IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EUGENIO POSTORIVO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Consolidated
	)	Civil Action No. 2991-VCP
AG PAINTBALL HOLDINGS, INC., a Delaware corporation, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
KEE ACTION SPORTS HOLDINGS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No. 3111-VCP
	)	
v.	)	Transferred Pursuant
	)	to 10 *Del. C.* § 1902
EUGENIO POSTORIVO, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: March 7, 2008
Decided: August 20, 2008

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Action Sports Holdings, Inc., KEE Action Sports, LLC, KEE Action Sports I, LLC, KEE Action Sports 1 UK Limited, Brent Leffel and Raymond E. Dombrowski, Jr.; Robert H. Pees, Esquire, Nancy Chung, Esquire, Ryan N. Marks, Esquire, AKIN GUMP STRAUSS HAUER & FELD, LLP, *Attorneys for Defendants Angelo, Gordon & Co. and AG Paintball Holdings, LLC*

PARSONS, Vice Chancellor.

This consolidated action is presently before me on Plaintiffs' motion to preclude violations of their attorney-client privilege and for sanctions against Defendants and their counsel, Montgomery, McCracken, Walker & Rhoads, LLP ("MMWR"), for misconduct in derogation of Plaintiffs' legitimate claims of privilege (the "Sanctions Motion"). In an earlier opinion,[1] I addressed which entity holds the attorney-client privilege as to documents or communications regarding the operation of Plaintiffs' business before, and after, entry into an Asset Purchase Agreement ("APA"), communications pertaining to the APA, and certain excluded assets and liabilities. By the time of that decision, the parties had reached agreement on each of these categories of privilege claims except the last one – the excluded assets and liabilities.[2] In *Postorivo I*, I concluded that Plaintiffs hold the attorney-client privilege with respect to communications regarding the excluded assets and liabilities, as well as those relating to the negotiation of the APA.[3]

Based on extensive discovery and relevant case law in this jurisdiction and elsewhere, Plaintiffs claim to have shown by clear and convincing evidence that

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1 *Postorivo v. AG Paintball Holdings, Inc. (Postorivo I)*, 2008 WL 343856 (Del. Ch. Feb. 7, 2008).

2 The parties agreed, consistent with the pertinent case law, that Defendants hold the attorney-client privilege as to communications regarding the operation of the business before and after the APA, and Plaintiffs hold the privilege as to communications regarding the negotiation of the APA.

3 *See* 2008 WL 343856, at *8. *Postorivo I* includes a more detailed description of the nature of the excluded assets and liabilities. In that opinion, I also rejected an argument by Plaintiffs that Defendants' pursuit of its claim of privilege as to an excluded asset or liability constituted bad faith litigation conduct justifying fee shifting. *Id.*

Defendants and MMWR have worked complicitly in a course of conduct that violates the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") and justifies disqualification of MMWR and dismissal of this action, among other sanctions. Defendants and their counsel deny any wrongdoing and urge rejection of Plaintiffs' motion in all respects.

For the reasons stated in this memorandum opinion, I hold that certain attorneys with MMWR and Defendant KEE Action Sports Holdings, Inc. or its affiliates have acted in a manner inconsistent with the DLRPC, which constitutes at least litigation misconduct, if not a violation of the Rules of Professional Conduct. I further find that this misconduct taints these proceedings and threatens to prejudice their fairness. Although the alleged misconduct and likely prejudice are not sufficiently serious as to justify the extreme sanction of dismissal or disqualification of the entire MMWR firm, the circumstances do warrant the imposition of significant, but lesser, sanctions. Specifically, I disqualify Richard L. Scheff and Craig E. Ziegler of MMWR from having any further involvement with this consolidated litigation. In addition, I hold the corporate Defendants and MMWR jointly and severally liable to reimburse Plaintiffs for a portion of their attorneys' fees and costs associated with the prosecution of their Sanctions Motion.

I. FACTS

National Paintball Supply, Inc. ("NPS") is a corporation founded and wholly owned by Eugenio Postorivo. NPS was in the business of selling equipment and supplies related to the paintball gaming industry, including guns, paintballs, protective goggles,

clothing, and other gear. Postorivo sold substantially all of the assets of NPS to AJ Intermediate Holdings, Inc. ("AJI") pursuant to the APA, initially signed September 29, 2006, amended, and subsequently closed on or about November 17, 2006. AJI formed a new company, KEE Action Sports Holdings, Inc.,[4] to receive these assets and combine them with assets from another company, Pursuit Marketing, Inc. ("PMI"), which had been a competitor of NPS.

In the APA, NPS and Postorivo (the "Postorivo Parties") made certain representations and warranties regarding, *inter alia*, the value of the NPS inventory and liabilities transferred to KEE. By late January 2007, KEE determined it might have a claim against the Postorivo Parties for breach of those representations and warranties.[5]

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[4] For simplicity, I use the designation "KEE" when referring to KEE Action Sports Holdings, Inc., KEE Action LLC, or AJ Intermediate Holdings, Inc., whether separately or collectively.

[5] Although the parties dispute the precise timing, Dombrowski admitted that KEE first learned of the claims against NPS by late January or early February 2007. DAB Ex. B, Dombrowski 11/12/07 Dep., at 252. The evidence further indicates that KEE retained MMWR to counsel it on the issues later raised in this action on January 30 or 31, 2007. DSAB Ex. FF, Scheff Supp. Aff., ¶ 3.

There were two full rounds of briefing on Plaintiffs' Sanctions Motion. Plaintiffs' opening, Defendants' answering, and Plaintiffs' reply briefs in the first round are cited as "POB", "DAB", and "PRB", respectively. The second round followed extensive discovery, and the supplemental opening, answering, and reply briefs are cited as "PSOB", "DSAB", and "PSRB", respectively. Citations to depositions and affidavits give the witness's surname and the page or paragraph reference.

A. The Persons Involved in the Disputed Actions

1. Postorivo and Campo

In conjunction with the acquisition, Postorivo, the sole stockholder of the selling company, NPS, was elected to the Boards of Directors of two of the principal KEE entities.[6] In addition, Postorivo served as President of KEE Action LLC (the operating entity), pursuant to an employment agreement.[7] On May 4 and 5, 2007, however, KEE removed Postorivo from the boards of the two KEE companies and terminated his employment with KEE "for cause."[8]

For several years before the APA, John Campo, an attorney, served as in-house and general counsel for NPS, and represented Postorivo personally as the majority stockholder of NPS.[9] While serving as in-house counsel for NPS, Campo maintained an office in the NPS headquarters, was privy to all aspects of the Company's operations, and advised Postorivo as to the various aspects of the Company's business, including intellectual property and third party disputes.[10]

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6 First Am. Verified Compl. (hereinafter "Compl.") ¶¶ 67, 93. A few months after briefing and argument on the Sanctions Motion, Plaintiffs filed a second amended complaint on June 23, 2008. Unless otherwise noted, citations in this opinion refer to the First Amended Verified Complaint.

7 *Id*. ¶ 67.

8 Compl. Exs. G, H.

9 Campo Aff. ¶ 3.

10 Campo Aff. ¶¶ 3-5. Campo also was heavily involved in managing the business affairs and operations of NPS. Scheff Aff. ¶¶ 11-12.

During the negotiations for the asset sale, Campo, along with attorneys from Blank Rome LLP ("Blank Rome"), represented NPS and Postorivo.[11] Campo was intimately involved, for example, in the preparation of schedules to the APA, including schedules related to transferred inventory.[12]

Campo also entered into a Consulting and Non-Competition, Non-Solicitation Agreement with KEE dated November 13, 2006 (the "Consulting Agreement") by which he served as an independent contractor, and not as an attorney, agent, employee, or servant, to the post-acquisition entities.[13] As a result of Campo's consulting arrangement, he continued to maintain an office in the NPS (now KEE) Sewell, New Jersey offices; Campo assisted KEE in certain matters it acquired in the asset sale, including a litigation matter known as the "Pulse Loader Litigation."[14] At the same time, however, Campo continued to provide legal advice to the Postorivo Parties and to assert the attorney-client privilege on behalf of Postorivo and NPS.[15] KEE terminated the Consulting Agreement with Campo on May 16, 2007.[16]

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11 Campo Aff. ¶¶ 6-7.

12 *Id*. ¶ 7.

13 *Id.* ¶¶ 9-10.

14 *Id*. ¶¶ 12-13.

15 *Id.* ¶¶ 11-12, 15.

16 Wilburn Certification ("Cert.") Ex. B.

2. The NPS Knowledge Group

Paragraph 3.28 of the APA denominates several persons who worked for NPS before the asset sale and provided information to the attorneys and others regarding due diligence and representations and warranties pertaining to the APA, as the "Knowledge Group." The members of the Knowledge Group are: Postorivo, Campo, Norm Gunn, Louis Spicer, Kim Postorivo, Johnny Postorivo, Avery Amaya, JJ Brookshire, and Simon Stevens. Most of these individuals continued to work for KEE after the asset sale.

3. KEE's CEO Dombrowski

Raymond E. Dombrowski, Jr., has served as KEE's Chief Executive Officer ("CEO") since the closing of the APA transaction. Dombrowski is also a managing director of Alvarez & Marsal ("A&M"), an international consulting firm hired to perform due diligence on NPS on behalf of the purchaser for the APA transaction, a project Dombrowski supervised.[17]

Dombrowski graduated from Temple Law School in 1979, and worked as a tax lawyer at Schnader Harrison Segal & Lewis, LLP for approximately five years.[18] He then worked as general counsel for Bell Atlantic Corporation for a few years, and later as senior vice president and chief financial officer for Ogden Corporation.[19]

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[17] Dombrowski 11/12/07 Dep. at 31, 38, 46-47.

[18] Dombrowski 11/12/07 Dep. at 22-24.

[19] *Id.* at 24, 27-28. Although Dombrowski is admitted to the practice of law in New Jersey and Pennsylvania, his licenses have not been active for over ten years. *Id.* at 23.

As KEE's CEO, Dombrowski was responsible for integrating NPS and PMI after the closing.[20] He had approximately eighteen groups reporting to him, including KEE's information technology or IT group.[21]

4. KEE's outside counsel

The law firm of Montgomery, McCracken, Walker & Rhoads, LLP represented KEE since December 2006 in connection with the unrelated Pulse Loader Litigation, and since late January 2007 in connection with the dispute underlying this action.[22] The MMWR attorneys working on the Pulse Loader Litigation included Richard Scheff and Joyce Link. Scheff serves as lead counsel for KEE at MMWR. In that capacity, he participated in and supervised the work of a number of other MMWR attorneys on this litigation relating to KEE's indemnification claims and NPS's claims against KEE, Dombrowski, and the other Defendants.[23] During the period before and including June 2007, Scheff and Craig Ziegler of MMWR had extensive contacts with Dombrowski, other employees of KEE, and members of the NPS Knowledge Group, regarding the various disputes over inventory values and indemnification involved in this action.

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20 *Id.* at 45-46.

21 *Id.* at 85-87.

22 Campo Aff. ¶¶ 14-15; Scheff Aff. ¶ 2.

23 *See Scheff* Aff. ¶ 2. According to Defendants, Link did not work on the indemnification claims. DSAB at 37-38.

