UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS C. and PAMELA McINTOSH,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:06-CV-1080-LTS-RHW
- against -	:	
STATE FARM FIRE & CASUALTY CO. and FORENSIC ANALYSIS & ENGINEERING CO., et al.,	:	
Defendants.	:	

DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY ATTORNEY RICHARD F. SCRUGGS, THE SCRUGGS LAW FIRM, P.A., AND THE SCRUGGS KATRINA GROUP

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Defendant State Farm Fire and Casualty Company ("State Farm") respectfully submits this memorandum of law in support of its motion to disqualify Plaintiffs Thomas C. and Pamela McIntoshes' attorney, Mr. Richard F. Scruggs, his law firm, the Scruggs Law Firm, P.A., and the Scruggs Katrina Group.

INTRODUCTION

> *[T]he ethical rules should not be perused as if they were on an à la carte menu. [An attorney] is not permitted to pick and choose which ethical rules to ignore or misinterpret simply because avoidance or abuse of those rules seems conveniently more beneficial to [his] client.*[1]

It is axiomatic that a lawyer is not merely a client's agent; he is an officer of the legal system, sworn to uphold the Rules of Professional Conduct and abide by the rules of the court.[2] When a lawyer's conduct does not meet the letter or spirit of these rules, the quality of justice and public perception of the legal profession are diminished.[3] The pertinent case law makes it abundantly clear that where, as here, a lawyer: (i) has unauthorized *ex parte* communications with a company's agents; (ii) obtains from those agents stolen confidential documents for use in his litigation against the company; and (iii) hires the agents to serve as "trial consultants" in that litigation, the lawyer has committed clear violations of several state and national ethical rules and should, at a minimum, be disqualified from the case against the company.

The unvarnished facts of this case make plain that attorney Richard F. Scruggs ("Scruggs") did just that and should, accordingly, be disqualified from representing Plaintiffs in this case. Scruggs admits that while he was representing hundreds of policyholders with Katrina-related claims against State Farm, he forged a relationship with two State Farm "insiders," Cori and Kerri Rigsby (the "Rigsby Sisters" or "Sisters"). Cori and Kerri Rigsby are former employees of E.A. Renfroe and Co., Inc. ("Renfroe"), a firm that provides insurance

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1 *EEOC v. HORA, Inc.*, No. 03-cv-1429, 2005 WL 1387982, at *9 (E.D. Pa. June 8, 2005) (emphasis added).

2 *See* MISS. RULES OF PROF'L CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITIES.

3 *Id.*

adjusters to insurance companies following a catastrophic event. The Rigsby Sisters were both employed by Renfroe to adjust and mediate claims by State Farm's policyholders in the aftermath of Hurricane Katrina, and had virtually plenary access to State Farm confidential policyholder information and claim files. Kerri Rigsby was the Renfroe manager who accompanied and supervised the Renfroe adjuster who inspected and adjusted the McIntoshes' claim that is the subject of this lawsuit.

By their own account, the Sisters surreptitiously began copying State Farm's confidential documents and funneling them to Scruggs for use in his civil litigations against State Farm as early as February 2006. In fact, one of the first documents they gave to Scruggs was an original engineering report prepared in conjunction with the McIntoshes' claim. The Rigsby Sisters' clandestine activities went on for several months, culminating in what they have referred to as a "data dump" – a weekend event in which the Sisters enlisted the help of several friends and printed out or copied a total of some 15,000 pages of State Farm documents and claim files, which they then handed over to Scruggs. Scruggs, in turn, rewarded the Sisters for their cooperation by paying them an annual salary of $150,000 each to serve as "litigation consultants" for him and his associates at the Scruggs Katrina Group (the "SKG").

