CRAIG CONLON Plaintiff, v. ENTERPRISE MOBILITY SOLUTIONS, LLC and JEFFREY GIOVINAZZO, i/j/s/a, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO.: MON-L-3933-16 CIVIL ACTION (CBLP) **ORDER**

THIS MATTER having been opened to the Court by Plaintiff Craig Conlon, through his counsel, Carmen M. Finegan, Esquire and Mark S. Halpern, Esquire, by way of Motion to Disqualify Defendants' Legal Counsel Andrew J. Cevasco pursuant to New Jersey Rule of Professional Conduct 3.7**,** and the Court having considered all papers submitted in support of said Motion, all papers submitted in opposition to said Motion, argument of counsel, and for good cause shown:

IT IS on this 1st day of October, 2020, hereby;

ORDERED that Plaintiff's Motion to Disqualify is **GRANTED** and Andrew J. Cevasco, Esquire is disqualified pursuant to New Jersey Rule of Professional Conduct 3.7 from serving as legal counsel for the Defendants at the trial in this matter; and

IT IS FURTHER ORDERED pursuant to R. 1:5-1(a) that a copy of this Order will be served on all parties not served electronically, nor served personally in court this date, within seven (7) days of the date of this Order.

/s/ MARA ZAZZALI-HOGAN, J.S.C.

Opposed (X)

Unopposed ( )

****SEE ATTACHED STATEMENT OF REASONS*****

STATEMENT OF REASONS PURSUANT TO R. 1:6-2(E) GRANTING PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANTS' COUNSEL PURSUANT TO RPC 3.7

CRAIG CONLON,
v.
ENTERPRISE MOBILITY SOLUTIONS, LLC, et al.

DOCKET NO. MON-L-3933-16 (CBLP)

This motion to disqualify Defendants' counsel was filed by Plaintiff Craig Conlon ("Plaintiff"). The motion is opposed by Defendants Enterprise Mobility Solutions, LLC ("EMS") and Jeffrey Giovinazzo (collectively, "Defendants"). Plaintiff is represented by Carmen M. Finnegan, Esq. and Mark S. Halpern, Esq. Defendants are represented by Andrew J. Cevasco, Esq. and Nicole G. McDonough, Esq. of Archer & Greiner, PC.

I. BACKGROUND

EMS was formed by Giovinazzo in 2006. Pl. Ex. D at 15. Giovinazzo was the sole owner and member of EMS until December 31, 2012. Id. at 17-18. From 2008 through December 2012, Plaintiff worked for EMS sporadically as either an employee or independent contractor. Pl. Ex. F at 66-69. In 2012, Giovinazzo agreed to memorialize his agreement to provide Plaintiff and another employee, Mary Manzo, with ownership interests in EMS. Pl. Ex. G at 43-44. In order to memorialize the new ownership structure, Manzo recommended, and Giovinazzo and Plaintiff agreed, to hire Mr. Cevasco to prepare an operating agreement (the "Operating Agreement") and serve as corporate counsel to EMS. Pl. Ex. G at 58-62. Manzo, Giovinazzo, and Plaintiff had at least three (3) meetings with Cevasco to discuss and review various drafts of the Operating Agreement. Ibid. During these meetings, Cevasco made clear to each of the members that he only represented EMS, and not any of the members' individual interests. Ibid.

On January 1, 2013, Giovinazzo, Manzo, and Plaintiff executed the final version of the Operating Agreement, which was drafted, revised, and finalized by Cevasco. Pl. Ex. A. According

to the terms of the Agreement, Giovinazzo retained a 46% ownership interest in EMS and served as its managing member, Plaintiff received a 44% ownership interest in EMS, and Manzo received a 10% ownership interest. Ibid. Section 15.10 of the Agreement authored by Cevasco states: "This Agreement constitutes the entire agreement with respect to, and supersedes all prior written and oral agreements, understanding and negotiations with respect to the subject matter hereof." Ibid. Accordingly, as of January 1, 2013, Cevasco presumably knew that any and all prior oral agreements and understandings by and between any of the three (3) members that contained the same subject matter as the Operating Agreement were superseded in their entirety by the terms of the Operating Agreement.

