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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

In this interlocutory appeal, Defendants-Appellants Interactive Communications International, Inc. and InComm Financial Services, Inc. (together, "InComm") seek reversal of the Superior Court's January 3, 2023 Memorandum Opinion and Order ("Order"), to the extent that the Order (1) denied InComm's motion to disqualify the law firm Bondurant, Mixson and Elmore LLP ("Bondurant"); and (2) denied InComm's motion to recover the costs InComm incurred in uncovering Bondurant's misconduct. In its detailed factual findings, the Superior Court recognized that Bondurant had invaded InComm's attorney-client privilege, "tainted the proceedings" by securing an "unfair advantage," made misrepresentations to the court, and forced InComm to incur prodigious and unnecessary expense. But the court disqualified only one Bondurant lawyer, and awarded only a small subset of InComm's fees. InComm was left to bear the consequences of Bondurant's misdeeds, in the form of a "tainted" proceeding and a hefty bill.

The events underlying InComm's motion began in October 2018, when InComm terminated the employment of Relator Russell Rogers. Unbeknownst to InComm, Rogers had recently filed the sealed *qui tam* Complaint in this case, against InComm and The Bancorp Bank, N.A. ("Bancorp"). When Bondurant, Rogers's counsel, got wind of his termination, the firm decided to hastily copy all 36,000

documents on his InComm-issued laptop before he returned it. Then Bondurant put the documents on its review platform and started perusing them.

Immediately, Bondurant noticed that some of the documents were clearly privileged. But that did not prompt the firm to pause or even curtail its review. For the next 20 months—as the State intervened, the Complaint was unsealed, and discovery began—Bondurant periodically rifled through its secret "trove" of InComm's files. The firm did not notify InComm or even the State that it had the files, until InComm elicited the information via an interrogatory in June 2020.

By that point, Bondurant had already gotten its money's worth in terms of strategic advantage from the laptop. It had reviewed nearly a thousand of InComm's documents, including 55 privileged documents—many of which it had viewed repeatedly, or flagged as documents of interest. The firm's forays into the laptop files coincided with critical points in the litigation, underscoring that it viewed the laptop as a font of strategic insight.

Although the review sessions were all conducted by a single individual, that individual, Mr. Benjamin Fox, was hardly a rogue actor. He was a senior Bondurant partner and lead counsel for Rogers, and he acted with the knowledge, assistance, and complicity of his colleagues at the firm. They, along with Fox, maintained the secrecy of the review by breaching their duty to notify InComm about the laptop. They retained access to the strategic insights that Fox gleaned, by breaching their

duty to implement an ethical screen or other prophylactic measure. And when InComm began raising questions about the laptop in June 2020, they threw their resources behind a "cover-up" that was arguably as troubling as the initial misconduct. A second Bondurant partner, David G. H. Brackett, first assured the court that the firm had "assiduously avoided" InComm's privileged documents, then rationalized the firm's conduct when a Special Master investigation proved otherwise. Because of this, as the Superior Court observed, "much ink was spilled, many hours were billed, and a pandemic came and went" before InComm learned the extent of Bondurant's invasions of privilege. Memorandum Opinion and Order ("Op.") 37.

When that process finally concluded, in January 2022, InComm moved to disqualify Bondurant and recover the fees incurred to uncover the misconduct. The Superior Court stopped at half-measures, disqualifying only Fox and awarding only a fraction of the fees.

The court's ruling was sharply at odds with its factual findings, which deemed Bondurant—not just Fox—responsible for the "surreptitious and protracted" review; the wholesale "failure" to notify InComm or implement an ethical screen; and the cover-up campaign that followed. *Id.* at 36-37. The court found that these violations had "taint[ed] these proceedings," and could "contaminat[e] . . . future tactical decisions" as well. *Id.* at 36-37. Nevertheless, after a three-paragraph analysis, the

court declared itself "reticent" to disqualify the firm, and held that awarding the full costs of Bondurant's misconduct would be too "extreme." *Id.* at 39, 42. InComm respectfully asks this Court to reverse the Superior Court's ruling, in part, by ordering disqualification of Bondurant and awarding InComm the fees it expended to uncover Bondurant's misconduct.

SUMMARY OF THE ARGUMENT

1. The trial court committed reversible error by declining to disqualify Bondurant because:

   a. It proceeded from the premise that Fox was the lone bad actor, such that the only question was whether his acts had "tainted" other attorneys. That premise is incorrect. The Superior Court found ***Bondurant as a firm*** responsible for significant ethical breaches, many of which—such as the lack of ethical screen, failure to notify InComm, and misrepresentations to the court—required the participation of attorneys other than Fox. Yet the court ignored all of Bondurant's misconduct when deciding whether to disqualify Bondurant. By considering only the extent to which Fox as an individual had "tainted" the firm, the court asked the wrong question.

   b. Even if that had been the right question, the court improperly placed the burden on InComm to demonstrate that Fox's ill-gotten knowledge had "tainted" other attorneys. This was backwards. Under the Rules of Professional Conduct, one attorney's knowledge of sensitive or "tainting" information is presumptively imputed to the firm, which bears the burden of rebutting that presumption by

demonstrating its timely adherence to concrete prophylactic measures. As the court concluded, Bondurant implemented ***no*** prophylactic measures. Indeed, the record shows that Fox, the lead lawyer on the case, freely shared his ill-gotten insights with his team for more than ***two and a half years***.

c. The court placed undue faith in Bondurant's future stewardship of the integrity of the proceedings, again in disregard of its own factual findings. Though the court acknowledged that the invasions of privilege gave Fox an ongoing capacity to "contaminat[e]" the proceedings, it permitted his firm to remain counsel of record. Op. at 37. Fox's colleagues must now scrupulously insulate him from the case—a case that Fox developed and masterminded for years, and in which he shares a financial interest with his partners. The rules do not countenance this degree of blind faith in any firm's capacity to act against its own self-interest. They demand concrete prophylactic measures, including prompt voluntary and financial screening, none of which Bondurant undertook. Yet the Superior Court not only placed this faith in Bondurant, but staked the integrity of the proceedings on it. What is more, the court did so immediately after recounting Bondurant's lengthy record of misconduct,

including misrepresentations to the court. This was credulous to the point of recklessness. Bondurant, the firm that repeatedly invaded InComm's privilege and repeatedly denied doing so, cannot now be appointed the guardian of Defendants' right to a fair proceeding.

2. The court erred by finding Bondurant responsible for the full costs of uncovering its misconduct, but awarding InComm only a fraction of those costs. The court's discretion with regard to fee awards, though broad, does not extend to wholly arbitrary rulings. Having concluded that InComm "should not . . . shoulder" costs occasioned by Bondurant's misconduct, the Superior Court should have awarded those costs, rather than an arbitrary subset of them. *Id.* at 42.

