROSS-APPELLEES'ANSWERING BRIEF ON CROSS APPEAL

Of Counsel:

Joshua A. Goldberg
Jane Metcalf
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

ASHBY & GEDDES
Catherine A. Gaul (#4310)
Randall J. Teti (#6334)
500 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
cgaul@ashbygeddes.com
rteti@ashbygeddes.com

Attorneys for Appellants/Cross-Appellees Interactive Communications International, Inc. and InComm Financial Services, Inc.

Dated: June 9, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Relator's appeal brief offers no good reason to excuse Bondurant's extensive record of misconduct. Instead, continuing a well-worn pattern, Bondurant refuses to acknowledge that record. It sidesteps the questions of why no lawyer in the firm ever disclosed the existence of the laptop copy to InComm; implemented an ethical screen; or opted to be forthcoming about the firm's actions when InComm first raised objections. Having escaped accountability so far for its misconduct in the Superior Court, Bondurant does not intend to accept responsibility for its actions now.

On the contrary, Bondurant ***continues*** to violate its duty of candor by presenting additional misstatements to this Court. For example, Bondurant repeatedly insinuates that InComm did not make the privileged documents available for *in camera* inspection, which is false. Bondurant also claims that the privileged documents at issue were not substantive, that nobody looked at them for all that long, and that all Bondurant meant to do was satisfy its disclosure obligations to the State. As the Superior Court concluded, these assertions are false. Moreover, although Bondurant largely avoided consequences for its misconduct below, it now complains that the lower court's ruling was ***too*** harsh, in a cross-appeal asking the Court to reverse the disqualification of its partner, Mr. Fox. Bondurant's persistent deceitfulness and refusal of responsibility only underscores why the Superior Court

erred by limiting the disqualification order to Fox. InComm and Bancorp cannot be assured of the integrity of these proceedings so long as Bondurant is involved in them.

Furthermore, even laying aside this firmwide misconduct, Fox's extensive exposure to privileged material, and failure to impose prophylactic measures, presumptively "taints" the entire firm. On this point, too, Bondurant offers nothing but evasions. Bondurant urges the Court to suspend the presumption of taint, either by adopting arbitrary limits on its applicability, or by finding, contrary to fact, that InComm waived the issue below. According to Bondurant, InComm bears the burden of proving taint, and can do so only by (1) divulging the contents of its privileged documents; ***and*** (2) determining exactly how Bondurant plans to use them, though Bondurant asserts privilege over that topic. Neither this Court, nor any other, has adopted this prohibitive standard.

Finally, Bondurant urges the Court to approach disqualification motions with more skepticism, and more solicitousness for litigants' choice of counsel, than other, "less stringent" jurisdictions have. In essence, Bondurant asks this Court to adopt uniquely lax ethical standards, establishing Delaware as a hospitable forum for transgressors. This Court should decline this invitation and exercise the same robust stewardship over the integrity of Delaware court proceedings that it always has. That stewardship warrants an order partially vacating the Superior Court's decision,

disqualifying Bondurant, and ordering full reimbursement of the fees caused by Bondurant's and Fox's misconduct.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The trial court did not err in disqualifying Fox.

    a. Denied. The trial court applied the correct legal standard.

        i. Denied. The trial court did not misapply rules from other contexts to DFCRA claims. In finding that Fox's misconduct prejudiced the fairness of the proceedings, the trial court did not lower the burden on InComm.

        ii. Denied. The trial court did not apply an outdated standard to the Professional Rules. The trial court did not rely on superseded authority. Relying on extensive factual findings, the trial court properly found by clear and convincing evidence that Fox committed misconduct and prejudiced the fairness of the proceedings.

    b. Denied. The trial court's order is not based on unsupported factual findings. The trial court properly found by clear and convincing evidence that Fox's actions prejudiced the fairness of the proceedings.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY NOT DISQUALIFYING BONDURANT

As shown in InComm's opening brief, the Superior Court made two crucial errors in denying the motion to disqualify Bondurant. First, the court failed to account for its extensive findings of misconduct by the firm, not just Fox. Notwithstanding those findings, the court's analysis treated Fox as the lone wrongdoer, and considered only whether his conduct had "tainted" other attorneys at the firm. Second, even if the "taint" question had been the proper one, the court improperly placed the burden on InComm to demonstrate "taint." Bondurant does not meaningfully rebut either argument.

A. Bondurant's Misconduct Warranted Disqualification

Although the Superior Court's detailed factual findings attributed serious misconduct to "the firm and its lawyers," not just Fox, the court ignored these extensive findings when deciding whether to disqualify the firm. Op. 38-39. Bondurant offers no explanation for the disconnect between the Superior Court's fact findings and its conclusion. Instead, Bondurant resorts to a revisionist account of the Superior Court's findings, offers the same disingenuous claims that the Superior Court properly rejected, and peddles new ones to this Court.

1. Bondurant Whitewashes the Superior Court's Findings of Firmwide Misconduct

Bondurant describes the Superior Court's order as having concluded that Fox alone "reviewed the laptop files," thus absolving everyone else at the firm of any wrongdoing. AB 23.[1] In Bondurant's retelling, the Superior Court's order was almost complimentary about the firm's conduct. Bondurant places outsize emphasis on the Superior Court's tepid acknowledgment that there was "some good intention" behind the firm's actions, a remark that it references four times. AB 2, 24, 39. Bondurant also congratulates itself six times on the Superior Court's purported description of its actions as "prudent" and/or "wise." AB 1, 2, 7, 34. But these peripheral comments referred only to the decision to preserve the hard drive, which was not the basis of InComm's motion to disqualify and is not at issue in this appeal. The issue is that after Bondurant preserved the hard drive's contents, it secretly perused them at will for nearly two years—repeatedly violating InComm's attorney-client privilege, and without imposing prophylactic measures—and then tried to conceal its misconduct. The Superior Court never described that course of action as "prudent" or "wise."

On the contrary, the court gave an unsparing account of Bondurant's ethical breaches, which Bondurant omits from its revisionist history. The court found that

[1] "AB __" refers to Appellee/Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross Appeal (Dkt. 16).

"***Bondurant*** . . . examin[ed] . . . [the laptop's] contents," recognizing that, even if Fox was the only attorney to personally review the documents, he did so with the firm's resources, personnel, and support. Op. 7, 39. Then Bondurant "fail[ed] to disclose [its] 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" in May 2019. *Id.* at 30. Bondurant also "fail[ed] to use remedial measures to ensure minimization of exposure or use of any potential privileged material"—thereby breaching a "paramount" obligation owed by "***the firm and its lawyers***." *Id.* at 30, 41 (emphasis added). Indeed, every lawyer on the case—including John Floyd, another senior Bondurant partner who knew about the hard drive review from day one—breached their duty to implement protective measures. *See* A0558, A1120 ¶ 8, A1126 ¶ 4, A1129. And every lawyer also breached their duty to inform InComm about the privileged documents in Bondurant's possession. These two failures, the Superior Court concluded, "weigh[ed] . . . heavily in favor of disqualification." Op. 30. Because the whole firm was responsible for them, the whole firm is subject to disqualification.