B. Timeline of Events

The following is a generally chronological recitation of the events relevant to Plaintiffs' Sanctions Motion. For purposes of this opinion, it is important to track who knew what and when during the period from November 2006 through June 2007.

This dispute traces back to the APA transaction, which closed on or about November 17, 2006. A few days after the closing, Dombrowski asked Campo to vacate his office and move to a cubicle. Later that day, Campo, in the presence of Postorivo, informed Dombrowski that he would need a locked office to identify and separate documents, records, and electronic data of NPS from those of KEE. Speaking in his capacity as counsel for NPS, Campo voiced concern about documents that related to the NPS's retained assets and liabilities and the APA negotiations.[24]

As of early January 2007, an adverse relationship existed between NPS and KEE at least as to certain excluded assets and liabilities that remained with NPS under the APA. One or more civil actions referred to as the Procaps Litigation constituted a major part of those excluded assets and liabilities. NPS and KEE had potentially conflicting interests as to that litigation.

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[24] POB Ex. 2, Campo Dep., at 28-30. Campo again raised the issue of NPS's retained privileges with Scott Thompson, KEE's CFO, in December 2006. Thompson inquired about the pending liabilities NPS remained responsible for, and Campo said he could not answer some of his questions because of NPS's attorney-client privilege. Campo also testified that he told Thompson he was in the process of culling and separating on his computer electronic data that remained privileged to NPS. Campo Dep. at 44-47.

1. The January 3 meeting

On January 3, 2007, three MMWR attorneys, Scheff, Link, and William Kingsbury, and another attorney, John O'Malley from Volpe and Koenig, met with Campo regarding another piece of litigation. During that meeting, Campo asserted attorney-client privilege regarding his communications with NPS before the APA closed.[25] Later the same day, Scheff discussed Campo's assertion of privilege with Dombrowski.[26]

Defendants emphasize that Campo's claim of privilege in the January 3, 2007 meeting encompassed all pre-APA communications he knew of or had in his possession. Scheff and his colleagues at MMWR did not understand Campo's claim to be limited to communications related to the negotiation of the APA or to excluded assets and liabilities. In addition, MMWR disputed Campo's claim and internally, at least, took the position that, because KEE acquired all of the assets of NPS and was carrying on essentially the same business operations after the APA as NPS had performed before, any privileges for pre-APA communications related to that business were transferred to KEE with the assets. There is no dispute, however, that by January 3, 2007, KEE and MMWR

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[25] POB Ex. 12, Scheff Dep., at 155-56; Kingsbury Dep. at 66-67; Wilburn Cert. Ex. 27 (Kingsbury Memo, 1/5/07).

[26] Scheff Dep. at 311-12. According to Scheff, Campo said everything he did for NPS was privileged; Campo did not limit his assertion to the negotiation of the APA, for example. *Id.* at 156-57. A memorandum to the file by Kingsbury of MMWR, dated January 5, 2007, stated that Campo "also shared his view that the attorney-client privilege stayed with NPS and was not assumed as a matter of law with the assets acquired by AJI." Supp. Wilburn Cert. Ex. 27.

knew Campo and NPS asserted attorney-client privilege as to pre-APA documents and communications.

2. Campo's computer

At the beginning of the first week in January, Dombrowski directed Spicer, a member of the Knowledge Group who became KEE's Chief Technology Officer ("CTO"), to make sure that Campo's computer was backed up.[27] According to Dombrowski, he ordered the backup to ensure that, in case of a computer failure, KEE had a copy of the documents, such as contracts with vendors, that only existed on Campo's computer.[28]

In accordance with Dombrowski's directive, Spicer and Jeff Frye, a KEE IT employee, attempted to back up Campo's computer.[29] To ensure the success of the backup, Spicer tried to verify that Campo's computer was powered on, but could not because his office was locked.[30] Neither Spicer nor Frye informed Campo of this attempt.[31]

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27 Dombrowski 11/12/07 Dep. at 243-44; Spicer Dep. at 32-33, 151-52.

28 Dombrowski 11/12/07 Dep. at 130-33, 228; Spicer Dep. at 137-42.

29 Spicer Dep. at 143.

30 *Id.* at 143, 152-53. Spicer tried to access Campo's office around dinnertime, when Campo was not in the office. *Id.* at 154.

31 Spicer Dep. at 158, 163; Frye Dep. at 93.

After Spicer tried unsuccessfully to obtain a key directly from Campo, he sent an email to Dolores Hammell, requesting a key to Campo's office.[32] Within a day or two, Hammell found a key and provided it to Spicer.[33] Spicer then instructed Frye to back up Campo's computer on the evening of January 8, 2007.[34]

Frye performed a backup of Campo's user profile, which included his documents, and the backup was stored as a flat file on a network server.[35] Spicer informed Dombrowski that the backup had been completed.[36] Neither Spicer nor Frye informed Campo of his attempt to back up Campo's computer until after it occurred.[37]

At some point in early summer 2007, shortly before his deposition, Spicer learned that the backup of Campo's computer had been overwritten and was unrecoverable, but

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32 Spicer Dep. at 158-60.

33 Hammell Dep. at 36-37. At first, Hammell asked Campo if he had an extra key to his office. Campo responded that he did, but would not give it to her. *Id.* at 38. Hammell then went through the keys she had, and found one for Campo's office. *Id.* at 38, 46-47.

34 Frye Dep. at 81-82; Spicer Dep. at 160-61. On that occasion, Campo's office was not locked. Spicer Dep. at 161.

35 Frye Dep. at 103-04; Spicer Dep. at 168, 204-05. The exact server on which the backup was stored is not clearly identified. Frye Dep. at 103; *see* Spicer Dep. at 169-70.

36 Dombrowski 11/12/07 Dep. at 218-19.

37 Spicer Dep. at 158, 163; Frye Dep. at 93; Campo Dep. at 74-77.

he did not know the circumstances.[38] It is unclear whether anyone looked for, or tried to access, the backup before Spicer discovered it had been overwritten.[39]

In the first round of briefing on the Sanctions Motion, Plaintiffs suggested KEE personnel intentionally copied selected files of Campo's computer that included privileged communications relating to the indemnification claims and other matters underlying this litigation. Defendants aver that Frey performed only a normal backup, and not a selective copying of primarily privileged files. Based on the evidence presented, I find that KEE probably did perform only a normal backup.

Jesse Lindmar, Plaintiffs' initial computer expert, conducted a forensic analysis of Campo's computer.[40] Plaintiffs relied on Lindmar's analysis, in arguing that the January 8 copying of Campo's computer was not a routine or preventative backup, but rather, a selective copying of certain targeted files.[41]

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38 Spicer Dep. at 176-77.

39 Spicer Dep. at 192-93; Dombrowski 11/12/07 Dep. at 233; Scheff Dep. at 122-24. To access the backup, a user would need to know the administrator password. Spicer Dep. at 193. Besides Spicer, only Kevin Lavin and Frye knew the password. *Id.* at 196-97. Dombrowski denied having accessed the backup. Dombrowski 11/12/07 Dep. at 233. Similarly, Scheff asserts that no one from MMWR ever handled, viewed, or possessed the backup. Scheff Dep. at 122-24.

40 Lindmar Aff. ¶ 5.

41 Lindmar Reb. Aff. ¶ 7. Based on a review of the "last access date" metadata, Lindmar determined that less than 0.1% of the Microsoft Word documents on Campo's computer were accessed between 6:52 p.m. and 10:17 p.m. on January 8, 2007, a time period when Campo was not at his computer. Lindmar Aff. ¶ 11; Lindmar Reb. Aff. ¶¶ 6-7.

Plaintiffs, however, have not demonstrated, by clear and convincing evidence, that the copying of Campo's computer was selectively performed.[42] Upon review of the record, it appears that the January 8 backup was a general backup, and not a selective copying. Specifically, Spicer and Frye both testified that the "Documents and Settings\John" directory ("Campo's user profile") was copied, not just selective Microsoft Word documents.[43] Jason Park, Defendants' computer expert, determined that almost all of the files in Campo's user profile were accessed on or after January 8, 2007, a finding that strongly supports Frye and Spicer's testimony.[44]

In early March 2007, Campo removed his computer from his office at KEE.[45] The computer has remained within the possession, custody, or control of Plaintiffs or an escrow agent since that time.[46]

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42 At best, Lindmar's analysis demonstrates that less than 0.1% of the Microsoft Word files in Campo's user profile have not been accessed since January 8, 2007. That, however, does not preclude the possibility that other files were accessed on January 8, and accessed again on a later date. *See* Park Aff. ¶ 7.

43 Frye Dep. at 103-04; Spicer Dep. at 168, 204-05.

44 Park Aff. ¶¶ 4, 7. When files are copied from a computer to a server, the last accessed time of the files on the computer will be updated to reflect the time of file copying. *Id.* With the exception of seventeen immaterial files, all of the 8,850 files in Campo's user profile have a last access date on or after January 8, 2007. *Id.* ¶¶ 4, 8.

45 Campo Dep. at 100. According to Campo, he took his computer "with permission." PSOB n.10.

46 Campo Dep. at 66, 100-01.

3. The period from late January, when KEE's indemnification claim ripened, through March 2007

KEE discovered the undisclosed liabilities that contributed to the commencement of this action in January 2007. On or about January 30, 2007, KEE retained MMWR to represent it in connection with potential indemnity claims against NPS.[47]

According to Brookshire, a Knowledge Group member, in February and March 2007, he worked with Link of MMWR regarding the Pulse Loader Litigation. One day during that period, Link prepared Brookshire for his deposition. According to Brookshire, Link repeatedly asked him about NPS inventory valuation matters, such as inventory quality and quality control issues pre-dating the APA transaction. Brookshire told Link that those issues had no relation to the Pulse Loader Litigation, but Link continued to ask about the history of possible quality problems with NPS's inventory.[48]

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[47] Scheff Supp. Aff. ¶ 3.

[48] PSOB Ex. 1, Brookshire Dep., at 144-46. Brookshire testified as follows:

> Q. Did you ever have any discussions with Joyce Link?
> A. Yes.
> Q. Anything related to this case?
> A. That's a hard yes or no, but we had extensive discussions preparing me for a deposition on the Pulse case.
> Q. Don't care about that.
> A. Well, we seemed to go beyond the Pulse prep in that discussion that seemed odd to me at the time. She asked me quite a bit about inventory quality, quality control issues, and she kept asking again about quality issues of inventory, quality issues, which had nothing to do with the Pulse case, and that – it kind of threw me at the time.
>
> I didn't understand, frankly, why she was asking about quality, and I would several times tell her, no, this really has nothing to do with quality, this is other issues at Pulse, and

While such questions were irrelevant to the Pulse Loader Litigation, they directly relate to issues in the controversy before me.

On March 28, 2007, KEE served an indemnification claims notice on NPS and Postorivo. Thus, from that date on, KEE and NPS were directly and openly adverse to one another on the indemnification and inventory issues.