STATEMENT OF FACTS

A. Bondurant's Representation of Relator

From 2012 to 2018, Russell Rogers was employed by InComm, a financial technology company headquartered in Atlanta. A0459, ¶ 2; A0462, ¶ 9. InComm develops and distributes payment products, including Vanilla Gift Cards—prepaid debit cards that do not have dedicated users or accounts, and can therefore be easily transferred as gifts. Rogers's responsibilities at InComm placed him in periodic contact with the banks that InComm uses to service the cards and disburse card funds. A0459, ¶ 3. One of those banks, Bancorp, was chartered in Delaware at the time of Rogers's employment.

Rogers met Benjamin Fox in 2017, while shopping around for a lawyer to represent him in the case that he had concocted against InComm and Bancorp. A1118, ¶ 5. Rogers, who has no expertise in either unclaimed property or law, had come to believe that the Vanilla Gift Card funds InComm maintained at Bancorp were subject to escheat in Delaware, a state to which InComm has no past or present connection. Rogers wanted a lawyer to help him parlay this theory into a False Claims Act complaint alleging that InComm and Bancorp had "conspired" to avoid their escheat obligations to Delaware. A0075-76, ¶ 4. After "numerous" phone and in-person interviews, Rogers retained Fox "and the Bondurant firm." A1118, ¶ 5.

It was a logical choice. As the Superior Court noted, Fox has "over two decades' worth of experience in *qui tam* and whistleblower litigation." Op. 41; *see* A0257, ¶ 3-5. He acquired that experience at Bondurant, where he has spent his entire private-practice career, and where he became a partner in 2008. A0257, ¶ 3. Once retained, Fox "work[ed] closely with [Rogers] to develop . . . his claims." A1118, ¶ 5. On September 28, 2018, Rogers filed the Complaint under seal, signed by Fox and another senior Bondurant partner, John Floyd. A0114. The Complaint asserted that Rogers had been privy to "private conversation[s]" with InComm's top-ranking officers about the company's "potential liability" under Delaware law. A0088-89, ¶¶ 28-30.

B. Bondurant's Copying of the Laptop

InComm did not learn about the Complaint until the case was unsealed in May 2019. Op. 8. In October 2018, however, InComm terminated Rogers's employment as part of a reduction in force. *Id.* at 6. Before Rogers returned his InComm-issued laptop to the company, he brought it to Bondurant, which "copied all files saved on the laptop"—more than 36,000 in all. Op. 7. As the Superior Court concluded, Bondurant thus "secret[ed] a trove of materials . . . some confidential or proprietary, some clearly covered by a recognized privilege." Op. 22.

Although this "secreting" of files was Fox's idea, he did not keep it a secret within Bondurant. He enlisted several Bondurant employees to copy and load the

documents onto DISCO, the firm's document review platform. A1119, ¶¶ 7-8; A0257, ¶¶ 8-9. Fox also looped in the lawyers on his team. A1129. Thus, many individuals within Bondurant knew about the "trove" of laptop materials from the outset. And given the Complaint's allegations about Rogers's job responsibilities, they could easily have predicted that some of these documents were privileged. Yet no one implemented any prophylactic measure to account for this possibility.

C. Fox's Review of Privileged Documents

Soon after acquiring the documents, Fox began "rummaging through them," in the Superior Court's words, and immediately observed that some were indeed privileged. Op. 28. During his very "first review" of laptop documents, on November 20, 2018, Fox came across a memo about unclaimed property issues from InComm's outside law firm. Op. 27. But then he kept clicking through the files, without taking any precautions to avoid other privileged documents. He did not even take precautions to avoid ***that particular*** memo, which "he later accessed . . . three more times." Op. 32. Fox also promptly came across other clearly privileged documents, including email chains with advice from in-house counsel, and law firm mark-ups of InComm's contracts. A0661; A0668-69; A0686; A0703; A0716.

Fox knew, of course, that InComm's privileged documents were off-limits. Indeed, as he later told the Superior Court in a sworn declaration, he had cautioned Rogers never to reveal any privileged InComm information in their conversations.

A0258-59, ¶ 13. Yet the privileged laptop files seemed to give him no pause. After his first review session on November 20, Fox continued to "surreptitiously rummag[e] through [the documents] at will," without "tak[ing] any safeguards" at all to avoid privileged material. Op. 28, 29. Over his first eight review sessions between November 2018 and January 2019, Fox opened more than 800 of InComm's documents, 55 of which were privileged. Op. 2, 29 n.131; A0834-50. He viewed 21 of those privileged documents more than once; applied "tags" to 19 privileged documents indicating that they were "responsive" or reminding himself to "ask client" about them; and wrote customized notes on the DISCO platform on four of them. Op. 29 n.131. What work product he generated outside the DISCO platform, with the assistance of InComm's privileged documents, is anybody's guess. But it is clear that his invasions of privilege were extensive, and that he had "any number of opportunities to course correct yet failed to do so." Op. 27.

Though Bondurant later claimed that Fox had acted in furtherance of his duty of disclosure to the State, that rationale did not add up. First, Fox's invasions of privilege continued until June 2020—a year and a half after Relator's final "disclosure" of documents to the State. A0207. Second, as the court observed, even if Fox felt obligated to review the files, "[a]t a minimum, [he] should have implemented some form of reasonable remedial or prophylactic measure to ensure the safeguarding of InComm's privileged materials," such as seeking "the Court's

guidance," "creating 'filters' or 'search terms' to exclude patently privileged documents," or "employing a third-party vendor to conduct the initial document vetting." Op. 33. Although InComm doubts any of these would have been sufficient, it is striking that Fox did not bother with any of them, nor did any of his colleagues at the firm.

D. Bondurant's Surreptitiousness

Bondurant's invasions of privilege were not only egregious but, as the Superior Court emphasized, "surreptitious." Op. 28, 36. This is another problem with Bondurant's later claim to have acted in furtherance of disclosure obligations to the State. Neither Fox nor anyone else at Bondurant disclosed the existence of the laptop files to the State. Although Bondurant produced several dozen cherry-picked documents from the laptop to the State in January 2019, nobody told the State that the production came from a covertly copied hard drive containing thousands of other files, many of them privileged. A0956-57, ¶¶ 16-19. If Bondurant had truly acted out of a desire to be transparent with the State, it would have been transparent with the State.

Bondurant's "surreptitiousness" also prevented InComm from learning about the laptop copy until June 2020. As the Superior Court observed, the Complaint was unsealed in May 2019, at which point "Mr. Fox could have informed opposing

counsel that he had a large cache of InComm's materials." Op. 28. Instead, he stayed "quiet," as did every other lawyer at the firm. *Id.*

E. Bondurant's Use of the Documents

Bondurant used the laptop files, including the privileged ones, to glean strategic insights and tactical advantage. When Bondurant acquired the files in fall 2018, the State was deciding whether to intervene, and Fox had the "strong[]" impression that the State would not conduct its own "document subpoenas or investigatory depositions" before making that decision. A1129. The State planned instead to interview Rogers in "late January 2019" and make its decision shortly thereafter. *Id.*

Fox leaned heavily on the "trove" of laptop files when preparing for that meeting, and like any seasoned lawyer, he focused on the relevant ones. Among those were two attorney markups of InComm's agreement with Metabank, another bank that InComm contracts with to service the Vanilla Gift Cards. According to Rogers's Complaint, subtle differences between the Metabank agreement and InComm's analogous agreement with Bancorp somehow support the "fraud" theory. A0110, ¶ 61. Thus, when Fox found an attorney markup of the Metabank agreement among the laptop files, he duly marked it "Responsive," and made a note that the "[f]inal version" of the same contract was "attached as [an] exhibit to the complaint."