Bondurant likewise glosses over the Superior Court's conclusion that the firm covered up its misconduct after the fact. For example, the Superior Court found that "Bondurant insisted that Mr. Fox 'performed a targeted search to provide documents to the State of Delaware in compliance with Relator's obligations under' the

Delaware False Claims Act. The Special Master's Report demonstrates otherwise." *Id.* at 29. And in its oral remarks, the court rebuked Bondurant for "stonewall[ing]" when InComm first raised privilege concerns in August 2020. A1214.

Thus, the court found, "Bondurant's surreptitious and protracted access to InComm's privileged materials . . . casts 'a substantial taint on any future proceedings.'" Op. 36. These findings were well-supported by the record, and, as Bondurant concedes, are entitled to substantial deference. AB 22. Bondurant fails to acknowledge these findings, much less explain why they should not have resulted in the firm's disqualification.

2. Bondurant Resurrects Misrepresentations That the Superior Court Already Rejected

Bondurant presents the Court with several revisionist narratives that the Superior Court already considered, and rejected, in its detailed factual findings. Notably, Bondurant does not argue that the lower court's findings were an abuse of discretion, but effectively treats this appeal as a do-over, inviting the Court to finely parse the record evidence and adopt Bondurant's interpretation of it. AB 13-16. The Court need not indulge this request, given the deference owed to the lower court on factual issues. But Bondurant's misleading characterizations only highlight its lack of candor.

For example, Bondurant marshals an array of cherry-picked data points from the Special Master's report purportedly establishing that the firm did not look at

InComm's privileged documents for all that long. AB 13-16. According to Bondurant, these data points show that Fox tore through the laptop documents so fast that he could not possibly have read any of them—not even the documents on which he made notes, or tagged "Responsive" or "Ask Client." AB at 13, 63. (Of course, Bondurant also says that the purpose of the laptop review was to satisfy disclosure obligations to the State, but maintains that purpose did not necessitate reading the documents, either. *Id.* at 57-58.) Thus, Bondurant claims, just because Fox tagged an attorney markup of a draft agreement "Responsive," and made a note that the "final version" of the draft agreement was "attached as an Exhibit to the Complaint," ***and*** returned to the same draft agreement 10 more times, that does not mean he ever read the document or found it consequential. AB 14; A0850. Instead, that record simply "explains how Fox concluded, without reading the document, that the draft was not material."[2] AB 14.

This account is, on its face, not credible. That is why the Superior Court rejected it, in a factual determination that Bondurant does not claim was an abuse of discretion. Op. 29, 29 n. 131. In fact, the record showed that Bondurant's invasions of privilege were extensive and substantial. Bondurant reviewed 55 privileged

[2] As discussed *infra*, Bondurant has offered these selective disclosures about its review and analysis of the documents while otherwise asserting attorney-client privilege over that topic. AR21. Thus, even if these assertions about the review process were facially credible (and they are not), Bondurant's reliance on them would be improper.

documents, reflecting InComm's counsel's advice on a broad range of escheat-related issues. AB 28, A0565. And Bondurant did not just review each document once. Rather, as the Superior Court emphasized, the metadata report logged 161 separate instances of engagement with InComm's privileged documents, including 19 tags of "Responsive" or "Ask Client," and 21 repeat visits to documents for a second (or third or fourth) look. Op. 29, 29 n. 131; A0836-850.

Contrary to Bondurant's claims, the investigation did not show that these looks were too quick to be meaningful. In fact, the investigation made no conclusive findings on the "maximum duration" that the firm reviewed any given document, because it was "not possible" to reconstruct all of Bondurant's viewing activity. Documents viewed in "preview mode," for example, did not appear on the Special Master's data report. A0389. Nor is it possible to determine whether Bondurant took screen captures of documents, or cut and pasted text from them. Bondurant's attempt to exonerate itself based on "maximum" view times is unavailing.

Furthermore, even putting these limitations aside, the Special Master's report generated a far more damning picture than Bondurant's selective account suggests. Take, for example, the memo from InComm's outside counsel, which was printed on law firm letterhead, and contained counsel's analysis of the escheat rules at issue in this case. Bondurant immediately recognized that document as privileged, but nevertheless went on to review it on four separate occasions. A0848. On appeal,

the firm demands credit for the fact that this was "the only legal memorandum" it reviewed, protests that its ***third and fourth*** peeks at the memo were "very brief," and faults the Superior Court for "fail[ing] to consider" these mitigating factors. AB 63. But even this defense, such as it is, depends upon a distortion of the facts. Bondurant neglects to mention that its first and second views of the memo were not "brief" at all. They lasted for a combined total of almost five minutes—ample time to glean substantive insights from a five-page memo. A1024-26 ¶¶ 6-9. And while Bondurant protests that this was the "only legal ***memorandum***" in the review set, Bondurant reviewed 54 other privileged ***documents***, often repeatedly and at length. These facts, among many others, support the Superior Court's conclusion that Bondurant's invasions of privilege were significant and consequential.

Equally unavailing is Bondurant's insistence that Section 1203(b)(2) "require[d]" it to invade InComm's privilege, and that it never "used [InComm's documents] for any other purpose" than fulfillment of those statutory obligations. AB 7, 35; *see also* 6 *Del. C.* § 1203(b)(2). The Superior Court heard that excuse, too, and did not buy it. As an initial matter, it has no basis in law, as no court has held that a *qui tam* relator's disclosure obligation justifies the appropriation and review of a defendant's privileged documents. In any event, as the Superior Court concluded, no conceivable interpretation of that obligation "could be viewed as licensing what occurred here." Op. 27. The statutory disclosure obligation could

not possibly explain, for example, why Bondurant "fail[ed] to inform opposing counsel [about the documents] for nearly a year after the Complaint was unsealed," seek the court's guidance, or "take any safeguards" to protect InComm's privilege. Op. 29. These breaches had nothing to do with "disclosure" to the State, and everything to do with Bondurant's needless "surreptitious[ness]." *Id.* at 28. Thus, the Superior Court declined to credit Bondurant's Section 1203(b)(2) rationalization. *Id.* at 29.

Bondurant cannot credibly claim that this factual determination was an abuse of discretion. If anything, the Superior Court understated the disconnect between Bondurant's *post hoc* rationalization and its actions. Notably, though Bondurant now adopts an expansive view of its disclosure obligations, the firm's actual disclosure to the State was quite parsimonious, consisting of 32 documents that Bondurant had cherry-picked from the 36,000 laptop files. A1120 ¶ 9; AB 9. Bondurant did not disclose to the State that there were thousands more files, including privileged ones, on a laptop in its possession. It did not disclose to the State that many of those documents squarely rebutted the relator's meritless claims. And after making its meager disclosure in January 2019, Bondurant continued to periodically rummage through the laptop files for another year and a half, while the State remained unaware of the files' existence. A0558. For a firm that now urges

such a capacious view of its disclosure obligations, Bondurant was, at every turn, exceedingly selective in its disclosures.