As concerns the compensation to be paid to the members, Section 4.4 of the Agreement provides that "The Company shall compensate [Giovinazzo, Plaintiff, and Manzo] for their services to the Company." Ibid. In addition, Section 3.5 requires a super-majority to determine the amount of compensation, and any increases or benefits, paid to the members. Ibid. Thus, according to Plaintiff, at all times relevant to this dispute, Cevasco knew that, contrary to the alleged 2007 oral true-up agreement, the members were only to be compensated based upon the actual services they provided to EMS and only in the amount approved by a super-majority of the members.

Furthermore, the Operating Agreement set forth the procedure by which a member could voluntarily withdraw from EMS. Section 9.7(ii) provides:

> On or after January 1, 2015, a Member may voluntarily withdraw ("Voluntary Withdraw") from the Company upon three (3) months advance written notice (the "Voluntary Withdrawal Notice") to the Company. In the event that a member elects to voluntarily withdraw from the Company, the terms of buyout payment under such voluntary Withdrawal are set forth in Subsection (1) below and the purchase price of the Interest or the Economic Interest of the withdrawing Member as determined pursuant to Section 8.3 (viii) (i.e. Fair Value).

Ibid.

Accordingly, Plaintiff provided his 90-day withdrawal notice to Defendants on March 28, 2016. Pl. Ex. B. In accordance with Section 9.7(ii) of the Operating Agreement, upon receipt of the notice, EMS was required to redeem Plaintiff's 44% membership interest at a purchase price equal to "100% of the valuation of the interest" as determined pursuant to Section 8.3(viii) of the Operating Agreement. Ibid. Pursuant to Section 9.7(ii)(A)(2), closing on EMS's obligation to redeem Plaintiff's interest was to occur ninety (90) days after receipt of Plaintiff's Withdrawal Notice. Section 8.3(viii) provides that if EMS and the withdrawing member cannot agree upon the purchase price, a third-party appraisal process is to be employed to determine the Fair Value of the interest. Ibid.

On the same day, Cevasco sent via overnight mail various documents to effectuate the mandatory redemption of Plaintiff's interest. Pl. Ex. C at Ex. C. In these documents, EMS offered $300,000 to redeem Plaintiff's interest. Ibid. Cevasco's letter to Plaintiff enclosing the documents evidences Cevasco's actual authority to act on behalf of and bind EMS, as he states that "[a]t the request of Jeff Giovinazzo, I am enclosing herewith … documents to effectuate your separation from [EMS] … If they are acceptable to you, please sign all four (4) documents and return them to me and I will have them countersigned on behalf of the Company and will return two (2) fully executed copies of each document to you. Please note that I have prepared these documents as counsel for the LLC, and at the direction of Mr. Giovinazzo." Ibid.

After Mr. Conlon gave his notice on March 26, 2016, correspondence was exchanged between Mr. Halpern and Mr. Cevasco. On March 31, 2016, Mr. Cevasco wrote that "the Company remains willing to redeem Mr. Conlon's membership interest for $300,000. . . but with the caveat that significant substantive changes are not envisioned. . . .the company is willing to

accommodate your client in the interest of an amicable termination of the relationship." Mr. Giovanazzo claims he did review the "Execution copies" that were sent to Conlon and prepared by Cevasco, [but that he] never authorized or approved same. On April 11, 2016, Mr. Cevasco advised Mr. Halpern that "my client would like to get moving on this. We need the executed docs to close the LOC. Please give me a time frame." For the next few weeks, indemnification was an issue and they continued to exchange emails and red-lined versions of the agreement.

On July 26, 2016, Mr. Cevasco provided the documents to be executed, advising that they had reached an agreement on all issues, stating that he was sending:

> what I believe to be a complete set of documents to be executed by our respective clients in order to conclude the matter. As you can see from paragraph 3 of the Separation Agreement, Jeffrey Giovinazzo has agreed to indemnify your client …Assuming the documents in question are acceptable to your client, I have forwarded five (5) duplicate original documents to you for your client's signature. Would you please have him sign them and return them to me so I can meet with my two clients and have them sign where indicated as well. I will then return two fully signed copies of the documents to you. (Emphasis added).

On July 29, 2016, the executed documents were returned to Mr. Cevasco – three days later.