A0849-50. Throughout his various review sessions, he went back to look at the Metabank markups ***13 more times***. A0849-50.

As the Superior Court observed, "what exactly Mr. Fox gleaned and incorporated from viewing these privileged documents can never be fully determined." Op. 29. But whatever insights he gleaned, they seem to have paid off at the January 2019 meeting. Just as Relator had hoped, the State intervened a few months later, with no independent investigation.

Bondurant's use of the laptop files for strategic gain did not end with the January 2019 meeting. Between then and June 2020, Fox "rummag[ed]" through the files six more times, always prompted by points of leverage in the litigation. Op. 28; A0207. He searched and perused the files in May 2019, right after the State intervened; in January 2020, as he prepared to present argument in opposition to Defendants' motion to dismiss; and in March 2020, as discovery began. A0558; A1267. And although Fox accessed the documents sporadically, the insights he gleaned from them were always at his disposal.

F. The "Contamination" of the Firm

As the Superior Court concluded, this conduct conferred an "unfair advantage [that] taints the proceedings." Op. 36. The court recognized that Bondurant's insights from the documents may well have "contribute[d] to strategy," and could still cause further "contamination of future tactical decisions or filings." Op. 36, 37.

Though the Superior Court disqualified only Fox, its factual findings underscore that the risk of future "contamination" emanates from the entire firm. The court repeatedly emphasized Bondurant's failure to implement an "immediate . . . ethical screen" to contain the taint of exposure to privileged materials. Op. 26, 31, 41. That failure had cascading effects over a ***two-and-a-half-year*** period. Every single time Fox talked to a colleague about the case, he had another opportunity to convey the ways that InComm's privileged documents had shaped his thinking—even if neither he nor the colleague realized he was doing so. And because Fox was the lead lawyer on the case, his "tainted" insights into the case had great influence. Thus, from November 2018 until June 2021—when the court ordered Bondurant to ethically screen Fox—the unfair advantage that Fox gleaned from InComm's privileged documents was an uncontained contaminant throughout the firm.

G. Bondurant's Cover-Up

Bondurant's invasions of privilege would warrant disqualification even if the firm's misconduct had stopped there. But as the record shows, Bondurant then compounded its misconduct by engaging in a no-holds-barred cover-up.

The cover-up was set in motion by a May 1, 2020 interrogatory from InComm, which asked Relator to identify any documents he had taken from InComm upon his termination. *See* A0042; A0493. Bondurant's response to that interrogatory would

reveal its heretofore-"surreptitious" possession of the laptop copy. Op. 36. This provoked a flurry of activity at Bondurant in the days surrounding June 1, 2020, the due date of the interrogatory response. First, on May 28, Bondurant set up a second partner with access to the laptop files. A0534 n.3. That partner was David Brackett, who had never previously appeared in the case, but who regularly represents lawyers in professional liability matters. A0534, A1033. Next, on May 31, Fox searched and reviewed documents, some of them privileged, from the laptop. A0408-09; A0558; A0846.

The next day, June 1, Relator served his interrogatory responses, with the stunning revelation that Bondurant had copied and retained the laptop files. A0493-94. As of June 6, Bondurant had not received any response from InComm regarding the laptop files, but the firm did two notable things. First, Fox took one valedictory pass through the laptop database. A0558. Second, Bondurant abruptly archived (*i.e.*, shut down) the database, in apparent anticipation of InComm's objections. A0558.

Sure enough, on June 8, 2020, InComm sent a letter expressing concerns about the laptop. A0155-57. Relator's response—which, for some reason, came from Delaware counsel—assured InComm that the laptop files were being "retained securely by Georgia counsel [*i.e.*, Bondurant]." A0160. Relator did not mention

that the "secur[ing]" had happened only days earlier, or that up until that point, Bondurant had been rifling through the files with abandon. A0160.

This sequence of events is deeply revealing, of both Bondurant's consciousness of guilt and the laptop's strategic value. The fact that Bondurant hastily "cleaned house" by purging the laptop files—***before*** InComm raised a single concern—shows that it had known the wrongness of its actions all along. But the fact that Fox took two final passes through the files, immediately before archiving them, shows that Bondurant viewed them as a significant strategic asset.

H. Bondurant's Correspondence with InComm

As shown above, though Fox was responsible for the direct document review, he acted at all times with the imprimatur and cooperation of Bondurant. And beginning in summer 2020, Bondurant threw its resources into the cover-up.

When InComm looked at the laptop files, it soon noticed that many were privileged, and raised that concern in an August 2020 letter to Fox. A0521-23. Bondurant's response came not from Fox, but from Brackett, whose involvement in the case was news to InComm. Brackett assured InComm that Fox merely conducted a "targeted" review that ended in January 2019, and during which "***no privileged information was reviewed or identified.***" A0526 (emphasis added). As shown above, these representations were false.

Rather than rush into court, InComm gave Brackett an opportunity to explain the basis for his sweeping denials. As the parties' correspondence progressed, Brackett's explanations descended into absurdity. When asked how Bondurant could possibly have avoided every privileged document, Brackett replied that they had skipped documents that looked even "*potentially* privileged." A0532 (emphasis in original). When asked how Fox had decided which documents looked privileged, Brackett responded that Fox was a "seasoned practitioner," who, furthermore, had done "diligence" on InComm's in-house lawyers and compiled a list of their names on a notepad. A0533 n.1, A0540. When asked to provide that notepad list, Brackett said that it was "work product"; later, he advised that Fox had also lost it. A0554, A0557-58. With each letter, however, Mr. Brackett doubled down on his assurances that "no documents bearing any indicia of [InComm's] *potential* privilege have been read." A0545 (emphasis in original). He called InComm's questions "unwarranted and unnecessary" and lamented that "seem[ingly] . . . no information . . . would satisfy" InComm. A0540; A0547.

As InComm explained, that was untrue: InComm just wanted to know which of the 36,000 laptop files Bondurant had reviewed. A0549. Though Brackett admitted that that was technologically feasible, he ultimately demurred, asserting "work product" over the question of which InComm documents Bondurant had reviewed. A0552.

Thus, after almost two months and numerous letters, InComm hit a dead end in its efforts to obtain the facts from Bondurant. InComm was then compelled to make an application to the Superior Court for a Special Master investigation into the laptop review.