For these reasons, the Superior Court was unpersuaded by Bondurant's attempts to rationalize and minimize its conduct. One key fact also undermined the credibility of all such attempts: Bondurant came up with them only after getting caught. When InComm first expressed concerns about invasions of privilege, Bondurant did not respond that Section 1203(b)(2) had compelled it to read InComm's privileged documents; or explain that it had clicked through InComm's privileged documents and made "tags" and "notes" on them without reading them. Bondurant said, to InComm and the Superior Court, that it had "assiduously avoided" privileged documents. A0584. If Bondurant believed its own excuses, it would have raised them from the outset. But it did not believe them, neither did the Superior Court, and nor should this Court.

3. Bondurant Offers New Misrepresentations on Appeal

In addition to rehashing misrepresentations the Superior Court rejected, Bondurant also fashions new ones on appeal. At six points in its brief, Bondurant implicitly accuses InComm of having failed to make the privileged documents available for *in camera* review. AB 3, 16, 28-29, 41, 49, 51. Even if this accusation were true, it would be irrelevant, for the reasons discussed *infra* at 27-28. But it is also not true. Bondurant coyly notes that "InComm mentioned *in camera* review in

a footnote, [but] it elected not to submit the documents." *Id.* at 29 (citing A0425 n.3). The referenced footnote reads as follows: "Without waiving any applicable privilege concerning these documents, ***upon request InComm will provide these documents to the Court for in camera review***." A0425 n.3 (emphasis added). The Superior Court never took InComm up on this offer, likely because *in camera* review was not necessary (and Bondurant never argued below that it was). But Bondurant's implication that InComm never made the offer is wrong.

Bondurant also dissembles about its actions in May and June 2020, when it launched a cover-up of its conduct. *See* OB 15-17.[3] Although Bondurant dismisses InComm's recitation of these events in its opening brief as "speculative nonsense," AB 18, in fact InComm's recitation contains no speculation at all. It consists entirely of facts that were found by the Special Master, admitted by Bondurant, or both. These facts establish that in late May 2020, as Bondurant prepared to serve the interrogatory response revealing its possession of the laptop, it gave Mr. Brackett, a partner at the firm with expertise in law firm defense, access to the files for the first time. A0534. Bondurant also searched the files on May 31, the day before serving the interrogatory response. A0408-09, A0558, A0846. Several days ***after*** serving the response, Bondurant searched the files one more time, then abruptly "archived"

[3] "OB __" refers to Appellants' Opening Brief (Dkt. 11).

them, removing them from the review platform where they had resided for 19 months. A0558.

On appeal Bondurant tries, and fails, to advance a plausible innocuous explanation for this chronology. The firm says that its valedictory searches were merely to "confirm information" for "Relator's upcoming interrogatory responses"—as if this were a justification for rifling through InComm's privileged documents. AB 18. But even if "confirming interrogatory responses" somehow provided a free pass, this explanation raises more questions than it resolves. Hasn't Bondurant insisted, in the same brief, that the documents were not "used for ***any other purpose***" beyond fulfillment of Relator's Section 1203(b)(2) disclosure obligations? AB 35. What does confirming "upcoming interrogatory responses" have to do with those obligations? Also, how could these files be so crucial that Fox depended on them to confirm Relator's sworn discovery responses, yet not "material" enough to warrant disclosure to the State? And, most importantly, what about Fox's last foray through the laptop files on June 6, five days ***after*** serving the interrogatory responses? That cannot have been to confirm "upcoming interrogatory responses," so what was its purpose? Bondurant leaves these questions unanswered.

Bondurant also has no satisfactory explanation for its abrupt decision, during the same period, to "archive" the files and remove them from its review platform. The firm describes this act as a "careful preservation of data." AB 18. But

Bondurant could have accomplished that when it acquired the documents in fall 2018, or any time during the intervening 19-month period. Instead, it waited until InComm learned about the laptop, at which point it hastily cleaned house. Bondurant's claim that it archived the files on June 9, 2020 "at InComm's request," AB 18, is false.[4] InComm's June 8, 2020 letter—the first letter InComm sent about the laptop—contained no request to "archive" the files or remove them from the review platform. A0506-08. Nor could it have, since InComm did not know at that time that the files had ever been on the review platform to begin with. Indeed, InComm's letter asked Bondurant how the files had been "maintained" and "safeguarded" up to that point. A0507.

Notably, Bondurant's hasty archiving of the files enabled the firm to answer these inquiries with the misleading suggestion that the files had been archived all along. A0507. On June 16, 2020, Bondurant responded to InComm's inquiries via a letter from Delaware counsel, in an apparent effort to avoid direct engagement with InComm on this subject. The letter represented that Bondurant had completed a single "targeted review" of the laptop, culminating in its January 2019 production to the State. A0510-11. The letter also claimed that ***"[s]ince completing th[at] . . .***

[4] Bondurant implied in initial correspondence with InComm that the archiving occurred on June 6, was vague about the archiving date in submissions to the Superior Court, and now says the date was June 9. A0558, A0261 ¶ 24, AB 18. Regardless, the timing suggests that Bondurant was attempting to conceal its misconduct.

review, ***the [laptop files] have been retained securely by Georgia counsel. . . [and] have not been used***." A0511 (emphasis added). This chronology elided that the files had remained accessible on Bondurant's database from January 2019 to June 2020; that the firm had indeed "used" them on multiple occasions throughout that period; and that the "secure retention" had happened only days earlier. But with the files newly archived, Bondurant could describe them as "secure[]," while evading questions about what had occurred before that point. Clearly, Bondurant archived the files in June 2020 to facilitate this act of deception, not to honor "InComm's request." Three years later, Bondurant persists in misrepresenting these events before the Court.

4. The Firm's Troubling Record of Misconduct Warrants Disqualification

In short, Bondurant has offered no reason to disturb the Superior Court's finding that the firm breached critical ethical duties—to safeguard InComm's privileged materials with prophylactic measures, to timely inform InComm of the laptop copy, and most importantly, to be candid with the tribunal. On the contrary, Bondurant has shown more of the same to this Court.