According to Plaintiff, on August 4, 2016, about six days after Plaintiff provided the executed documents to Cevasco, Giovinazzo informed Plaintiff by telephone that Defendants were refusing to sign the settlement documents. Pl. Ex. C at ¶¶ 20-21. On the same day, counsel for Plaintiff emailed Cevasco in pertinent part: "Please advise your client that we have a binding agreement and that there will be no renegotiation … Please further advise your client that if I do not receive fully executed copies of the various settlement documents by email by 5:00 PM tomorrow we will, immediately thereafter, notify Chase Bank of Mr. Conlon's termination of his guaranty obligation on the Company's Line of Credit and commence appropriate legal proceedings to enforce the various agreements." Pl. Ex. K. Plaintiff claims that Cevasco did not respond to this

email for six (6) weeks, when he informed Plaintiff by letter dated September 8, 2016 that EMS would not pay Plaintiff anything for his interest in EMS due to the oral true-up agreement of 2007. Pl. Ex. L. That letter states in relevant part as follows:

> My client has also asked me to convey to you that there is another financial consideration to take into account in determining payment of Craig's buyout. When Craig [Conlon] and Mary [Manzo] became members of {EMS}, there was an agreement that Craig and Jeff would earn the same salary since their contributions to the company were viewed as equivalent…however, because Craig was in a difficult situation, it was also agreed that he should temporarily receive a salary in excess of Jeff's, subject to an eventual "true up" when Craig, either through a reduction in salary or through payment to Jeff, would equalize the differential." (Emphasis added.)

At the end of the letter, Mr. Cevasco states that "applying that amount to the sum due to Craig for his interest in Pathways yields a sum remaining due to Jeff Giovinazzo of slightly more than $96,000. Jeff is willing to waive any balance due to him in order to resolve the parties' issues expeditiously but the net effect of the "true up" is that Craig is not due any additional funds from Pathways." Id. (emphasis added).

To provide additional context about the true up, the court notes that Giovinazzo testified that the oral true-up agreement was entered into in 2007, about five (5) years before the Operating Agreement was signed and Plaintiff became a member of EMS, and then amended in 2010 and 2012. bid. According to Giovinazzo, the agreement was to be kept secret from everybody and was never revealed to EMS's accountant or legal counsel, Cevasco. Ibid. Giovinazzo added that the 2012 amendment was that the oral agreement was never to be put in writing and was not to be referenced in the not to be mentioned in the written January 2013 Operating Agreement. Id. at 44. Giovinazzo, however, also testified that when he signed the Operating Agreement in January 2013, he understood that the provisions of the supposed oral agreement were not included in the Operating Agreement, and he read the "Entire Agreement" Clause and understood that it meant that all previous oral agreements were now "null and void." Id. at 111-17. Thus far, none of the

parties has produced writings referencing the true up aside from Cevasco's September 8 letter representing that such an agreement exists.

II. PLAINTIFF'S ARGUMENT

Plaintiff has moved to disqualify Mr. Cevasco as a necessary witness based upon RPC 3.7, which is entitled "Lawyers as Witnesses," and states in relevant part as follows

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
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> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
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> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

Plaintiff argues that testimony is needed on two issues: whether Cevasco had authority to negotiate and make the offer to Plaintiff, and whether either defendant breached any duty to Plaintiff or the company by having Cevasco write the letter on September 8, 2016 to assert that the true up essentially superseded the operating agreement drafted by Cevasco.

A. Apparent or Actual Authority

At trial, Plaintiff intends on questioning Cevasco about his March 28, 2016 and July 26 letters and their enclosures, as well as his discussions with Giovinazzo regarding the buyout. According to Plaintiff, these areas of inquiry go directly to the issue of Cevasco's actual or apparent authority to bind EMS, as well as the value of Plaintiff's interest.

In early 2020, the parties cross-moved for summary judgment. Defendants argued that Cevasco's July 26 letter was not authorized by Defendants and did not constitute an offer, while Plaintiff argued that the letter amounted to a binding settlement offer, which was accepted by Plaintiff. Denying both motions, the Court found that there were issues of fact concerning the

meaning of the letter and Cevasco's actual or apparent authority to bind Defendants. Plaintiff posits that this ruling makes Cevasco a necessary witness on this issue. Plaintiff also intends on questioning Cevasco at trial concerning the July 26 letter and enclosure; other previous email communications regarding buy out; and Cevasco's prior course of conduct when transmitting revised draft documents during negotiations.

