IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

GLENDA SHOWS, ET AL **PLAINTIFFS**

vs. **CAUSE NUMBER: 1:07CV709-WHB/LRA**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL **DEFENDANTS**

PLAINTIFF'S RESPONSE TO STATE FARM FIRE AND CASUALTY COMPANY'S MOTION TO DISQUALIFY THE BARRETT LAW OFFICE, P.A., NUTT & MCALISTER, P.L.L.C., AND THE LOVELACE LAW FIRM, P.A.

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I. INTRODUCTION

State Farm's latest Motion for Disqualification ("Second Motion") is unfounded and duplicative. State Farm's ("SF's") and its Counsel's dishonest personal attacks on Plaintiffs' chosen attorneys have crossed the line that separates aggressive advocacy from improper and vexatious litigation tactics. SF's Counsel have abused their roles as Officers of the Court by cobbling together gossip, out of-context quotes, and innuendo to poison the jury pool, confuse the facts and distort the law. [1]

A. Procedural Posture

The relevant, substantiated facts are as follows. In the *McIntosh* case, State Farm ("SF") filed a Motion to Disqualify the "Scruggs Katrina Group" ("SKG") in June of 2007 ("First Motion") with the District Court for the Southern District of Mississippi. SF's lengthy briefing focused upon: 1) the supposedly improper relationship between Richard Scruggs ("Scruggs") and the Rigsbys, 2) thousands of allegedly "stolen" documents, 3) the assertion that the Rigsbys were somehow "agents" of SF, 4) payments of money to the Rigsbys as consultants, and 5) alleged criminal contempt by Scruggs in Alabama. **SF's latest Motion is simply an attempt to revisit the allegations argued to Judge Senter and the Fifth Circuit months ago in the *McIntosh* case**.

In *McIntosh*, after months of briefing and the submission of hundreds of pages of argument and exhibits, the District Court **denied** SF's Motion and holding that SF had known most of the information that it complained about for more than a year before acting upon it.

[1] For these serious abuses, Plaintiffs are filing separate motions asking the Court to strike State Farm' Motion and to issue sanctions against State Farm and its attorneys, who will continue to file meritless pleadings until deterred by the Court.

McIntosh v. State Farm Fire & Cas. Co., Case No. 1:06-cv-01080-LTS-RHW, Opinion on Motion to Disqualify (S.D. Miss. Sept. 12, 2007) ("*McIntosh Order*") (Ex. 1) SF's delays were inexplicable and resulted in waiver:

> Given this history between State Farm and Scruggs, **I am at a loss to understand why State Farm has waited so long to invite the Court's attention to issues raised in this motion**. . . . **I cannot close my eyes to the fact that State Farm has proceeded in hundreds of other similar cases without raising the issue of Scruggs's alleged misconduct and seeking his disqualification**. . . .
>
> Disqualification of Scruggs and his firm at this point would necessarily deprive these litigants' of their choice of counsel and would put these State Farm policyholders back to square one in seeking a resolution of their insurance claims.
>
> . . . I am unwilling to now deprive many of the remaining State Farm claimants of their choice of attorney based on conduct that was known to State Farm and that State Farm has not seen fit heretofore to challenge.

Id at 2.

Despite losing its Motion, SF proceeded upon the highly unusual course of petitioning the Fifth Circuit Court of Appeals ("Fifth Circuit") for a Writ of Mandamus ("*Petition*") (Ex. 2), arguing that Judge Senter had committed "clear error." The Fifth Circuit then received hundreds of pages of briefing and materials recounting the same facts and arguments. However, the Fifth Circuit found SF's arguments unpersuasive:

> Although State Farm argues that the public interest in upholding ethical violations is paramount here, **attorney disqualification "is a sanction that must not be imposed cavalierly."** *FDIC v. U.S. Fire Ins. Co.*, 50 F. 3d 1304, 1316 (5th Cir. 1995). Without deciding the contested issue of ethics, we are satisfied that **Judge Senter has carefully weighed the balance between the need to ensure ethical conduct on the part of lawyers and other social interests, including litigants' right to choose their counsel.** *See Woods v. Covington County Bank*, 537 F. 2d 804, 810 (5th Cir. 1976). **State Farm has failed to show the extraordinary circumstances necessary for relief**.

In Re: State Farm Fire & Casualty Company, Petition for Writ of Mandamus to the United States District Court for the Southern District of Mississippi, Gulfport (06-CV-1080) at 3 (Per Curiam), November 19, 2007. (Ex. 3)

Less than a month after the Fifth Circuit denied its request for a writ of mandamus, SF came to this Court on December 18, 2007, asking for the same remedy that had just been denied. The determinations by the Southern District Court and the Fifth Circuit should be respected rather than undermined by the inconsistent ruling SF seeks.

B. State Farm's Motion Is An Attempt To Relitigate Other Cases Pending Before Other Courts

Read carefully, SF's Second Motion asks this Court to sit as an all-overseeing court and render rulings on other cases pending before other courts. SF seeks to disqualify Plaintiffs' chosen counsel for actions allegedly undertaken by Scruggs (who no longer represents Plaintiffs) in supposed violation of an injunction issued in a separate case in Alabama. The reality is that the Northern District of Alabama can address the legal issues before it, while this Court handles the instant RICO case pending here.

SF also asks this Court to rule upon the propriety of supposed *ex parte* communications and consulting fees paid to the Rigsbys, even though these issues were squarely addressed in the *McIntosh* case and reviewed by the Fifth Circuit. Similarly, SF seeks disqualification for conduct that allegedly occurred in the *Mullins* case. According to SF, one of Plaintiffs' attorneys allegedly abused "subpoena power" and "badgered" a witness into turning over multiple CDs. Again, SF looks to this Court to deal with events that occurred long ago in other cases. Not only are SF's characterizations respecting events in *Mullins* incomplete and inaccurate, the court presiding over the *Mullins* case was the proper venue in which to address alleged abuses in that case, not this Court.[2]

[2] Further, as addressed below in greater detail, State Farm is not even the proper party to pursue this alleged violation. The witness herself, Nellie Williams, and her employer have withdrawn any and all objections to Plaintiffs' possession of and use of information they provided Plaintiffs' Counsel.

Instead of bringing a motion for disqualification in *Mullins*, on November 11, 2006 at a settlement meeting in Nashville, Counsel for SF, Sheila Birnbaum, unethically threatened raising "disqualification" as an issue, but never filed any motions seeking disqualification. In fact, Ms. Birnbaum stated that she "needed" the undersigned. Two months later, in January 2007, SKG successfully settled 640 cases with SF, including the *Mullins* case. Following that settlement, the undersigned attempted to have the district court approve a class action settlement for other SF policyholders. SF did not raise the "*Mullins* issue" or disqualification at that time either. Even after that, SF continued to settle cases with the undersigned, settling the Minh Nguyen and Trent Lott cases in April 2007. Again, no motion for disqualification was filed. At all times, SF was aware of the depositions of Kerri and Cori Rigsby taken in the *Renfroe v. Rigsby* case in Alabama, those depositions having been taken on January 25 and 26, 2007.

As stated by Judge Senter, a litigant cannot store up disqualification ammunition and then fire it months or years later: "**A motion to disqualify should be filed at the earliest practical opportunity. It is not permissible to hold this right to relief in order to assert the right at a tactically advantageous time and thereby put an opponent at an unfair disadvantage**." *McIntosh Order* at 2 (Ex. 1) (Emphasis added).

Aside from all of the above, SF also urges this Court to rule upon conduct by the former and sitting Attorneys General for the State of Mississippi, based upon gossip, supposition, and hearsay. Jim Hood and Mike Moore are not on trial here; nor have any charges been brought against either Mr. Hood or Mr. Moore for the conduct at issue in SF's Motion. SF's conjecture-laden mudslinging with the hopes that some might stick is unprofessional and wholly deficient to justify disqualification.