Notably, in a separate lawsuit brought against the Sisters by Renfroe, captioned *E.A. Renfroe & Co., Inc. v. Moran*, No. 2:06-cv-01752-WMA, 2006 WL 4458009 (N.D. Ala. Sept. 1, 2006), a federal court in Alabama has already found this conduct improper. *See id.* at *1. There, Judge William M. Acker Jr. found that "[t]here can be no doubt that Moran[4] and Rigsby violated important and critical terms of their contracts with Renfroe when they copied State Farm's records and turned them over to Scruggs." Mem. Opinion and Preliminary Injunction, dated Dec. 8, 2006 ("12/8/06 *Renfroe* Order," attached hereto as Exhibit 2), at 10 (footnote added). The court issued a preliminary injunction, which required Scruggs and the Sisters "to deliver

[4] Cori Rigsby was formerly known by her married name, Cori Rigsby Moran. She is now divorced and goes by her maiden name. *See* Deposition of Cori Rigsby ("C. Rigsby Dep.") at 12:21-25. All pertinent portions of C. Rigsby Dep. are attached hereto as Exhibit 1.

forthwith" to Renfroe's counsel all of the pilfered documents and to stop using them. *Id.* at 13-14. Judge Acker further found that the Rigsbys acted "upon advice of counsel [presumably Scruggs]," *id.* at 8 (alterations in the original), and that "it is apparent that they are all three now engaged in a cooperative effort," *id.* at 9.

On June 15, 2007, Judge Acker found that there was ample evidence that Scruggs willfully violated the court's preliminary injunction and formally requested that the United States Attorney for the Northern District of Alabama prosecute Scruggs and his law firm for criminal contempt. *See* Mem. Opinion dated June 15, 2007 ("6/15/07 *Renfroe* Order," attached as Exhibit 3) at 1-2, 25-26. The court explained that "[Scruggs's] brazen disregard of the court's preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address." *Id.* at 20.[5]

That Scruggs's conduct violated several local and national ethical rules and standards is beyond serious dispute. First, Mississippi Rule of Professional Conduct 4.2 prohibits attorneys from *ex parte* communications with represented parties. As managers and adjusters for Renfroe working exclusively on State Farm matters, the Rigsby Sisters had the authority to speak for State Farm in their claims handling and mediation/litigation duties, and thus clearly fall under the definition of "represented parties." Scruggs admits that he had many unauthorized *ex parte* conversations with them over the course of several months.

Second, Scruggs's conduct violates Mississippi Rule of Professional Conduct 4.4, which prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third party, and Mississippi Rule of Professional Conduct 8.4, which prohibits an attorney from engaging in conduct involving dishonesty or deceit or that is prejudicial to the administration of justice. The *Renfroe* court has already found that Scruggs and the Sisters clearly violated the legal rights of a third party – Renfroe – by "engag[ing] in a cooperative effort" to misuse

[5] *See also* June 15, 2007 Order issued in *Renfroe*, attached hereto as Exhibit 4; January 19, 2007 Order issued in *Renfroe* (finding sufficient evidence "to suggest that Scruggs, as defendants' agent or attorney, knowingly violated and/or permitted or helped defendants to violate this court's [injunction]"), attached hereto as Exhibit 5.

confidential information. *See* 12/8/06 *Renfroe* Order at 9. And Scruggs's blatant use of stolen State Farm documents in lawsuits where he represents plaintiffs against State Farm – including this one – has grossly violated State Farm's legal rights as well.

Third, hiring the Rigsby Sisters – whom Scruggs has repeatedly described as material witnesses whose testimony he intends to offer against State Farm – as "litigation consultants" violates Rules 4.2, 4.4, and 8.4, and most assuredly creates the appearance of impropriety in derogation of Canon 9 of the Model Code of Professional Responsibility.

Fourth, Scruggs's concurrent representation of the Rigsby Sisters and the Plaintiffs in this case violates Mississippi Rule of Professional Conduct 1.7, which prohibits lawyers from representing clients when doing so would be adverse to, or would materially limit, their representation of another client.

Fifth, Scruggs must be disqualified under Mississippi Rule of Professional Conduct 3.7, which prevents a lawyer from representing a party in a proceeding in which the lawyer is likely to be called as a witness. Here, Scruggs has unique firsthand knowledge regarding crucial exculpatory facts that bear directly on the McIntoshes' claims against State Farm.