Based on these facts, Plaintiff argues that Cevasco should be disqualified from representing Defendants at trial because he is a "necessary witness" whose testimony is unobtainable elsewhere. Plaintiff asserts that there are no other witnesses who can provide testimony on six significant issues, which are within the particular knowledge of Cevasco including whether Cevasco had actual or apparent authority to bind Defendants regarding the terms of the buyout.

B. Other Causes of Action Related to the Role of the True Up

In addition to the issue of agency or authority, Plaintiff also seeks testimony regarding events that occurred between the drafting of the operating agreement in 2013 and the September 8, 2016 letter including: (1) Cevasco's knowledge that the positions he took on behalf of Defendants in his September 8, 2016 letter were directly contrary to the express provisions of the Operating Agreement; (2) Cevasco's communications with Giovinazzo at the time he drafted the Operating Agreement in relation to the supposed oral true-up agreement; (3) Cevasco's knowledge of Giovinazzo's assertion that Plaintiff was not a member and did not have any ownership interest in EMS prior to January 2013; (4) Cevasco's knowledge concerning the fact that there were no changes to the member ownership interests in EMS from January 1, 2013 through Plaintiff's Withdrawal Notice on March 28, 2016; and (5) Cevasco's knowledge that there were never any amendments to the Operating Agreement.

Originally, Plaintiff asserted in the motion that Cevasco had "taken sides" by writing the September letter referencing the true up. At oral argument, Defendants argued that EMS is the client but that Giovinazzo was the spokesperson or manager for EMS as the majority shareholder. That may have been true when the operating agreement was drafted up to and including the September letter. Yet, after evasive responses during his deposition, he ultimately rejected the notion that the request to enforce the true up was made on behalf of EMS. He conceded that the agreement was between him and Conlon.

To be clear, however, Plaintiff is not asserting that Cevasco was duplicitous about the true up vis-a-vis the operating agreement. Specifically, Plaintiff emphasizes that "it is anticipated that Mr. Cevasco will testify that during the 3 1/2 year period Mr. Cevasco represented EMS he heard nothing about and never saw a single document which evidenced the Fictional Oral True-up Agreement." The issue is that such testimony "goes directly to Plaintiff's cause of action for Breach of Fiduciary Duty and Breach of Contract (breach of the contractual duty of loyalty, care and good faith and fair dealings) against both EMS and Giovinazzo." In fact, Plaintiff contends that Cevasco owed an equal duty to each of EMS' members, that said privilege has been waived.

As reflected in the parties' arguments, there is some disagreement as to who the client is and therefore, who holds any privilege. N.J.R.E. defines client as "a person or corporation…that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from his professional capacity." A communication made in the course of that attorney-client relationship is presumed confidential pursuant to N.J.R.E. 504(b). When a corporation retains an attorney, the attorney normally represents "the [corporation] as distinct from its directors, officers, employees, members, shareholders or other constituents.'" RPC 1.13(a). McCarthy v. John T. Henderson, Inc., 246

N.J. Super 230, 230 (App. Div. 1991). A closely held corporation is not an exception to the rule. In fact, relying on McCarthy a recent Appellate Division decision declined to accept the proposition that shareholders in a closely held corporation hold the privilege individually and distinguishable from the corporate entity." See id. at 231 (stating that courts have rarely "disregarded the corporate form and determined that the principals of the corporation were indistinguishable from the corporation itself.")

An attorney "may also represent any of [the corporation's] directors, officers, employees, members, shareholders or other constituents," although each client must consent to "the dual representations" if it would involve a "concurrent conflict of interest" as set forth in RPC 1.7 and 1.13(e). Moreover "[i]n dealing with a corporation's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part." RPC 1.13(d). Where "two or more persons employ the same attorney to act for them in common, no one of their clients may assert the privilege against any one or all of the others." Aysseh v. Lawn, 186 N.J. Super. 218, 227 (Ch. Div. 1982).