C. State Farm's Motion Would Work Extreme Prejudice Upon Plaintiffs And Hundreds Of Other Policyholders

In addition to ruling that holding a supposed right to relief for "tactical advantage" is inappropriate, which SF clearly did in hundreds of cases, Judge Senter also noted the devastating impact that disqualification would have in this litigation:

> This motion asks the Court to disqualify Scruggs and his firm from this action and, as a practical result, from approximately 170 other actions in which Scruggs and his firm are presently representing State Farm policyholders in property damage claims arising from Hurricane Katrina.

Id at 2-3. At present, the Katrina Litigation Group ("KLG") represents more than 1100 Mississippi policyholders, more than 450 of which are SF policyholders. In addition, hundreds of additional plaintiffs have contacted KLG about possible representation.

D. State Farm's Alleged "New" Evidence Was Known Months Ago And Is Also Insufficient To Warrant Disqualification

SF attempts to bootstrap its old allegations to a few supposedly new ones consisting of unsubstantiated charges and suppositions. Further, the timeline of events demonstrates that SF's "new" assertions have been known by SF for months or years. SF's briefing on its original Motion did not end until November 16, 2007, when it filed its Reply with the Fifth Circuit in support of its motion for a writ. SF's latest Motion in this case was filed a mere month later (December 18, 2007). Thus, as detailed below, SF's allegedly "new" information (that would necessarily have to have been discovered within a short period of time) is really old and unsubstantiated, and is merely being used as a pretext for the filing of this redundant Motion that has already been rejected.

E. State Farm's Likely Motivation Is To Capitalize On The Scruggs' Indictment

SF's improper invitations to 1) review Judge Senter's or the Fifth Circuit's decisions, or 2) chase rabbit trails related to other civil and criminal cases pending before other courts, or the workings of the Attorney General's Office, should be declined.

SF's Second Motion is merely an attempt to capitalize on recent press concerning the indictment of Scruggs and two other lawyers with his firm. SF attempts to distract this Court and the public from its fraud and racketeering - the limited and proper subject of this case. The lack of any bar complaints further demonstrate SF's disingenuous motives. For the reasons already briefed and addressed by the Southern District, as well as for those detailed below, SF's latest Motion must be denied.

F. The Proper Analysis For Considering State Farm's Second Motion For Disqualification

The proper analysis for considering SF's Second Motion is as follows: **First,** SF's Motion is merely an attempt to revisit an earlier one that has already been thoroughly considered and denied both by Judge Senter. Under fundamental principles of judicial integrity and efficiency that undergird the doctrines of *res judicata*, collateral estoppel, and judicial estoppel, SF's Motion must be denied. *See Wolfson v. Baker*, 623 F.2d 1074 (5th Cir. 1980) (Affirming the application of the doctrine of "nonmutual collateral estoppel" and holding that it applies when a litigant has had a full and fair opportunity to litigate an issue, i.e., where a matter has been "distinctly put in issue and directly determined". . . "The Supreme Court and this court have held that nonmutual collateral estoppel will be applied only where there was a 'full and fair' opportunity in the first action . . . , *Parklane Hosiery*, 439 U.S. at 326-33, 99 S. Ct. at 648-52; *Blonder-Tongue*, 402 U.S. at 332-33, 91 S. Ct. at 1444-45; *Johnson v. United States*, 576 F.2d 606, 614-15 (5th Cir. 1978); *Rachal v. Hill*, 435 F.2d at 62." *Id.* at 1080)." *Id.* at 1180 *See also Sidag Aktiengesellschaft v. Smoked Foods Products Co.*, 776 F.2d 1270 (5th Cir. 1985) ("To effectuate the principles of collateral estoppel, none of these claims may be supported by the facts or matters . . . which were distinctly and necessarily found by the Texas court." *Id.* at 1276)

SF "distinctly" put the issue of disqualifying these same lawyers before Judge Senter months ago and is estopped from relitigating that issue again now.

Second, even if this Court were to entertain a review SF's allegations, it would properly conclude that most of the allegations are months or years "old" and cannot be raised now due to the doctrine of waiver and the permanent prejudice that disqualification would work upon hundreds of Mississippi Plaintiffs. As Judge Senter determined, SF has waived its right to pursue disqualification in light of substantial, inexplicable delays in acting upon information within its knowledge.

Third, SF's latest disqualification Motion is based upon untenable legal suppositions. SF seeks to disqualify KLG for alleged actions of a lawyer (Richard Scruggs) and a law firm (The Scruggs Firm) that are no longer representing Plaintiffs. This argument is ironic in light of recent arguments made by the SF Defendants. In separate motions to dismiss, the SF Defendants argue to this Court that their separate corporate structures must be respected. The SF Defendants argue that, notwithstanding any direct actions by SF Mutual or ratifications of SF Fire's actions by SF Mutual, Mutual cannot be held liable under a piercing the veil analysis. But, the SF entities disregard the fact that SF Fire is a wholly owned subsidiary of SF Mutual and that many integral functions of their collective insurance business are performed by Mutual.

In stark contrast to its plea for "separate treatment" of its cooperating companies, SF now argues that a mere affiliation of separate law firms requires this Court to disregard their separate structures and disqualify all of the firms for the alleged actions of one firm. Furthermore, if the actions of The Scruggs Firm did not result in disqualification months ago in *McIntosh*, how can those same actions result in the disqualification of separate firms in this case months later?

These type of inconsistent arguments cannot be given the force of law to the detriment of hundreds of policyholders.

Fourth, much of SF's latest Motion rests upon an false assumption – that Scruggs engaged in *ex parte* communications by talking NOT TO ANY SF EMPLOYEES, but instead by communicating with employees from another company (E.A. Renfroe) that was not being sued at the time those communications were initiated. This argument is absurd. Further, SF argues that these communications were *ex parte*, despite SF's own prior representations that Renfroe was/is a separate company that makes its own decisions. (*See Birnbaum Letter*) (Ex. 4). In other words, when concerned about liability, SF calls Renfroe a separate company or independent contractor. But when SF is intent upon stirring up the press and confusing the Courts about alleged unethical conduct, it argues that Renfroe is a mere agent/instrumentality of SF, thereby making any communications with the Rigsbys *ex parte*. SF's inconsistent arguments that depend upon whatever is most convenient at that time should be rejected by this Court.

Fifth, SF continues to disregard the unique *qui tam* context that led the Rigsbys to approach Richard Scruggs. SF disregards the fact that *ex parte* communications (which did not occur here) by whistleblowers reporting perceived criminal activity are expressly allowed by law, common sense and basic principles of justice.

Sixth, notwithstanding everything above, the alleged conduct is not unethical or illegal, as briefed with Judge Senter and discussed below. Additionally, and as noted by Judge Senter, Plaintiffs' position is supported by one of the foremost national ethics authorities, Geoffrey Hazard (who has been cited by the Fifth Circuit), as well as one of Mississippi's leading ethics experts, Cham Trotter. (*See* Hazard and Trotter Declarations) (Ex. 5 and Ex. 6) (See also *McIntosh Order* at 2 (Ex. 1).

II. Plaintiffs' Counsel Did Not Violate The Federal Bribery Statute

In an attempt to avoid liability for its illegal acts (ones detailed in the First Amended Complaint), SF makes a bald claim that SKG violated the Federal Bribery Statute, 18 U.S.C. § 201, and MRPC 3.4 and 8.4 by hiring the Rigsbys as consultants. However, this same consulting arrangement was previously presented to Judge Senter and deemed to have been "waived." Aside from the clear waiver, any payments made for the Rigsbys' consultation in no way relates to, has influenced or will influence their testimony. Further, SF has presented no evidence that any compensation was contingent upon the content of their testimony. Further, the Rigsbys have not been compensated or employed by KLG.