Bondurant also does not, and cannot, defend the Superior Court's unexplained dismissal of these facts when disposing of the motion to disqualify. As detailed in InComm's opening brief, OB 26-28, the fact that multiple attorneys were "on notice" of the privileged documents and "did not take any action to mitigate the alleged

impropriety" weighs in favor of disqualifying the firm. *Bona Fide Conglomerate, Inc. v. Sourceamerica*, 2016 WL 4361808, at *12 (S.D. Cal. Aug. 16, 2016) (disqualifying entire firm based in part on these findings); *see also Richards v. Jain*, 168 F. Supp. 2d 1195, 1204 (W.D. Wash. 2001) (disqualifying entire firm for, among other things, failure to adopt "institutional measures that would have prevented disclosure" of privileged information). Yet the Superior Court gave no weight to its own finding that "the firm and its lawyers" violated these "paramount" ethical duties. Op. 41. Instead, it reasoned that even if multiple Bondurant lawyers committed these breaches, Fox's conduct was the most egregious, since no other lawyer was known to have "accessed the privileged information" directly. Op. 39. Accordingly, the court settled on the intermediate measure of disqualifying only the worst offender, while sparing those who had exceeded his low standards. This Court should reject that relativist approach, which would permit every firm to set its own ethical rules, and reward association with unscrupulous colleagues. The Superior Court should have held Bondurant to the ethical standards that govern every lawyer's conduct, regardless of whether their colleagues have done worse.

Bondurant's track record of deceit and evasion—which the Superior Court acknowledged, but likewise failed to consider—weighs especially heavily in favor of disqualification. As set forth in InComm's opening brief, these breaches are uniquely insidious, since each court proceeding has only as much integrity as the

attorneys conducting it. OB 29-31. Accordingly, courts often disqualify attorneys who display "recalcitrance," rather than transparency, when called upon to "rectify[] disclosure" of privileged materials. *Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572, 574 (Fla. Dist. Ct. App. 1998). Indeed, in *United States ex rel. Frazier v. IASIS Healthcare Corp*., 2012 WL 130332, at *5-7 (D. Ariz. Jan. 10, 2012), the court disqualified a firm for a similar review of its adversary's documents—despite the fact that the firm, unlike Bondurant, had sought to avoid privileged documents by having a paralegal separate them and place them in a "sealed box." The court emphasized that when confronted by the defendant, the firm's attorneys had "***play[ed] 'dumb'***" and "***feigned ignorance*** with respect to the Sealed Box of privileged documents." *Id.* at *15 (emphases added). That firm's conduct was bad enough to warrant disqualification, but it was better than Bondurant's. Bondurant made no attempt at all to quarantine privileged documents. And when confronted, Bondurant not only "played dumb," but affirmatively misrepresented the facts, both to InComm and the court. These facts compel the firm's disqualification.

5. <u>The Superior Court Erred by Relying on Bondurant's Self-Serving Representations</u>

Making matters worse, the Superior Court accepted Bondurant's self-serving representations about the extent of its review, despite the court's own findings of Bondurant's past misstatements. Courts approach representations of this sort with

skepticism, regardless of the attorney's record of trustworthiness. "[S]elf-serving affidavits of counsel" disclaiming substantive review of an adversary's privileged documents are intrinsically suspect, "because of [counsel's] undeniable interest in preserving any tactical advantage they may have garnered." *Maldonado v. New Jersey ex rel. Admin. Off. of Cts.-Prob. Div*., 225 F.R.D. 120, 137 (D.N.J. 2004) (citing *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.,* 764 F. Supp. 712, 726 (D. Conn. 1991)). Given this self-interest, courts are reluctant to "ignore the appearance of impropriety and simply trust that [the firm] did not substantively review the documents." *Gifford v. Target Corp.*, 723 F. Supp. 2d 1110, 1119 (D. Minn. 2010) (quoting *Arnold v. Cargill Inc.,* 2004 WL 2203410, at *10 (D. Minn. Sept. 24, 2004)) (declining to credit self-serving declarations); *MMR/Wallace Power & Indus., Inc.,* 764 F. Supp. at 726-27 (same).

Here, however, the Superior Court did just that, "accept[ing] Bondurant at its word" that its paralegals and staff had conducted "no substantive review" of the documents. Op. 39. The court also staked the ongoing integrity of the proceedings on Fox's compliance with its order not to "discuss the contents of the privileged documents nor provide his work product to new or remaining counsel." Op. 43. In so doing, the court disregarded not only these self-serving affirmations' inherent unreliability, but also its own findings that Bondurant's past representations had been untruthful. Op. 29.

The court's disregard of those findings yielded contradictory results. For example, the court correctly held that the Special Master had discredited Bondurant's portrayal of its review as "a targeted search" to satisfy disclosure obligations. Op. 29. That false claim appeared, among other places, in Fox's November 6, 2020 affidavit to the court. A0258 ¶ 11. In the same paragraph of the same affidavit, Fox claimed that the "paralegal and two paralegal assistants" who had seen the documents had conducted "no substantive review." A0258 ¶ 11. This latter representation was the one that the Superior Court accepted "at its word," and relied upon when declining to disqualify Bondurant. Op. 39. Why this statement was entitled to credence, when the ones surrounding it had turned out to be false, the Superior Court did not explain. But in any event, the court's ruling hinged the integrity of the proceedings on Bondurant's self-serving, intrinsically unreliable, and largely discredited accounts. This was error.

***

Bondurant's brief offers no reason to disturb the Superior Court's findings that the misconduct extended well beyond Fox. Multiple individuals were involved in the failure to impose prophylactic measures, the failure to timely notify InComm, and the deceitful cover-up. Yet the Court declined to account for these acts of misconduct when denying the motion to disqualify Bondurant. Having thus far escaped accountability for its lack of candor, Bondurant continues that conduct on

appeal. This Court should put a stop to this corrosive cycle, and reverse the Superior Court's denial of InComm's motion to disqualify Bondurant.

B. Bondurant's Invasions of Privileged Prejudice the Fairness of the Proceedings

For the reasons set forth above, the Superior Court erred by proceeding from the premise that Fox was the lone wrongdoer, and considering only whether his ill-gotten knowledge had "tainted" other attorneys. But even if that had been the right question, the court's approach to it was erroneous, and wrongly placed the burden of proving "taint" on InComm.

1. The Court Failed to Recognize the Impact of Bondurant's Conduct on the Integrity of the Proceedings

The Superior Court reasoned that only Fox was "tainted" with improper knowledge, because the Special Master's investigation did not show that any other attorney directly accessed the privileged documents. But as the court recognized elsewhere in its findings, direct access to the documents was only the tip of the iceberg. The court held that "[w]hat exactly Mr. Fox gleaned and incorporated from viewing those privileged documents can never be fully determined." Op. 29. Nor could the court determine how those insights might "contribute to strategy" and influence "tactical decisions or filings," though "troubling links" had emerged between the two. Op. 36-37. Thus, even though Fox no longer had access to the

privileged documents, the insights he derived from them provided an "unfair advantage [that] taints the proceedings." Op. 36.

The Superior Court also recognized Bondurant's "wholesale failure" to impede, in any way, the flow of these ill-gotten insights throughout the firm. Op. 34. The court rebuked Bondurant for failing to "build[] proper ethical walls" around the information, or indeed to "take any safeguards" at all to prevent the spread of taint. Op. 26, 29. This "wholesale failure" persisted from November 2018 to June 2021, at which time the court ordered implementation of an ethical wall between Fox and his colleagues. A0375-A0378. To this day, however, the firm has not divested Fox of his financial stake in the case, as it must to rebut the presumption of firmwide taint.