Here, paragraph 15.15 of the January 1, 2013 Operating Agreement states that Mr. Cevasco represented only the company (not the individual members) and advised the individuals of their respective rights to consult with separate counsel. Apparently, Plaintiff contends that Mr. Cevasco never represented any of the members in their individual capacities, but that even if he did, there was no waiver regarding dual representation executed as required by RPC 3.7(a)(3). Accordingly, he argues that any such dual representation constitutes a conflict although he claims that there was no such "dual representation" until this present lawsuit was filed.

As for the three (3) exceptions to RPC 3.7, Plaintiff maintains that the first exception does not apply because Cevasco's anticipated testimony is relevant to contested issues of fact. Plaintiff submits the second exception is inapplicable here, and the third exception should be rejected because there is sufficient time for other attorneys in Cevasco's firm, including Ms. McDonough, who has been active in this case from the outset, to come up to speed on the case in time for the October trial date. Plaintiff adds that Cevasco was notified of Plaintiff's intention to seek his disqualification as trial counsel years ago but chose to run the risk of disqualification after discovery by not bringing in another attorney from his firm to act as lead trial counsel.[1] Finally, Plaintiff concedes that RPC 3.7 is usually applicable in jury trials as opposed to bench trials but insists that disqualification is the most prudent course of action.

III. DEFENDANTS' OPPOSITION

In opposition, Defendants argue that Cevasco is not a "necessary witness" because the evidence sought through his testimony is obtainable elsewhere. Defendants point out that Plaintiff cites no case law in support of his argument for disqualification, and they analogize this case to that of J.G. Rise & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216 (App. Div. 2006). Defendants assert that in that case, plaintiff's counsel was deemed not to be a "necessary witness" merely because he authored pre-litigation correspondence concerning the subject matter of the dispute. Id. at 230-31. Defendants contend that as in that case, here, the recipients of Cevasco's emails – Giovinazzo, Manzo, and Mr. Halpern – can authenticate Cevasco's messages, so his testimony is not necessary.

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[1] The court recognizes that there may be additional complexities with Archer & Greiner representing EMS at trial and whether Mr. Cevasco's disqualification should be imputed to the firm pursuant to RPC 1.10. See RPC 3.7(b) and Michels, New Jersey Attorney Ethics, 31:4-4, at 770 (stating that a RPC 3.7 disqualification is not imputed to the attorney's firm unless the representation "would involve a conflict of interest between the lawyer and the client within the meaning of either RPC 1.7 or 1.9") Because those issues are not before the court, it declines to address them in additional detail.

In addition, Cevasco contends that he advised Plaintiff's counsel in June 2018 that he did not send the settlement documents attached to his July 26, 2016 correspondence to Defendants prior to sending them to Plaintiff's counsel, so Defendants maintain that this area of inquiry is uncontested. Defendants submit that this is consistent with Giovinazzo's deposition testimony that he had not received the settlement documents prior to their transmission to Plaintiff's counsel, so the testimony sought is available from Giovinazzo and therefore, Cevasco is not a "necessary witness."

Concerning the testimony sought from Plaintiff regarding Cevasco's knowledge that the positions he took on behalf of Defendants in his September 8, 2016 letter were directly contrary to the express provisions of the Operating Agreement, Defendants posit that the recipients of the correspondence can authenticate the document. In addition, Defendants claim that any testimony from Cevasco concerning his thought process in preparing the letter and reviewing the Operating Agreement are protected by the attorney work product doctrine and/or attorney-client privilege although no legal authority was cited to support that position.

As to the testimony sought concerning Cevasco's communications with Giovinazzo at the time he drafted the Operating Agreement relating to the supposed oral true-up agreement, Defendants advance that Giovinazzo testified that the oral agreement was never disclosed to Cevasco during discussions of the Operating Agreement, so the matter is uncontested. Accordingly, Defendants reason that Giovinazzo can testify to his communications with Cevasco, so Cevasco is not a "necessary witness." Defendants further claim that testimony concerning Plaintiff not being a member of EMS prior to January 1, 2013 can be elicited from Plaintiff, Giovinazzo, or EMS' accountant, who was also deposed in this case. Finally, Defendants submit that testimony concerning the fact that there were no changes to the member ownership interests

in EMS after January 2013 and no amendments to the Operating Agreement can be elicited from Plaintiff, Giovinazzo, or Manzo, and Giovinazzo already testified that he never told Cevasco about the oral agreement, so Cevasco is not a "necessary witness."