On March 30, 2007, Robert Kelly, counsel for the Postorivo Parties in a separate arbitration matter against Procaps, which is also a defendant in the Pulse Loader Litigation,[49] sent an email to Link summarizing various items he recently discussed with MMWR. The email stated in pertinent part:

> 3. . . . [A]s a result of recent contacts, it has come to our attention that you and/or Your Clients may be in possession, custody or control of documents and information pertaining to assets, liabilities and other matters, including legal rights and obligations, that were not transferred to Your Clients under the Asset Purchase Agreement and/or were specifically retained by Old NPS (collectively "Old NPS' Retained Assets, Rights and Liabilities").
>
> 4. . . . [W]e have advised you that, per the APA, Old NPS retains, all rights with respect to Old NPS' Retained Assets,

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> she would often double-back to well, what about other quality issues, and isn't there a history of quality problems with the inventory at NPS, things like that.
>
> And they just seemed to really be odd questions, and it didn't make sense until later on when I realized – this was way before May, this was early on in the year – later on when I –
>
> Q. February, March?
>
> A. Yeah, February, March time frame.

Id. at 144-45.

[49] Scheff Aff. ¶ 15.

> Rights and Liabilities, including the right to protect from disclosure any and all confidential and/or privileged information relating to same and that old NPS has not, does not and will not waive these rights as to Your Clients or any other party regardless of the circumstance under which such confidential and/or privileged information was obtained.* Old NPS' position applies not only to the Pulse Loader Litigation but to all circumstances and matters, legal and non legal.
>
> *** Please be advised that Old NPS hereby demands the return of any and all docs referenced in items 3 and 4, above, which includes docs that you and/or Your Clients may have come into possession of through the APA or that may have been procured by the current or former employees, agents, reps and principals of Old NPS.**[50]

In a reply copied to Scheff, among others, Link evasively stated as to Item 3: "I do not know what you are referring to, nor do I know the identity of your 'recent contacts.'" Link further responded: "Regarding your demand for return of documents currently in my clients' possession, you have not specified what documents you refer to and I am unaware of any such documents which are not *rightfully* in my clients possession. I suggest that you be more specific regarding your demand."[51] Although Link's response may be consistent with Scheff's professed belief at the time that NPS retained "zero privileges" after the APA transaction, I find it disingenuous.

Link was present with Scheff at the January 3 meeting in which Campo raised the issue of attorney-client privilege with respect to the pre-APA documents and information in his possession.[52] By the end of January 2007, MMWR knew KEE was directly

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50 Campo Aff. Ex. C.

51 *Id.* (emphasis added).

52 Campo Aff. ¶ 15; Campo Dep. at 54; PSOB 10 n.6.

adverse to the Postorivo Parties regarding their compliance with the indemnification provisions of the APA.[53] Scheff of MMWR worked for KEE on both the Pulse Loader Litigation and the indemnification claims.[54] Further, Brookshire's testimony discussed *supra*, shows Link knew about KEE's potential indemnification claims against NPS when she received Kelly's email in late March 2007.[55]

Furthermore, in late March 2007, Dombrowski and Kingsbury discovered a large volume of Campo's documents seemingly abandoned in a KEE facility in Sewell, New Jersey.[56] Kingsbury, believing that some of these documents could be responsive to the document request in the Pulse Loader Litigation, notified Link and Scheff.[57] The documents were then compiled into a total of sixty-seven boxes and transferred to MMWR's possession, where members of the Pulse Loader Litigation team reviewed them.[58] Those documents undoubtedly included at least some emails and communications to and from Campo related to pre-APA matters, and, most likely, the negotiation of the APA and the excluded assets and liabilities. Thus, I find Link's

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53 *See* Dombrowski 11/12/07 Dep. at 266, 281.

54 Scheff Supp. Aff. ¶ 2.

55 Brookshire Dep. at 144-47.

56 Kingsbury Dep. at 134. The documents were Campo's, and Campo avers that he moved them from his office when he needed to move offices. *Id.* at 139-40; Campo Dep. at 128-29.

57 Kingsbury Dep. at 134, 142. When Kingsbury opened one of the boxes, he found an email from Campo. *Id.* at 139-40.

58 *Id.* at 141-44; Gunn Dep. at 187-88. The documents were transported to MMWR's Cherry Hill office.

statement that she (and, by implication, Scheff) did not know what Kelly was referring to difficult to believe.

4. KEE and MMWR's meetings with members of the Knowledge Group in May and June

In May 2007, Gunn, another member of the Knowledge Group, met at the offices of MMWR with Dombrowski, Scheff, and Ziegler for the purpose of discussing this litigation.[59] During the meeting, Gunn learned that an MMWR attorney was reviewing Campo's emails and that Dombrowski knew the content of some of those emails.[60] None of the evidence concerning this meeting, however, directly indicates MMWR or Dombrowski examined any privileged emails of NPS, Postorivo, or Campo.

Dombrowski described a meeting on May 29, 2007, with Ziegler present, in which he gathered former NPS employees together "telling them that I wanted to get every piece of information that was possible to demonstrate that the factual references in [the Postorivo Parties'] litigation [against him] were wrong. And I probably said that I wanted to bury Mr. Postorivo."[61] Whether this was the same meeting Gunn testified occurred in May 2007, or another meeting, is unclear.

In any event, the evidence shows there were at least two such meetings.[62] At the first meeting, which involved Gunn, Dombrowski, and Zeigler, a template list of the

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59 Gunn Dep. at 99.

60 POB Ex. 7, Gunn Dep., at 101-04, 185. Gunn believed the emails were pulled from the company server.

61 Dombrowski Dep. at 268-69.

62 Gunn Dep. at 99-100.

topics Dombrowski sought information on was generated.[63] In the second meeting, Dombrowski, Scheff, and Ziegler again met with members of the Knowledge Group.[64] For this meeting, most of the Knowledge Group members, including Gunn, Brookshire, Spicer, Johnny Postorivo, and Amaya, convened in a conference room at KEE to teleconference with Dombrowski, Ziegler, and possibly Scheff, who were in MMWR's Philadelphia office. During the meeting, members of the Knowledge Group were given the template list of topics. They were directed to gather paper and electronic information on each topic listed, including communications with Campo or Postorivo, any information relating to Campo or Postorivo, and any information concerning vendors, including discussions with vendors and vendor agreements.[65]

In response to this request, Gunn copied some hard drive and email file accounts relating to due diligence information and pre-APA communications he had with Campo.[66] Gunn sent this information directly to MMWR.[67]

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63 *Id.* at 99-100. Gunn had been designated to be KEE's point-person to work with MMWR in the process of gathering documents in connection with discovery in this action and the Pulse Loader Litigation. DSAB at 37-38; Gunn Dep. at 182-83.

64 *Id.* at 97, 99; Brookshire Dep. at 109. Defendants assert that the second meeting occurred on June 20, 2007. DSOB at 38. Gunn, however, testified that the two meetings were held very close together, approximately one week apart. Gunn Dep. at 131, 134-35. Thus, the second meeting may have occurred before June 20, 2007.

65 Brookshire Dep. at 103-09; Gunn Dep. at 145-46.

66 Gunn Dep. at 147-48, 167.

67 *Id.* at 147-48.

As this controversy progressed, members of the Knowledge Group felt the need for separate counsel. After the Knowledge Group's two meetings with Dombrowski and MMWR attorneys, and at their urging, members of the Group met on June 22, 2007, with Nicolas Nastasi, an attorney with a firm other than MMWR.[68] After meeting with Nastasi, the members of the Knowledge Group retained him, at KEE's expense, to represent them.[69]

Plaintiffs contend that before the Knowledge Group members retained counsel, Dombrowski attempted to manipulate all three of the likely witnesses from that Group who were directly involved in the inventory valuation for the APA, *i.e.*, Gunn, Johnny Postorivo, and Spicer. According to Gunn, Dombrowski approached him in January or February 2007 and said, "Norm, you know inventory was overstated, don't you?"[70] Gunn believes Dombrowski was not asking him a question, but rather telling him what to say.[71]

Another Knowledge Group member, Brookshire, recounted a conversation he witnessed between Dombrowski and Johnny Postorivo in Johnny's office in May or June 2007. Dombrowski directly asked Johnny what the term "fair market value" meant. When Dombrowski received an answer he did not like, he said, "no, that's not it," and asked the question again. Looking flustered and confused, according to Brookshire,

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68 *Id.* at 131; Scheff Supp. Aff. ¶ 8.

69 *Id.* at 128-30.

70 *Id*. at 72-73.

71 *Id.* at 157.

Johnny said he did not understand. Dombrowski responded, "then that's your answer, is that you don't understand and you didn't understand, is that right?" to which Johnny agreed. Brookshire further testified that Dombrowski told Johnny Postorivo that if he is "called on the stand or in court,… that's the answer I want to hear, is you don't, and Johnny said okay."[72] Both Brookshire and Gunn perceived Johnny as being under pressure and believing his job depended on providing the answers and information Dombrowski wanted him to provide.[73]

Additionally, Brookshire and Gunn testified that Spicer, who is now KEE's CTO, downplayed and misrepresented his role in the inventory valuation process at NPS.[74] Plaintiffs assert that Spicer perjured himself due to intimidation by Dombrowski, and that Dombrowski's actions have deprived Plaintiffs of testimony critical to NPS's defense that the APA inventory valuation was consistent with GAAP and past practice.

5. The parties file suit

On May 4, 2007, KEE terminated Postorivo. On the same date, KEE also sued NPS and Postorivo in the Superior Court of the State of Delaware for breach of contract, misrepresentation, and unjust enrichment based on the dispute regarding post-closing

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[72] Brookshire Dep. at 129-31. Gunn provided additional testimony suggesting Dombrowski tried to intimidate Johnny Postorivo or manipulate his testimony. Gunn Dep. at 25-26, 30-32, 158-59, 160-61.

[73] Brookshire Dep. at 158-61; Gunn Dep. at 160-61.

[74] Gunn Dep. at 152-56; Brookshire Dep. at 127-28.

indemnification. KEE's indemnity claims against the Postorivo Parties exceed $8.7 million.[75]

On May 29, 2007, NPS and Postorivo commenced this action in the Court of Chancery against KEE, Dombrowski, and others. On June 20, 2007, this Court granted a stipulation of the parties consolidating the two actions in Chancery. As of June 26, 2007, when NPS and Postorivo filed their First Amended Complaint in the consolidated action, the named defendants included two individual directors, Dombrowski and Brent Leffel, and five business entities, AG Paintball Holdings, Inc., KEE Action Sports Holdings, Inc., KEE Action Sports LLC, KEE Action Sports I, LLC, and KEE Action Sports I UK Ltd. For purposes of this opinion, references to KEE and Defendants are intended to be synonymous and refer only to the five defendant entities, not Dombrowski and Leffel.

6. NPS's counsel's June 14 letter

On June 14, 2007, NPS counsel James Andrews of Blank Rome sent a letter to Scheff, cautioning MMWR and KEE about speaking with members of the Knowledge Group about matters related to the APA's representations and warranties, "some of which form the subject matter of our consolidated action in Delaware."[76] Noting that all members of the Knowledge Group, to varying degrees, performed functions for NPS related to this litigation, Andrews objected "to any attempt by KEE Action Sports personnel or its attorneys to make informal inquiry of any of these individuals and/or to

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[75] *See* POB at 8.

