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

UNITED STATES OF AMERICA, *ex rel.* Cori Rigsby, *et al.*,	)	
Plaintiff,	)	Civil No. 1:06cv433 LTS-RHW
v.	)	
STATE FARM MUTUAL INS. CO., *et al.*	)	
Defendants.	)	

RELATORS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY GRAVES BARTLE & MARCUS LLC

In its motion to disqualify, State Farm Fire and Casualty Company ("State Farm") seeks to avoid liability for engaging in one of the largest fraudulent schemes ever perpetrated on the United States Government by asserting that Graves Bartle & Marcus LLC ("GBM") (a) improperly accessed the company's confidential, password-protected databases and (b) made or ratified improper payments to Relators Cori and Kerri Rigsby.

These are outright lies told by an arrogant and corrupt corporation that has little regard for the truth or the reputations of the GBM attorneys it attacks. It is unfortunate but hardly surprising that State Farm would resort to this strategy, given that it faces potential civil liability reaching into the hundreds of millions of dollars and an ongoing criminal investigation regarding the handling of Hurricane Katrina claims.[1]

[1] Many of the materials State Farm contends were wrongfully taken were turned over to and are currently in the possession of federal investigators. Alexis King, the State Farm employee primarily responsible for facilitating the wronging at issue, has repeatedly taken the Fifth Amendment in depositions in other Hurricane Katrina litigation.

If State Farm's strategy were to be successful, it would have a tremendous chilling effect on future *qui tam* cases. By their very nature, *qui tam* cases rely upon non-public information from insiders who are willing to blow the whistle—often at their own peril—on corrupt corporate conduct. Such individuals would be reluctant to come forward if their manner of collecting facts could itself serve as a complete defense (as State Farm urges here), and cause the Government's claims to be dismissed and its attorneys disqualified. Fortunately, research has disclosed no cases arriving at such a result, and State Farm cites none in its briefing.

Disqualification and dismissal would be particularly inappropriate here. Despite its best efforts, State Farm cannot change the following facts:

- No member of GBM ever accessed or instructed the Rigsbys to access State Farm's confidential, password-protected databases;
- No member of GBM ever made or ratified any improper payments to the Rigsbys; and
- No member of GBM was ever associated with or has ever performed work for the Scruggs Katrina Group ("SKG") or its successor, the Katrina Litigation Group ("KLG").

These facts are wholly dispositive of State Farm's motion with respect to disqualification of GBM and dismissal of the Rigsbys' claim on behalf of the United States. The motion should be DENIED and this lawsuit should be allowed to move forward so the Government can obtain recompense for State Farm's unconscionable wrongdoing.

BACKGROUND AND SUMMARY OF THE ARGUMENT

This is an action to recover damages and civil penalties on behalf of the United States arising out of false claims presented for payment under the National Flood Insurance Program ("NFIP"), 42 USC § 4001 *et seq*. Relators Cori and Kerri Rigsby are former employees of E. A. Renfroe & Company ("E.A. Renfroe"), one of the defendants in this action. E. A. Renfroe

provided claims adjustors and team managers to State Farm's Catastrophe Team in the aftermath of Hurricane Katrina.

In the course of performing their duties for E. A. Renfroe, Relators learned that State Farm was defrauding the Government in the manner it adjusted and/or instructed others to adjust claims for storm damage. Specifically, State Farm caused claims for storm damage to be classified as flood claims rather than wind claims—no matter what type of damage the home actually sustained—so they would be paid by the Government through the NFIP rather than by State Farm under a homeowner's or hurricane policy. This cost United States taxpayers hundreds of millions of dollars and resulted in homeowners being woefully undercompensated.

After Relators discovered State Farm's fraud, they decided to seek counsel. To enable counsel to fully evaluate their allegations, they provided emails and other documents they had received as members of the Catastrophe Team. These materials were provided to the United States Attorney's Office and Mississippi's Attorney General, and were used to file this *qui tam* action, pursuant to the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*

State Farm now moves the Court to disqualify Relators' counsel from continuing to represent them in this lawsuit and to dismiss this lawsuit in its entirety on the ground that Relators' counsel (a) improperly accessed the company's confidential databases and (b) made or ratified. State Farm's motion is completely without merit.