The implications of these findings are sobering. For ***two and a half years***, Fox—the lead lawyer on the case—remained at liberty to share the insights he had "gleaned and incorporated" from InComm's privileged documents with his team. Op. 29. He brought those insights to every email, call, meeting, and strategic decision throughout that period. He may have periodically refreshed these insights with his notes, emails, or other work product from the review. Notably, even in its self-serving affidavits, Bondurant has never denied the existence of, or made any representations about, such notes, emails, or work product.

In any event, no representation from Fox about his use (or purported non-use) of the privileged information could level the playing field. Even if Fox's representations were trustworthy (and they are not), he may have conveyed some of these ill-gotten insights without realizing that they originated in privileged documents, since his grasp of which documents were privileged was imperfect at best. A0259-60. His colleagues, moreover, had no way of knowing the provenance of Fox's insights. All of these consequences flowed from Bondurant's admitted failure to implement prophylactic measures. Fox had boundless opportunities, and the financial incentive, to taint his colleagues with his ill-gotten insights, whether knowingly or unknowingly. Short of reviewing every intra-Bondurant communication from November 2018 onward, and interviewing every lawyer about every discussion of the case, there is no way to determine the extent to which he did so. The prejudice from his conduct cannot be retraced, nor can it be undone.

None of the facts above is disputed on appeal. Bondurant does not deny that Fox led the case team, that he was free to share insights from his review for two and a half years, that he generated and disseminated work product from his review, or that he maintains a financial stake in the case to this day. Thus, the prejudice analysis is simple: because Fox was exposed to privileged documents and failed to timely implement prophylactic measures, the firm was presumptively tainted. Bondurant

nevertheless asks the Court to eschew this well-settled principle, and impose on InComm an unattainably high standard for demonstrating prejudice.

2. The Presumption of Taint Extends Throughout the Firm

As set forth in InComm's opening brief, OB 32-36, one lawyer's exposure to privileged materials, combined with the absence of prompt prophylactic measures, presumptively taints the firm. Here, the Superior Court found that these conditions were satisfied, but did not apply the presumption. Instead, it disqualified only Fox, and placed the burden on InComm to show that "others at the firm, specifically attorneys" had been "tainted." Op. 38-39. This was error.

Bondurant has little to say in response. It tries, first, to dodge the issue by claiming that InComm "waived" this argument. AB 25. That is incorrect. InComm argued extensively in the Superior Court that Bondurant's review of privileged materials, failure to implement prophylactic measures, and general misconduct had tainted the whole firm. A0446-48, A1286-90. InComm did not present the situation as one in which Fox's individual misconduct presumptively "tainted" his colleagues, but that is because the misconduct was not limited to Fox. More generally, InComm's motion did not distinguish between Fox and Bondurant, just as Delaware courts do not. *See Bleacher v. Bose*, 2017 WL 1854794, at *2 (Del. Super. Ct. May. 3, 2017) ("It is clear that if [the individual lawyer] would be barred from representation of the Plaintiff in this matter, his firm is likewise barred"); *Madukwe*

v. Delaware State Univ., 552 F. Supp. 2d 452, 463 (D. Del 2008) ("It follows" from disqualification of two attorneys "that the entire firm [] may not [continue in the representation] either."). In its ruling, however, the Superior Court drew that artificial distinction *sua sponte*, disqualified Fox, then failed to apply the proper presumption of taint to the firm. Although InComm has accordingly focused its appeal on that discrete error in the court's reasoning, its rationale for seeking disqualification remains unchanged.

Next Bondurant argues that the presumption of taint applies only in cases of "side-switching," *i.e*., conflicts of interest based on an attorney's past representation of a firm adversary. AB 24-27. According to Bondurant, the presumption exists only to promote a lawyer's duty of loyalty to a former client, which has "no relevance here." *Id.* at 25-26. But the presumption of taint does not exist to promote loyalty to former clients. It simply recognizes the "everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information." *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 798 (Cal. Ct. App. 2010) (quoting *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc*., 20 Cal. 4th 1135, 1154 (1999)). Thus, even without malicious intent, "where tainted attorneys and nontainted attorneys are working together at the same firm, there is . . . a pragmatic recognition that the confidential information will work its way to the nontainted attorneys." *Goldberg*

v. Warner/Chappel Music, Inc., 125 Cal. App. 4th 752, 765 (Cal. Ct. App. 2005); *Crudele v. New York City Police Dep't*, 2001 WL 1033539, at *4 (S.D.N.Y. Sept. 7, 2001) (noting the "concern[] that the disqualified attorney, in his day-to-day contact with his new [colleagues], may unintentionally transmit information"). The presumption of taint exists because lawyers within a firm communicate with one another, whether in the "side-switching" context or otherwise.

Bondurant cites no case supporting the arbitrary limitation of this presumption to "side-switching" cases. Though Bondurant relies upon *In re Corn Derivatives*, the court there described the presumption as applicable whenever necessary for "the maintenance of public confidence in the integrity of the bar." *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 162 (3d Cir. 1984). This imperative leads courts to apply the presumption where, as here, attorney misconduct rather than "side-switching" has caused the exposure to privileged materials. *See, e.g.*, *Richards*, 168 F. Supp. 2d at 1204. In such cases, disqualification of the firm promotes "public trust in the scrupulous administration of justice and the integrity of the bar." *Bona Fide Conglomerate*, 2016 WL 4361808, at *12 (quoting *SpeeDee Oil*, 20 Cal. 4th at 1145). Whenever a firm possesses an adversary's privileged materials and fails to implement protective measures to prevent their dissemination, those values are threatened.

Here, the threat was clear and present. Fox not only brought his ill-gotten insights to two and a half years of collaboration with his firm colleagues, but he led the case team throughout that time, making his insights especially likely to "work [their] way to the nontainted attorneys" on his team. *Goldberg*, 125 Cal. App. 4th at 765. He admits that there were no prophylactic measures in place to inhibit their dissemination. Moreover, if anything, Fox's lack of a duty of loyalty to InComm made him more rather than less apt to spread his ill-gotten insights. Fox reviewed InComm's documents from the perspective of an adversary, and brought that same perspective to discussions within the firm. This warrants a presumption of taint.

3. Bondurant Espouses a Virtually Prohibitive Standard for Prejudice

Although Bondurant disputes the applicability of the presumption of taint, it notably fails to say what standard the Superior Court ***should*** have applied when determining the extent to which Fox's ill-gotten insights had spread throughout the firm. That is because no such workable standard exists. Instead, Bondurant argues that the lower court did not demand ***enough*** evidence of prejudice from InComm, and that if it had, it would not even have disqualified Fox. Bondurant urges this Court to adopt a virtually unattainable standard for prejudice, requiring InComm to offer detailed evidence of its privileged documents ***and*** Bondurant's strategic analysis of them.