I. Bondurant's Misrepresentations to the Court

In opposition to InComm's motion, Bondurant redoubled its cover-up efforts. Bondurant suggested that, instead of having a vendor identify the roughly 850 documents that Bondurant had reviewed, InComm should submit a privilege log identifying which of the 36,000 documents on the laptop were privileged. A0221; A0251.

Bondurant also repeated to the court the same categorical denials that it had made to InComm. Fox, in a sworn affidavit, assured the court that he had "skipped over" any documents bearing "indicia of possible privilege," and that to the extent the laptop contained "potentially privileged information," that information "ha[d] not been read, disclosed, distributed, or otherwise used by anyone." A0956-57, ¶¶ 16-19. At a November 30, 2020 hearing on InComm's motion, Brackett not only repeated these false representations, but also took full ownership, on the firm's behalf, of Fox's activities. Brackett represented that "when ***we*** reviewed these documents . . . ***we*** did a targeted search, ***we*** did a limited search . . . for things that would be material." A0588 (emphasis added). He also assured the court that "***we***

have ***assiduously avoided*** looking at any privileged information and potentially privileged information." A0584 (emphases added). Nevertheless, the Superior Court granted InComm's application for a Special Master investigation.

J. Bondurant's Obstinacy

Although the investigation made fast work of Bondurant's claim to have "assiduously avoided" InComm's privileged information, Bondurant persisted in its refusal to take any remedial measures. A0584. In March 2021, InComm received a list of the documents Bondurant had reviewed, 55 of which were privileged.[1] A0649; A0479, ¶ 37; A0822-33. On March 30, InComm served a privilege log of those documents, which included, among other things, the memo from InComm's outside counsel, numerous emails with in-house counsel, and attorney markups of the Metabank agreement. A0835-50.

Meanwhile, the case was moving full steam ahead. On April 16, Plaintiffs served 13 deposition notices on various topics, including the Metabank agreement. A306-66. InComm, increasingly concerned about Fox's participation in these efforts, asked Bondurant to ethically screen Fox, but Bondurant refused. A0852-53; A0855-56.

[1] InComm initially identified 59 but, after further investigation of the documents, concluded there were 55. *See* A0479, ¶¶ 35-37.

Days later, Fox appeared at a meet-and-confer call about Plaintiffs' request for deposition testimony regarding the Metabank agreement—a subject on which Fox had reviewed privileged documents. A0849-51; A0862-63. InComm wrote to Bondurant reiterating its request for an ethical screen, but Brackett responded, in essence, that InComm was too late. He pointed out that Fox had been "participat[ing] in ongoing discovery" the whole time, and that InComm "should have promptly moved to stay all discovery" earlier if it wanted to keep Fox from "taint[ing] the proceedings." A0863.

That evening, the Special Master provided the "metadata" from Fox's review, bringing his invasions of privilege into even clearer focus. A0668-69; A0672-0694. Once again, InComm prevailed on Relator and the State for an ethical screen, not just of Fox but of Bondurant. Once again, Plaintiffs declined, forcing InComm to make an application to the court. A0865-66; A0868. On June 1, 2021, the Court granted InComm's requested relief, and stayed discovery in the case. A0375-78.

K. InComm's Motion

On January 7, 2022, the Special Master filed his final report. A0379. Shortly thereafter, InComm moved to disqualify Bondurant and recoup the prodigious fees and costs that it had expended in unraveling the record of misconduct. A0410-0411. Bancorp joined the motion. A0012-13.

On March 1, 2022, Bondurant filed its opposition, which denied any wrongdoing and offered yet another revisionist account. A0892-0950. Fox, who had assured the court in his November 2020 affidavit that he had "skipped" every privileged document, A0260, ¶ 6, filed a second affidavit responding to the Special Master's finding that he had in fact tagged many such documents as "Responsive" or "Ask Client." A0955-56, ¶¶ 12, 13. Although Fox's previous account had failed to mention these tags, in his March 2022 affidavit he recalled them with abrupt clarity, and informed the court that they had no significance. As he explained, he applied these tags to InComm's privileged documents because he thought they might be relevant "at first blush," but he "ultimately determined that the[y]. . . w[ere] not material." A0955, ¶ 12. He also acknowledged occasionally using the "Attorney-Client [Privileged]" tag, but allowed that he "may not" have used the tag for every privileged document that he "skipped." A0956, ¶14.

Bondurant's opposition also switched stories without missing a beat. Whereas previously Bondurant had categorically denied seeing any privileged documents at all, the firm maintained in its opposition that Fox's invasions of privilege were entirely justified. A0892-0940.

L. The Court's Order

On January 3, 2023, the Superior Court issued its order granting in part and denying in part Defendants' motion for disqualification and reimbursement. Though

the court recounted Bondurant's record of egregious misconduct, it declared itself "reticent" to disqualify the whole firm. Op. 39. The court also found that Bondurant's misconduct had resulted in considerable fees for InComm, but awarded InComm only the Special Master's costs, not its own attorneys' fees. *Id.* at 43.

ARGUMENT

I. THE TRIAL COURT ERRED IN DECLINING TO DISQUALIFY BONDURANT

A. Question Presented

Whether the Superior Court erred by denying InComm's motion to disqualify Bondurant, despite its findings of the firm's misconduct. InComm raised this issue in briefing before the Superior Court. *See* A0410-11; A0436.

B. Scope of Review

The Supreme Court "review[s] 'matters affecting the governance of the Bar' *de novo*." *Dunlap v. State Farm Fire and Cas. Co. Disqualification of Counsel*, 2008 WL 2415043, at *1 (Del. May 6, 2008) (quoting *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 218 (Del. 1990)). InComm does not seek to disturb the Superior Court's specific factual findings.

C. Merits of Argument

The Superior Court observed that InComm's motion involved "not-often visited territory," on which Delaware courts had had "little to say." Op. 11. This absence of guidance, combined with the court's recognition of the "extreme" nature of disqualification, caused the court to err in several respects. First, it approached the disqualification question as one of the firm's "vicarious" liability for Fox's individual misconduct, despite its extensive factual findings that ***the firm itself*** had engaged in misconduct. Second, it approached even that inapposite question by

improperly placing the burden on InComm to show "taint." Finally, it did not adequately account for the impact of its ruling on the integrity of the proceedings.

1. The Superior Court Erred by Ignoring Bondurant's Misconduct

The Superior Court found that "***Bondurant's*** surreptitious and protracted access to InComm's privileged materials . . . casts 'a substantial taint on any future proceedings.'" Op. 36 (emphasis added). The court also emphasized several ethical breaches that required the participation of attorneys other than Fox. Two of these—the failure to notify InComm, and the failure to implement remedial measures—it described as "weigh[ing] . . . heavily in favor of disqualification." Op. 30. The court also took note of Bondurant's after-the-fact misrepresentations. Op. 29.