[76] Scheff Dep. Ex. 9.

obtain records therefrom relating to any of these or related issues without the consent of National Paintball and Gino Postorivo."[77] Andrews also asked for immediate notification if any such attempts had been made in the past and requested MMWR to direct KEE to make no such attempts in the future without the Postorivo Parties' knowledge and consent.

According to Defendants' own recitation of the facts,[78] on June 20, 2007, Dombrowski met with at least some members of the Knowledge Group, who were then employed by KEE. Ziegler of MMWR also attended the meeting. "[T]he purpose of the meeting was to begin the process of gathering documents belonging to KEE that were relevant to the pending litigation and that would be used to defend the lawsuit that the Postorivo Parties had initiated against KEE."[79] This meeting may coincide with one of the occasions described previously at which Dombrowski and MMWR personnel met with former employees of NPS, but whether it does or not is immaterial. It is important, however, that this meeting occurred after Andrews' June 14 letter complaining about attempts by KEE to make inquiries of former NPS employees to obtain records or other information relating to the issues in this action. Despite having unequivocal notice of the Postorivo Parties' privilege claims and objections to contacts with former NPS employees, Dombrowski and Ziegler went ahead with the June 20 meeting. Moreover,

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77 *Id.*

78 DSAB at 38-40.

79 DSAB at 39.

based on the evidence presented, I find that the former NPS employees were not represented by counsel at this meeting or told that they had a right to separate counsel, and that Dombrowski and Ziegler did not warn the Knowledge Group members about the need for them to protect privileged information of NPS or Postorivo.

7. Scheff's June 28 letter

As described in the next section, Plaintiffs filed the initial version of their Sanctions Motion on June 27, 2007. The next day, Scheff sent a letter to Andrews complaining about Plaintiffs' failure to provide him any advance notice of their intent to file the motion and putting Plaintiffs "on notice of several critical facts."[80] Among other things, Scheff's letter states:

> No one at KEE Action Sports or any of its related entities, and no one at Montgomery McCracken, has interviewed any former employees of [NPS] about any topics that might touch on any privileged communications that those former employees may have had with any attorneys for NPS, including John Campo. …
>
> Over the course of the last several months, your firm and other lawyers acting on behalf of NPS and Gino Postorivo have made various assertions of attorney-client privilege, many of which assertions have been substantially broader than the claims you have made in yesterday's motion. We have disagreed with the broad assertions of privilege that were made by NPS and its related entities. Nevertheless, we have always been sensitive to the privilege issues that have been raised, and have acted at all times to take reasonable precautions to ensure that KEE Action Sports and its counsel have not reviewed any documents to which NPS and Gino

[80] PRB Ex. A at 1.

> Postorivo have a colorable claim to the protection of an attorney-client privilege.[81]

These statements are carefully worded and, although literally they may be true, they easily could be misunderstood.

As to the first sentence quoted above, the evidence shows, for example, that KEE and attorneys from MMWR spoke to former employees of NPS about topics that touch on matters relevant to the issues in this indemnification action on more than one occasion. Arguably, those conversations might not qualify as what Scheff dubbed an "interview[]," because MMWR's focus was on gathering documents for discovery. And, perhaps, a discussion with members of the Knowledge Group about how NPS valued its inventory for purposes of the representations and warranties in the APA "might [not] touch on any *privileged communications* that those former employees may have had with any attorneys for NPS," including Campo. But both those readings seem strained, at best.

The second paragraph of the quoted excerpt from Scheff's letter contains another statement difficult to square with the facts developed as to the Sanctions Motion. In particular, I doubt the accuracy of the representation that KEE and MMWR "have always been sensitive to the privilege issues that have been raised, and have acted at all times to take reasonable precautions" to ensure that they have not reviewed any documents to which NPS and Gino Postorivo have a colorable claim of privilege. By "colorable claim"

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[81] Ironically, immediately after the portion of Scheff's letter quoted in the text, Scheff admonishes NPS's counsel to make sure they obtain KEE's prior permission before they allow anyone associated with NPS to review any documents on Campo's computer that might belong to KEE.

of privilege, Scheff appears to be referring narrowly to the explicit claim the Postorivo Parties made in early June regarding communications relating to the negotiation of the APA. As KEE admitted one week after Scheff's June 28 letter in its answering brief on the Sanctions Motion, NPS's position on that point was not only colorable, but also correct.[82] As to NPS's earlier claims of privilege and its suggestion that Campo waived any claim of privilege for the sixty-seven boxes of his documents by "abandoning" them, Scheff seems improperly to have equated "colorable" to sufficient to convince KEE and its attorneys that the claims of privilege were, in fact, well-founded.[83]

II. PROCEDURAL HISTORY

Plaintiffs originally styled their Sanctions Motion as a motion to preclude Defendants' violation of the attorney-client privilege and improper contact with employees. The motion included several components and was initially briefed and argued in the summer of 2007. Specifically, Plaintiffs' motion initially sought confirmation of their right to retain the attorney-client privilege as to communications and materials associated with: "[i] the negotiation of the purchase agreement at issue in this litigation; and (ii) … assets and liabilities specifically excluded from the transfer to

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82 *See* DAB at 14. At that point, the only opposition KEE raised to the Postorivo Parties' privilege claim for the negotiation documents was based on a waiver theory, which I later rejected.

83 This court has described a "colorable claim" as one that has some reasonable chance of succeeding, if the facts support it, *see* Transcript of Oral Argument at 76, *Creo, Inc. v. Printcafe Software, Inc.*, C.A. No. 21064 (Del. Ch. Feb. 21, 2003), and, in another case, as "a claim worthy of serious consideration." *CBOT Holdings, Inc. v. Chicago Bd. of Options Exch.*, 2007 Del. Ch. LEXIS 114, at * 14 (Aug. 3, 2007).

Defendants and retained by Plaintiffs under the purchase agreement."[84] In opposing this part of Plaintiffs' motion, Defendants argued that any privilege Plaintiffs previously may have had passed to Defendants by virtue of the APA.

Plaintiffs' Sanctions Motion also sought the Court's guidance as to their right to protect their attorney-client privilege, particularly in connection with Defendants' interviews of Plaintiffs' former employees, then in Defendants' employ, regarding matters as to which Plaintiffs asserted privilege. Lastly, Plaintiffs claimed Defendants had irreparably violated their privilege rights and sought an appropriate sanction, including disqualification of Defendants' counsel or dismissal of this action.

At argument in 2007, the Court ruled on certain aspects of Plaintiffs' motion, and reserved decision on others. In addition, the Court authorized discovery pertaining to some of Plaintiffs' allegations of misconduct.

On February 7, 2008, I issued an opinion regarding the portion of Plaintiffs' Sanctions Motion that dealt with the scope of Plaintiffs' retained privilege. In that opinion, I held that under New York law NPS and Postorivo retained their attorney-client privilege for communications regarding assets and liabilities excluded from the APA.[85] I also confirmed "the parties' agreement that Defendants [the KEE parties] hold the attorney-client privilege with respect to communications regarding the operation of the business before and after the APA, and Plaintiffs hold the privilege as to communications

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84 POB at 2.

85 *Postorivo I*, 2008 WL 343856, at *8 (Del. Ch. Feb. 7, 2008).

[among the Postorivo Parties] regarding the negotiation of the APA."[86] Relying on *Tekni-Plex, Inc. v. Meyner & Landis*,[87] I noted that "when the successor [, which purchased substantially all of the assets of a predecessor entity,] continues the operations of the predecessor company, the successor company stands in the shoes of prior management and holds the privilege with respect to communications regarding the company's management."[88] The successor company, however, does not hold the attorney-client privilege for the predecessor's communications relating to the agreement because of the adversarial relationship that existed when the parties were negotiating.[89]

Although the APA expressly excluded certain assets and liabilities,[90] KEE maintained that NPS's attorney-client privilege passed as a whole to KEE and that the privilege could not be split among several different entities. Notably, KEE's position regarding the attorney-client privilege as to pre-APA documents and information evolved over time. From as early as January 2007, KEE, through MMWR, contended that NPS's attorney-client privilege passed as a whole to KEE. By mid-June 2007, MMWR determined that the Postorivo parties retained the privilege as to any communications they had regarding the negotiation of the APA.

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86 *Id.* at *1.

87 89 N.Y.2d 123 (N.Y. 1996).

88 *Postorivo I*, 2008 WL 343856, at *5.

89 *Id.* at *5-6.

90 Sections 1.2(e) and 1.6 of the APA, for example, state that NPS retained and did not transfer to KEE the right to pursue a cause of action defined as the "Procaps Litigation."

Still later, KEE changed its position again. After extensive discovery related to the Sanctions Motion, Defendants filed a supplemental answering brief on January 24, 2008, in which they stated that they would not object to the Postorivo Parties identifying and removing on attorney-client privilege grounds documents relating to the retained assets and liabilities under the APA.[91]

Pursuant to the Court's 2007 ruling, the parties engaged in discovery as to the manner in which KEE and MMWR had dealt with former NPS documents and interviews with former NPS employees. Following months of written discovery and depositions, the parties submitted extensive supplemental briefing in January 2008 on the Sanctions Motion.[92] The Court heard argument on the outstanding portions of that motion on March 7, 2008.[93]

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91 In *Postorivo I*, I held this concession did not render the issue moot, because Plaintiffs also argued that KEE's and MMWR's actions constituted bad faith litigation warranting attorneys' fees. 2008 WL 343856, at *7. Ultimately, I upheld Plaintiffs' claims of privilege, but refused to award attorneys' fees against Defendants on that issue. *Id.* at *8.

92 After five months of discovery and two rounds of briefing on the Sanctions Motion, the parties have submitted 211 pages of briefs; 15 deposition transcripts, representing 2,461 pages of testimony; 79 pages of witness and expert affidavits with 123 pages of exhibits; and 1,535 pages of other exhibits. Plaintiffs also produced a 2,999-page privilege log and, more recently, a revised privilege log containing 1,179 pages (in *six*-point font).

93 On February 22, 2008, Defendants moved to strike Plaintiffs' supplemental reply brief, filed January 31, 2008, on the grounds that it raised new matters that should have been included in a full and fair opening brief. Defs.' Mot. to Strike at 1-2. For the reasons stated at the March 7, 2008 argument, I deny Defendants' motion to strike. *See* Tr. at 4-5.

III. PARTIES' CONTENTIONS

The Postorivo Parties make three principal allegations: (1) on January 8, 2007 KEE, with the approval and at the direction of MMWR, improperly copied the contents of attorney Campo's computer for the purpose of accessing and reading privileged information contained on that computer; and the executives of KEE and lawyers from MMWR (2) mishandled documents in KEE's possession as to which the Postorivo Parties asserted claims of attorney-client privilege, and (3) improperly interviewed former NPS employees (who were current employees of KEE), namely members of the

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One aspect of the motion to strike I did not rule on at argument involves Plaintiffs' contention in their reply brief that Defendants were improperly attempting to use the attorney-client privilege as a sword and a shield, and had thereby vitiated their claim of privilege by placing the substance of their discussions with the NPS Knowledge Group "at issue." *See* PSRB at 22-24. In particular, Plaintiffs complain that when they asked in depositions about what was said in the meetings KEE and MMWR had with members of the Knowledge Group, Defendants directed the witnesses not to answer on privilege grounds. In support of their supplemental answering brief, however, Defendants filed supplemental affidavits from Scheff and Ziegler in which they made statements about what they and Dombrowski did and did not discuss in meetings with former employees of NPS.