In its recast Second Motion, SF ignores the "great difference between . . . payments to witnesses and subornation of perjury." *Fund of Funds, Ltd. V. Arthur Andersen & Co.*, 545 F. Supp. 1314, 1369 & n.28 (S.D.N.Y. 1982) (stating, "as a substantive matter, we are not convinced that the mere fact of payments, even seemingly large payments, warrants any explicit reference to [the Federal Anti-Gratuity Statute]"). Pursuant to Rule 3.4(b), "occurrence witnesses may be reasonably compensated for time spent in attending a deposition or trial; for time spent in pretrial interviews with the lawyer in preparation for testifying; and for time spent in reviewing and researching records that are germane to his or her testimony." *Centennial Mngt Servs., Inc., v. Axa Re Vie, et al.*, 193 F.R.D. 671,682 (D. Kan. 2000), citing ABA Comm. On Ethics and Professional Responsibility, Formal Op. 96-402 (1996).

SF also totally disregards the well-settled rule that "a witness may be compensated for time spent preparing to testify or otherwise consulting on a litigation matter in addition to the time spent providing testimony in a deposition or trial." *Prasad , et al., v. MML Investors Services, Inc.*, 2004 U.S. Dist. LEXIS 9289, *17-18 (S.D.N.Y.), citing *Centennial Mgmt. Servs., Inc. v. Axa Re Vie*, 193 F.R.D. 671, 679-80 (D. Kan. 2000) and *New York v. Solvent Chemical*

Co., 166 F.R.D. 284, 289 (W.D.N.Y.). (holding in pertinent part that the payment of a witness as a "litigation consultant does not, in and of itself, appear to be improper, absent some indication that the retention was designed as a financial inducement or as a method to secure the cooperation of a hostile witness, or was otherwise improper." *Prasad* , 2004 U.S. Dist. LEXIS 9289 at *19.)

SF's request for the extreme sanction of disqualification also ignores the fact that payments to witnesses only affects credibility: ". . . its only effect on the trial in which the witness testimony is received is on that witness's credibility." *Goldstein v. Exxon Research & Eng'g Co.*, 1997 U.S. Dist. LEXIS 14600, 19-20 (D.N.J. 1997). See also *United States v. Goff*, 847 F.2d 149, 161 (5th Cir. 1988). ("The credibility of a compensated witness .... is for the jury to determine."). See also *United States v. Medina*, 41 F. Supp. 2d 38, 53-54 (D. Mass. 1999) ("Section 201(c)(2) cannot make it illegal to give anything of value to a witness simply because testimony might eventually be desired, but is not the immediate reason for the exchange. Such an interpretation would make criminal the hiring by the defense of an investigator primarily to gather documents or do surveillance, and possibly testify – an absurd result.").

In keeping with the foregoing rules, compensation to the Rigsbys reasonably reflected the value of the services that they performed and/or to be performed, including reviewing documents, meeting with attorneys and preparing for depositions, as well as being accessible on relatively short-term bases. Moreover, the amounts paid were commensurate with the compensation they received in their previous job and are on par with what insurance adjusters with similar experience are paid. SF's assertion that the Rigsbys somehow benefited from their service as consultants to SKG after they acted as whistleblowers and lost the jobs they held for

many years is at odds with facts and common sense. The Rigsbys uncovered widespread fraud on Mississippi insureds and in the process lost their means of susbsistence.

SF does not cite a single authority prohibiting compensation to litigation consultants for attending depositions, preparing for depositions, reviewing documents and the like. In fact, payment for these activities is not contrary to the case law and ethical rules, but is instead supported by both. Pursuant to rule 3.4(b), "occurrence witnesses may be reasonably compensated for time spent in attending a deposition or trial; for time spent in pretrial interviews with the lawyer in preparation for testifying; and for time spent in reviewing and researching records that are germane to his or her testimony." *Centennial Mgmt. Servs. v. Axa Re Vie, et al.*, 193 F.R.D. 671,682 (D. Kan. 2000), citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996). A witness may also be compensated for "consulting on a litigation matter in addition to the time spent providing testimony in a deposition or trial." *Prasad , et al., v. MML Investors Servs, Inc.*, 2004 U.S. Dist. LEXIS 9289, *17-18 (S.D.N.Y.), citing *Centennial Mgmt. Servs., Inc. v. Axa Re Vie*, 193 F.R.D. 671, 679-80 (D. Kan. 2000) and *New York v. Solvent Chemical Co.*, 166 F.R.D. 284, 289 (W.D.N.Y.).)

As the rules and cases indicate, the remedy SF seeks is extreme and unwarranted. The proper remedy for addressing a scenario where a litigation consultant also testifies as a fact witness (a scenario that may not occur in this case) is to provide the opposing party with notice of the arrangement and allow for a full airing of the arrangement at trial (including an opportunity for cross-examination). In short, compensation goes to credibility rather than resulting in the disqualification of either the witness or counsel. See *Goldstein v. Exxon Research & Eng'g Co.,* 1997 U.S. Dist. LEXIS 14600, 19-20 (D.N.J. 1997) ("...it is the

witness's credibility which is affected by a payment agreement. Numerous criminal cases stand for the same proposition... ").[3]

III. State Farm's Alleged "New" Bases For Seeking Disqualification Are Not "New" And Are Insufficient To Warrant Disqualification

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[3] State Farm cites the case of *Mataya v. Kingston*, 371 F.3d 353 (7th Cir. 2004). State Farm cites selectively from the *Mataya* case and attempts to confuse the Court into thinking that the court in *Mataya* disqualified a lawyer or law firms and that this Court should also take the drastic step of attorney disqualification. State Farm failed to inform the Court that NO LAWYER was disqualified in the *Mataya* case. In fact, *Mataya* did not even involve a disqualification decision. Nor did it involve a civil case. The *Mataya* case involved the alleged payment of funds by the prosecution/state to a principal witness for his "cooperation and testimony" in a murder conviction. Also, the "deal" included a "favorable letter to the parole authorities. These things were told to the jury.

State Farm failed to inform the Court that, despite all of the inducements at issue and the seriousness of that murder case involving the most grave criminal charge, the Seventh Circuit Court of Appeals did not disqualify any attorney. Further, while the *Mataya* Court did discuss the inducements, including both freedom and money, the Seventh Circuit did not determine that any attorney needed to be punished nor that the conviction needed to be overturned. Instead, the *Mataya* court found that the evidence was actually self-validating and credible:

Hertel may have been willing or even eager to lie in exchange for the dropping of the burglary charges. But we know that he didn't lie. ... There is no suggestion that he may have learned it from someone, not Mataya, who was the real murderer. Nor is there evidence or reason to believe that the police planted these facts in Hertel's head. ... There is no reasonable possibility that Hertel simply made up the facts that he recounted to the police and that his fabrication just happened to correspond to the truth. The odds against such a coincidence between fiction and fact are astronomical.

... Our point is only that because "it is wrong to view items of evidence in isolation when they point in the same direction," *Rowan v. Owens, supra*, 752 F.2d at 1188, Hertel's evidence was not only self-validating but also strongly corroborated by the other evidence that the state presented.

In this case, it is important to point out that no trial has occurred and the witnesses have not yet been determined or identified. Further, the one prejudice that was considered in the *Mataya* case, i.e., failure to disclose one of the inducements to the jury, can easily be addressed through cross examination when the trial occurs and IF the Rigsbys are called as witnesses in this case. Even under the facts of *Mataya*, which involved undisclosed inducements at the time of trial in a murder case, the court found no prejudice: "Mataya argues that a distinct violation of his rights occurred when the prosecution failed to correct Hertel's false testimony that he had been offered no inducements to testify beyond the reward and the favorable letter. ... **That prejudice, as we have been at pains to show, was nil."** *Id.* at (Emphasis added).

As stated above in the Introduction, SF injects a few supposedly new allegations in its Second Motion in order to serve as pretext for this redundant filing. However, as pointed out, SF's briefing on the original Motion did not end until November 16, 2007, when it filed a Reply Brief with the Fifth Circuit in support of its motion for a writ of mandamus. SF's latest Motion was filed a mere month later on December 18, 2007. What novel information did SF discover for the first time in that short intervening period that now makes disqualification proper? The short answer is very little, if any, and certainly nothing that would warrant SF's extreme request for disqualification.