Next, Defendants argue that the motion should be denied pursuant to RPC 3.7(a)(1) because the testimony sought relates to uncontested issues. Regarding the letter of July 26, 2016 and its enclosed settlement documents, Defendants assert that the letter and documents speak for themselves and are uncontested. As to the other areas of inquiry, Defendants submit that Giovinazzo has already testified on these matters, so the issues are not in dispute.

Furthermore, Defendants submit that the motion should be denied pursuant to RPC 3.7(a)(3) because disqualification would result in substantial hardship on Defendants. Defendants explain that Cevasco has been involved as their lead counsel since the commencement of this action in 2016 and has represented his clients throughout the negotiations at the heart of this matter. Defendants contend that in contrast, Ms. McDonough has substantially less trial experience than Cevasco, so another attorney would have to spend the time familiarizing themselves with this matter for trial. Defendants claim this would result in substantial financial hardship.

Finally, Defendants argue that the motion should be denied because Plaintiff waived his right to seek disqualification by waiting until this stage of the litigation to do so. Defendants analogize this case to that of Bierman v. Bourquin, 2012 WL 4008956 (App. Div. Sep. 13, 2012) , in which the Appellate Division held that disqualification was inappropriate when the litigation had been ongoing for two years and disqualification was not sought until two months prior to trial. Defendants posit that here, discovery has ended, the litigation has been pending for 3.5 years, Plaintiff has always been aware of Cevasco's representation in this matter, the motion was filed

only four months before trial, and disqualification would result in substantial hardship. Alternatively, Defendants claim that if Cevasco is a "necessary witness," Mr. Halpern is as well, and should be subject to disqualification.

IV. DISQUALIFICATION GENERALLY AND THE NECESSARY WITNESS RULE

Generally, "[d]isqualification of counsel is a harsh discretionary remedy which must be used sparingly." Twenty-First Century Rail Corp. v. N.J. Transit Corp., 419 N.J. Super. 343, 357 (App. Div. 2011) (citation omitted). "A motion to disqualify requires the court to balance competing interests, weighing the need to maintain the highest standards of the profession against the client's right to choose his counsel." Ibid. (punctuation and citation omitted). As the Supreme Court explained in City of Atl. City v. Trupos, 201 N.J. 447 (2010):

> [s]uch a motion should ordinarily be decided on the affidavits and documentary evidence submitted, and an evidentiary hearing should be held only when the court cannot with confidence decide the issue on the basis of the information contained in those papers, as, for instance, when despite that information there remain gaps that must be filled before a factfinder can with a sense of assurance render a determination, or when there looms a question of witness credibility.
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> Id. at 463 (citation omitted).

"Although doubts are to be resolved in favor of disqualification, the party seeking disqualification must carry a heavy burden and must meet a high standard of proof before a lawyer is disqualified." Alexander v. Primerica Holdings, Inc., 822 F.Supp. 1099 (D.N.J. 1993). Furthermore, "because motions to disqualify can have such drastic consequences, courts disfavor such motions and grant them only when absolutely necessary." Rohm & Haas Co. v. American Cyanamid Co., 187 F. Supp. 2d. 221, 226 (D.N.J. 2001) (punctuation and citation omitted).

When an attorney is called as a witness at trial, disqualification may be absolutely necessary." RPC 3.7 provides that a "lawyer shall not act as advocate at trial in which the lawyer is likely to

be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualified of the lawyer would work substantial hardship on the client." See also J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 230 (App. Div. 2006). A witness is a "necessary witness" for purposes of RPC 3.7 when their testimony is unobtainable elsewhere. The attorney's testimony need only be likely, not certain. Freeman v. Vicciarelli, 827 F. Supp. 300, 3-2 (D.N.J. 1993). The concern is rooted in the risk that an attorney's dual role as both advocate and witness can mislead the trier of fact or prejudice the opposing party. Main Events Productions v. Lacy, 220 F. Supp. 2d 353, 357 (D.N.J. 2002). While the risk is heightened in a jury trial rather than a bench trial, which is how this case will be determined, the court cannot ignore the fundamental tension.

