

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

NETRATINGS, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) Civ. No. 03-295-SLR  
 )  
 THE NPD GROUP, INC., )  
 )  
 Defendant. )

**MEMORANDUM ORDER**

At Wilmington this 11th day of December, 2003, having reviewed the evidence submitted at the August 27, 2003 hearing (D.I. 37) relating to defendant NPD's motion to disqualify Alan Shapiro, plaintiff NetRating's general counsel, as well as the post-hearing papers submitted in connection therewith;

IT IS ORDERED that said motion (D.I. 7) is denied, for the reasons that follow:

1. Defendant NPD, as the moving party, has the burden to prove by clear and convincing evidence that disqualification is mandated by the existence of a conflict of interest that will prejudice the fairness of these proceedings. See IMC Global, Inc. v. Moffett, Civ. Nos. 16387-NC and 16393-NC, 1998 WL 942312, at \*2 (Del. Ch. 1998). Under the facts of this case, the conflict asserted is that an attorney-client relationship existed

between Shapiro and NPD during prior litigation between these parties.

2. To carry its burden of proof, NPD relies solely on the testimony of Tod Johnson, who serves as the Chairman and Chief Executive Officer of NPD. (D.I. 37 at 5-42)

a. In 2000, Mr. Johnson also served as Chairman of the Board of Directors of an NPD subsidiary, Jupiter Media Matrix ("JMM"). At that time, Mr. Shapiro was general counsel for JMM. Pursuant to various services agreements, NPD had certain rights to some of JMM's patented technology and software. (Id. at 8, 11-12, 16)

b. JMM initiated patent infringement litigation against NetRatings in 2000. Mr. Johnson testified that he was involved in this litigation on behalf of both NPD and JMM to the extent that he was consulted by Shapiro and others and made sure that NPD employees were cooperative. (Id. at 12)

c. Mr. Johnson testified that his discussions with Mr. Shapiro "were about strategy. They were about the benefits and objectives of the litigation and how we ought to go about accomplishing those goals." (Id. at 13)

d. Because he viewed the interests of NPD and JMM to be interchangeable vis a vis the NetRatings litigation, Mr. Johnson testified that he believed that Alan Shapiro represented the interests of NPD in said litigation. (Id.)

e. Mr. Johnson also testified that he shared NPD confidential information with Mr. Shapiro. (Id. at 14) More specifically, Mr. Johnson recalled being prepped for a deposition by Mr. Shapiro and JMM's outside counsel. During that preparation, settlement was discussed. Mr. Johnson testified that he told Mr. Shapiro "what the objectives of NPD would be, what would have to be changed if NPD would agree to certain things that NetRatings was requesting of NPD," and he gave Mr. Shapiro instructions on how to negotiate the settlement on behalf of NPD. (Id. at 15-18)

f. According to Mr. Johnson, the dispute at bar "involves basically the rights of NPD to use the software and technology for certain parts of the market research industry exclusive of Internet audience measurement." (Id. at 22) Mr. Johnson avers that the rights of NPD are reflected in the settlement agreement executed in connection with the prior litigation between JMM and NetRatings. (Id.)

3. The settlement agreement between JMM and NetRatings required JMM to assign the patent in suit to NetRatings for approximately \$15 million. NPD was not a signatory to that agreement. NPD did execute a three-way contract between JMM, NetRatings and NPD amending the services agreement that related to the patent in suit. NPD's corporate counsel reviewed said contract. (Id. at 35-39)

4. Mr. Shapiro left JMM in 2002 and became general counsel for NetRatings. (Id. at 43)

5. At all relevant times hereto, NPD was not a public company. At all relevant times hereto, JMM was a public company listed on NASDAQ with many shareholders, only one of which was NPD. (Id. at 23) Except to the extent permitted by agreement between the parties, it would have been inappropriate for Mr. Johnson, as Chairman of the Board of JMM with a fiduciary duty to all of JMM's shareholder, to use JMM resources for the benefit of NPD, a single shareholder. (Id. at 24) There was no explicit agreement between NPD, a private company, and JMM, a public company, that allowed for the use of the latter's general counsel for the benefit of NPD, a single shareholder. (Id.).

6. At all relevant times hereto, Mr. Shapiro was employed and paid only by JMM. (Id. at 25, 46) Mr. Shapiro never held himself out as representing NPD and never visited NPD's office while employed at JMM. (Id. at 47-50) Any arrangements between NPD and JMM were fully disclosed and set forth in written, arm's-length agreements. (Id.) Aside from Mr. Johnson's belief that Mr. Shapiro was representing NPD's interests in the prior litigation, there is not a single document or witness of record to corroborate Mr. Johnson's testimony.

7. Under the circumstances as evidenced by the record, the court finds that NPD has not carried its burden to

demonstrate that an attorney-client relationship existed between Alan Shapiro and NPD such that disqualification is justified.

Sue L. Robinson  
United States District Judge