A. The Brian Ford Allegations

SF broadly accuses the undersigned lawyers of attempting to pay Brian Ford, an engineer who inspected homes after Hurricane Katrina for Forensic Engineering. SF also suggests that favorable testimony was negotiated in exchange for the payment of money. These allegations are deficient in numerous respects.

First, SF does not and cannot allege that any money was ever paid to Mr. Ford or that he was ever hired. *See* Affidavits of Derek Wyatt and Mr. Ford. (Ex. 7 and Ex. 8, respectively). **Second,** there is no allegation that anyone ever considered paying Mr. Ford for anything other than his time and consultation. **Third,** SF admits that Mr. Ford was explicitly told that he could not be paid as "a fact witness." **Fourth,** all of the information concerning Mr. Ford was known to SF prior to the close of briefing with the Fifth Circuit; Brian Ford's deposition occurred on October, 10, 2007, more than a month prior to SF's Reply Brief. SF's attempt to transform a never-materialized payment arrangement for consulting services into "bribery" of a witness for testimony falls woefully short of the standard for the draconian measure of attorney disqualification.

B. The Testimony of David Lee Harrell

SF also tries to use deposition testimony supplied by David Lee Harrell, Deputy Commissioner of Insurance, in a desperate attempt to create another "new" basis for its Motion. However, Mr. Harrell's testimony was provided more than two weeks prior to SF's Reply Brief filed on November 16, 2007. Furthermore, Daniel Webb had deposed Mr. Harrell during a previous deposition in that same case (the *McIntosh* case). His direct examination style suggests that he had access to Mr. Harrell (either directly or through counsel) prior to that date. Notably, SF and its Counsel fail to instruct the Court about the very first time that they had <u>any</u> knowledge of the alleged conversation between Richard Scruggs, Mr. Harrell, and George Dale.[4]

In addition to the fact that SF was aware of the information on which it bases its allegations prior to the close of briefing with the Fifth Circuit, the conversation at issue does not at all warrant disqualification. SF's citation of Mr. Harrell's testimony about a "Dick Scruggs said" then "George Dale said" conversation is nothing more than spin. Where is the ethical violation? No *ex parte* communications. No payments of money. No bribery. Instead, SF offers its baseless opinion that somehow that conversation means that Richard Scruggs, Jim Hood, and Mike Moore were cooperating in illegal ways.

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[4] Any representation by State Farm regarding when it first learned of the information conveyed by Mr. Harrell in his deposition testimony should be received with skepticism. Plaintiffs discovered while deposing Mr. Harrell on June 7, 2006, that his representation was paid for by State Farm. See *McIntosh v. State Farm*, Deposition of Lee Harrell, 7:20-23. Mr. Harrell is an official of the State of Mississippi, yet he and State Farm see nothing wrong with his representation being provided by one of the very corporations that he was appointed to regulate. Because of the intimate relationship Mr. Harrell has with State Farm, and the fact that State Farm first deposed Mr. Harrell in June of 2007, it is likely that State Farm was apprised of the 2005 conversation at issue long before it was raised in its disqualification Motion. This only further supports Plaintiffs' argument that all the allegations advanced by State Farm are waived due to inexcusable and opportunistic delay. Finally, because Mr. Harrell's interests appear to be so closely aligned with those of State Farm (as evidenced by their provision for his legal representation), any testimony he has offered should also be considered with a high degree of skepticism.

Notably, none of the undersigned attorneys were even present for this alleged conversation, much less said anything. SF's selective cherry-picking of "facts," self-serving interpretations, and unbounded theories of "imputed liability" and guilt by previous association would make disqualifications the norm rather than the extreme rarities they are. Because SF's Second Motion improperly attacks former Mississippi Attorney General Mike Moore with personal attacks and innuendo, Mr. Moore has written an affidavit ("Moore Affidavit"), which only further refutes the unsubstantiated bases offered by SF. (Ex. 9)

C. The Evidence KLG Received From Nellie Williams Was Properly Obtained

Defendant SF broadly asserts that evidence obtained in separate litigation, from an employee of a separate company, was acquired improperly by one KLG attorney such that all of Plaintiffs' Counsel should be disqualified from prosecuting this litigation. SF's sweeping argument suffers from flawed premises and faulty conclusions.

SF's position is untenable from the outset because it lacks standing to challenge the way in which the information in question was obtained. This evidence was acquired from an employee of Forensic Engineering, Inc., not an employee of SF. Forensic and/or its employees were/are the only parties who could/may properly raise an objection to the methods used to obtain this information. Moreover, Forensic and its employees have explicitly withdrawn any objections to Plaintiffs' possession or use of that evidence.

In addition to its lack of standing, SF has also waived its right to object the manner in which Plaintiffs' Counsel acquired information from Nellie Williams, a Forensic employee, in the form of a multi-disk set of CDs. That information was obtained pursuant to a subpoena issued by the United States District Court, District of Nevada, during a deposition conducted in Nevada on December 14, 2006. SF was provided copies of the CDs many months ago during

discovery in *McIntosh*, but it is only now, more than a year after the deposition occurred and approximately six months after the initial Complaint was filed in this case, that SF raises the issue of perceived ethical violations. Because of SF's unreasonable and inexcusable delay, SF's right to now allege ethical or legal violations has been waived.

Aside from SF's lack of standing and clear waiver, SF's *ipse dixit* assertion that the evidence in question was "improperly obtained" is nothing more than conjecture and hyperbole.[5] As stated, the production came pursuant to a subpoena issued by a district court. Ignoring this key fact, SF irrelevantly asserts that the information was obtained at a time when Ms. Williams was not represented by counsel. While Ms. Williams was not technically represented by counsel at her deposition, her lack of representation was her choice and she had ample opportunity to obtain Counsel. Ms. Williams was given fourteen (14) days advance notice of her deposition and thirteen (13) days advance notice of the subpoena issued pursuant to the deposition. Despite this advance notice, Ms. Williams failed to object as she could have done pursuant to F.R.C.P. 45.

Further, SF failed to inform the Court that Ms. Williams' deposition was attended by Larry Canada, an attorney for Forensic Engineering, Inc., Ms. Williams' employer. Mr. Canada did advise Ms. Williams during the deposition, including issuing an initial instruction in which he counseled her to refuse to comply with the subpoena. However, Mr. Canada later withdrew this recommendation and told Ms. Williams to "do what you think you should do." Nellie

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[5] State Farm asserts that evidence obtained from Nellie Williams pursuant to a valid subpoena was "improperly obtained," but State Farm itself committed a discovery violation when it failed to turn over emails found on the CDs supplied to Plaintiffs by Nellie Williams at the deposition in question. Request for those emails were made in *Mullins v. State Farm* (See *Mullins* Requests for Production) (Ex. 6), yet State Farm neither supplied the emails nor objected to their production. Rather than pursue either course of action, as required by the Federal Rules of Civil Procedure, State Farm obstructed Plaintiffs' attempt to lawfully obtain evidence and committed a clear discovery violation.

Williams Deposition in *Mullins v. State Farm Fire and Casualty Co*, et al., Civil Action No. 1:06-cv-457-LTS at 176:23-177:25, 184:6-184:18 (Ex. 10). In addition, SF itself had an attorney, Sherry Moore, present at the deposition. SF did not object at that time to the questioning of Ms. Williams or the CD production. SF has waived its right to complain about things it knew about

Also, SF complains that the subpoena was served without prior filing of notice of intent. SF and its Counsel fail to mention that they have made this exact mistake numerous times, including in this very case. SF served subpoenas upon numerous Plaintiffs in this case <u>*without*</u> filing prior notices and without the requisite personal service. SF ignores its own technical errors and then, hypocritically, asks that this scrivener's error by Plaintiffs' Counsel somehow merits disqualification.