Here, the three exceptions to RPC 3.7 do not apply. First, whether Mr. Cevasco had actual or apparent authority to make an offer and generally act on behalf of the company is the pivotal issue of this case. See Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005) (stating that attorneys are presumed to have authority to enter stipulations of settlement of an action in court, and "the party asserting the lack of authority" bears the burden to show that his or her "'attorney acted without any kind of authority in agreeing to the entry of judgment in the trial court.'). If Mr. Cevasco truly had apparent or actual authority to send those documents and related communications between March and July 2016, his position is contrary to that of Mr. Giovinazzo. If he did not have any authority to engage in those discussions or make those representations, his position is likewise adverse for a slightly different reason. See RPC 1.7(a)(2) (prohibiting attorney from undertaking representation that may be materially limited by the lawyer's own interests, unless the affected client consents after full disclosure) and Circle Chevrolet v. Giordano, Halleran

& Ciesla, 142 N.J. 280, 291-92 (1995) (concluding that respective interests of client and attorney may diverge if the lawyer could be subject to potential malpractice liability). Regardless, it is difficult to reconcile Defendants' position that the testimony relates to an uncontested issue.

Regardless, because the scope of Mr. Cevasco's authority is a pivotal issue in this case, Mr. Giovinazzo has waived the privilege having testified on the issue of whether he had given Mr. Cevasco authority. In re Grand Jury Subpoena Issued to Glassao, 389 N.J. Super. 281, 298 (App. Div. 2006) (stating that "our courts have 'recognized implicit waiver of the attorney-client privilege where the client has placed in issue a communication which goes to the heart of the claim in controversy."). Clearly, any such communication "goes to the heart" of the issue of whether Mr. Cevasco had authority to act and if so, whether Mr. Giovinazzo breached the agreement. Similarly, Giovinazzo's reliance on the "true up" as stated om the September letter sent by Cevasco, also goes to the heart of whether Giovanazzo breached any duties to EMS and/or its members.

According to Plaintiff, Mr. Cevasco was not representing Mr. Giovinazzo when he wrote the September 8, 2016 letter, and therefore, Mr. Giovinazzo cannot claim any privilege on behalf of EMS. In contrast, Defendants contend that Mr. Giovinazzo holds the attorney-client privilege individually and distinctly from the corporate entity. Defendants, however, cite to no legal authority in support of this argument, and indeed, the argument is made in a single sentence without further explanation. Regardless, the information conveyed in the September 8, 2016 letter go to the issue of whether Mr. Giovinazzo was improperly advancing his own interests ahead of EMS

and others with membership interests.[2] The parties concede that the second exception does not apply because there is no dispute regarding the value of legal services rendered.

Although the final consideration is not as straightforward, there is not sufficient evidence to support a conclusion that Defendants will suffer a substantial hardship if Mr. Cevasco is disqualified. The hardship described by Defendants relates to the consequence of having a lesser trained attorney try this case and/or having to pay a higher fee for a more seasoned attorney.

A litigant's right to counsel of its choosing is not absolute. Indeed, a "client's right freely to choose his counsel" must be balanced against "the need to maintain the highest standards of the profession," as this State's highest court has held. Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988). A violation of the RPC's tips in favor of disqualification to "validate the integrity of the profession and its commitment in compliance with the Rules of Court." Cavallaro v. Jaco Prop. Mgmt, 334 N.J. Super. 557, 572 (App. Div. 200). These ethical standards of the profession, demand that Mr. Cevasco, a necessary fact witness, not be allowed to act both as a lawyer and witness.

Courts have considered a variety of factors and circumstances in determining whether the disqualification of counsel under RPC 3.7 will pose a substantial hardship on the client, including (1) the amount of time and money which the client has invested in counsel; (2) the proximity of the trial date; and (3) whether the moving party delayed in seeking the disqualification of opposing counsel. Freeman v. Vicchiarelli, 827 F. Supp. at 303 (D.N.J. 1993).

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[2] A hearing may be necessary to determine who the client was at various times between March 2016 and the present. Regardless, that issue does not affect the analysis of whether Mr. Cevasco had actual apparent authority. Rather it goes to the other five issues for which Plaintiff seeks testimony.