Bondurant claims that InComm was obligated to adduce clear and convincing evidence of what "insight into sensitive topics" Bondurant derived from the privileged documents, and why those insights were "consequential." AB 28. This showing purportedly demanded, among other things, that InComm submit all 55 privileged documents for *in camera* review, along with an explanation of the strategic "advantage to be gained" from each one. AB 50-51. This would have required InComm to effectively waive privilege over the very documents that the motion was intended to protect. It also would have saddled InComm with the awkward task of detailing, for the trial court, how Bondurant could exploit each such document to InComm's strategic disadvantage. Somehow, these responsibilities fell to InComm by virtue of ***Bondurant's*** decision to misappropriate and review InComm's privileged documents.

Bondurant, by contrast, accepts no obligation to expose its internal communications to scrutiny—even as it faults InComm for offering inadequate proof of those communications. As the Superior Court found, InComm demonstrated topical "links" between the documents and the substance of the case, Op. 37, yet Bondurant argues on appeal that these "broad" characterizations were insufficient. AB 28. According to Bondurant, InComm was required to offer "clear and convincing evidence . . . prov[ing] what critical knowledge or 'playbook information' Bondurant" gained. AB 27-28. Thus, Bondurant assigns InComm the

formidable task of proving what insights ***Bondurant*** took away from InComm's privileged documents. Moreover, in Bondurant's view, InComm was required to do so without access to Bondurant's internal communications, which the firm has insulated from scrutiny with its own claims of privilege.

To stack the deck even further against InComm, Bondurant's assertion of privilege has been conveniently selective. On several occasions, Bondurant offered partial accounts of its review process, which it insulated from scrutiny by continuing to assert privilege over the topic. A0552, A0554, A0557-58, AR21. Bondurant now resurrects those accounts on appeal, claims that the Superior Court should have credited them, and takes InComm to task for failing to rebut them—all while maintaining its selective assertions of privilege.

Thus, under Bondurant's espoused standard, InComm was required to (1) submit all 55 privileged documents for *in camera* inspection; (2) identify what "insight[s] into sensitive topics" Bondurant took from each; (3) explain how Bondurant planned to use those insights against InComm; and (4) offer "clear and convincing evidence" of all of the above. AB 27-28. Not only that, InComm was supposed to do this without access to Bondurant's internal privileged communications—except the ones Bondurant unilaterally decided to share.

4. Bondurant's Unattainable Standard Has No Basis in Law

This standard has no basis in law. This Court simply requires a movant for disqualification to show "***prejudice [to] the fairness of the proceedings***," by clear and convincing evidence. *In re Appeal of Infotechnology*, *Inc.,* 582 A.2d 215, 221 (Del. 1990) (emphasis added). That flexible standard does not encompass any, let alone all, of the exacting criteria that Bondurant seeks to impose here. This Court has never required movants to submit privileged documents *in camera*, or to detail their adversaries' strategic plans for the documents, as Bondurant urges. Also contrary to Bondurant's assertions, *Infotechnology* did not "signal[] a shift" in the standard for prejudice or disqualification. AB 44. The Court expressly disclaimed that outcome, noting that "trial courts retain their traditional powers . . . to address, rectify and punish conduct of a party or counsel which threatens the legitimacy of judicial proceedings. Nothing we say here is intended to limit or circumscribe such authority." *In re Appeal of Infotechnology, Inc.*, 582 A.2d at 221-22.

Bondurant also wrongly asserts that this Court has abandoned the standard of "prejudice to the fairness of the proceedings," in favor of one "requir[ing] a [movant] to demonstrate . . . prejudice[] [to] ***his or her rights***." AB 29; *see also id.* at 43 ("*Infotechnology* requires clear and convincing evidence of *prejudice to movant's rights*.") (emphasis added). As an initial matter, the distinction between these standards is unclear, since any litigant who is deprived of a fair proceeding

necessarily suffers prejudice to his or her rights. Further, Bondurant's "rights"-based formulation appears nowhere in *Infotechnology* or any other decision of this Court. Bondurant lifts it from a Minnesota federal court decision in a criminal case, which considered the unrelated question of whether a criminal defendant's "Fifth Amendment right to due process was violated by the government's . . . intrusion into his privileged communications," to a degree that "shock[ed] the conscience" and thus warranted dismissal. *United States v. Adams*, 2018 WL 6991106, at *27 (D. Minn. Sept. 17, 2018); *see also* AB 58-67. That standard for dismissing a criminal indictment has nothing to do with attorney disqualification, civil litigation, or Delaware law.[5] Bondurant's reliance on it is, at best, misguided.

So too is Bondurant's insistence on InComm's obligation to submit the documents *in camera,* and identify the exact "playbook information" that Bondurant derived from them. AB 26-28. Bondurant notes InComm's reference to "playbook information" in its opening brief, as if to suggest that InComm has acknowledged this component of the prejudice standard. *Id.*; OB 33 (quoting *Madukwe*, 552 F. Supp. 2d at 462). But the *Madukwe* court merely held that "playbook information" is sufficiently prejudicial to support disqualification. It did not place the burden on

[5] The court also denied an alternative motion to disqualify the prosecution, but applied a separate analysis emphasizing, *e.g.*, the prosecutors' consistent "candor to the Court," and emphasized that the standard for disqualification was higher in criminal cases. *Id.* *29-30.

the movant to detail the content or utility of the information. On the contrary, the court found it "not necessary for [the movant] to reveal the specific confidential information it claims [the firm] obtained." 552 F. Supp. 2d at 461. The movant simply had to show, based on the general circumstances, that the firm "***might have*** learned confidential information . . . that ***could be*** used to the [movant's] detriment." *Id.* (emphases added). That was enough to compel the firm's disqualification.

Similarly, in *Acierno v. Hayward*, 2004 WL 1517134, at *7 (Del. Ch. July 1, 2004), the Court of Chancery recognized that the movant for disqualification was "unable to disclose the specifics of [their confidential] information due to the risk of waiving the privilege," and was also "not required" to do so. *Id.* at *7, n.52. The court nevertheless granted the motion for disqualification upon a generalized showing that the information was "substantially related" to the subject matter of the case. *Id.* at *7. These cases belie Bondurant's claim that movants for disqualification must subject their privileged communications to scrutiny as the price of defending their right to a fair proceeding.

In fact, to InComm's knowledge, no court in any jurisdiction has adopted Bondurant's prohibitive standard. Many have rejected similar standards. In *Clark v. Superior Court*, 196 Cal. App. 4th 37, 55 (Cal. Ct. App. June 2, 2011), the court declined to demand a "showing of existing injury [to the party] from the misuse of privileged documents." Another court deemed such a demand impractical, given the

difficulty of quantifying "how much of an advantage, if any, one party may gain" from review of privileged material. *General Acc. Ins. Co. v. Borg-Warner Acceptance Corp.*, 483 So.2d 505, 506 (Fl. Ct. App. 1986). Such a standard would also fail to protect the movant's "interest in a trial free from even the *risk* that confidential information has been unfairly used against it." *Gifford*, 723 F. Supp. 2d at 1119 (quoting *Arnold*, 2004 WL 2203410, at *5). Accordingly, rather than demand a showing of present injury, courts have disqualified counsel upon a showing of "risk that improperly obtained confidential and privileged information might be used against [the movant]." *Arnold,* 2004 WL 2203410, at *13 (finding that this showing "justifies disqualification"); *Walker v. GEICO Indem. Co.*, 2016 WL 11234453, at *7 (M.D. Fla. Sept. 13, 2016) (risk that a firm may "mak[e] strategic decisions . . . based on its knowledge" of confidential documents warrants disqualification). That risk is plainly present here.