Aside from distorting the facts, SF distorts the law. For example, SF cites *Fox Industries, Inc. v. Gurovich*, No. CV 03-5166, 2006 WL 2882580 (E.D.N.Y. Oct. 6, 2006) for the proposition that Plaintiffs' Counsel behaved improperly. However, in *Fox*, plaintiffs' counsel subpoenaed non-parties and Defendant's counsel sent those non-parties letters ordering them not to comply because the subpoenas were void and illicit, without sending the same letter to plaintiffs' counsel. *Id.* at 27. In response, plaintiffs' counsel sought to have the defendant's counsel disqualified. *Id.* at 2. However, the Court in *Fox* declined to disqualify defendant's counsel. Thus, the *Fox* case does not support SF's arguments for disqualification, but undermines them.

Further, SF cites *Louisiana State Bar Assoc. v. Harrington*, 585 So.2d 514 (La. 1990) for the proposition that Plaintiffs' counsel violated MRPC 4.4(a). The facts of the *Louisiana State Bar* case are so far afield from the facts at issue here that they speak for themselves. Harrington

was suspended from the practice of law by the Louisiana State Bar Assoc. for eighteen (18) months not because he obtained evidence pursuant to a subpoena, but instead because he violated MRPC 4.4(a) when he entered into the home of his client's adversary in a dispute over the sale of carpet and threatened the individual while misrepresenting his identity; Harrington also wrote a letter to an adversary of a client in an automobile accident dispute threatening extradition and prosecution if she did not provide the name of her insurance company. *Id.* at 517, 521. Requesting a witness to comply with a subpoena at a deposition bears no resemblance to the outrageous conduct at issue in *Louisiana State Bar*. SF should not have cited that case for support here.

In fact, in addition to the above examples of inapposite case law cited by SF, none of SF's cases involved disqualifications for abusing subpoena power in violation of MRPC 4.1(a) and 4.4. SF's latest Motion to Disqualify lacks merit and should be denied.

IV. The Scruggs Firm's Actions Were Not Unethical or Illegal

A. Scruggs Did Not Violate Rule 4.2 And Have Impermissible *Ex Parte* Contact With State Farm.

SF broadly argues that Scruggs had contact with the Rigsbys and such contact was allegedly impermissible *ex parte* contact. The reality is that the lawyers of KLG are not Scruggs. Moreover, Scruggs himself did not engage in any *ex parte* communications and, in addition, any communications (even if *ex parte*, which is not the case) were "authorized by law" in accordance with Rule 4.2. These issues were extensively briefed to Judge Senter and the Fifth Circuit before their respective denials of SF's Motion and Writ. Accordingly, as stated above, Plaintiffs incorporate their Response to SF's original Motion to Disqualify and their Response to SF's Petition for Writ (Ex. 11 and Ex 12).

1. According To State Farm, The Rigsbys Were Not SF's Employees/Agents.

SF glosses over a large and fatal gap in its argument: The Rigsbys were not employed by SF. The cases cited heavily by SF all involve payments to current or former employees and are not analogous to the facts here.[6] Instead, the Rigsbys were salaried employees of E.A. Renfroe & Company, Inc. ("Renfroe"). Further, Defendant SF's contract for engagement of Renfroe characterizes the arrangement between SF and Renfroe as being "independent" directly in the title of that contract: "Agreement For Independent Adjuster Services." In Section 4 to that "Independent Adjuster" agreement, the relationship between the two companies is described in detail as being strictly an independent contractor arrangement:

> **INDEPENDENT CONTRACTOR**
>
> **ADJUSTING FIRM [Renfroe] warrants and represents that it is an independent contractor and employer of all ADJUSTERS** assigned to provide STATE FARM Services under this Agreement so as to **relieve STATE FARM of any responsibility or liability whatsoever** for treating ADJUSTING FIRM'S workers as employees of STATE FARM, that ADJUSTING FIRM is responsible for the withholding and payment of all taxes (local, state, and federal) including, but not limited to, federal and state income taxes . . . **Further, ADJUSTING FIRM understands and agrees that neither it nor its adjusters or other employees are entitled to STATE FARM's employment or benefits**.

State Farm – Renfroe "Agreement For Independent Adjuster Services," p. 5 (Attached hereto as Ex. 13) (Emphasis Added). The SF – Renfroe independent adjuster agreement emphasizes the fact that Renfroe adjusters such as the Rigsbys are employees of Renfroe, and NOT SF: "WHEREAS, ADJUSTING FIRM is in the business of providing independent claim adjusting

[6] Even according to SF, the case of *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992) involved the hiring of a "former highly placed employee" with the defendant company. In contrast, the Rigsbys were former employees of Renfroe (not SF) when they were hired as consultants and NO litigation was pending against Renfroe. Likewise, SF's other cited cases (such as *Camden v. Maryland*, 910 F. Supp. 1115 D. Md. 1996) and those cited in footnote 49 on page 26 of its Memorandum, also all involve the hiring of current or former employees (including managers and presidents). These fact patterns are not at all analogous to the facts at bar.

services to clients such as STATE FARM through claim adjusters working as ADJUSTING FIRM's employees." *Id.* at 1.

In addition to this contract, SF has flatly declared that SF and Renfroe are independent companies: "Renfroe is a separate company and makes its own decisions. Indeed, we have repeatedly told you that we do not control Renfroe and cannot and will not apply pressure on them to abandon what they believe is in their best interests." February 21, 2007(,) Letter from Sheila L. Birnbaum to Richard Scruggs. (Emphasis Added) (Ex. 4). This letter was not some singular or obscure admission in error. Instead the letter was written by one of the lead attorneys for SF and was sent to Scruggs, with copies sent to counsel for the Rigsbys, Attorney General Jim Hood, two Congressmen, and Mississippi's Insurance Commissioner, George Dale.

In addition to the Birnbaum letter, there is a growing list of denials by SF and Renfroe that Renfroe and/or the Rigsbys were SF's agents:

- Renfroe denied agency in Paragraph 101 of its Answer to Plaintiffs' First Amended Complaint: "Renfroe cannot be held vicariously liable for any actions or omissions of Cori and Kerri Rigsby which this defendant did not authorize, ratify or was even aware of regarding the adjustment of Plaintiffs' claim by State Farm." (Attached hereto as Ex. 14).
- SF denied agency in Paragraph 101 of its Answer to Plaintiffs' First Amended Complaint. (Attached hereto as Ex. 15).
- In the deposition of Kerri Rigsby in *McIntosh v. State Farm*, **Dan W. Webb** (attorney for SF) disagreed with a statement that Kerri Rigsby was SF's "employee." (413:12). Mr. Webb responded to the assertion of employment/agency by stating, "I disagree with that and move to strike." (413:17). (Attached hereto as Ex. 16).
- In *Marion v. State Farm*, SF attorney **John Banahan** stated that Kerri Rigsby was always an employee of Renfroe (not SF) and asked Ms. Rigsby to verify that statement: "During the entire tenure working catastrophe claims on behalf of SF, you were always a Renfroe employee; correct?" Ms. Rigsby's response was: "Correct." (67:9-12). (Attached hereto as Ex. 17).
- In a deposition of Cori Rigsby in *Marion v. State Farm*, referring to Cori Rigsby, SF attorney **John Banahan stated, "She was never an employee of State Farm."** (165:25-166:1).[7] (Attached hereto as Ex. 18).