There is no disputing that this lawsuit, like every *qui tam* lawsuit, is based on information that was not available to the general public. The very essence of a *qui tam* or "whistleblower" lawsuit is a courageous insider—typically an employee—willing to come forward and report wrongdoing that would otherwise be shielded from public view. *See Wercinski v. Int'l Business Machines Corp.*, 982 F.Supp. 449, 455 (S.D.Tex. 1997)(purpose of a *qui tam* lawsuit is "to aid in

the effort to root out fraud against the government"); *Courageous Whistleblowers Are Not Left Out In The Cold*, TAF Quarterly Review, Vol. 39, at pp. 127-134, October 2005 (attached hereto as Exhibit A). As State Farm succinctly notes in its motion to dismiss for lack of subject matter jurisdiction, § 3730(e)(4) of the False Claims Act "expressly denies subject matter jurisdiction to federal courts over a cause of action based on allegations that were publicly disclosed before the lawsuit was initiated and for which the plaintiff is not the 'original source.'" *Mot. to Dismiss for Lack of Subject Matter Jurisdiction* (Dkt. 91) at ¶ 8. Thus, while a private litigant may be properly penalized for using non-public information to build his or her case, a *qui tam* relator must "[have] direct and independent knowledge of the information on which [] [his or her] allegations are based and [][must] voluntarily provide [] the information to the Government ***before*** filing an action under [][the False Claims Act]…." 31 U.S.C. § 3730(e)(4)(B) (emphasis added).

It makes no difference that Relators signed agreements with their employer vowing to keep certain information secret.[2] Congress amended the False Claims Act in 1986 to protect whistleblowers, even whistleblowers involved in wrongdoing themselves, and to provide a strong incentive to expose fraud against the United States Treasury. Private agreements that would frustrate the public interest and the Congressional objective of encouraging False Claims cases are unenforceable. *See United States ex rel. Green v. Northrop Corp*., 59 F.3d 956, 963 (9th Cir. 1995) (refusing to enforce a private, pre-filing settlement agreement, entered into without the knowledge or consent of the government, releasing a relator's *qui tam* claims against the company for alleged double billing because to enforce the agreement "would impair a

[2] Because counsel do not have copies of any documents supposedly accessed by the whistleblowers, but passed them on to the government, counsel cannot say whether any of the documents were covered by a confidentiality agreement or were documents that would have been available to an insistent insured who wanted to see his or her file.

substantial public interest" and specifically "threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986"); *see also Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"); *Fomby-Denson v. Dept. of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (concluding that "the public policy interest at stake [in] the reporting of possible crimes to the authorities is one of the highest order and is indisputably 'well defined and dominant' in the jurisprudence of contract law."); *Palmateer v. Int'l Harvester Co.*, 421 N.E. 2d 876, 878 (1981) ("parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public"); *Lachman v. Sperry-Sun Well Surveying Co*., 457 F.2d 850, 854 (10th Cir. 1972) ("By holding that appellee breached its contract we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed").

The fact that this is a *qui tam* action distinguishes it from *McIntosh v. State Farm Fire and Casualty Co.*, No. 1:06-cv-01080-LTS-RHW (S.D. Miss. filed Oct. 23, 2006) and the various other cases cited in State Farm's briefing. Whereas the *McIntosh* order precluded private plaintiffs from relying on evidence gathered outside normal discovery channels, *see McIntosh Order of Disqualification* (*McIntosh* Dkt.1172), it would be improper and inconsistent with the statutory framework of 31 U.S.C. § 3729 *et seq.* to preclude the Government – or its representatives – from doing so in this *qui tam* action.

However, while this lawsuit is admittedly based on non-public information, it is not based on information gathered by GBM from State Farm's confidential databases. At no time did any member of GBM ever access or instruct the Rigsbys to access such databases. State Farm's assertion to the contrary is an outright lie. Yet, without any facts to support the allegation, State Farm spins a fantastic yarn about meetings involving GBM attorneys receiving "carte blanche" access.