Defendants do not assert that the first factor weighs in their favor. To the extent the client invested significant time or money in Mr. Cevasco, that concern is diluted by the proffer that his firm will continue to represent Defendants. More importantly, Defendants knew of potential disqualification several years ago. According to Plaintiff, "Plaintiff raised the issue of Mr. Cevasco's inability to serve as trial counsel repeatedly over the past two (2) years throughout discovery. Plaintiff alerted the Court to this issue at several Court appearances well before it filed the present Motion to Disqualify."

Regarding the second factor, the motion was filed four months before trial after all parties were aware that it may be an issue later in the case. Unfortunately, there is a lack of published opinions on what the acceptable deadline is. But see United States v. Lacerda, 929 F. Supp.2d 348, 360-61 (D.N.J. 2014) (rejecting argument that disqualification within "three months of trial" would cause substantial hardship).[3] Here, the court finds that filing a motion four months before trial is a reasonable amount of time, particularly when everyone was aware of the potential motion for several years.

The third factor is concededly more troubling, and in fact, delay in filing such a motion after learning of the possibility that an attorney could be called as a witness can result in a finding that the moving party has waived its right to raise this issue. See Alexander, 822 F. Supp. at 1115-18. When the opposing party argues that the moving party has waived their right to seek disqualification of counsel by waiting too long to seek such relief, the court should consider factors such as (1) the length of the delay in bringing the motion to disqualify; (2) when the movant learned

[3] Because of various delays and adjournments, this motion is being decided one month before trial, which concededly is not a long time. For that reason, the court is willing to consider and adjournment request for a reasonable amount of time to provide Defendants with additional time to prepare without Mr. Cevasco. Said request shall be filed within seven (7) days of this Opinion and Oder.

of the [grounds for disqualification]; (3) whether the movant was represented by counsel during the delay; (4) why the delay occurred; and (5) whether disqualification would result in prejudice to the non-moving party. Ibid.

This court has already addressed the first two Alexander factors above. Regarding the third factor, the movant was represented by counsel during the delay. The fourth consideration, however, is a little murky because the moving papers provide no reason for the delay except to contend that "RPC 3.7 does not permit disqualification as counsel during discovery." Moving Brief at 16. They cite to no authority, however, to support that position. Accordingly, it appears that the delay was caused at least in part based on a misplaced assumption that disqualification could not be sought earlier. Nonetheless, the court recognizes that there may be some distinction between disqualifying an attorney from serving the client in pre-trial proceedings in contrast to actual trial itself even though no New Jersey court has addressed whether the two scenarios should be treated differently. See Main Events Productions v. Lacy, 220 F. Supp. 2d 353, 357 (D.N.J. 2002) (allowing pre-trial representation but not trial representation) and Kevin H. Michels, New Jersey Attorney Ethics, 31:4-6, at 772 (2019) (stating that Main Events represents the appropriate approach). In other words, there is some authority to support the notion that even if the court heard the motion during discovery, it could have allowed Cevasco to remain as the attorney up until trial.

Parenthetically, to assess prejudice and whether gamesmanship was at issue, the court inquired at oral argument whether this motion is a ruse or tactic to have Mr. Cevasco disqualified and Plaintiff ultimately has no intention of calling Mr. Cevasco at trial. Counsel for Plaintiff, however, stated clearly on the record that she would be calling Mr. Cevasco as a witness and that this motion is not a litigation tactic wherein Plaintiffs are attempting to put Defendants at a

disadvantage. Therefore, the court declines to hold that the remedy of disqualification was waived when looking at all of the relevant factors as applied to the facts of this case, in large part because Defendants will not suffer a significant hardship for the reasons stated above.

For the foregoing reasons, the court finds that disqualification is an appropriate remedy. Although there may be some prejudice in disqualifying Mr. Cevasco, "[a] motion to disqualify requires the court to balance competing interests, weighing the need to maintain the highest standards of the profession against the client's right to choose his counsel." First Century Rail Corp. v. N.J. Transit Corp., 419 N.J. Super. 343, 357 (punctuation and citation omitted). For the reasons stated above, Defendant's Motion to Disqualify Mr. Cevasco is **GRANTED**.

/s/ MARA ZAZZALI-HOGAN, J.S.C.