[7] For State Farm to work with a company (Renfroe) supposedly at arms length as an "independent" and "separate" company and then claim here in litigation, when it serves them,

Further, for SF's Second Motion to succeed, SF must not only show that the Rigsbys were agents of SF (despite being employed by Renfroe), but it also must show that they had sufficient "managerial responsibility" to make them "officers" of SF. *See ABA Model Rule Prof. Conduct 4.2*; Miss. Rule Prof. Conduct 4.2**:** "[A] person having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." The Rigbsys were not "officers" authorized to speak on behalf of Renfroe, much less SF. The Renfroe Code of Conduct, signed by the Rigsbys, explicitly prohibits unauthorized communications by its employees: "RENFROE employees should respond to inquiries about RENFROE, our clients and their customers only if given the authority to do so. Media contact and public discussion concerning RENFROE, our clients and their customers must be conducted only through

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that the statements of Renfroe employees could be imputed to State Farm as its agents is dishonest and absurd. State Farm has bluntly denied that Renfroe is or ever has been its agent in all of its official legal filings in Hurricane Katrina litigation. State Farm should be estopped from <u>denying</u> agency whenever liability is at issue and then, in turn, <u>declaring</u> agency as a basis for the serious step of sanctioning Plaintiffs' Counsel for alleged ethical violations. State Farm's directly contradictory and dishonest positions warrant sanctions and fees, and the attorneys who have knowingly attempted to deceive this Court to support State Farm's Motion are in violation of Mississippi Rule of Professional Conduct 3.3, entitled *"Candor Toward the Tribunal," which states:*

(a) A lawyer shall not knowingly:

(1) **make a false statement of material fact or law to a tribunal**;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction know to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

(Emphasis Added).

authorized spokespersons." *See* Renfroe Code of Conduct (Ex. 19). The uncontested testimony is that the Rigsbys were not "spokespersons" "authorized" to bind Renfroe or its clients:

> Q: Down at the next to last paragraph on the first page of the code of conduct, did you understand that media contact and public discussion concerning Renfroe, Renfroe's clients and their customers was only to be conducted through authorized spokespersons?
> A: Yes.
> Q: Were you ever an authorized spokesperson for Renfroe or for any of its customers or clients for media contact?
> A: No.

Deposition of Cori Rigsby, January 25, 2007, p. 29-30, lines 14-24. (Ex. 20).

The inconsistency of arguing that the Rigsbys were officers of SF becomes even more apparent when reviewing a filing by SF with the Eastern District of Louisiana:

> **Moreover, upon information and belief, Ms. [Lecky] King is neither a party to the litigation nor an "officer" of State Farm. To the contrary, State Farm records indicate that she is a Catastrophe Claim Team Manager who reports to a Catastrophe Claims Section Manager, in stark contrast to the sort of high-level employees that the term "officer" contemplates**.

Memorandum In Support of State Farm Fire's Motion to Quash Subpoena Duces Tecum, p. 3 (Filed and Served July 16, 2007) (Ex. 21) (Emphasis added).

Under SF's illogical reasoning, Lecky King (an employee of SF who holds the title of "manager," and who directed and oversaw Renfroe's and the Rigsbys' involvement in adjusting SF claims) is not an "officer" of SF, while the Rigsbys (who worked for Renfroe under the direction of Lecky King with respect to SF claims) are "officers" of SF whose actions can be imputed to SF, and thus fall under the purview of Rule 4.2. SF's inconsistent arguments must fail.

2. Communications With Rigsbys Were "Authorized By Law."

a. SF Ignores The "Qui Tam" Context

SF misunderstands and/or misrepresents the context of Scruggs' communications with the Rigsbys. Two employees (the Rigsbys) of a different company (Renfroe) approached Scruggs to report gross violations of state and federal law. These Renfroe employees sought his assistance to protect their own legal interests and to stop ongoing fraud and crime perpetrated against the government and private citizens. *See* Declaration of Geoffrey Hazard, pp. 3-4. (Ex. 5).

Thus, the Rigsbys were not simply employees arbitrarily violating confidentiality provisions of their employment contracts, as Defendants SF and Renfroe have argued. Instead, the Rigsbys were and remain genuine *qui tam* whistleblowers. At the time they first contacted him, Mr. Scruggs did not have any cases against Renfroe and was not preparing to file such cases. Thus, in listening to the Rigsbys and receiving the corroborative evidence they offered to him in the form of documents, Scruggs was engaged in the very type of activity that the False Claims Act and other similar whistleblower statutes contemplate, expect, and encourage.

The case law interpreting Rule 4.2 (as well as other ethical rules) in the specific context of *qui tam* litigation is scarcely cited or mentioned in SF's briefing. However, that case law, which controls the issue before this Court, is clear in recognizing that conduct such as Scruggs' vis-à-vis the Rigsbys is not improper, illegal, or unethical. The case law recognizes the value of such conduct in fighting fraud and criminal activity. For instance, in the case of *U.S. v. Teevan*, 1990 U.S. Dist. LEXIS 20269 (Dist of Del 1990), the district court noted the lack of conflict between Rule 4.2 and the False Claims Act:

> **. . . It would appear from the court's discussion that pre-indictment *ex parte* interviews, absent some prosecutorial misconduct, would be considered a legitimate investigative technique.** *Id.* at 840; *see also U.S. v. Buda,* 718 F. Supp. 1094 (W.D.N.Y. 1989) . . .

> **. . . The policy interests underlying Rule 4.2, therefore, do not weight very heavily in this case. The Government's interest in investigating the alleged violations of the False Claims Act, however, does weigh very heavily**. . . . in favor of allowing them to conduct *ex parte* interviews.
>
> **For all of the factors mentioned above, the Court finds that the *ex parte* interviews Academy employees are "authorized by law" and are not prohibited by Rule 4.2.**

Id. at 9-13. (Emphasis Added). *See also EEOC v. Illinois Dep't of Empl. Sec.*, 6 F. Supp. 2d 784 (ND IL 1998): "The court notes that there is authority for the proposition that the EEOC's investigation . . . falls within the exception to the no-contact rule where contact is permitted if "otherwise authorized by law." (citing *U.S. v. Teevan*, 1990 U.S. Dist. LEXIS 20269, No. 90-503 LON, 1990 WL 599373, at *4 (D. Del. Sept. 28, 1990).")

In another federal case addressing alleged improper communications with "represented parties," the presiding district court also held that Rule 4.2 authorizes contact that furthers a government investigation, as is the case here:

> Rule 4.2 does not prohibit all contact between attorneys and parties represented by counsel. Rather, that rule specifically makes an exception for those contacts which are "authorized by law." Pa. R. Prof'l Conduct 4.2. . . . . *Balter* makes clear that pre-indictment non-custodial interrogations by Government agents do not violate the no-contact rule because such contacts are authorized by law.
>
> With the exception of the Second Circuit, every other court of appeals that has considered the issue has similarly held that the no-contact rule does not prevent non-custodial pre-indictment communications . . .

United States v. Grass, 239 F. Supp. 2d 535, 541 (M.D. PA 2003) (Emphasis Added). In the *Grass* case, the district court noted the provision for contact "authorized by law" as well as the ABA Model Rule commentary, which directly discusses the permissibility of lawyers who represent government entities in contacting represented parties:

> Moreover, such a reading is consistent with the intentions of the authors of the original no-contact rule. The commentary to American Bar Association Model Rule of Professional Responsibility 4.2 states the following: Communications

authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is an applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Id. at 542 (Emphasis Added).

SF's Motion runs counter to the case law and to common sense. If granted, SF's Motion would effectively punish whistleblowers and any assisting attorneys for doing exactly what the False Claims Act expects and requires. Furthermore, any attempt by SF to distinguish the above authorities on the basis that they relate only to the government itself and its attorneys, but not relators (e.g., the Rigsbys) or private attorneys working with relators, must fail because such relators and assisting attorneys act as agents of the government. The government is the real party of interest and both relators and their counsel are considered private attorneys general when they undertake *qui tam* litigation. The Fifth Circuit has repeatedly underscored these legal principles:

> "Regardless of whether the government opts to control or intervene in a case, the False Claims Act requires that actions 'be brought in the name of the Government.' 31 U.S.C. § 3730(b)(1). Thus, . . . the United States is a real party in interest even if it does not control the False Claims Act suit. See *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-49 (4th Cir. 1992).