Finally, it is important to underscore that this motion is *not* about preventing Plaintiffs from "obtain[ing] discovery regarding any matter, not privileged, that is relevant to the[ir] claims." Fed. R. Civ. P. 26(b)(1). The Federal Rules of Civil Procedure provide Scruggs with ample tools to obtain relevant documents and question witnesses regarding Plaintiffs' claims. Scruggs chose to ignore the Federal Rules, opting instead to chart a path that is clearly proscribed by the Mississippi Rules of Professional Conduct. As one court observed granting disqualification under analogous facts, "[t]he integrity of the justice system is at risk unless a stand is taken against conduct of the sort that occurred here."[6] This is also not a motion that State Farm makes lightly. However, in the course of this litigation, deposition testimony, public statements, and other evidence make it abundantly clear that Scruggs has committed serious and

[6] *Camden v. Maryland*, 910 F. Supp. 1115, 1123 (D. Md. 1996).

repeated ethical violations and traduced the Federal Rules. Given these flagrant violations, State Farm's counsel is duty-bound to bring these issues to the attention of the Court.[7]

To assist the Court in evaluating Scruggs's conduct in this matter, State Farm has retained Professor Charles W. Wolfram, who is a nationally-recognized expert in the field of professional responsibilities and ethics. Among his many other writings in the field, Professor Wolfram is the author of the treatise MODERN LEGAL ETHICS. He also served as Chief Reporter for the American Law Institute's RESTATEMENT OF THE LAW GOVERNING LAWYERS. After reviewing the record evidence, Professor Wolfram concluded:

> In summary, it is my considered expert opinion that Mr. Scruggs blatantly, seriously, and repeatedly departed from the standard of conduct that would be followed by a lawyer of ordinary care and prudence in dealing with clearly confidential and privileged information possessed by the Rigsby Sisters as former confidential agents of State Farm. Mr. Scruggs' course of conduct warrants his disqualification from further participation in this matter. Moreover, Mr. Scruggs' extensive sharing of State Farm confidential documents and other information obtained from the Rigsby Sisters with all other members of the SKG requires that those other lawyers and their law firms also be disqualified.

Decl. of Charles W. Wolfram ¶ 3. State Farm respectfully submits that when Scruggs's conduct is measured against the pertinent rules of professional responsibility and the case law applying those rules, the Court will similarly conclude that disqualification of Scruggs, his law firm, and the SKG is more than warranted in this case.

FACTUAL BACKGROUND

1. Conditions Attendant to Cori and Kerri's Employment with Renfroe and Assignment to State Farm

Cori and Kerri Rigsby began employment with Renfroe around 1998, working as independent claims representatives primarily on State Farm catastrophe assignments. The Rigsby Sisters worked on catastrophe teams adjusting hail, wind, tornado, flood, and hurricane

[7] *See* Mississippi Rule of Professional Conduct 8.3 (1987) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

claims across the United States, including catastrophe claims in Florida, Oklahoma, Mississippi, and Texas.[8]

When "independents" like the Rigsby Sisters are assigned by Renfroe to work on State Farm catastrophe teams, they are issued laptop computers by State Farm which permit them access to confidential policyholder and company information.[9] To protect the confidentiality of State Farm and State Farm policyholder information, both of the Rigsby Sisters have been consistently required by Renfroe to sign a Code of Conduct, which specifically states in its various forms that Renfroe employees will be handling sensitive information and that they must treat all such information confidentially.[10] The Code of Conduct also specifically states that Renfroe employees are expected to protect the computers they are issued from misuse and from unauthorized access and disclosure of information.[11]

Renfroe employees are also required to sign an employment agreement which sets forth Renfroe's expectations of its employees. Included among those expectations is a plainly stated requirement that employees will neither disclose nor misappropriate any confidential information of either Renfroe or its clients such as State Farm.[12] Among other things, the employment agreements signed by the Rigsby Sisters define "misappropriate" as disclosing or using confidential information for any purpose other than fulfilling the employee's responsibilities as an employee of Renfroe.

State Farm also requires all independents, including the Rigsby Sisters, to sign an Access Agreement whereby they agree to keep confidential all State Farm and State Farm policyholder information. The Access Agreement further requires that such information not be used for the

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8 *See* Deposition of Kerri Rigsby ("K. Rigsby Dep.") at 97:25-103:6, 242:2-7. All pertinent portions of K. Rigsby Dep. are attached hereto as Exhibit 6. *See also* C. Rigsby Dep. at 108:23-109:11, 124:16-18, 141:11-14.