By way of relief from this alleged unfairness, Plaintiffs sought a ruling that Defendants waived any claim of privilege they might have had by putting the content of the subject communications at issue. Alternatively, Plaintiffs urged the Court to disregard the supplemental affidavits of Scheff and Ziegler. Tr. at 15-16.

Because Defendants did direct a number of witnesses not to answer questions in deposition based on claims of attorney-client privilege or work product, I agree with Plaintiffs that it would be unfair to permit Defendants to rely on the supplemental affidavits purporting to state what was or was not said in the meetings in question. Therefore, I have disregarded and hereby order stricken those portions of the supplemental Scheff and Ziegler affidavits that address the substance of any communications as to which Defendants blocked discovery on the basis of privilege, such as, for example, paragraph 6 of the Supplemental Ziegler Affidavit.

Knowledge Group, about documents and information relating to NPS's inventory valuations in the APA and other matters at issue in this litigation. Plaintiffs further contend the misconduct of KEE and MMWR has substantially prejudiced them and warrants dismissal of this action or disqualification of MMWR. The Postorivo Parties also seek their attorneys' fees and expenses in prosecuting their Sanctions Motion.

Defendants and MMWR deny any wrongdoing. They further deny Plaintiffs' claim of prejudice and submit no sanction is justified in the circumstances of this case.

IV. ANALYSIS

Broadly, Plaintiffs seek disqualification of MMWR based on alleged violations of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") 4.2, 4.4, and 8.4 and the resulting prejudice. Plaintiffs also seek dismissal of KEE's claims on the grounds that Defendants' misconduct amounts to fraud on the court. All of Plaintiffs' claims center around MMWR's and KEE's alleged failure to properly respect and preserve the Postorivo Parties' claims of attorney-client privilege. Specifically, Plaintiffs assert misconduct regarding certain documents and information in KEE's possession as well as Defendants' contacts with former NPS employees then employed by KEE.

A. When and to What Extent Were MMWR and KEE on Notice of Plaintiffs' Claims of Privilege?

In determining whether MMWR and KEE engaged in misconduct warranting sanctions, a threshold issue is when and to what extent Defendants were on notice of Plaintiffs' claims of privilege. Although there is some evidence that Defendants first received notice of the Postorivo Parties' claims of privilege in November or December

2006, Defendants certainly had notice by early January 2007. On January 3, 2007, Campo met with MMWR attorneys Scheff, Kingsbury, and Link regarding the Pulse Loader Litigation. In that meeting, Campo generally invoked the attorney-client privilege regarding his communications with NPS before the APA closed. Later that day, Scheff discussed Campo's assertion of privilege with Dombrowski. Therefore, by January 3, 2007, MMWR and KEE were on notice of a general assertion of privilege by Campo.

Campo's assertion of privilege was reinforced in late March. On March 30, 2007, Robert Kelly of Duane Morris LLP, counsel for NPS and Postorivo in the ProCaps Litigation, sent an email to Link with a copy to Scheff, invoking the attorney-client privilege as to documents and information pertaining to Old NPS' Retained Assets, Rights, and Liabilities under the APA. Kelly also demanded the return of all such documents.

About ten weeks later, Plaintiffs reiterated their claims of privilege even more pointedly. On June 14, 2007, NPS's outside counsel Andrews, in a letter to Scheff, objected to any attempt by KEE or its attorneys to make informal inquiry of any of the Knowledge Group individuals or obtain records from them relating to any representations or warranties in the APA or related issues without the consent of NPS and Postorivo. Moreover, in a June 28 letter to Andrews, Scheff specifically asserted that MMWR and KEE had taken reasonable precautions not to review any documents to which NPS and Postorivo had a colorable claim of attorney-client privilege. This statement, at least

tacitly, acknowledged that MMWR and KEE knew of NPS's claims of privilege and that they had documents that might be privileged to NPS.

Based on this record, I find that by January 2007 MMWR and KEE knew Plaintiffs generally claimed privilege for pre-APA communications with at least Campo. As time passed, Defendants received increasingly more detailed information on the nature and the extent of Plaintiffs' assertions of privilege. By the end of March 2007, Defendants and MMWR knew Plaintiffs claimed attorney-client privilege for communications and information regarding the assets and liabilities of NPS excluded from the APA, and by mid-June 2007, they knew Plaintiffs claims also extended to pre-APA communications with Campo and others relating to the negotiation of the APA. Moreover, within a few days of receiving the June notice, MMWR had determined Plaintiffs' claim as to the negotiation documents had merit.[94]

B. The Legal Framework for the Court's Analysis

Much of Plaintiffs' argument for dismissal, disqualification, and fee shifting hinges on their contention that MMWR, acting in concert with KEE, violated the applicable Lawyers' Rules of Professional Conduct. Before turning to the specific conduct upon which Plaintiffs rely and the pertinent Rules, however, I examine first whether Plaintiffs have standing to challenge, and whether this Court has jurisdiction to assess, a lawyer's alleged breach of the Rules outside of a disciplinary proceeding. After

[94] Scheff Dep. at 259-60.

identifying the limited circumstances in which such standing and jurisdiction exist, I focus on each of the three Rules Plaintiffs contend apply here: DLRPC 4.2, 4.4, and 8.4.

1. Standing

The Delaware Supreme Court has held that "a non-client litigant *does have standing* to enforce the Delaware Rules of Professional Conduct in a trial court when they can demonstrate to the trial judge that the 'opposing counsel's conflict somehow prejudiced *his* or *her* rights' and calls into question the 'fair or efficient administration of justice.'"[95] The party seeking disqualification bears the burden of proving, by clear and convincing evidence: (1) the violation of a rule; and (2) how that violation will prejudice the fairness of the proceedings.[96] While generally disfavored, disqualification may be appropriate if there is "misconduct which taints the proceeding, thereby obstructing the orderly administration of justice . . . ."[97]

As Plaintiffs acknowledge, the majority of disqualification cases arise under the conflict of interest rules, specifically Rules 1.7 through 1.10, and the advocate or witness rule, DLRPC 3.7. Those rules do not apply here. Nonetheless, Plaintiffs advocate the use of the same two-prong analytical framework in the unusual factual scenario of this case. Defendants have not questioned the use of that approach.

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95 *In re Estate of Waters*, 647 A.2d 1091, 1095-96 (Del. 1994) (quoting *In re Infotechnology, Inc.*, 582 A.2d 215, 221 (Del. 1990)).

96 *Infotechnology*, 582 A.2d at 221. "The non-client litigant does not have standing to merely enforce a technical violation of the Rules." *Id.* Thus, there needs to be a showing of prejudice.

97 *Id.*

In the conflict context, the usual sanction for a violation of the rules of professional conduct is disqualification. The existence of prejudice from the conflict that would call into question the fairness of the proceeding provides a nonclient litigant with standing to challenge the conflict.

In the nonconflict situation, similar principles apply. As the Supreme Court stated in *Infotechnology*:

> 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. Likewise, the trial courts have no jurisdiction to entertain such applications except as noted above. Nonetheless, trial courts retain their traditional powers, which are indeed potent, to address, rectify and punish conduct of a party or counsel which threatens the legitimacy of judicial proceedings.[98]

In determining whether misconduct occurred that warrants disqualification, a court must weigh the policy disfavoring disqualification against its interest in protecting the integrity of the proceedings. To justify the disfavored sanction of disqualification, a moving party must establish, by clear and convincing evidence, (1) either an actual violation of the rules of professional conduct or litigation misconduct of counsel which (2) threatens the legitimacy of the judicial proceedings.

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98 *Id.* at 221-22.

2. Rules 4.2, 4.4, and 8.4

a. Rule 4.2

Although the parties presented voluminous briefing, they cited relatively few legal precedents governing the challenged conduct. The Postorivo Parties principally rely on Rule 4.2, a comment to the Rule, and two cases: *LaPoint v. AmerisourceBergen Corp.*[99] and *Monsanto Co. v. Aetna Casualty & Surety Co.*[100] KEE proffered no authority to the contrary.

Rule 4.2 of the DLRPC prohibits communication with a party represented by counsel about the subject of the representation, unless the counsel consents.[101] As comment 7 to the Rule further explains:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[102]

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99 2006 WL 2105862 (Del. Ch. July 18, 2006).

100 593 A.2d 1013 (Del. Super. 1990).

101 Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

102 DLRPC R. 4.2 cmt. [7].

Thus, comment 7 indicates that Rule 4.2 is designed to protect against an attorney having unfettered communications with persons like the NPS Knowledge Group with whose former employer the attorney's client has an adverse relationship.

Addressing the two cited cases chronologically, the Delaware Superior Court in *Monsanto* interpreted Rule 4.2 as including a cautionary component.[103] In *Monsanto*, an insured, Monsanto Company, sued several of its insurers. During the litigation, the defendant insurers' counsel employed investigators who interviewed former Monsanto employees. In those interviews, the investigators allegedly did not inquire as to whether the interviewee was represented by counsel, did not inform the interviewee that the investigator represented insurance companies involved in litigation adverse to Monsanto, and misrepresented the scope of the investigation.

In construing Rule 4.2 in the context of the challenged investigations, the court in *Monsanto* noted that the Rule does not prohibit *ex parte* contacts with former employees.[104] The Rule, however, does require cautionary steps be taken. The court reasoned that, because Rule 4.2 only applies if a lawyer knows a person is represented by counsel, the lawyer should ask the former employee whether he or she is represented.[105]

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[103] Rule 4.2 has been amended since the court construed it in *Monsanto*. The amendments to Rule 4.2, however, do not change the analysis here.

[104] 593 A.2d at 1016.

[105] *Id.* at 1018. Although the *Monsanto* court required this inquiry under Rule 4.2, the current comment to the Rule provides that the Rule only applies when the lawyer has actual knowledge of the fact of representation. Actual knowledge, however, may be inferred from the circumstances. "Thus, the lawyer cannot evade the

Further, Rule 4.2, read in conjunction with Rule 4.3, which concerns dealing with unrepresented persons, "contemplate[s] that former employees, unrepresented by counsel, be warned of the respective positions of the parties to the dispute."[106] To illustrate the form of an appropriate cautionary communication, the court in *Monsanto* provided an example, which is now sometimes referred to as a *Monsanto* letter.[107]

The Court of Chancery, in construing Rule 4.2 in *LaPoint*, stated:

> One party's attorney may contact a former manager of an adverse party *ex parte*, even if the former employee was privy to extensive privileged communications, as long as the attorney is seeking only key non-privileged facts, *and makes the former employee aware that she cannot divulge any communications she may have had with the adverse party's attorneys, or any other privileged information.*[108]

In *LaPoint*, former shareholders of an acquired corporation, Bridge Medical Corporation, Inc. ("Bridge"), sued the acquiring company, AmerisourceBergen Corporation ("ABC"), alleging breach of the merger agreement. Under the terms of the merger agreement, ABC paid a purchase price and agreed to make additional earnout payments, contingent upon its meeting certain financial targets. The plaintiff former shareholders of Bridge alleged ABC improperly calculated the financial targets.