Searcy v Philips, 117 F3d 154, 41 (5th Cir. 1997). *See also United States ex rel. St. John LaCorte v. SmithKline*, 1999 U.S. Dist. LEXIS 13036, * 16 (E.D. LA 1999). Citing the Fifth Circuit and the *Searcy* decision, other courts around the country also have held that relators act as agents of the government and are "clothed in the government's standing":

> While *Riley* is an intriguing opinion, every other court that has considered challenges to a relator's standing under the FCA has rejected similar arguments. **Many courts have held that because the relator is authorized by the FCA to act as the government's representative or agent, he or she is in effect clothed with the government's indisputable standing as the real party in interest**. See **Searcy v. Philips Electronic North America Corp., 117 F.3d 154, 157 (5th Cir. 1997) . . .**

United States ex rel. Gublo v. Novacare, Inc., 62 F. Supp. 2d 347, 351-352 (D. Mass 1999) (Emphasis added).

3. The Rigsbys Possessed Personal Interests In The Information Provided And Acted In Legal Self-Defense

In its Motion, SF discusses its and Renfroe's interests in the documents obtained by the Rigsbys, but fails to recognize the Rigsbys' lawful proprietary interest and moral/ethical interest in those same materials. The Rigsbys had been personally involved in events in which they observed that SF personnel employed fraudulent, duplicate engineering reports to lead policyholders to believe that losses were not covered. The Rigsbys had reason to believe that these practices were widespread and systematic. The documents were strong evidence of SF's wrongdoing, and demonstrated the Rigsbys need to protect their own legal rights and defend their role in Katrina-related adjustments.

Accordingly, the Rigsbys had an interest in the content of the documents at issue that is coexistent with the interest of Renfroe and/or SF. *See* Declaration of Geoffrey Hazard, p. 5 (Ex. 5); *see also* Restatement (Third) of Agency § 8.05 cmt. c (2006); *see also* Restatement (Second) of Agency §395, Comment *f*. When an employee or agent of a company encounters information indicating that criminal fraud may be occurring and that the agent/employee may be implicated in some way (as is the case here), then that agent/employee has a legitimate interest in anticipated self-defense. In the context of lawyers' services, the rules of most jurisdictions, including Mississippi, permit a lawyer to use or disclose information in self defense, including "anticipated self defense." *See* Rule 1.6(b)(5). "Anticipated self defense" means that a disclosure can be made where reasonably necessary to head off a charge of complicity on the lawyer's part. *See* Comment [10] to Rule 1.6(b)(5): "Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity."

This principle is long established in decisional law, particularly the case of *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2nd Cir. 1974). There, a lawyer working on a securities issue that involved misleading omissions (Mr. Goldberg) was held to have the right to disclose these omissions to the relevant regulatory authority, the federal Securities and Exchange Commission. Mr. Goldberg then made a second disclosure to counsel for injured purchasers of the stock (the Benson firm). The court also held that the counsel to whom the disclosure was made acted properly in receiving it, and hence was not subject to disqualification for having done so. Accord, Restatement of the Law Governing Lawyers § 67 and comment f thereto. The Rigsby sisters in the present situation are in the same position as lawyer Goldberg in the *Meyerhofer* case, and Mr. Scruggs is in the same position as the Bernson firm. The Rigsbys disclosed the information to law enforcement authorities and to Mr. Scruggs.

Any attempt to distinguish *Meyerhofer* by SF on the grounds that it involved a lawyer rather than a supposed agent/employee of a company must fail because, as this Court is aware, a lawyer's responsibility for confidentiality of client information is as high as any comparable duty under the law governing agents. Inasmuch as a lawyer situated as the Rigsby sisters could properly have made the disclosure to a lawyer situated as Mr. Scruggs, Rule 1.6(d) and the *Meyerhofer* Rule specifically authorize such conduct. The *Meyerhofer* case has been cited in jurisdictions around the country, including by district courts within the Fifth Circuit. *See also* Declaration of Geoffrey Hazard (Ex. 5).

4. The Restatement Of Agency Authorizes The Communications At Issue

Even assuming that the Rigsbys were SF's agents, which is not the case, SF's analysis would still be flawed. SF simply reads an agent's fiduciary and confidentiality obligations too broadly. Comments to the Restatement (Third) of Agency directly contradict SF's position and

recognize that a "fiduciary obligation is not monolithic in how it operates, it is not absolute in what it demands of agents."

SF's Motion argues as if confidentiality agreements somehow trump the law. This is incorrect, as explained in the Restatement (Third) of Agency:

> First, an agent's fiduciary relationship to the principal does not shelter either person from the applicability of general legal rules. In particular, an agent's fiduciary relationship to the principal does not privilege conduct by the agent that is otherwise tortious or criminal although done with actual authority nor does their fiduciary relationship privilege a principal who demands such conduct. See §§ 7.01 and 7.04. Second, an agent may in some circumstances be privileged to engage in conduct that may be adverse to a principal's interests or that may in some other respect depart from the principal's wishes. . . . Moreover, . . . the agent may reveal information to a third party with an interest superior to that of a principal. Thus, as a general matter, an agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime. See § 8.05, Comment *c.*

Restatement (Third) of Agency §§ 7.01, 7.04, 8.05(2), 8.05 cmt. c (2006).

Rule 1.6, the *Meyerhofer* rule, and the Restatement of Agency, all reinforce the same principles that underlie the propriety of whistleblower revelations under the False Claims Act. Both the legal system and the Rules of Professional Conduct allow for the revelation of and receipt of otherwise confidential information when fraud or crimes are being committed and concealed, as is the case here.

B. Mississippi Rules of Professional Conduct 4.4 and 8.4 Were Not Violated.

SF asserts that Richard Scruggs used the Rigsbys to bypass discovery and, in doing so, violated Mississippi Rules of Professional Conduct 4.4 and 8.4. As stated above, in the interests of brevity, Plaintiffs hereby incorporate their Response to SF's original Motion to Disqualify, which already addressed these issues in detail in the record before Judge Senter. Specifically, Plaintiffs direct the Court to pages 20 through 25 (Ex. 11) Plaintiffs also incorporate its Response to SF's Petition to the Fifth Circuit (Ex. 12)

1. The Legal Rights Of A Third Person Were Not Violated (Rule 4.4).

In asserting that Richard Scruggs used methods of obtaining evidence that violated the legal rights of a third person, SF is referring to litigation currently taking place in the Northern District of Alabama. This litigation was brought by Renfroe against the Rigsbys in retaliation for their actions in service of the public as whistleblowers uncovering a fraud both on the taxpayers and SF policyholders. Mr. Scruggs is not a party to the foregoing litigation, nor has he submitted to the personal jurisdiction of the federal court in Alabama; thus, Mr. Scruggs maintains that despite the Alabama court's determinations, he did not and cannot have violated an order issued from a court in which he was never subject to jurisdiction.

Additionally, Defendant's reference to litigation against the Rigsbys in Alabama as support for its unsupported Motion in this Court is simply an attempt to try an Alabama lawsuit in a Mississippi court. SF fails to inform the Court that the United States District Attorney, Alice H. Martin, recently examined the facts at issue and the proceedings that occurred before the Northern District of Alabama. Ms. Martin declined Judge Acker's request to pursue criminal contempt charges: "I write to advise that I have undertaken a 'dispassionate assessment of the propriety of criminal charges for (the) affront to the Judiciary.' See *Young v. U.S.*, 481 U.S. 787 (1987). Following a serious and thorough review of the facts surrounding this indirect criminal contempt, I respectfully decline to prosecute Mr. Scruggs or his firm." *See* United States Attorney Alice H. Martin's July 25, 2007 Letter to Judge Acker (Ex. 22).