9 K. Rigsby Dep. at 35:17-36:2, 325:16-25; C. Rigsby Dep. at 52:17-24.

10 *See* Code of Conduct dated 1999 (Exhibit 7) at 2; Code of Conduct dated 2004 (Exhibit 8) at 2.

11 *Id.*

12 *See* Employment Agreements at ¶ 6 (Exhibits 9 and 10).

benefit of any third party. In addition, the Rigsby Sisters and all other independents agree to access only data they have been authorized to access.[13]

Upon their agreement to the confidentiality and access restrictions, State Farm issues independent adjusters laptop computers and passwords for the various State Farm databases they will need to access.[14] For example, a password is required to access Outlook and Reflections in the State Farm system.[15]

Reflections is also known as State Farm's Claim Service Record ("CSR") and is a part of its claims management system. Independent adjusters like the Rigsby Sisters are permitted routine access to the CSR as part of their duties as catastrophe team personnel. The CSR system has the ability to track access to individual claim files by every person – State Farm employee or independent contractor – who accesses a particular file.[16]

Both of the Rigsby Sisters served in the role of manager at the Gulfport Catastrophe Office, with Kerri serving in this role until December 2005 and Cori serving in this role until January 2006. As managers, the Rigsby Sisters did not have claim files assigned to them and, if at all, would have accessed claim files only occasionally to assist adjusters when needed.[17]

2. The Rigsby Sisters' Involvement in Handling Katrina Claims for State Farm and Absconding with Confidential Policyholder Information

The Rigsby Sisters returned to Mississippi just a few days after Hurricane Katrina made landfall. They worked for Renfroe and were assigned to adjust State Farm's claims on the Mississippi coast from early September 2005 through June 2006.[18] The Rigsby Sisters state that

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[13] *See* Access Agreements signed by the Rigsby Sisters, attached hereto as Exhibits 11, 12, 13, and 14.

[14] *See* C. Rigsby Dep. at 144:3-147:21.

[15] *Id.*

[16] *See* K. Rigsby Dep. at 325:9-326:7.

[17] *See* K. Rigsby Dep. at 103:7-105:10; C. Rigsby Dep. at 123:17-23.

[18] *See* Deposition of Cori Rigsby given in *Renfroe* ("C. Rigsby *Renfroe* Dep.") at 56; Deposition of Kerri Rigsby given in *Renfroe* ("K. Rigsby *Renfroe* Dep.") at 107-08. All pertinent portions of C. Rigsby *Renfroe* Dep. and K. Rigsby *Renfroe* Dep. are attached hereto as Exhibits 15 and 16 respectively.

they began copying confidential State Farm information sometime between October 20, 2005 and October 31, 2005.[19]

The Rigsby Sisters claim that the copying started when Kerri became aware of two engineering reports regarding the claim file of Plaintiffs Thomas C. and Pamela McIntosh.[20] According to Kerri, the first report, dated October 12, 2005 (the "October 12 Report"), allegedly had a "sticky note" on it which stated: "Do not pay. Do not discuss."[21] The copy of the October 12 Report they gave to ABC newsmagazine *20/20* actually states: "Do not *pay bill*. Do not discuss."[22] Plaintiffs allege that a second report, dated October 20, 2005, was much more favorable to State Farm's position. (Am. Compl. ¶ 37.) Kerri has testified that she copied the two engineering reports, took them to her home, and showed them to her mother, Pat Lobrano ("Lobrano").[23] Lobrano was not at that time and has never been either a Renfroe employee or a State Farm employee.

Kerri supervised the adjustment of the McIntosh homeowners and flood insurance claims.[24] According to the claim files, she inspected the property, scoped the loss, and made findings as to the causation of damage. Kerri also authorized payment of the policy limits on the National Flood Insurance Program policy on the McIntosh property, and initiated State Farm's decision to pay $38,000 for wind damage under the homeowners policy in September 2005 prior to any request for an engineering report.