5. Bondurant's Proposed Standard is Manifestly Unworkable

Bondurant's proposed standard also creates a catch-22 by requiring InComm to adduce proof of Bondurant's internal deliberations, while Bondurant selectively claims privilege over that topic. Bondurant's criteria for prejudice would require each movant to demonstrate its privileged documents' strategic utility to its adversary. Courts have deemed requirements of this nature unfair, given that a "party seeking disqualification will be at a loss to prove what [was] known by the

adversary's attorney," much less how it was used. *In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 596 (Cal. Ct. App. 1991).

Here, however, Bondurant not only puts InComm to this impossible task, but adds yet another obstacle with its opportunistic waivers of privilege. In attacking the Superior Court's finding that the privileged documents were "consequential" to the litigation, Bondurant relies upon its own selective accounts of its review process, a topic that Bondurant has otherwise insulated from scrutiny by asserting privilege. For example, Bondurant insists that Fox deemed the documents not material, hence his decision not to produce them to the State. AB 17. It suggests that many of the documents were unrelated to the allegations in the Complaint. AB 51. And it minimizes its invasions of privilege by noting, for example, that there was some overlap in content among the 21 different privileged email chains that it reviewed. AB 11-12. If these documents are so trivially unimportant, it is not clear why Bondurant engaged with them so extensively. But in any event, Bondurant has foreclosed inquiry into the evidence that could refute these accounts. AR21. The Court cannot know, for example, how Fox's current account matches up with his contemporaneous emails or notes, because Bondurant claims privilege over all of those.

Bondurant's opportunistic waiver and re-invocation of the privilege is improper. A party may not "use [privilege] as a sword as well as a shield." *Hoechst*

Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania, 623 A.2d 1118, 1125 (Del. Super. Ct. 1992). Rather, when a party "injects an issue into the litigation" whose resolution requires "examination of [] confidential communications," it "waive[s] the attorney-client privilege" as to those communications. *Id.* Here, Bondurant cannot "inject" self-serving representations about Fox's "use" of the documents into the record, while maintaining its claim of privilege over its contemporaneous emails and work product. AR21. Accordingly, the Court should not credit these representations—even if they were otherwise reliable, which, as discussed above, they are not.

While Bondurant's selective waiver is unfair in and of itself, it becomes even more absurd when combined with its proposed standards for demonstrating prejudice. For example, Bondurant complains that the Superior Court credited InComm's "generalized" description of a privileged email chain entitled "Legal Question for Amida Care," which Bondurant reviewed repeatedly. AB 51. As noted in InComm's privilege log, the chain contains privileged attorney advice about the role of issuing banks. A0844-46. But Bondurant scoffs that Amida Care is "a healthcare card program that clearly falls outside the scope of this action," and points to the Complaint's allegation limiting Relator's claims of fraud to open-loop prepaid cards. AB 51. Because the allegations in the Complaint are not about healthcare cards, Bondurant maintains, an email chain about the healthcare card "Amida Care"

was "clearly" irrelevant. *Id.* Bondurant argues that the Superior Court should have credited this account over InComm's "generalized" descriptions, and deemed the email chain "inconsequential." *Id.*

Bondurant's account is dubious at best. The "Legal Question for Amida Care" chain includes attorney advice on the allocation of responsibility between InComm and an issuing bank, a key disputed question in this case, to which Bondurant was probably attuned when perusing the documents. And back then, Bondurant did not act as though the "Amida Care" subject line rendered the document *per se* irrelevant. On the contrary, Fox tagged three different iterations of the chain as "Responsive" and "Ask Client." A0844-46. (He also tagged one as "Attorney-Client," but proceeded to review other iterations of the chain anyway. A0844.) According to Fox's March 1, 2022 affidavit, those tags indicated that "at first blush, [he] thought the document could be material," even if he "ultimately determined" that it was not. A0955, ¶¶ 12-13. This multi-step process would not have been necessary if, as Bondurant now claims, the subject line "Legal Question for Amida Care" conclusively established the document's irrelevance.

Although these inconsistencies render Bondurant's account suspect, Bondurant has immunized it from scrutiny. Bondurant's contemporaneous emails, notes, or work product could shed light on its true interpretation of the email chain's significance. But Bondurant has claimed privilege over all of those materials,

requiring InComm to accept Bondurant's sanitized account of its review at face value. AR21. Then, Bondurant faults InComm for failing to adduce sufficient proof of Bondurant's "insights" from the documents.

Bondurant advances an even more dubious argument for the "inconsequentiality" of another cluster of documents: InComm's attorney's markups of a contract between InComm and Metabank, another issuing bank for prepaid cards. The Complaint describes the Metabank agreement in some detail, noting its minor divergences from the analogous agreement between InComm and Bancorp. A0110-11, ¶ 61. The Complaint alleges that these differences exist because, unlike Bancorp, "Metabank has no reason to conceal its status as the holder" of unredeemed card balances, given the leniency of "South Dakota's unclaimed property law." A0111 ¶ 61.

So, the Complaint contains substantive allegations about the Metabank agreement, its minor variations from the Bancorp agreement, and the legal motivations behind those variations. Unsurprisingly, then, InComm's attorney markups of that agreement were items of interest on the laptop. Bondurant secretly reviewed attorney edits of the Metabank agreement more than 10 times, tagging the documents repeatedly, and affixing a note highlighting the agreement's connection to the Complaint. A0850. Then, in the light of day, Bondurant sought extensive discovery on the agreement, including via a subpoena to Metabank. A0306-366.

That the Metabank agreements are "consequential" to the case seems uncontroversial. They are the subject of detailed allegations in the Complaint. As noted above, when addressing the "Amida Care" email chain, even Bondurant agreed that this was the relevant standard for consequentiality. Yet for the Metabank agreements, Bondurant applies an entirely different standard, under which the agreements are ***in***consequential precisely ***because*** the topic is referenced in the Complaint. *See* AB 16 (noting that "InComm's agreement with MetaBank . . . is referenced in the Complaint, which was drafted before the laptop files were reviewed.").