State Farm's fabricated database access claim is based upon select snippets from Relators' depositions wherein they discuss "secret" (to use State Farm's terminology) meetings they had with counsel in a trailer in Pascagoula. There is *nothing* improper or untoward about unannounced "secret" meetings between clients and their attorneys. State Farm and its counsel likely have conducted hundreds of "secret" meetings since its fraudulent claims-handling practices came to light. As for the trailer, it was located on a site where a home once stood, in an area where Relators were adjusting claims and positioned so counsel could view the devastation of Hurricane Katrina.

More to the point, Relators' testimony about their meetings with counsel do not support the conclusion State Farm asks the Court to draw. The Rigsbys testified to meeting counsel twice in a Pascagoula, Mississippi trailer. The Rigsbys also testified that these meetings took place in March or April, 2006, and that Tony Dewitt, Mary Winter, Todd Graves and/or Chip Robertson were present at one or both of the meetings. Mr. Graves' records show that his only meeting in the trailer took place on April 14, 2006 (in March 2006, Mr. Graves was still employed as the United States Attorney for the Western District of Missouri and was in the process of wrapping up the last of his official duties before leaving office). *See Graves Decl.* at ¶ 6,8 (attached as Exhibit B). Mr. Graves did not use any laptop computer during this meeting or

any other meeting with the Rigsbys, and does not recall a laptop computer being used by anyone else. *See id*. at ¶ 9. There simply is nothing to show GBM violated any ethical rules in any manner. State Farm's suggestions to the contrary are utterly misplaced.

State Farm next attacks GBM by contending it made or ratified improper payments to the Rigsbys. This, again, is an utter falsehood. The Rigsbys were hired by a joint venture group known as SKG. This group was formed to litigate policyholder claims against State Farm and other insurance companies. The Rigsbys' former counsel was part of SKG, as were several other law firms. On information and belief, payments to the Rigsbys were made by their former counsel and then charged to SKG as business expenses.

No member of GBM was ever associated with or performed any work for SKG or its successor entity, KLG. No member of GBM was ever involved in the private policyholder lawsuits. GBM was retained to handle the present *qui tam* action, and that has been the focus of its efforts.

At some point long after the fact, GBM became aware that the Rigsbys were working for SKG. GBM understood that SKG was using the Rigsbys as consulting experts to review claim files and to provide analysis in cases involving insurance companies other than State Farm. GBM was not provided with the terms and conditions of the Rigsbys' employment arrangement, or asked to become part of or approve that arrangement. GBM was not told the Rigsbys were being paid, the amount of money the Rigsbys were paid, or how those payments were made. The payments to the Rigsbys were not charged as expenses in this action, and there was never any suggestion that the Rigsbys were performing work in this action for which compensation might be appropriate.

On these facts, there is no basis for disqualifying GBM from continuing to represent the Government in this action. GBM did not commit or ratify any of the unethical conduct of which State Farm complains. While State Farm may desire to paint GBM with the same broad brush that it used to obtain disqualification of the SKG/KLG firms, the bristles are now too frayed and the paint is now too thin. As this Court recognized in the *McIntosh* Order of April 15, 2008, "[d]isqualification orders have been entered in all other affected cases." *McIntosh* Dkt. 1183. GBM should be allowed to press the Government's claim to recover for State Farm's unconscionable wrongdoing.

State Farm's motion to disqualify should be DENIED and this lawsuit should be allowed to move forward.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARDS ARE MISSISSIPPI RULES OF PROFESSIONAL CONDUCT 8.4 AND 5.1.

State Farm cites a hodgepodge of legal principles in support of its motion to disqualify. Separating the wheat from the chaff, the most applicable standards are Rule 8.4 and 5.1 of the Mississippi Rules of Professional Conduct, which have been adopted by the United States District Courts in Mississippi. *See* Miss. Unif. Dist. Ct. R. 83.5. Rules 8.4 and 5.1 provide:

> Rule 8.4 Misconduct
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;

> (e) state or imply an ability to influence improperly a government agency or official; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Mississippi Rules of Professional Conduct, Rule 8.4.

> Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer
>
> (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Mississippi Rules of Professional Conduct, Rule 5.1.