After December 2005, Kerri had no reason to access files not assigned to her, and after January 2006, Cori had no reason to access files not assigned to her, as both women were

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[19] *See* K. Rigsby *Renfroe* Dep. at 45:3-7, 46:6-47:17; C. Rigsby Dep. at 63:7-16.

[20] C. Rigsby *Renfroe* Dep. at 69; K. Rigsby *Renfroe* Dep. at 46.

[21] K. Rigsby Dep. at 431:7-8; C. Rigsby Dep. at 217-18.

[22] *See* Tr. of *20/20* (ABC television broadcast Aug. 25, 2006) at 4 (emphasis added), attached as Exhibit 17.

[23] K. Rigsby Dep. at 403:21-404:1.

[24] *Id*. at 220:23-25, 221:1-10.

assigned to mediation responsibilities after those dates. Adjusters with mediation assignments have no reason to access files not assigned to them.

The Rigsby Sisters testified that they were introduced by their mother to Attorney Richard F. Scruggs in late February 2006.[25] In addition to being the mother of the Rigsby Sisters, Lobrano is a State Farm policyholder who had a pending claim for damage to her home in Ocean Springs.[26] According to the Rigsby Sisters, Scruggs and Lobrano were longtime friends, and Lobrano arranged for her daughters to meet Scruggs.[27]

Having filed his first Katrina-related lawsuit against State Farm in October 2005 (*Best v. State Farm Fire & Casualty Co.*, 1:06-cv-00074-RHW (S.D. Miss. Oct. 21, 2005)), it is clear that Scruggs was aware that State Farm was represented by counsel when he met with the Rigsby Sisters in February.[28] The Rigsby Sisters state that at the meeting, they provided Scruggs with various State Farm documents, including the McIntosh engineering reports.[29] In the contempt hearing in the *Renfroe* matter, Scruggs testified that the documents provided to him at this meeting had "sticky notes" attached.[30] Kerri, however, has denied taking any original documents.[31]

Kerri has testified that, during the February meeting with Scruggs, she authorized Scruggs to use the documents to further his civil litigations against State Farm.[32] Cori has

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[25] C. Rigsby Dep. at 75:10-19; K. Rigsby Dep. at 301:18-302:2.

[26] C. Rigsby Dep. at 93:20-94:5; K. Rigsby Dep. at 358:4-13; *see also* C. Rigsby *Renfroe* Dep. at 18-19.

[27] K. Rigsby Dep. at 301:12-302:2.

[28] Indeed, Scruggs was no doubt also aware that the State Attorney General had filed suit against State Farm and numerous other insurance companies on September 15, 2005. *See Hood v. Miss. Farm Bureau Ins.*, Civ. No. G2005-1642 (Miss. Ch. Ct. Sept. 15, 2005).

[29] *See* K. Rigsby *Renfroe* Dep. at 64-66; C. Rigsby *Renfroe* Dep. at 112.

[30] *See* Transcript of Mar. 19, 2007 *Renfroe* Contempt Hearing ("*Renfroe* Hr'g Tr.") at 138:15-16, 139:7-13. All pertinent portions of the *Renfroe* Hr'g Tr. are attached hereto as Exhibit 18.

[31] C. Rigsby Dep. at 155:2-23; *see also* K. Rigsby *Renfroe* Dep. at 80; C. Rigsby *Renfroe* Dep. at 77.

[32] K. Rigsby *Renfroe* Dep. at 98-101.

similarly testified that Scruggs had free rein to do whatever he wished with the documents.[33] Scruggs has testified that the documents were disseminated within the SKG and to other lawyers not affiliated with that group pursuing civil litigation against State Farm.[34]

During the period between February 2006 and June 5, 2006, Cori forwarded internal State Farm e-mails and documents from the State Farm laptop assigned to her to her home e-mail account (Moran2058@aol.com).[35] During this same time period, Kerri forwarded internal State Farm e-mails from her State Farm laptop to her home e-mail account (Krigsby111@aol.com).[36]

The Rigsby Sisters testified that in April 2006, they retained Scruggs and a second unidentified lawyer to represent them on what they describe as a "related" matter regarding State Farm issues.[37] They further testified that around this time, they met with both state and federal law enforcement authorities.[38]

On May 9, 2006, Scruggs filed the complaint in the case of *McFarland v. State Farm Fire & Casualty Co.*, Civil Action No. 1:06-CV-0466-LTS-RHW, in the Southern Division of the Southern District of Mississippi. Some 476 plaintiffs, all of whom are State Farm policyholders, alleged bad faith denial of their claims by State Farm, including the improper use of engineering reports by State Farm.