But the court ignored all of this when deciding whether to disqualify Bondurant. It started from the premise that—contrary to its own factual findings—the bad "actions" were solely Fox's, and that the only question was whether his misconduct had "tainted" other attorneys at the firm. Thus, the Superior Court gave zero weight to Bondurant's misconduct when deciding whether to sanction Bondurant.

a. Bondurant Was Responsible for the Illicit Laptop Review

As a general matter, the Superior Court's factual findings attributed the laptop review to Bondurant as a whole, though Fox was the one to carry it out. The court held that "***Bondurant*** . . . examin[ed] . . . [the laptop's] contents," and described

"***Bondurant's*** surreptitious and protracted access" to the files. Op. 7, 36 (emphases added). In other words, the court concluded that Fox's actions with respect to the laptop were Bondurant's actions.

That conclusion was well-supported by the record. Fox, a veteran partner, conducted his illicit review with the knowledge and support of his colleagues at the firm, on behalf of a firm client, using the firm's resources. Op. 39; A1120, ¶ 8. What is more, Bondurant openly endorsed Fox's conduct as its own. At the hearing on InComm's October 2020 evidentiary motion, Brackett assured the court that "***we***," the firm, had conducted only a "targeted" review and had "assiduously" avoided privileged materials. A0584. Bondurant backtracked from these representations when they were exposed as false, but it cannot backtrack from its acceptance of responsibility. As the Superior Court concluded, "Bondurant" copied and reviewed InComm's privileged files. Fox did not do it alone.

b. Multiple Attorneys Participated in the Subsequent Misconduct

Moreover, even if the initial misdeeds had been Fox's alone, the other attorneys at Bondurant participated actively in the ethical breaches that followed. The Superior Court described two such breaches as "weigh[ing] heavily in favor of disqualification." Op. 30. *First*, there was the "failure to disclose Bondurant's possession of the privileged (as well as InComm's otherwise confidential or even irrelevant, but proprietary) material for more than a year after the Complaint was

unsealed" in May 2019, in defiance of the firm's clear obligations under Rule 4.4(b). *Id.*; Del. R. Prof. Conduct 4.4(b). Numerous individuals at Bondurant were complicit in this failure. From the beginning, Fox was open about the laptop files with Bondurant staff; with at least two of his partners, John Floyd and (ultimately) David Brackett; and presumably with the other attorneys who worked on the case. A0558; A1120, ¶ 8; A1126, ¶ 4; A1129. For more than a year, each of these individuals violated his obligation to notify InComm.

Second, there was the "failure to use remedial measures to ensure minimization of exposure or use of any potential privileged material." Op. 30. This, too, involved the active participation of multiple Bondurant attorneys. As the Superior Court found, the "paramount" obligation to impose an ethical screen belonged to "***the firm and its lawyers***." *Id.* at 41 (emphasis added). Among other options, the firm could have erected a "proper ethical wall[]" around the "privilege team" with access to InComm's privileged documents, so that those working on the merits of the case would not be "contaminated" with privileged information. *Id.* at 26, 26 n.122.

But "the firm and its lawyers" failed to honor this obligation, not just once but over and over again. They failed in November 2018, when Fox embarked on a review that he and his colleagues should have known would yield privileged documents; in June 2020, when InComm raised concerns about the privileged

materials; in November 2020, when the Court ordered the Special Master investigation; and finally, in May 2021, when they rebuffed InComm's explicit request to wall Fox off. Each one of these failures was a firmwide ethical breach, in which multiple attorneys were complicit.

c. Bondurant Executed the Cover-Up

Last but not least, Bondurant tried to evade responsibility for these failures by launching a cover-up. As the Superior Court concluded, the cover-up began in earnest when "Bondurant penned a letter to InComm denying ***any exposure*** to privileged information." Op. 34 (emphasis added). That letter came from Brackett, who later repeated the same false denials to the court. Even after the Special Master's investigation revealed the facts, Bondurant persisted with its cover-up, by switching its story and advancing disingenuous post hoc rationalizations.

The Superior Court recognized the deliberate nature of these misrepresentations. On Brackett's series of letters to InComm in fall 2020, the court observed, "[W]hat I read is what I think the other side pretty accurately described as stonewall[ing]." A1241. The court also noted that Fox's story had "evolved" dramatically, thus "giv[ing] the Court less and less confidence . . . every time Mr. Fox has . . . opened his mouth." A1196. The court's findings reflect that the cover-up was yet another ethical violation in which multiple Bondurant attorneys participated. Op. 26-40.

d. The Court Erred by Ignoring Bondurant's Misconduct

Bondurant's misconduct, including its history of misrepresentations to the court, has a strong bearing on whether it should be disqualified. Courts have consistently held that "violation of [an attorney's] duty of candor to the court" weighs heavily in favor of disqualification. *See U.S. ex rel. Holmes v. Northrop Grunman Corp.*, 642 F. App'x 373, 377 (5th Cir. 2016) (disqualifying counsel). As the Seventh Circuit has observed, "[a]ttorney integrity is fundamental to the judicial process." *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 796 (7th Cir. 2009). Accordingly, when a history of untruthfulness has made it difficult to "rely on . . . counsel's promises and agreements," disqualification and even dismissal of the complaint is warranted. *Id.* The logic of these cases is simple: a lawyer who has misled the court is no longer trustworthy as an officer of the court.

By the same token, whether a lawyer's actions were in bad faith is also relevant to the disqualification decision. This Court has held that the appropriate sanction for an ethical violation depends in large part on whether the violation was "willful or in bad faith," *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008) (quoting *Poulis v. State Farm Fire & Cas. Ins.*, 747 F.2d 863, 868 (3d Cir. 1984)), because "the rights of litigants who in good faith comply" with their obligations "should not be jeopardized by litigants who disregard such rules," *Wahle v. Med. Ctr. of Del., Inc.*, 559 A.2d 1228, 1233 (Del. 1989). This principle has

repeatedly led the Court to affirm ***dismissal of the complaint*** as a sanction for repeated and deliberate failure to comply with discovery deadlines. *Id.*; *see also Hoag*, 953 A.2d at 718.

Yet here, the Superior Court gave zero consideration to the deliberate or brazen nature of Bondurant's misconduct when denying InComm's motion to disqualify Bondurant. The court focused narrowly on whether Fox's individual misconduct had tainted "other[] . . . attorneys," without acknowledging its own finding that other attorneys had participated in the misconduct. Op. 38-39.

The court's approach not only diverged from this Court's precedent, but yielded patently illogical results. In deciding that other attorneys had not been tainted, the court "accept[ed] Bondurant at its word" that none of the nonlawyer personnel who accessed the documents had conducted any substantive review. *Id.* at 39. But all of Bondurant's "words" about this subject to date have been false, a fact that the court ignored. The court also reached the unwarranted conclusion that Bondurant, a firm of "nearly three dozen" attorneys, was somehow too large to be disqualified. Op. 39, 39 n.164. In other words, the court found that Bondurant's ***attorney headcount*** was relevant to whether it should be disqualified, while its ***years-long record of misconduct*** was not.