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requirement of obtaining the consent of counsel by closing eyes to the obvious." DLRPC R. 4.2 cmt. [8].

106 *Monsanto*, 593 A.2d at 1018.

107 *Id.* at 1019-20.

108 *LaPoint*, 2006 WL 2105862, at *3 (emphasis added).

During the litigation, ABC's counsel met with Brenda Kraft, Bridge's Vice President of Finance and a former Bridge shareholder. Kraft participated in preparing the challenged earnout calculation. In the course of their meetings, ABC's counsel disclosed their mental impressions, conclusions, opinions, and developing legal theories to Kraft, and discussed with her the strengths and weaknesses of plaintiffs' claims. Several months later, ABC sold Bridge to a third party. All Bridge employees, including Kraft, were terminated. Nearly a year later, plaintiffs sent a *Monsanto* letter to Kraft. ABC objected to any *ex parte* contact with Kraft, contending such contact threatened the disclosure of privileged communications. Plaintiffs disagreed.

The court in *LaPoint*, noting the dispute was novel in Delaware, looked for guidance in the language of Rule 4.2 and its comments, as well as in the actions of other jurisdictions and the ABA. Consistent with the majority of states and the ABA, the Court of Chancery held that an attorney who intends to contact a former manager of an adverse party *ex parte*, and seeks only key nonprivileged facts, must, at the outset, make the former employee aware that she cannot divulge attorney-client privileged, or any other privileged information.

b. Rule 4.4

Rule 4.4 provides in pertinent part that: "In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person]." Under DLRPC R. 4.4(b), a lawyer who knows or reasonably should know he received a document inadvertently has an affirmative duty to promptly notify the

sender.[109] The comment to Rule 4.4 explicitly confirms that it proscribes unwarranted intrusions into privileged relationships.[110]

c. Rule 8.4

Rule 8.4 provides, in pertinent part, that it is professional misconduct for a lawyer to: "(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another . . . ; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice . . . ."

C. Are KEE or MMWR Guilty of Misconduct?

The next step in addressing Plaintiffs' Sanctions Motion involves determining, in the context of the legal principles just recited, whether KEE or MMWR or both have acted improperly. This analysis will focus on three categories of wrongdoing alleged by the Postorivo Parties: (1) the secret imaging of Campo's desktop computer; (2) the improper handling of privileged documents in KEE's possession; and (3) MMWR and

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[109] To the extent certain attorneys from MMWR were subject to the New Jersey Rules of Professional Conduct before the initiation of litigation in Delaware on May 4, 2007, their professional obligations under the New Jersey rules are identical in all material respects to those under the Delaware rules. *See, e.g.,* New Jersey Rules of Professional Conduct R. 4.4.

[110] DLRPC R. 4.4 cmt. [1] states:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

KEE's improper contacts with former NPS employees, specifically the Knowledge Group.

1. Imaging of Campo's desktop computer

On or about January 8, 2007, KEE, at Dombrowski's direction, made a backup of the desktop computer of Campo, who was then a consultant to KEE and had been counsel to the Postorivo Parties before the asset purchase transaction. KEE's IT personnel made the backup after business hours and without providing prior notice to Campo or seeking his consent. The evidence indicates, however, that Campo contemporaneously knew that KEE's IT personnel had requested a key to his office.

When Dombrowski directed the backing up of Campo's computer, he knew or should have known that Campo claimed privilege on behalf of the Postorivo Parties as to at least some of the documents in his files. On January 3, 2007, Scheff told Dombrowski about Campo's privilege claim. As a lawyer by training and previous work experience, Dombrowski knew or should have known that some of the documents on Campo's computer, which still contained most of his pre-APA files, were likely to be privileged. Yet, there is no evidence Dombrowski did anything to ensure that any claims of privilege by the Postorivo Parties as to the documents on Campo's computer were preserved until such time as any disputes regarding them could be resolved by either the parties themselves or the Court. In fact, Dombrowski apparently did not even inform MMWR about the backup of Campo's computer.

Although Plaintiffs alleged that KEE copied specifically targeted documents, including privileged documents, from Campo's computer, they failed after extensive

discovery to prove that allegation by even a preponderance of the evidence, let alone clear and convincing evidence. Rather, the evidence corroborates KEE's allegations that they backed up virtually all the files on Campo's computer other than system and program files.

Without question, KEE's inability to account for the subsequent destruction of all or a part of the backup is troubling and likely will be the subject of further proofs as this litigation progresses. For purposes of their Sanctions Motion, however, Plaintiffs have failed to prove any misconduct by KEE in that regard. The evidence indicates Dombrowski ordered the backup for business purposes. The fact that neither Dombrowski nor anyone else at KEE considered the information important enough to take appropriate steps to ensure the preservation of the backup, however, reduces my confidence in that conclusion. The same is true for KEE's explanation that the backup simply fell through the cracks and, in time, was overwritten in the normal course of events within its IT group. I remain skeptical of these explanations and, ultimately, may need to evaluate the credibility of Dombrowski and other KEE witnesses on this and related issues before this litigation concludes. Nevertheless, I do not find KEE's position so implausible as to warrant my rejecting it on this preliminary record or drawing an adverse inference against KEE based on the absence of the backup.[111]

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[111] Plaintiffs point to a federal court case in Minnesota, *Arnold v. Cargill Inc.*, 2004 WL 2203410 (D. Minn. 2004), where the court drew adverse inferences from the absence of certain evidence and found that privileged and confidential information was disclosed and discussed despite counsel's assertions to the contrary. The *Arnold* case is distinguishable from the present situation. The party against whom an adverse inference was drawn in *Arnold* identified and actively sought out a

Furthermore, Plaintiffs have failed to prove that MMWR either knew about, or was complicit in, the decision by Dombrowski to have Campo's computer backed up in January 2007. Thus, regarding MMWR's conduct as to the Campo computer, I find it had notice as of January 3, 2007, that Campo claimed privilege on behalf of NPS as to pre-APA communications within his possession at KEE. Although Scheff rightly may have concluded that Campo's assertion was incorrect to the extent he claimed that *all* pre-APA communications and documents in his files were the property of the Postorivo Parties, he also should have recognized that Campo may have had a legitimate claim of privilege as to at least some of his documents. In those circumstances, MMWR and, in particular, Scheff should have cautioned Dombrowski and his colleagues at KEE to handle Campo's files with care and in consultation with MMWR.

In hindsight, MMWR and Scheff should have exercised a greater degree of care as to Campo's documents, including his computer. Campo, however, raised a general and overly broad claim of privilege, and MMWR responded in kind. I reach a similar conclusion regarding KEE's copying of the Campo computer. Under all the

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former employee of a company it had sued in the past and planned to sue in the future. *Id.* at *7. That party then accepted, and retained for nearly a year and a half, copies of documents marked as privileged and confidential, styled the retention as a mistake by an anonymous case clerk, and refused to identify the clerk or to make him available for sworn testimony. *Id.* at *3-4. Consequently, the court in *Arnold* understandably viewed the accused party's acts with skepticism and rejected any assertion that the documents were not reviewed substantively by that party. *Id.* at *10, *13. The evidence here on Plaintiffs' Sanctions Motion fails to show intentionally deceptive conduct of the kind involved in *Arnold*. Thus, I do not consider it appropriate in this case to draw the adverse inferences the Postorivo Parties suggest.

circumstances, the failings of KEE and MMWR in this instance, standing alone, do not justify sanctions.

2. The handling of disputed documents in KEE's possession

Another category of alleged misconduct by KEE and MMWR relates to the handling of documents in KEE's possession as to which the Postorivo Parties asserted claims of privilege. One example is the large volume of Campo documents that were discovered in a KEE warehouse in or around March 2007. MMWR later placed those documents in sixty-seven boxes and evidently reviewed them for responsiveness to discovery requests in unrelated litigation between KEE and a third party. A second example involves the documents produced internally in response to the requests Dombrowski made in the presence of Scheff, Ziegler, or both to members of the NPS Knowledge Group for all documents relating in any way to the dispute with the Postorivo Parties regarding the inventory valuation in the APA and related matters.

By the end of January 2007, an adverse relationship existed between KEE and the Postorivo Parties as to the matters at issue in this action, and MMWR had been retained to represent KEE regarding those matters.[112] Furthermore, on March 30, 2007, the Postorivo Parties' counsel Kelly sent an email to MMWR expressly requesting return of documents in the possession of KEE regarding NPS's retained assets and liabilities under the APA on grounds of privilege, among other things. By mid-June 2007, the Postorivo

[112] The first of these two consolidated actions was filed on May 4, 2007.

Parties also had asserted to MMWR their claim of privilege to former NPS documents in the possession of KEE that pertained to the negotiation of the APA.

The ethical rule most pertinent to the handling of these disputed documents is DLRPC R. 4.4. Under Rule 4.4, a lawyer may not "use methods of obtaining evidence that violate the legal rights of [a third person]." The first comment to Rule 4.4 explains that, "such rights … include legal restrictions on … unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." Additionally, Rule 4.4(b) provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." According to the comments to Rule 4.4, a lawyer who receives such an inadvertently produced document must "notify the sender in order to permit that person to take protective measures."[113]

Turning to the circumstances of this case, I begin by noting that the documents at issue were rightfully in the possession of KEE as a result of the APA transaction and the fact that, at or around the time the APA closed, Campo and the Postorivo Parties did not segregate the documents they considered privileged from the files transferred to KEE. Thus, this case does not involve inadvertent production. Yet, during the relevant time period, KEE and MMWR knew that KEE was adverse to the Postorivo Parties, that those parties were represented by counsel, and that they claimed privilege as to documents in

[113] DLRPC R. 4.4 cmt. [2]. The comments further state that whether the lawyer needs to take additional steps, and questions of possible waiver of privilege, are matters of law beyond the scope of the Rules of Professional Conduct. *Id.*

KEE's possession that likely related to the subject matter of this litigation. In these circumstances, reasoning analogously to the inadvertent production situation addressed in Rule 4.4(b), I conclude the MMWR attorneys had a duty, at least, to notify counsel for the Postorivo Parties about the documents, so that they could take protective measures.[114] Moreover, this duty obtained whether or not KEE or MMWR questioned the validity of the Postorivo Parties' privilege claim or contended they had waived any such claim.[115]

The evidence shows that MMWR did not acknowledge to the Postorivo Parties the existence of the problem in terms of KEE's possession of documents as to which the Postorivo Parties asserted a colorable claim of privilege until late June 2007. One clear opportunity to do so would have been in response to Kelly's March 30 email expressly asserting a claim of privilege. Yet, Link of MMWR responded, with a copy to Scheff, that she did not know what Kelly was referring to, and regarding his demand for return of documents in KEE's possession, suggested that he be more specific about what documents he meant and asserted that she understood any such documents were "rightfully" in KEE's possession. This smacks more of gamesmanship than a good faith effort to deal with a complicated situation involving the legal rights of a third party to

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[114] I further note that the same files of Campo, for example, whether in paper or electronic form, undoubtedly also contained privileged information of KEE that KEE acquired in the APA transaction. Thus, KEE had no immediate duty to deliver those documents to the Postorivo Parties, absent an agreement among the parties regarding how the documents would be handled to preserve any colorable claims of privilege of either side, pending resolution of any disputes as to those privilege claims.