During the weekend of June 3-5, 2006, the Rigsby Sisters, along with three other women (none of whom worked for Renfroe or State Farm), began what they have referred to as a "data dump."[39] The Rigsby Sisters testified that they divided up claims listed on a State Farm

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[33] *Renfroe* Hr'g Tr. at 115:6-7.

[34] *Id.* at 158:9-11, 160:16-24.

[35] C. Rigsby Dep. at 45:21-46:12; K. Rigsby Dep. at 334:12-25.

[36] K. Rigsby Dep. at 38:6-39:11, 409:9-15.

[37] K. Rigsby *Renfroe* Dep. at 80-83; C. Rigsby *Renfroe* Dep. at 116-17, 130.

[38] K. Rigsby Dep. at 302:3-7; C. Rigsby Dep. at 76:12-18.

[39] K. Rigsby Dep. at 48:19-49:1, 308:14-309:16; C. Rigsby Dep. at 36:17-38:7.

engineering roster and printed log entries and payment information.[40] Over the course of the weekend, the Rigsby Sisters printed out or copied a total of some 15,000 pages of State Farm documents and claim files, which they assembled into about nine or ten boxes.[41]

After the "data dump" was completed, the Rigsby Sisters, on the advice of counsel (presumably Scruggs), called the FBI and the Mississippi Attorney General's Office for those officials to pick up copies of the documents at Cori's home.[42] The Rigsby Sisters kept one copy of the documents, which they claim was later given to Scruggs for safekeeping to be used in the other matter they retained him for back in April 2006.

On or about June 6, 2006, after the Rigsby Sisters completed the "data dump" and delivered the documents to law enforcement officials, they met with a State Farm manager, Dave Randel, and told him for the first time that they copied State Farm documents and provided them to law enforcement officials and Scruggs.[43] A number of media stories featuring the Rigsby Sisters and State Farm documents followed, including a nationally broadcast ABC *20/20* feature story.[44] At no time prior to their August 25, 2006 appearance on ABC's *20/20* did either of the Rigsby Sisters advise Renfroe that they had been funneling State Farm documents to Scruggs, the media, or state and federal law enforcement authorities.[45]

By July 1, 2006, Kerri and Cori Rigsby went to work for the Scruggs Law Firm as "litigation consultants."[46] They each receive $150,000 annually for their "consulting" services.

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[40] C. Rigsby Dep. at 77:19-78-4; K. Rigsby Dep. at 332:23-334:5; *see also* K. Rigsby *Renfroe* Dep. at 88, 96; C. Rigsby *Renfroe* Dep. at 89.

[41] C. Rigsby *Renfroe* Dep. at 90, 92.

[42] K. Rigsby *Renfroe* Dep. at 103; C. Rigsby *Renfroe* Dep. at 92.

[43] K. Rigsby *Renfroe* Dep. at 103-04; C. Rigsby *Renfroe* Dep. at 95.

[44] *See* Tr. of *20/20* at 8; *see also* Michael Kunzelman, *Sisters Blew Whistle on Katrina Claims*, Assoc. Press, Aug. 26, 2006 (Exhibit 19); Anita Lee, *Sisters copied State Farm files; Insurer underpaid on purpose, they believe*, Biloxi Sun Herald, Aug. 26, 2006 (Exhibit 20).

[45] K. Rigsby *Renfroe* Dep. at 110-11; C. Rigsby *Renfroe* Dep. at 138-40.

[46] 10/2/06 Rigsby Answer at ¶ 21, Exhibit 21.