These provisions are taken from the Model Rules of Professional Responsibility promulgated by the American Bar Association. *See United States v. Starnes*, 157 F. App'x 687, 693 (5th Cir. 2005). The Model Rules have been adopted by the courts in numerous jurisdictions, and cases from those jurisdictions are informative here. *See Owens v. First Family Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 846 n.2, 850-51 (S.D. Miss. 2005).

State Farm contends that GBM violated these provisions by accessing State Farm's confidential, password-protected computer databases and by making or ratifying improper payments to the Rigsbys and/or associating with attorneys who engaged in these activities. *Mem.*

in Supp. of Mot. to Disqualify, at 3, 21-24. These contentions are factually wrong and, for that reason, legally without merit. As set forth below,

- No member of GBM ever accessed or instructed the Rigsbys to access State Farm's confidential, password-protected databases;
- No member of GBM ever made or ratified any improper payments to the Rigsbys; and
- No member of GBM was ever associated with or has ever performed work for SKG or its successor, KLG.

These facts are dispositive. State Farm's motion should be DENIED and this lawsuit should be allowed to move forward.

II. GBM DID NOT VIOLATE RULE 8.4.

A. GBM did not violate rule 8.4(b).

Under Rule 8.4(b) of the Mississippi Rules of Professional Conduct, it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." State Farm contends that GBM committed a criminal act within the meaning of Rule 8.4(b) by accessing State Farm's confidential, password-protected computer databases. *Mem. of in Supp. of Mot. to Disqualify* at 3. State Farm also contends GBM violated Rule 8.4(b) by paying Cori and Kerri Rigsbsy "annual 'consulting fees' of $150,000 that were in no way related to reasonable witness expenses…" *Id.* at 21. These contentions are wholly without merit.

1. No member of GBM ever accessed or instructed the Rigsbys to access State Farm's confidential, password-protected databases

State Farm accuses GBM of accessing password-protected databases by stringing together select snippets from Relators' depositions wherein they discuss "secret" meetings with

counsel in a trailer in Pascagoula. State Farm asks the Court to accept these distorted snippets as admissions that GBM engaged in the misconduct, and to disqualify Counsel without further proof. If criminal conduct could be established so easily, there would be more prisons than there are McDonald's.

To be clear, no member of GBM ever accessed or instructed the Rigsbys to access State Farm's confidential, password-protected databases. It simply did not happen, and neither Kerri Rigsby nor Cori Rigsby testified to the contrary.

Despite the absence of any evidentiary support, State Farm makes cavalier accusations of wrongdoing against Relators' counsel, such as:

> "Cori Rigsby testified that she signed on to her State Farm laptop and gave her 'qui tam lawyers' carte blanche to retrieve State farm documents directly from State Farm's databases;" and
>
> "The Rigsbys *admit* that they held secret meetings with Robertson, DeWitt, Winter and Graves during which they accessed State Farm's password-protected databases."

Id. at 12, 17 (emphasis in original).[3]

Comparing these accusations against the Rigsbys' actual testimony, it is apparent that State Farm had little regard for the truth in drafting its motion to disqualify. Where does Cori Rigsby state that she gave her counsel carte blanche to retrieve State Farm documents directly from State Farm's database? Where does Kerri Rigsby admit "secret" [sic] meetings with Graves where State Farm's databases were accessed?

State Farm's unsubstantiated accusations are worthy of strong rebuke and sanction under Rule 11 of the Federal Rules of Civil Procedure. Merely hoping that Relators' counsel was

[3] Besides making these accusations in these proceedings, State Farm also has issued a press release pointing to the same alleged unlawful conduct. *See State Farm Asks Court to Dismiss False Claims Act Suit and to Hold Rigsby Sisters and their Lawyers Accountable for Conspiracy and Fraud*, April 8, 2008, attached hereto as Exhibit C.

engaged in wrongdoing does not make it so. Actual proof is required. State Farm presented no proof in support of its claims because the wrongdoing it alleges is make-believe.