Bondurant's rationale appears to be that, as the Complaint shows, InComm's privileged documents did not give the firm the idea of making the Metabank agreement a focal point of their claims. They had already made the Metabank agreement a focal point of their claims, ***then*** they reviewed InComm's privileged documents on that topic. But this distinction is immaterial: either way, ***the Metabank agreement was a focal point of their claims, and they reviewed InComm's privileged documents on it***. What is more, their claims include allegations about the legal motivation behind the wording of the Metabank agreement, and they reviewed InComm's counsel's fine-tuning of the wording of the Metabank agreement. It does not get more "consequential" than that. By disputing this basic notion, and by applying different "consequentiality" standards to different

documents, Bondurant gives the Court yet another reason to doubt its selective representations on this issue.

As these examples show, Bondurant's selective waivers of privilege make its proposed standard for "prejudice" all the more untenable. Bondurant puts the onus on InComm to rebut its incomplete narratives of the review process, while Bondurant immunizes those narratives from scrutiny, and applies different rules from one narrative to the next. In Bondurant's view, the only prevailing rule is "heads I win, tails you lose." This Court should reject Bondurant's novel and unattainable standards for prejudice.

C. There Is No Basis for "Reticence" to Disqualify Bondurant

Throughout its brief, Bondurant urges the Court to approach disqualification motions with even greater reticence than the Superior Court did. While acknowledging that "other jurisdictions" may be "less stringent," Bondurant asks this Court to "require[] more to disqualify opposing counsel." AB 42-43. Bondurant appeals to litigants' rights to the "counsel of [their] choice," and argues for leniency on the grounds that its conduct was not "unreasonable." AB 28, 41, 50. According to Bondurant, these considerations trump the niceties that other jurisdictions consider, such as maintaining the "appearance" of fairness in court proceedings. AB 45. In essence, Bondurant urges the State of Delaware to distinguish its courts as

uniquely forgiving of ethical breaches, and uniquely unconcerned with the integrity of the proceedings.

The Court should reject this invitation. To be sure, disqualification is a serious remedy, which courts should not deploy for minor errors in judgment. But neither is there any reason for reticence where, as here, counsel's sustained misconduct has profoundly threatened the integrity of the proceedings. On the contrary, this Court has "potent" power to safeguard that integrity, and the responsibility to do so. *In re Appeal of Infotechnology*, *Inc*., 582 A.2d at 221. This Court need not and should not be any less protective of its proceedings' integrity than courts in other jurisdictions.

Nor should the Court tolerate a corrupted proceeding simply to indulge Relator's choice of counsel. Had Bondurant wished to protect its client's choice of counsel, it should have complied more faithfully with its ethical duties. Courts have recognized that "when chosen counsel strains the limits of ethical conduct, that choice has to yield to the preservation of a fair and just litigation process." *Maldonado,* 225 F.R.D. at 137; *see also Hull v. Celanese Corp.,* 513 F.2d 568, 572 (2d Cir. 1975) (party's right to choose her counsel "must yield [] to considerations of ethics which run to the very integrity of our judicial process."). In any event, as the Superior Court concluded, any prejudice to Relator is minimized by the involvement of competent Delaware counsel. Op. 40. Counsel for the State, the real party in interest, is likewise unaffected by the motion.

This Court has long prioritized the integrity of its proceedings over ethical transgressors' pleas for leniency, and should continue to do so. Those priorities weigh so clearly in favor of disqualifying Bondurant that the Court should have no "reticence" about imposing that remedy. Instead, this Court should convey its lack of tolerance for deliberate misconduct that threatens the integrity of the proceedings.

II. THE SUPERIOR COURT ERRED BY DENYING INCOMM'S MOTION FOR ATTORNEYS' FEES

In the Superior Court's ruling on InComm's application for fees, the court once again resorted to half-measures, and charged Bondurant with only a small portion of the costs its misconduct had occasioned. This arbitrary limitation was error and creates perverse incentives for litigants hoping to conceal their misconduct.

In shifting the Special Master's fees, the Superior Court found that "Fox and Bondurant's conduct create[d] the need for the Special Master investigation. It was not the conduct of InComm and so it should not, and will not, shoulder the specific costs for that resource to determine the specific interaction of opposing counsel with its materials." Op. 42. Accordingly, the court exercised its authority to shift fees to a litigant that acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Dover Hist. Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1093 (Del. 2006) (quoting *Slawik v. State*, 480 A.2d 636, 639 n.5 (Del. 1984)) (internal quotation marks omitted).

But the Special Master costs were far from the only ones that Bondurant's misconduct "created the need" for. Elsewhere, the Superior Court noted that this long "detour" began with Bondurant's failure to observe ethical "obligations" that were "clear[]." Op. 41-42. These failures include Bondurant's repeated invasions of InComm's privilege; its year-long failure to take any remedial action; and its lengthy cover-up. Op. 13-15, 28. The process of uncovering and remedying these

acts encompassed much more than the Special Master investigation. It required extensive motion practice, several court appearances, and voluminous correspondence and briefing. Every cent of these costs was attributable to Bondurant's misconduct, which "unnecessarily prolonged [and] delayed" this litigation. *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005) (quoting *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998)). There was no basis for the trial court's decision to limit its fee award to the Special Master costs, while otherwise leaving InComm to bear the costs of Bondurant's misconduct.

What is more, the Superior Court's ruling creates a perverse incentive for litigants to attempt to conceal their misconduct, just as Bondurant did. Bondurant's cover-up might have been successful, if InComm had been less vigilant or less well-resourced. Although the cover-up did not succeed, it imposed significant costs on InComm. Allowing Bondurant to avoid responsibility for the costs caused by its misconduct makes it more expensive for an adversary to seek accountability, and may deter litigants of modest means from doing so at all. Meanwhile, it costs the transgressor nothing but its own fees. This message does not serve the purpose of fee-shifting, which is "to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process." *Dover Hist. Soc'y, Inc.*, 902 A.2d at 1093 (quoting *Brice v. State Dept. of Correction,* 704 A.2d 1176,

1179 (Del. 1998)). This Court should hold Bondurant accountable for the needless costs that it generated.

III. BONDURANT'S CROSS-APPEAL SHOULD BE DENIED

Bondurant's cross-appeal is yet another example of the firm's attempt to downplay the severity of Fox's actions—rather than owning up to them. From the moment that Fox's misdeeds first came to light, in June 2020, Bondurant has defended Fox and rallied around him at a grave cost to the integrity of the proceedings, which the Superior Court found in disqualifying Fox. Op. 36-38. Bondurant's cross-appeal is no different. For the reasons laid out *supra*, and in the opening brief, Fox's disqualification was proper and must be extended to Bondurant; there was no reversible error in disqualifying Fox.[6]

Of Counsel:

PATTERSON BELKNAP
WEBB & TYLER LLP
Joshua A. Goldberg
Jane Metcalf
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

ASHBY & GEDDES

/s/ Catherine A. Gaul
Catherine A. Gaul (#4310)
Randall J. Teti (#6334)
500 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888

Attorneys for Appellants/Cross-Appellees Interactive Communications International, Inc. and InComm Financial Services, Inc.

Dated: June 9, 2023

[6] While the State of Delaware opposed disqualification in the Superior Court, the State has chosen to take no position with respect to the Relator's appeal.