Media reports about this consulting arrangement confirm that they were hired to assist on the Scruggs Law Firm's insurance lawsuits and that the law firm has been using information provided by Kerri and Cori Rigsby for the cases they are pursuing.[47]

On September 25, 2006, the Scruggs firm filed a pleading in the *McFarland* case to which they attached portions of the activity log, which has not yet been produced but presumably came from the McFarland claim file.[48] On October 20, 2006, the Scruggs Law Firm filed this lawsuit on behalf of Pamela and Thomas McIntosh and attached as an exhibit a copy of the first engineering report and a copy of the "sticky note" Kerri stated was attached.[49]

That the SKG is using the documents taken by the Rigsby Sisters to obtain an unfair advantage in this litigation is undeniable. Indeed, the Rigsbys themselves represented – presumably with input from their counsel and employer, the Scruggs Law Firm – that such documents "will be utilized in one or more currently pending cases in Mississippi (indeed, may be the focal point of one or more cases in Mississippi)."[50] Scruggs has confirmed this in press interviews. When asked whether the documents purloined by the Rigsbys had an impact on cases he is handling, Scruggs replied, "[v]ery much so."[51]

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[47] Michael Kunzelman, *Lawyer: Whistleblower helping build case against insurer in Hurricane Katrina lawsuit*, Assoc. Press, Mar. 17, 2006 (Exhibit 22); Anita Lee, *Grand juries looking at State Farm*, Biloxi Sun Herald, Sept. 28, 2006 (Exhibit 23).

[48] *See* Exhibit 3 to *McFarland* Plaintiffs' Response in Opposition to State Farm Fire and Casualty Company's Emergency Mot. for a Protective Order, attached hereto as Exhibit 24.

[49] *See* Compl. [Docket no. 1].

[50] Defendants' Motion to Transfer, filed Oct. 2, 2006 in *Renfroe v. Moran*, at 3 (Exhibit 25). *See also* Opposition to Plaintiff's Expedited Motion for Limited Expedited Discovery, filed Oct. 2, 2006 in *Renfroe v. Moran*, at 2 ("In the Southern District of Mississippi, there are currently thousands of lawsuits pending against insurance companies involving breach of contract and/or fraud claims relating to hurricane damage. The documents that Defendants have turned over to their lawyers in Mississippi, to the FBI, and to the Mississippi Attorney General are squarely at issue in one or more of these lawsuits."), attached hereto as Exhibit 26.

[51] *News & Notes: Hundreds of Katrina Victims Sue Insurance Companies* (NPR radio broadcast Oct. 9, 2006), attached as Exhibit 27.

3. Renfroe's Lawsuit against Cori and Kerri Rigsby

As noted above, on September 1, 2006, Renfroe filed a complaint for breach of employment contract against Kerri and Cori Rigsby in the United States District Court for the Northern District of Alabama. *E.A. Renfroe & Co., Inc. v. Moran*, No. 2:06-cv-01752-WMA, 2006 WL 4458009 (N.D. Ala. Sept. 1, 2006). On December 8, 2006, Judge Acker found that Kerri and Cori Rigsby had violated their employment agreements and granted Renfroe's motion for a preliminary injunction, which required Scruggs and the Sisters "to deliver forthwith" to Renfroe's counsel all of the pilfered documents. His findings included the following:

> Without knowing the precise terms of the relationship between Scruggs and the two defendants, it is apparent that they are all three now engaged in a cooperative effort. Scruggs has filed one or more lawsuits against State Farm, claiming fraud against policyholders. The attachments to one of Scruggs's fraud complaints against State Farm look[] very much like items from a State Farm investigative file, like documents accessed and copied by Moran and Rigsby.
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> * * *
>
> There can be no doubt that Moran and Rigsby violated important and critical terms of their contracts with Renfroe when they copied State Farm's records and turned them over to Scruggs. Nothing could be more plain than Renfroe's need to protect its clients' information. . . . [B]ecause the court finds no legal excuse for defendants' violating their employment agreements in the name of the public interest in helping with law enforcement, the court finds a very high degree of likelihood that Renfroe will succeed in obtaining a permanent injunction when the final judgment is entered.
>
> * * *
>
> [W]ithout an injunction Moran and Rigsby can continue to engage in the public criticism of Renfroe's most important client, and with impunity they can share State Farm's internal records with lawyers and other persons outside of the law enforcement community. Considering the clear and meaningful confidential relationship that exists between Renfroe and its insurance clients, nothing could be more potentially harmful to Renfroe than a breach of the duty to keep its clients' confidential records confidential.[52]

Judge Acker issued the following preliminary injunction, conditioned on Renfroe's subsequent posting of bond:

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[52] 12/8/06 *Renfroe* Order at 9-11.