Most troublingly, the court staked the ongoing integrity of the proceedings on Bondurant's ability to uphold its ethical obligations, without regard for Bondurant's

record of repeated ethical failures. By permitting Bondurant to remain in the case, the court placed its faith in Bondurant to contain the "contamination" of Fox's ill-gotten knowledge. That is inherently a tall order, given that Fox is still a Bondurant partner and maintains a personal and financial stake in the case. When viewed in the context of Bondurant's history of misconduct, it is utterly unsupportable. The court reached this contradictory result only by ignoring Bondurant's history of misrepresentations and other misconduct. For these reasons, the Superior Court's disregard of Bondurant's overall record of misconduct was error.

2. The Superior Court Erroneously Placed the Burden on InComm to Show the Absence of "Taint"

As set forth above, the premise that Fox was individually responsible for the misconduct was erroneous. Accordingly, whether Fox "tainted" others was not the right question. But even if it had been, the Superior Court's analysis of that question was also misguided. The Rules of Professional Conduct make clear that one attorney's confidential knowledge is presumptively imputed to others within the firm. The burden falls on the firm to rebut that presumption by demonstrating its adherence to remedial measures—none of which Bondurant adopted, and some of which it openly rejected.

The Superior Court, however, placed the burden on InComm to affirmatively show "taint" to other Bondurant attorneys. This was not only an improper burden to impose on InComm, but also a virtually impossible one. To determine just how

Bondurant used the privileged information, and make an argument on that subject to the court, InComm would have to both invade Relator's privilege ***and*** waive its own. That is a primary reason why courts do not demand specific evidence of taint, and the Superior Court should not have done so here.

a. Lawyers in Law Firms Are Presumed to Share Information

Lawyers within a law firm routinely share insights, knowledge and information to further the firm's representation of its clients. That is, in fact, the purpose of a law firm. Accordingly, when one attorney has confidential information about a firm adversary, "the presumption is that the information was shared" with other lawyers at the firm. *Richards v. Jain*, 168 F. Supp. 2d 1195, 1204 (W.D. Wash. 2001). This presumption is accepted across jurisdictions, and "is firmly embedded in Delaware law." *Bleacher v. Bose*, 2017 WL 1854794, at *2 (Del. Super. Ct. May 3, 2017); *see also Acierno v. Hayward*, 2004 WL 1517134 (Del. Ch. July 1, 2004) (automatically disqualifying law firm based on single attorney's conflict). It also underlies the well-settled default rule that "if [one lawyer] would be barred from representation of [a party in a given matter], his firm is likewise barred." *Bleacher*, 2017 WL 1854794, at *2.

The Rules of Professional Conduct codify this principle in, among other things, Rule 1.10, which provides that if an attorney arrives at a firm having previously represented a party adverse to a firm client, his conflict presumptively

disqualifies not only him but the entire firm from continuing to represent the client. *See* Del. R. Prof Conduct 1.9, 1.10.

This limitation guards against "the potential that . . . confidences and secrets will be used against" the former client in the ongoing litigation. *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 162 (3d Cir. 1984). Even if the tainted lawyer is careful not to reveal any explicit confidences, his access to confidential information will likely put him "in a better position to know where to look and what questions to ask in discovery." *Acierno*, 2004 WL 1517134, at *6-7 (recognizing the "substantial risk" that despite attorney's "best intentions," use of confidential information was "inevitable").

The collaborative nature of a law firm amplifies that risk. Even in the absence of bad-faith conduct, "the disqualified attorney, in his day-to-day contact with his new [colleagues], may unintentionally transmit information learned in the course of the prior representation." *Crudele v. New York City Police Dep't*, 2001 WL 1033539, at *4 (S.D.N.Y. Sept. 7, 2001). Accordingly, knowledge of "playbook information"—*e.g.*, insight into a client's thinking about "what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject"—is "a basis for disqualification" of the ***entire firm***. *Madukwe v. Delaware State Univ.*, 552 F. Supp. 2d 452, 462 (D. Del. 2008) (internal quotation marks omitted) (disqualifying entire firm).

Another practical reality driving this presumption is that both sides' assertions of privilege preclude an exhaustive inquiry into how the privileged information has been, or may be, used. The "party seeking disqualification will necessarily be at a loss to prove what [wa]s known by the adversary's attorney and legal staff," or how it was used, without invading the adversary's privilege. *In re Complex Asbestos Litig.*, 283 Cal. Rptr. 732, 747 (Cal. Ct. App. 1991). Conversely, the party seeking disqualification will also be "unable to disclose the specifics" of how the adversary's attorney may "use confidential information . . . to [the adversary's] advantage," without creating "the risk of waiving the privilege." *Acierno*, 2004 WL 1517134, at *7. Rather than putting litigants in this catch-22, courts presume that lawyers within a law firm freely share insights and information.

b. The Law Firm Must Rebut This Showing with Specific Remedial Measures

To rebut this presumption, a law firm must show that it has taken affirmative prophylactic measures to prevent the "taint" of disqualifying information from spreading. Per Rule 1.10, it must show that (i) "the personally disqualified lawyer [was] timely screened from any participation in the matter"; (ii) the disqualified lawyer "is apportioned no part of the fee therefrom"; ***and*** (iii) **"**written notice [was] promptly given to the affected former client" of both the existence of the conflict and the firm's implementation of prophylactic measures. Del. R. Prof. Conduct 1.10(1)-(2). The "screening" requirement demands the "isolation of a lawyer from

any participation in a matter through the ***timely imposition of procedures within a firm***." Del. R. Prof. Conduct 1.0(k) (emphasis added).

Courts routinely disqualify firms who fail to demonstrate their compliance with these criteria. In *Enzo Life Sciences, Inc. v. Adipogen Corp.*, 2013 WL 6138791, at *3 (D. Del. Nov. 20, 2013), the court disqualified a firm for one attorney's possession of disqualifying information, after concluding that the firm "failed to properly establish an effective screen" to prevent contamination of other lawyers, and accordingly "ha[d] not met its burden" to overcome the presumption that others had been tainted. Similarly, in *Richards*, the court disqualified a firm because—despite "ample opportunity"—the firm made "no showing" that it adopted "institutional measures that would have prevented disclosure" of the privileged information to other attorneys on the case. 168 F. Supp. 2d at 1204. Even when a firm claims to have implemented ***some*** ethical screen, it may be disqualified for failure to provide sufficient detail about the screen's "practicalities," since such ambiguities leave the court to rely on the "self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens.'" *Cardona v. Gen. Motors Corp.*, 942 F. Supp. 968, 978 (D.N.J. 1996) (quoting Charles W. Wolfram, *Modern Legal Ethics*, *Modern Legal Ethics* § 7.6.4, at 402 (West Hornbook Series 1986)) (disqualifying entire firm). Courts have also disqualified entire firms for failure to provide assurance that the tainted attorney would "receive

no part of the fee" from the matter in question. *Norfolk S. Ry. Co. v. Reading Blue Mountain & N. Ry. Co.*, 397 F. Supp. 2d 551, 554 (M.D. Pa. 2005).