[115] *See* DLRPC R. 4.4 & cmts. [1], [2].

privileged material in the possession of MMWR's client. I find equally untenable MMWR's attempt to blame the Postorivo Parties and their counsel for the problem, because Kelly did not respond to Link's email. MMWR contemporaneously was reviewing or preparing to review for another litigation matter the sixty-seven boxes of Campo's documents that had been located in a KEE warehouse. MMWR knew or should have known that review threatened to be an unwarranted intrusion into the Postorivo Parties' attorney-client-privileged communications related to the subject matter of this dispute, as well. In those circumstances, MMWR had a duty to provide fair notice so that the Postorivo Parties understood the situation and could take protective measures, if necessary, to preserve their rights. MMWR and KEE failed to provide such notice, however, until late June 2007, almost three months after Kelly's email.

There also is no evidence MMWR or KEE took any precautions before late June 2007 to protect the Postorivo Parties' ability to press their claim of privilege before the documents of concern in this case were reviewed by KEE or its agents. To the contrary, on more than one occasion from March to mid-June 2007, Dombrowski of KEE within the presence or hearing of Ziegler and, perhaps, Scheff of MMWR asked members of the NPS Knowledge Group to produce all documents relating to the disputes underlying this litigation. Nor is there any evidence that KEE or MMWR provided any warning to the Knowledge Group members, or qualified their request for documents, to avoid the production to KEE or MMWR of privileged documents of NPS or Postorivo. In fact, the

testimony of the Knowledge Group members suggests no such warning or qualification was given to them before late June, when they were afforded separate counsel by KEE.[116]

The fact that KEE rightfully may have possessed the disputed documents does not excuse KEE or MMWR's conduct. In modern commercial litigation, it is becoming more common for outside counsel or other agents of a party to litigation to be in possession of privileged information of an adverse party. Many cases involve some form of electronic discovery, for example, and the sheer volume of documents involved often necessitates creative means to handle privileged documents. Consequently, for cost-saving or -shifting reasons, during the early stages of discovery, one side rightfully may come into possession of documents and information storage devices that contain privileged information or communications of an adverse party. It is essential to the integrity of the litigation process in such circumstances that the court and the parties can rely on counsel scrupulously to conform to their ethical obligations and to whatever treaties or agreements they work out for handling the particular discovery challenges they face. As reflected in the relatively recent amendments to the Federal Rules of Civil Procedure relating to discovery of electronically stored information, the success of that approach depends importantly on early and fulsome communications among counsel for the opposing parties about the discovery demands of their particular case. Similar communications in early 2007 in this case would have ameliorated many of the problems that arose. Indeed, had Scheff acted from the outset consistently with the guidelines he,

116 *See* Gunn Dep. at 167-68.

himself, requested in various communications in late June 2007 that the Postorivo Parties follow as to documents in their possession for which KEE claimed privilege, the Sanctions Motion probably could have been avoided.

In sum, having carefully considered the evidence and briefing, I conclude that Scheff and Ziegler are guilty of litigation misconduct in failing to act sooner to provide appropriate notice to the Postorivo Parties and to take reasonable steps in the meantime to avoid unwarranted intrusions upon their colorable claims of privilege.[117] For reasons discussed *infra*, I also find that the actions of Scheff, Ziegler, and MMWR have created a sufficient threat to the integrity of these proceedings that some form of sanction is warranted. Specifically, I find the problematic conduct here has tainted this proceeding and interfered with the orderly administration of justice. Any sanction I might impose would be under the traditional powers of trial courts recognized in *Infotechnology* "to address, rectify and punish conduct of a party or counsel which threatens the legitimacy of judicial proceedings."[118] Because the misconduct involved here does not involve an alleged conflict of interest, however, I do not consider it necessary to decide whether the actions of Scheff or Ziegler actually violate the ethical rules. They definitely come close to the line and create at least the appearance of impropriety in my opinion, but I have not

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[117] The evidence indicates attorney Link has not worked, and does not work, on this litigation. Nor has she been admitted *pro hac vice* for purposes of this case. Therefore, I have not considered whether any of Link's actions might warrant the imposition of sanctions.

[118] *In re Infotechnology, Inc.*, 582 A.2d 215, 221-22 (Del. 1990).

concluded that either attorney has, in fact, violated the applicable Rules of Professional Conduct.

3. KEE and MMWR's contacts with former NPS employees

As mentioned in the previous part, in May and June 2007, Dombrowski, Scheff, and Ziegler met with members of the NPS Knowledge Group who were then employed by KEE without any prior notice to, or involvement of, the Postorivo Parties. At one of those meetings between May 29 and June 20, Dombrowski told the former NPS employees that he wanted to get every piece of information possible to demonstrate that the allegations of the Postorivo Parties against him were wrong. Members of the Knowledge Group also were given a list of various topics and directed to gather information on each topic listed, including communications with Campo or Postorivo. One Knowledge Group member, Gunn, recalled copying some hard drive and email file accounts relating to NPS's due diligence and pre-APA communications he had with Campo, and sending them to MMWR. Nothing in the record, however, indicates that Dombrowski, Scheff, or Ziegler cautioned the Knowledge Group members at any meeting before late June to be careful not to disclose privileged information of NPS or Postorivo.

In addition, Dombrowski spoke to at least Gunn and Johnny Postorivo before June 2007 about the subject matter of this litigation. Again, there is no evidence Dombrowski or anyone at MMWR provided any warning to the former NPS employees about maintaining the confidentiality of any privileged information of NPS or Postorivo.

KEE and MMWR contend they had the right to engage in *ex parte* communications with former employees of NPS, so long as they sought only nonprivileged factual information, and potentially privileged information in the possession of the former employees was protected. According to Defendants, the rules regarding contacts with former employees of an adverse party are designed to protect the attorney-client relationship, including communications between an attorney and a client, not to protect facts from discovery. Therefore, Defendants posit, KEE executives, including Dombrowski, were free to talk with former NPS employees about factual issues, including inventory valuation, so long as they did not seek the disclosure of privileged communications.

Defendants' argument conflicts with Delaware law. The MMWR attorneys had an obligation to comply with the applicable rules of professional conduct. Under Rule 4.2 and *LaPoint*, a KEE attorney may have been free to contact former NPS employees *ex parte*, but he could not do so without first making the former employee aware that she could not divulge attorney-client-privileged, or any other privileged, information and providing the information required in *Monsanto*. The record contains no indication that such information was ever provided before late June, when the Knowledge Group obtained their own counsel. Rather, the record indicates the contrary. Indeed, as the events unfolded, the Postorivo Parties repeatedly conveyed their claims of privilege to MMWR with increasing specificity. Still, during the period before late June 2007, MMWR and KEE repeatedly contacted former NPS employees *ex parte*, many of whom then worked for KEE, without giving them the required cautionary instructions.

Neither the *Monsanto* nor the *LaPoint* opinion conditions the need to caution a former employee on whether the interviewer sought only nonprivileged, factual material. Either way a lawyer must give the required warnings.[119]

Because MMWR and Dombrowski, who arguably acted as MMWR's agent, failed to provide the necessary cautionary instructions, their actions at least create the appearance of violating the Rules of Professional Conduct, and undermine the integrity of these proceedings. I therefore conclude that KEE's and MMWR's contacts with former employees of NPS represent litigation misconduct deserving of sanctions.

D. Sanctions

Having found that Defendants and MMWR engaged in misconduct, I turn to what sanctions, if any, are appropriate. Plaintiffs seek dismissal of the action, disqualification of counsel, and attorneys' fees.

1. Dismissal

Plaintiffs have not cited any Delaware case in which a court has dismissed an action based on the misconduct of a party or its counsel, and I am not aware of such a precedent. Plaintiffs do rely, however, on a 2007 decision by the Delaware Superior Court in *Smith v. Williams* that discussed the circumstances that might lead to a sanction as drastic as dismissal.[120] Although the court in that case denied the motion to dismiss, it set forth an instructive framework for determining whether dismissal would be appropriate.

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[119] *LaPoint*, 2006 WL 2105862, at *3; *Monsanto*, 593 A.2d at 1020-21.

[120] 2007 WL 2193748 (Del. Super. Ct. July 27, 2007).

Dismissal is a drastic sanction "generally reserved for instances where the defaulting party's misconduct is correspondingly egregious."[121] In *Smith v. Williams*, the court observed that, as part of its inherent power to manage the cases before it, it has "considerable latitude in dealing with serious abuses of the judicial process," and has the discretion in the face of abuse or fraud to impose a sanction of dismissal.[122]

Although a precise definition of "fraud on the Court" is elusive, the courts typically confine the concept to serious cases of misconduct that threaten "the integrity of the court and its ability to function impartially."[123] The court in *Smith v. Williams* drew a distinction between extrinsic and intrinsic fraud for purposes of its analysis. Intrinsic fraud is fraud that "can be discoverable through the ordinary processes and rules of the trial court."[124] Extrinsic fraud, on the other hand, "affects the integrity and fairness of the judicial process itself," and includes situations "where a party is prevented by trick, artifice, or other fraudulent conduct from fairly presenting his claim or defenses or introducing relevant and material evidence."[125] The court held that only extrinsic fraud will justify dismissal to remedy a fraud on the court, and only where established by clear

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121 *Id*. at *3.

122 *Id.*

123 *Id*. at *4 (citations omitted).

124 *Id.* at *5.

125 *Id.* An example of such extrinsic fraud would be bribery of a judge or juror. *Id.* at *4.

and convincing evidence.[126] The court also noted that "perjury or fabricated evidence are not grounds for dismissal as these are evils that can be exposed at trial and court rules are fashioned to facilitate such revelations."[127]

A federal district court in New Jersey, in *Perna v. Electronic Data Systems, Corp.*,[128] cited by Plaintiffs, adopted a Magistrate Judge's report and recommendation and granted dismissal of the plaintiff's claim. Consistent with *Smith*, the court in *Perna* stated: "Dismissal . . . is the most severe sanction a court can levy against a party. It is justified under a court's inherent power in extreme circumstances, in response to abusive litigation practices, and to insure the orderly administration of justice and the integrity of the court's order."[129] In the absence of pertinent Third Circuit authority, the Magistrate Judge relied on Ninth[130] and Fourth Circuit[131] cases to develop a series of factors relevant to determining whether dismissal is appropriate. Those factors are:

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126 *Id.* at *4-5.

127 *Id.*

128 916 F. Supp. 388 (D.N.J. 1995).

129 *Id.* at 397.

130 *See Halaco Eng'g Co. v. Castle*, 843 F.2d 376, 380 (9th Cir. 1988). The court in *Halaco* considered six factors in determining whether to impose a sanction of dismissal: (1) the existence of certain extraordinary circumstances; (2) the presence of willfulness, bad faith, or fault by the offending party; (3) the efficacy of lesser sanctions; (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case; and finally, as optional considerations where appropriate, (5) the prejudice to the party victim of the misconduct; and (6) the government interests at stake.