Ignoring all of the above, SF cites *In re Shell Oil Refinery*, 143 F.R.D. 105, 108, amended, 144 F.R.D. 73 (E.D. La. 1992) to support its argument that Scruggs, and by imputed liability, the lawyers of KLG, circumvented proper discovery channels. However, *In Re Shell Oil Refinery* is not analogous to the instant case because the plaintiff's attorneys in that case

engaged in *ex parte* contact with an **actual** Shell employee outside of the *qui tam* context. In this case, the Rigsbys are whistleblowers who worked for Renfroe, a separate company, and disclosed evidence of a criminal fraud to Mr. Scruggs and law enforcement authorities in accordance with mandatory *qui tam* provisions. Meaningful "fraud on the government" investigations contemplate, allow, and, in fact, depend upon communication between lawyers/investigators and employees/whistleblowers without the knowledge of the defendant company.

Mr. Scruggs' conduct did not undermine "the administration of justice" as SF alleges, but rather assisted such administration by helping to investigate and prosecute widespread fraud. Accordingly, Mr. Scruggs' contact with the Rigsbys was not in violation of MRPC 4.4 or MRPC 8.4 or any of the other rules cited by SF in its Motion. *See* Letter from Cham Trotter, p. 3. (Ex. 6)

C. Disqualification Would Cause Severe Prejudice To Plaintiffs

Because of the combined experience, resources, and expertise of the KLG firms and, most importantly, their intimate and specific knowledge of this litigation and the fraudulent practices of SF following Hurricane Katrina, disqualifying them would work a substantial hardship upon Plaintiffs. SF did not address these "hardship" provisions in its motion because SF clearly is not defending the McIntoshes' interests, but its own. However, considering such hardship is crucial to a disqualification inquiry. *See McIntosh* Order (Ex.1). *See also* Letter from Cham Trotter, p. 4. (Ex. 6).

In this case, Plaintiffs' interests and the broader societal interests are substantial. SF's fraud was institutional and harmed thousands of policyholders. The adversarial process should continue and Plaintiffs should be allowed to keep their chosen counsel.

D. State Farm's Canon 9 / "Appearance of Impropriety" Argument is Inapplicable and Insufficient.

In a 1995 decision, the Fifth Circuit Court of Appeals discussed disqualification motions at length before refusing to disqualify the law firm in that case:

> The disqualification of the entire LMHT&B law firm is the most sweeping result sought by U.S. Fire in its motion to disqualify. This is an interlocutory inquiry of profound significance. The ability of the FDIC to present its case at trial will be impacted substantially if the firm that the FDIC has chosen to represent it must withdraw. Depriving a party of the right to be represented by the attorney of his or her choice is a penalty that must not be imposed without careful consideration.

FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1312-13 (5th Cir. 1995).

In particular, the Fifth Circuit, citing Plaintiffs' expert Geoffrey Hazard, noted the widespread rejection of the "appearance of impropriety" as a rationale supporting ethical violations: "*See* GEOFFREY C. HAZARD & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, § 3.7:102, at 679(1994).

. . . [n]either the ABA nor the drafters of the Texas canons have relied on the appearance of impropriety as a justification for the lawyer-witness rule. . . . [T]he ABA acknowledges the weaknesses of the appearance of impropriety rationale. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, 61:501 (1984)." *Id.* In short, Canon 9 is largely a historical relic.

Further, in *FDIC*, the Fifth Circuit noted that disqualification is too frequently used as a tool for harassment and denied the attempt to disqualify the law firm at issue:

> It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. *Woods*, 537 F.2d at 813. As noted in the comments to both the Model Rules and the Texas Rules, an opponent may be tempted to invoke the disqualification rule for purposes of harassment. Unhappily, as often as the rule is misused, the profession is disserved. When . . . opposing counsel raises the question of disqualification, and subsequently prevails, public confidence in the integrity of the legal system is proportionately diminished. "Indeed, the more frequently a

> litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. *Woods*, 537 F.2d at 813.

FDIC 50 F.3d at 1312-13.

E. Granting State Farm's Motion Would Qualify as Error.

Even if SF's legal analysis were correct, which is not the case, its Motion still would have to be denied on the facts alone and SF's failure to meet its evidentiary burden. It is well settled that attorney disqualification is "a drastic measure which courts should hesitate to impose except when absolutely necessary." *Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir. 1993). "A disqualification inquiry, particularly when instigated by an opponent, presents a palpable risk of unfairly denying a party the counsel of his choosing" and "must not be imposed cavalierly." *FDIC* 50 F.3d at 1316.

Disqualification is an extreme step that has the effect of tarnishing the reputation of the attorney and depriving the client of his/her chosen counsel. In *U.S. v. Gonzalez-Lopez,* 126 S. Ct. 2557, 2564 (2006), a case involving an alleged violation of Rule 4.2, the U. S. Supreme Court recognized the fundamental constitutional importance of a litigant's right to choose counsel: "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.* (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 282 (1993)).

F. Disqualification Would Discredit the Bar and Increase Public Cynicism.

Carefully considered, SF's Second Motion is intended to harass Plaintiffs, KLG, and anyone else determined to see this case adjudicated on the merits. The case law is replete with discussions of the abuses that can accompany motions such as SF's:

> Moreover, both judicial opinions and the Rules of Professional Conduct themselves recognize that motions for disqualification "should be viewed with extreme caution for they can be misused as techniques of harassment." *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982); Rules of Professional Conduct for the Northern District of Illinois, Rule 1.7 cmt. (1995).

Guillen v. City of Chicago, 956 F. Supp. 1416, 1421 (N.D. Ill. 1997)

Furthermore, disqualifications discredit the bar and undermine the public's trust in the judicial process ["A disqualification order discredits the bar generally and the individual attorneys particularly. . . . judges must exercise caution not to paint with a broad brush stroke under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely--encouragement of vexatious tactics and increased cynicism by the public. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1576-77 (Fed. Cir. 1984) (citations omitted)." *Id. See also* Cham Trotter Letter, p. 5. (Ex. 6).

VI. CONCLUSION

SF's Motion is unsupported, dishonest, and must be denied for numerous compelling reasons. **First,** SF's Motion to Disqualify has already been heard and DENIED. SF should be estopped from relitigating this issue that was already decided and reviewed. **Second,** SF waived its right to seek disqualification due to months and years of delay. **Third,** the argument that the law firms of KLG are responsible for the actions of the Scruggs Firm is overbroad and unfounded. **Fourth,** the claim that Scruggs engaged in *ex parte* communications with SF's employees/agents is contested and, in fact, contradicted by SF, Renfroe, and their Counsel. **Fifth,** SF fails to recognize the ethical rules, statutes, and applicable case law that all allow for the revelation of conduct such as that perpetrated by SF and its cohorts, whether or not such revelations involve *ex parte* communications. **Sixth,** SF fails to recognize that the duties of

agents, even if applicable, which is not the case here, are bounded. Agents are entitled to protect their own legal interests and act in anticipation of legal self-defense. **Seventh,** the Fifth Circuit Court of Appeals has long recognized that disqualification motions are often abused by opposing parties to harass and delay, and should rarely be granted. **Eighth,** the substantial burden for justifying the drastic remedy of disqualification requires a specific showing of facts, not bare contested allegations such as those offered by SF.

Hurricane Katrina was an unavoidable catastrophe of unprecedented proportions. In Katrina's wake, SF inflicted a second catastrophe upon the Plaintiffs and other Mississippi homeowners. While SF may contest these claims during litigation, it should not be allowed to undermine the very essence of the adversarial process by violating the Plaintiffs' constitutionally protected right to their selected counsel.

Disregarding the law and the facts, Defendant's Counsel betray their roles as officers of the Court by accusing Plaintiffs' Counsel of suborning perjury. These allegations are baseless. Plaintiffs' counsel respectfully request that this Court impose sanctions on Defendant, grant Plaintiffs' Counsel attorneys' fees and costs for responding to such allegations, and strike any such allegations from the record.

Respectfully submitted, this 17th day of January 17, 2008.

GLENDA SHOWS, et. al.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 17th day of January, 2008.

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