Although imputed disqualification of the entire firm most commonly arises in "side-switching" cases, it likewise applies in cases involving attorney misconduct, where there is even less reason to rely on the "best intentions" of counsel. For example, in *Richards*, a paralegal for plaintiff's counsel searched and reviewed privileged emails from a copy of defendant's computer hard drive over an 11-month period. 168 F. Supp. 2d at 1198-1200. Though the firm "argued stridently that no confidences were revealed to or used by the firm," the court found that firmwide disqualification was the "only remedy [that could] mitigate the effects" on the integrity of the proceedings of the paralegal's "possession and review" of the emails. *Id.* at 1209. Similarly, in *United States ex rel. Frazier v. IASIS Healthcare Corp.*, a *qui tam* action, the court disqualified relator's counsel's law firm for misappropriating and reviewing the defendant's privileged documents without notifying the defendant—even though counsel had attempted to "wall off" the privileged materials by having a paralegal identify them and place them in a "sealed box." 2012 WL 130332, at *5, *15 (D. Ariz. Jan. 10, 2012); *see also Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2016 WL 4361808, at *12 (S.D. Cal. Aug. 16, 2016) (disqualifying entire firm where one attorney reviewed adversary's privileged information, presumptively tainting other lawyers). In none of these cases

did the court place the burden on the movant to demonstrate how the "taint" of the ill-gotten knowledge had manifested itself.

c. The Superior Court Improperly Placed the Burden on InComm

Rather than placing the burden on InComm to demonstrate that Fox had "tainted" others with his ill-gotten knowledge, the Superior Court should have put the burden on Bondurant to demonstrate that he had not. The Superior Court's factual findings underscored the logic of that presumption, by highlighting the diffuse effects of Fox's invasions of privilege. The court concluded that Fox's "surreptitious and protracted" invasions of privilege likely "contribute[d] to strategy" in unknown ways, imbuing Relator with an "unfair advantage"; that there were in fact "troubling links" between the privileged documents and "strategies employed" in the litigation; and that the ill-gotten knowledge would likely lead to "contamination of future tactical decisions or filings," thereby "taint[ing] the proceedings." Op. 36, 37. This risk of insidious but unprovable "contamination" from confidential information is exactly why courts put the onus on firms to show that they have contained the taint, rather than the other way around. Yet the Superior Court, after demonstrating the logic of this rule, declined to apply it.

Even as the Superior Court failed to hold Bondurant to the burden of rebutting the presumption, its factual findings made clear that Bondurant could not discharge that burden. No remand for additional fact-finding is necessary to determine

whether Fox was "timely screened from any participation in the matter," or whether "written notice [was] promptly given" to InComm about its privileged documents. Del. R. Prof. Conduct. 1.10(c)(1), (2). The Superior Court explicitly found that neither of these things ever happened, two firmwide failures that "weigh[ed] heavily in favor of disqualification." Op. 30. It is therefore clear that Bondurant did not satisfy the criteria for rebutting the presumption of firmwide taint.

To the extent the Superior Court considered an ethical screen unnecessary because Fox "was the only attorney who accessed the privileged information," that was also erroneous. *Id.* at 39. Attorneys are "tainted" not just by directly accessing privileged information, but by working alongside attorneys who have done so—which is why tainted attorneys must be "screened from any participation in the matter" whatsoever. As the courts in *Richards* and *Frazier* each recognized, even when a ***paralegal*** has accessed privileged documents and continued to participate in a case team for a substantial period, the potential for "taint" warrants firmwide disqualification. *Richards*, 168 F. Supp. 2d at 1204; *Frazier,* 2012 WL 130332 at *15.

Here, Fox not only "participated" but acted as ***lead counsel*** for more than two and a half years after his first exposure to InComm's privileged information. Over those years, Fox brought his insights from InComm's privileged documents to every single email, meeting, or call that he conducted about the case. Every one of these

exchanges presented a new opportunity for "contamination." For these reasons, as Rule 1.10 reflects, Fox's assurances that he was the only one to see the documents do not suffice to rebut the presumption of taint, even if they could be credited.

Indeed, earlier in the proceedings, Bondurant admitted, and the court recognized, that the taint inhered in Fox's sheer participation in the case. In May 2021, when InComm asked Bondurant to wall Fox off, Brackett essentially responded that the cat was out of the bag, since Fox had been participating the whole time. A0855-56. Similarly, the Superior Court's June 1, 2021 order recognized that Fox's participation in the case could taint the proceedings, and accordingly required him to "refrain from participating in any substantive work on the merits of the case." A0376-77. That was an interim measure, to maintain the status quo pending InComm's anticipated disqualification motion. But when the court granted that motion, it failed to account for the contamination that had already occurred between November 2018 and May 2021. As Brackett noted, by May 2021 Fox had been contaminating the proceedings for more than two and a half years, and it was too late to undo the damage. The Superior Court thus erred by declining to place the burden on Bondurant to rebut the presumption of firmwide taint.

3. Bondurant's Participation Jeopardizes the Integrity of the Proceedings and Public Confidence in the Courts

Finally, the Superior Court not only disregarded the damage that Bondurant's misconduct had already wrought, but the potential for still more damage in the future. The Superior Court placed its trust in Fox—whose conduct had fallen "well below" ethical standards—to refrain from any participation in the case, from today until final disposition. As Fox's Bondurant colleagues are proceeding with discovery, briefing summary judgment motions, and conceivably even preparing for trial, they will have opportunities to seek counsel and advice from Fox, the "tainted" attorney and also the most knowledgeable attorney about the case. Every day, the integrity of the proceedings to come will rest on their forbearance from availing themselves of this unfair advantage. As noted above, this would be a leap of faith in any circumstance. Here, where the firm in question has a history of misrepresentations to the court, it is untenable.

Bondurant's participation not only violates Defendants' right to a fair proceeding, but risks breeding cynicism among observers of the courts. As this Court and others have recognized, permitting compromised advocates to participate in judicial proceedings threatens public confidence in the legitimacy of the courts. This threat often weighs heavily in favor of disqualification of seemingly compromised counsel. *See In re Appeal of Infotechnology, Inc.*, 582 A.2d at 221-22 (disqualifying firm to avoid "threat[] [to] the legitimacy of judicial proceedings");

Bona Fide Conglomerate, Inc., 2016 WL 4361808, at *12 (disqualifying firm to "preserve[] the public trust in the scrupulous administration of justice and the integrity of the bar"); *Sun Life Assurance Co. of Canada v. Wilm. Sav. Fund Soc'y, FSB*, 2019 WL 6998156, at *7 (Del. Super. Ct. Dec. 19, 2019) (disqualifying firm to avoid "threat[] [to] public confidence in the administration of justice") *appeal dismissed, remanded, and vacated*, 249 A.3d 131 (Del. 2021) (TABLE). It is difficult to imagine a more compromised firm than Bondurant, which derived unfair advantage from InComm's privileged documents, made misrepresentations to the court about it for years, and has every financial incentive to continue doing so. By entrusting the integrity of the proceedings to such a firm, the Superior Court has overlooked a grave threat to public confidence in these proceedings.