131 *See U.S. v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993). The court in *Shaffer* considered the following factors before dismissing a case: (1) the degree

> (1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the consideration of lesser sanctions to rectify the wrong and to deter similar conduct in the future, (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case, (5) prejudice and the public interest, and (6) the degree of the wrongdoer's culpability.[132]

These factors provide a useful guideline for this Court in deciding whether dismissal is an appropriate sanction in this case.

Having considered the listed factors and in the exercise of my informed discretion, I conclude that the misconduct attributable to KEE and MMWR here is not so extreme or damaging to the orderly administration of justice in this matter or otherwise as to justify the drastic sanction of dismissal. The circumstances of the misconduct are not extraordinary or extreme. Further, as to the second and fifth factors identified in *Perna*, the improprieties in this case appear to stem from an overzealous approach to litigation, rather than an intent to deceive or defraud. Thus, the principal actors, Scheff, Ziegler, and Dombrowski, all bear a degree of culpability, but it is not of the highest degree. Plaintiffs have not shown that any of those three persons willfully sought to invade the Postorivo's Parties' attorney-client privilege. Instead, I find that Scheff and Ziegler

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> of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that courts seldom dismiss claims against blameless clients; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest.

[132] *Perna*, 916 F. Supp. at 398.

repeatedly underestimated their ethical obligations vis à vis the Postorivo Parties' claims of privilege and their and Dombrowski's ability to communicate with former NPS employees.

None of the other factors listed in *Perna* support a dismissal either. As explained in the next part, lesser sanctions than dismissal are available to rectify the wrong here and deter similar conduct in the future.[133] Lastly, regarding the fourth *Perna* factor, there is a relationship or nexus between the misconduct about which Plaintiffs complain and the matters in controversy. Nevertheless, Plaintiffs have failed to prove that the prejudice to them or the public interest from the actions of KEE and MMWR is so substantial that it can only be assuaged effectively by a dismissal. I therefore deny Plaintiffs' request for dismissal of this action on the basis of Defendants' alleged misconduct.

2. Disqualification of counsel

Alternatively, Plaintiffs seek disqualification of MMWR as counsel for Defendants in these consolidated actions. Having found that MMWR and KEE engaged in misconduct, I now must determine whether the misconduct caused prejudice to

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133 Although the Postorivo Parties engaged in extensive discovery, they did not prove that MMWR or Defendants accessed any specific privileged communication of theirs that Defendants are likely to be able to use to undermine the integrity of this judicial process. Moreover, I am satisfied that the complained-of misconduct involving communications with former NPS employees can be remedied at trial. For example, this Court can address Dombrowski's alleged manipulation of the testimony of Johnny Postorivo and Spicer by using our judicial system's usual tools for guarding against false testimony or fabricated evidence, such as cross-examination and the Court's own observation of a witness's demeanor and testimony at trial. *See Smith v. Williams*, 2007 WL 2193748, at *6 (Del. Super. July 27, 2007).

Plaintiffs or these proceedings. In deciding the prejudice prong of the disqualification test, the Court considers whether the challenged conduct will adversely affect the fair and efficient administration of justice.[134] In determining the extent to which prejudice exists, the Court may analyze the likelihood that allowing counsel to continue as trial counsel would "result in the release of detrimental client confidences" or "so threaten[s] to undermine the fairness and integrity of the proceeding as to warrant their disqualification."[135] The party seeking disqualification bears the burden of proving a basis for it by clear and convincing evidence.[136]

This case involves a series of incidents that amount to, at least, litigation misconduct and, perhaps, a violation of the ethical rules. Having found litigation misconduct, I consider the question of an appropriate sanction from that perspective. As previously noted, this Court has the power to address, rectify, and punish conduct of a party or counsel which threatens the legitimacy of judicial proceedings.[137]

The misconduct here occurred with respect to: (1) the handling of documents in the possession of KEE as to which the Postorivo Parties had asserted a colorable claim of privilege; and (2) improper communications with former employees of NPS, then employed by KEE, at a time when MMWR attorneys Scheff and Ziegler knew that KEE

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134 *Infotechnology*, 582 A.2d at 221.

135 *Unanue v. Unanue*, 2004 WL 602096, at *8 (Del. Ch. Mar. 25, 2004) (citing *IMC Global, Inc. v. Moffett*, 1998 WL 842312, at *3 (Del. Ch. Nov. 12, 1998)).

136 *Infotechnology*, 582 A.2d at 221.

137 *See id.* at 221-22.

was adverse to the Postorivo Parties regarding the subject matter of those communications and that those Parties claimed privilege as to information likely to be in the former employees' possession. The misconduct occurred during the period from January through June 2007. The MMWR attorneys most involved in the challenged conduct during that period were Scheff and Ziegler. Although a few other MMWR attorneys engaged in some questionable activities, their involvement was relatively isolated and less critical in nature.

Based on the evidence presented in connection with Plaintiffs' Sanctions Motion, I find it is more likely than not that Scheff and Ziegler were exposed to privileged client confidences of the Postorivo Parties regarding matters at issue in this litigation by virtue of their misconduct in the handling of documents and communications with former NPS employees. Thus, allowing them to continue as trial counsel would create a risk of the release or use of confidential privileged information of NPS and Postorivo. In addition, I find that Scheff and Ziegler's continued participation in this action would so threaten to undermine the fairness and integrity of this proceeding as to warrant their disqualification.

In reaching that conclusion, I rely, in part, on several apparent inconsistencies between the representations Scheff made in his June 28, 2007 letter to counsel for the Postorivo Parties and the facts suggested by the evidence developed in discovery, regarding the extent to which Scheff, Ziegler, and MMWR previously had taken appropriate precautions to ensure the preservation of the Postorivo Parties' claims of attorney-client privilege. For example, I infer from the evidence, including that related to

Scheff and MMWR's handling of the sixty-seven boxes of Campo documents and Gunn's testimony regarding the types of documents he delivered to MMWR, that Scheff and Ziegler did see, or at least had ready access to, privileged communications of the Postorivo Parties. Moreover, nothing in the evidence, apart from self-serving statements of Scheff or Ziegler, suggests that they or MMWR took any actions before late June 2007 to safeguard or preserve Plaintiffs' ability to pursue their claims of privilege as to documents in KEE's possession relevant to this action without interference from KEE or its agents. Yet, Scheff stated in his June 28 letter that KEE and MMWR "have always been sensitive to the privilege issues that have been raised, and have acted at all times to take reasonable precautions to ensure that KEE Action Sports and its counsel have not reviewed any documents to which NPS and Gino Postorivo have a colorable claim to the protection of an attorney-client privilege." When he made that statement, Scheff may have believed it to be true. The evidence, however, shows it is inaccurate or, at least, misleading. I am equally dubious of Scheff's assurances in his June 28 letter that no one at KEE or MMWR had interviewed any former employees of NPS "about any topics that might touch on any privileged communications that those former employees may have had with any attorneys for NPS, including John Campo." Perhaps no one at KEE or MMWR ever explicitly asked a former NPS employee about communications they had with an attorney. Fairly read, however, Scheff's statement goes much further than that, and is not borne out by the evidence.

As to Plaintiffs' request for disqualification of MMWR as a firm, however, I find they have not shown by clear and convincing evidence that the continued participation of

MMWR in this action would create a similar risk of the disclosure of privileged information or threaten the integrity of this proceeding. By the end of June 2007, MMWR had instituted adequate measures to protect the ability of NPS and Postorivo to pursue any privilege claims they might have without concern that KEE or its agents would review the subject information or documents before any dispute as to their privileged nature could be resolved. I also am mindful that disqualification motions are disfavored and subject to abuse in litigation for tactical and other reasons, and that depriving Defendants of their chosen counsel, especially in a case like this one with large numbers of documents, extensive electronic discovery, and numerous fact witnesses, would cause substantial prejudice.

Based on all the circumstances, I therefore hold that Plaintiffs have not shown an adequate basis to disqualify MMWR from continuing to represent Defendants. Nevertheless, for the reasons stated, I will disqualify Scheff and Ziegler from having any further involvement in these consolidated actions, and require MMWR to create an appropriate "firewall" to prevent any communications between Scheff and Ziegler, on the one hand, and any persons from MMWR who work on this matter, on the other, relating in any way to this action or the underlying disputes.

3. Attorneys' fees and expenses

Postorivo and NPS also seek an award of their attorneys' fees and costs in bringing the Sanctions Motion and conducting the related discovery. Defendants disagree and characterize the Sanctions Motion as nothing but a sideshow that itself is sanctionable.

Generally, Delaware follows the American Rule and litigants must pay their own attorneys' fees and costs.[138] As an equitable exception to the American Rule, however, this Court may grant attorneys' fees if it finds that a party brought litigation in bad faith or acted in bad faith during the course of the litigation.[139] Still, this Court does not lightly award attorneys' fees under this exception, and has limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons.[140]

Here, I find that Defendants' and MMWR's misconduct was vexatious and to some extent reckless. I therefore conclude it warrants at least a partial award of attorneys' fees. Because all the parties contributed to inflating the complexity and expense of the Sanctions Motion and Plaintiffs only partially succeeded on that Motion, it would not be equitable to hold Defendants and MMWR responsible for the entire cost, or even most, of it. Having reviewed the extensive briefing and record created through discovery, I would not be surprised if Plaintiffs' attorneys' fees and costs associated with the Sanctions Motion exceed $100,000. Indeed, the total expense greatly may exceed that amount. To the extent it does, however, tactical and other concerns of Plaintiffs likely contributed to the increased costs, and such fees and costs should not be borne by Defendants or MMWR.

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138 *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

139 *Mainiero v. Tanter*, 2003 WL 21003260, at *2 (Del. Ch. Apr. 25, 2003).

140 *See Slawik v. State*, 480 A.2d 636, 639 (Del. 1984); *Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000).

With those considerations in mind and to avoid wasteful and unproductive haggling over the nature and extent of Plaintiffs' reimbursable fees and expenses related to the Sanctions Motion, I will award Plaintiffs up to $50,000 in attorneys' fees and costs against Defendants and MMWR, subject to their receipt from Plaintiffs of a certification in good faith that the total of such fees and expenses exceeds that amount or, if not, the specific amount of the fees and expenses.

V. CONCLUSION

For the reasons stated, Plaintiffs' Sanctions Motion is granted in part and denied in part as follows:

1. Scheff and Ziegler are disqualified from any further participation in this action.

2. Plaintiffs are awarded their attorneys' fees and expenses in prosecuting their Sanctions Motion, other than the portion of the Motion decided in *Postorivo I*, in an amount not to exceed $50,000. Defendants, including KEE Action Sports Holdings, Inc., and MMWR are jointly and severally liable for the payment of these fees and expenses.

3. In all other respects, the Sanctions Motion is denied.

4. A copy of this opinion and order is being directed to the attention of Andrea L. Rocanelli, Esquire, Office of Disciplinary Counsel.

IT IS SO ORDERED.