2. No member of GBM ever made or ratified any improper payments to the Rigsbys.

State Farm contends that GBM violated Rule 8.4(b) by paying Cori and Kerri Rigsby "annual 'consulting fees; of $150,000 that were in no way related to reasonable witness expenses…" *Id.* at 21. This contention is completely specious. No member of GBM ever made or ratified any improper payments to the Rigsbys, and no member of GBM was ever associated with or performed any work for SKG or its successor entity, KLG.

In accusing GBM of criminal conduct, *id.* at 24 ("[o]f course, in this case, the Court is not called upon to decide the issue of counsel's criminal liability"), State Farm employs the same shameless disregard for the truth that is the hallmark of the rest of its briefing. The federal bribery statute, 18 U.S.C. § 201, criminalizes the giving, offering or promising of something of value to a person for or because of that person's testimony. *See* 18 U.S.C. § 201 (c)(2). There is not a shred of evidence that any member of GBM gave, offered or promised anything of value to the Rigsbys, much less that it was given, offered or promised for or because of testimony. State Farm offers nothing but innuendo and supposition, carefully calculated to tarnish the reputations of Relators' current counsel. State Farm's briefing cries out for sanctions. Its "factual" contentions do not "have evidentiary support" nor will they "likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *See* FRCP 11(b)(3).

The cases cited in State Farm's briefing, such as *Disciplinary Counsel v. Blaszak*, 819 N.E.2d 689 (Ohio 2004) and *In re Bruno*, 956 So. 2d 577 (La. 2007) are all beside the point. They involve the disqualification of attorneys who—unlike the members of GBM — actually

made improper payments to witnesses. In that scenario, the Rule 8.4(b) violation is crystal clear. The situation is far different where (as here) the payments were made by a different attorney in another law firm, to advance the interests of other litigation.

Under the facts of this case, there is no Rule 8.4(b) violation, and thus no basis for disqualifying GBM under Rule 8.4(b). State Farm's motion to disqualify should be DENIED.

B. GBM did not violate rule 8.4(a).

In a tacit acknowledgment that its accusations under Rule 8.4(b) are shaky (*i.e.*, fabricated), State Farm argues that GBM also violated Rule 8.4(a) by knowingly assisting the Rigsbys to obtain confidential information from State Farm and using that information in the First Amended Complaint. *Mem. in Supp. of Mot. to Disqualify* at 16. There are at least two problems with this argument. First, Rule 8.4(a) only applies where one attorney knowingly assists or induces another to violate the Rules of Professional Conduct. *See Mississippi Rules of Professional Conduct*, Rule 8.4(a). Neither Cori nor Kerri Rigsby was an attorney for State Farm (or E.A. Renfroe), and neither Cori nor Kerri Rigsby was subject to or violated the Rules of Professional Conduct in disclosing non-public information to GBM. This fact alone distinguishes the instant action from the primary case relied upon by State Farm, *Ackerman v. Nat'l Prop. Analysts, Inc.,* 887 F. Supp. 510 (S.D.N.Y. 1993). In *Ackerman*, the corporate "insider" was a former in-house attorney for the company being sued who violated client confidences (and the Rules of Professional Conduct) in disclosing information to adverse counsel. *Id.* at 513-18. That is obviously not the situation here.

Second, unlike *Ackerman* and the other cases cited by State Farm, this case is a *qui tam* or "whistleblower" lawsuit. By definition, a whistleblower lawsuit is predicated on non-public, "insider" information. *See Wercinski*, 982 F.Supp. at 455; 31 U.S.C. § 3730(e)(4). Relators

were required to disclose such information to the Government before filing suit. *Id.* It would be improper and inconsistent with the statutory scheme of 31 U.S.C. § 3729 *et seq.* to hold that such information may not be relied upon in Relators' subsequent pleadings.

In short, while State Farm may be uncomfortable having evidence of its fraudulent scheme exposed to the through court filings and the like, the United States is nonetheless entitled to rely on such inside information in pursuing claims for restitution and damages under the False Claims Act. There is no basis for disqualifying GBM as counsel or dismissing this case. State Farm must answer for its unconscionable conduct and cannot simply un-blow the whistle. State Farm's motion to disqualify should be DENIED.