Two factors make the threat to public confidence especially acute here. *First*, it is a False Claims Act case, in which the State has steadfastly aligned itself with Bondurant and Rogers. Public confidence in the neutral administration of justice is particularly essential in cases involving the police power of the State, and all the more so in escheat cases, where the state's bargaining power can lead to "an abusive process designed to force a monetary settlement." *See Marathon Petroleum Corp. v. Sec'y of Fin. for State of Del.*, 876 F.3d 481, 501 (3d Cir. 2017). The State's auditing techniques in the unclaimed property context have likewise been found to "shock[] the conscience" and violate principles of substantive due process. *See*

Temple-Inland v. Cook, 192 F. Supp. 3d 527, 550 (D. Del. 2016). Given the State's intrinsic bargaining advantage and troubling record in this area, the suggestion of special leniency toward those aligned with the State is inimical to public confidence in the courts.

Second, the Superior Court's remarks evinced a high degree of sympathy with the Bondurant lawyers, seemingly because of their status as *qui tam* lawyers. When rendering its oral ruling, the court noted that the decision on disqualification was "not easy," because judges are also "lawyers in the end," and it is "never easy for a Court to say that one of our own . . . [has] faltered." A1309. The court echoed that sentiment in its written ruling, displaying solicitousness for Fox's predicament and for the difficulty of his job: "No doubt, navigating the ethical snares present in the initial stages of a *qui tam* litigation is a tall task even for the most astute and experienced lawyer." Op. 27. While the court's affirmations of sympathy with Bondurant are understandable on a human level, they are improper considerations on a disqualification motion, which requires the court to affirm and protect the neutral administration of justice. The court's insinuation of special solicitude for Bondurant, as "one of our own," compounded the threats that its ruling posed to public confidence in the courts. A1309.

II. THE SUPERIOR COURT'S DENIAL OF INCOMM'S MOTION FOR FEES WAS ARBITRARY AND ERRONEOUS

A. Question Presented

Whether the Superior Court abused its discretion by limiting its award of fees to the Special Master's fees, despite finding Bondurant responsible for all fees associated with uncovering its misconduct. InComm raised this issue in briefing before the Superior Court. A0410-11; A0450.

B. Scope of Review

This Court "review[s] a denial of an application for counsel fees and costs for abuse of discretion." *Dover Hist. Soc'y, Inc. v. City of Dover Plan. Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

C. Merits of Argument

The Superior Court abused its discretion in declining to award InComm all of the fees for which, as the court recognized, Bondurant was responsible.

1. Bondurant Should Bear all Costs of the Arduous Exploration into its Misconduct

The Superior Court correctly held Bondurant responsible for forcing the parties to "endure this long discovery detour"—which began in May 2020, and continued until August 2022—while InComm uncovered the firm's misconduct. It held that "Bondurant's conduct created the need for the Special Master's investigation," and more generally that "much ink was spilled[] [and] many hours were billed" to uncover Bondurant's conduct, thanks to the firm's own

intransigence. Op. 37, 42. The Superior Court further reasoned that InComm "should not, and will not, shoulder the specific costs" that Bondurant necessitated through its misconduct. Op. 42.

These conclusions were well-supported by the record, which showed that Bondurant spawned needless fees at every turn. Because Bondurant was evasive when InComm first inquired about the laptop, InComm had to devote months to its fruitless correspondence with Brackett, then its application to the Superior Court. Because Bondurant would not cooperate with InComm on the logistics of providing the information, InComm had to participate in a formal process before the Special Master. Because Bondurant refused to take remedial measures even after its invasions of privilege were revealed, InComm had to seek that relief before the Court, too. And because Bondurant then responded with new revisionist accounts, InComm had to rebut yet another round of disingenuous assertions.

However, reasoning that the disqualification of Fox was "already an extreme" remedy, the court ordered payment of only "the Special Master's fees." Op. 43. Excluded from the court's order were the considerable attorneys' fees InComm expended to overcome Bondurant's stonewalling, seek the Special Master procedure, engage in that procedure, ***and*** move to disqualify. Bondurant's conduct—not InComm's conduct, and not even Bondurant's zealous advocacy for its client—"created the need" for all of these expenses. The court's decision to

award only a small fraction of them was arbitrary, and therefore an abuse of discretion. *See Dover Hist. Soc'y*, 902 A.2d at 1089 (holding that decision on attorneys' fees must be overturned if it is "arbitrar[y]").

The Superior Court's reasoning that it had already imposed an "extreme" remedy by disqualifying Fox, and should therefore show leniency on fees, was misguided. In fact, as noted *supra* at § I.C.1.d, this Court has repeatedly affirmed more severe sanctions for less severe misconduct. Moreover, Bondurant's conduct wrought extreme consequences—in costs, delay, and corruption of the proceedings—and Bondurant, not InComm, should be held responsible for those consequences. Moreover, particularly in conjunction with its refusal to disqualify Bondurant, the court's ruling creates a perverse incentive for other attorneys to attempt cover-ups of misconduct. Although Bondurant's cover-up did not succeed, it cost Bondurant very little: InComm was saddled with the expenses, while Bondurant remained entrusted with the integrity of the proceedings. Thus, the court's ruling communicates that an attempt at a cover-up is all upside. To avoid that destructive incentive, this Court should vacate the decision and order the award of all InComm's fees and costs relating to Bondurant's misconduct, from the first

exchange of letters in June 2020 to the final submission on disqualification in August 2022.[2]

CONCLUSION

Defendants-Appellants respectfully request that this Court vacate and reverse the Superior Court's Order to the extent it denied InComm's motion for disqualification and fees.

[2] Although InComm recognizes that counsel may oppose a motion to disqualify in good faith, even if unsuccessfully, that is not what Bondurant did. Bondurant began its stonewalling campaign by acknowledging that the review of InComm's privileged documents would have been improper, and denying—in outraged terms—that it had done any such thing. By 2022, when it opposed InComm's motion to disqualify, the Special Master investigation had dispensed with that story, so Bondurant came up with a new and equally dishonest account. It claimed to have reviewed privileged documents in connection with its special responsibilities as counsel for a *qui tam* relator, and to have believed its actions to be justified, since Rule 4.4(b) does not expressly prohibit the covert review of privileged documents by counsel who stole the documents, as opposed to acquiring them inadvertently. A0918-31. These post hoc justifications were not only meritless, but plainly disingenuous, since Bondurant had never mentioned them until its original denials were proven false. Yet Bondurant forced InComm to rebut this revisionist factual and legal history in litigating the motion to disqualify. Accordingly, InComm respectfully submits that it be awarded fees in connection with the motion to disqualify Bondurant.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 10, 2023, a copy of Appellant's Opening Brief was caused to be served by File & Serve*Xpress* upon the following counsel of record.

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