C. GBM did not violate rule 8.4(c) or (d).

In a last-gasp effort to tar GBM with ethical violations under Rule 8.4 of the Mississippi Rules of Professional Conduct, State Farm argues that GBM violated Rules 8.4(c) and (d) by "hiring the Rigsbys—who are key material witnesses in this and other cases against State Farm—to serve as highly paid litigation consultants." *Mem. in Supp. of Mot. to Dismiss* at 19. Rules 8.4(c) and (d) prohibit attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or] engag[ing] in conduct that is detrimental to the administration of justice." *Mississippi Rules of Professional Conduct*, Rule 8.4(c) & (d). State Farm's argument fails because GBM did not hire the Rigsbys as litigation consultants or in any other capacity and no member of GBM was associated with or performed work for the entity that did hire the Rigsbys (SKG).

The cases cited by State Farm, such as *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992) and *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996) are easily distinguishable, as they involve attorneys who actually engaged in improper

conduct, such as hiring a trial consultant (*Rentclub*) or participating in *ex parte* communications with the former investigator for the opposing party (*Camden*). These cases do not involve the situation presented here, where disqualification is sought because of conduct committed by a different attorney in another law firm in connection with other litigation. Not surprisingly, State Farm fails to mention this important distinction.

This is yet another example of State Farm saying or doing whatever it needs to say or do to avoid repaying the hundreds of millions of dollars it improperly charged the NFIP. Reputations and facts are not even a speed bump. Firing random charges of misconduct into crowds of opposing counsel may, from time to time, clip an opponent in the midst of an impropriety. But more often, State Farm's indiscriminate shots will damage the courts, the legal profession, and the claims of the United States. GBM did not do anything improper, and GBM has no intention of backing down from State Farm's meritless challenge. State Farm's motion to disqualify should be DENIED and this case should be allowed to move forward.

III. GBM DID NOT VIOLATE RULE 5.1.

State Farm contends that GBM violated Rule 5.1(c) because GBM knew of and ratified the improper payments that the Rigsbys received from their former counsel in connection with other litigation. Alternatively, State Farm contends GBM violated Rule 5.1(c) merely because of its association with the Rigsbys' former counsel. These contentions are without merit.

Rule 5.1(c) provides that a lawyer shall be responsible for another lawyer's conduct if "(1) the lawyer … with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Mississippi Rules of Professional Conduct, Rule 5.1(c). The term "knowledge," as used in this provision, "denotes actual knowledge of the fact in question … [which] may be inferred from circumstances." *Mississippi Rules of Professional Conduct, Terminology.*

Until they became public record, GBM did not know of improper payments to the Rigsbys. GBM knew only that SKG was using the Rigsbys to review claim files and provide analysis in cases involving insurance companies other than State Farm. This did not appear to present an ethical problem because the Rigsbys were competent to perform this sort of work and presumably would not be serving as fact witnesses in the non-State Farm cases.

Because GBM did not know about improper payments to the Rigsbys, GBM did not ratify and could not have ratified those payments. *See id.,* Rule 5.1(c) (a lawyer is responsible for the conduct of another lawyer if the lawyer has "knowledge of the specific conduct" and ratifies it); *see also U.S. Fidelity & Guar. Co. v. Citizens' State Bank of Moorhead*, 150 Miss. 386, 116 So. 605, 608 (1928) ("As a general rule, in order that a ratification of an unauthorized act or transaction of an agent may be valid and binding, it is essential that the principal have full knowledge, at the time of the ratification, of all material facts and circumstances relative to the unauthorized act or transaction"). Because GBM did not, and could not, ratify those payments, it did not, and could not, violate Rule 5.1(c).

In an effort to confuse the issues, State Farm argues that GBM can be disqualified merely because of its past association with the Rigsbys' former counsel (the Rigsbys' former counsel was once local counsel in this action). In support of this argument, State Farm cites *Duggins v. Guardianship of Washington ex rel. Huntley*, 632 So.2d 420 (Miss. 1993), wherein the Supreme Court of Mississippi held that one attorney could be held vicariously liable for the acts of another

under the Uniform Partnership Act where the lawyers jointly represent common clients. *Id.* at 426-28.

The *Duggins* case is inapposite to the present action for at least two reasons. First, *Duggins* involved civil liability, not liability under the Rules of Professional Conduct. The Rules of Professional Conduct expressly provide the circumstances under which one lawyer may be held responsible for the acts of another, *see* Rule 5.1, *supra*, and it would be manifestly improper to rewrite those provisions to include concepts from other areas of the law. Because of the reputational damage involved, the bar for finding an ethical violation is and should be higher than the bar for finding civil liability.

Second, the primary basis for the *Duggins* decision was the court's finding that in committing the wrongdoing at issue—misappropriating client funds—the lawyer/wrongdoer was acting "well within the scope of the partnership's business." 632 So.2d at 427-28. It would be an untenable stretch to conclude that in making improper payments to the Rigsbys, the Rigsbys' former counsel was acting within the scope of any "partnership" with GBM. The payments were made in connection with a different "partnership" (SKG) of which GBM had no part, and were charged as an expense to that joint venture and not to the present action.

State Farm also tries to muddy the waters by citing inappropriate cases such as *Am. Can. Co. v. Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971) and *Restatement (Third) of the Law Governing Lawyers* § 123 (2000) which discuss the imputed disqualification of counsel due to conflicts of interest. These authorities might be applicable if one attorney associated with GBM had represented State Farm in prior litigation and a different attorney associated with GBM were attempting to pursue the present action against the company. There is little question that under those circumstances, the second attorney would be disqualified because of the first attorney's

conflicts of interest. The present dispute involves a vastly different factual scenario. The *Citrus Feed* case and the *Restatement (Third) of the Law Governing Lawyers* § 123 are about as relevant to the present dispute as the Uniform Commercial Code.

State Farm's motion to disqualify is completely without merit and based primarily on outright lies and factual distortions that cross the boundaries articulated by Rule 11 of the Federal Rules of Civil Procedure. The motion should be DENIED and this case should be allowed to move forward.

IV. GBM DID NOT VIOLATE ANY OTHER RULE OF PROFESSIONAL CONDUCT.

Employing a "kitchen sink" approach that smacks of desperation, State Farm concludes its papers by referencing various other ethical rules and suggesting—but providing no proof—that those rules might support the relief State Farm seeks. For example, State Farm cites Rule 3.4(b)—which prohibits an attorney offering an inducement to a witness that is prohibited by law—and suggests that the payments to the Rigsbys fall squarely within this prohibition. Whether or not the payments to the Rigsbys fall within Rule 3.4(b) is beside the point. GBM made no payments, and offered no unlawful inducements to the Rigsbys, therefore GBM did not, and could not, violate Rule 3.4.

State Farm also cites Rule 4.4(a)—which prohibits an attorney from using methods of obtaining evidence that violate the legal rights of third persons—and suggests that GBM violated the rights of E.A. Renfroe by utilizing inside information to file the present action. First, E.A. Renfroe is the Relators' former employer and a defendant in this action, not some innocent bystander. Second, litigants are allowed, and indeed required, to utilize inside information to file lawsuits on behalf of the Government under the False Claims Act. *See* 31 U.S.C. § 3730(e)(4)(B) (emphasis added). This distinguishes the present action from *McIntosh* and the

other policyholder lawsuits involving Hurricane Katrina. Finally, Relators themselves gathered the information at issue; it was not gathered by or at the direction of any member of GBM.

CONCLUSION

State Farm treats its motion to disqualify as some sort of academic exercise where it is free to cite whatever rules and laws and legal principles it wants regardless of whether they have any grounding in fact. Yet, clearly this is not an academic exercise. This is the real world. There are real reputations being damaged by State Farm's unsupported and unsupportable assertions. Without a wisp of evidence, State Farm has accused a former United States Attorney of committing federal crimes. This should have consequences.

Not only should State Farm's meritless motion to disqualify be denied, State Farm should be ordered to show cause why it should not be sanctioned for making baseless accusations of wrongdoing against GBM. If State Farm does not come forward with evidence to support its accusations, then it should be sanctioned and its own attorneys disqualified from continuing in this representation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Marcus, one of the attorneys for Cori and Kerri Rigsby, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's Electronic Filing System:

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THIS the 28th day of April, 2008

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