> Cori Rigsby Moran and Kerri Rigsby, and their agents [and] . . . . attorneys . . . **(with the express exception of law enforcement officials)** are hereby MANDATORILY ENJOINED to deliver forthwith to counsel for plaintiff all documents, whether originals or copies, of each document and tangible thing, in any form or medium, that either of defendants or anyone acting in conjunction with or at the request or instruction of either of them, downloaded, copied, took or transferred from the premises, files, records, or systems of Renfroe or of any of its clients, including, but not limited to, State Farm Insurance Company and which refer or relate to any insurance claims involving damages caused or alleged to have been caused by Hurricane Katrina in the State of Mississippi.
>
> Defendants and their agents . . . are further ENJOINED not to further disclose, use or misappropriate any material described in the preceding paragraph unless to law enforcement officials at their request.[53]

Attorney General Hood was permitted to intervene in *Renfroe* for the purpose of seeking a stay of the litigation, a request that was denied.[54] But in response to arguments that the injunction would interfere with Attorney General Hood's criminal investigation, Renfroe suggested that the order could also provide that Renfroe's counsel not share the documents with anyone (including Renfroe or State Farm) absent express authorization of the court.[55] The court's order reflects this compromise.

On June 15, 2007, Judge Acker found that there was ample evidence that Scruggs willfully violated the court's preliminary injunction and formally requested that the United States Attorney for the Northern District of Alabama prosecute Scruggs and his law firm for criminal contempt. *See* 6/15/07 *Renfroe* Order at 1-2, 25-26. The court found that Scruggs's testimony showed that, on the day the injunction was issued, Scruggs did not send his copies of the documents to Renfroe's attorneys as ordered by the injunction.[56] Rather, after initiating telephonic and written communications with representatives from the Attorney General's office, "Scruggs promptly sent the documents to Hood for the calculated purpose of ensuring

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53 12/8/06 *Renfroe* Order at 13-14.

54 Order filed Nov. 20, 2006 in *Renfroe*, attached as Exhibit 28.

55 12/8/06 *Renfroe* Order at 13-15.

56 *See* 6/15/07 *Renfroe* Order at 7-8; *see also Renfroe* Hr'g Tr. at 74:4-76:23, 192:17-200:21.

noncompliance with or avoidance of the injunction's clear first paragraph."[57] The court concluded that "[Scruggs's] brazen disregard of the court's preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address." 6/15/07 *Renfroe* Order at 20.

ARGUMENTS AND AUTHORITIES

I. SCRUGGS HAS COMMITTED NUMEROUS ETHICAL VIOLATIONS

"'[M]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under *federal law*.'" *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992) (emphasis in original) (citation omitted). When deciding motions to disqualify, federal courts in the Fifth Circuit look to both "state and national ethical standards" governing attorney conduct that have been "adopted by the court." *Id.* The United States District Courts of Mississippi have adopted the Mississippi Rules of Professional Conduct. *See* Uniform Local Rule 83.5. Like many states, Mississippi has adopted the American Bar Association Model Rules of Professional Conduct. *See United States v. Starnes*, 157 F. App'x 687, 693 (5th Cir. 2005), *cert. denied*, 127 S. Ct. 1992 (2007). Because of this uniformity, Mississippi courts rely frequently on cases interpreting analogue rules in other jurisdictions.[58]

Moreover, standards of the profession, the public interest, and the litigant's right to choice of counsel should also be considered. *See id.*; *see also Occu-Health, Inc. v. Miss. Space Servs.*, No. 1:06-CV-159-LG-RHW, 2006 WL 2290472, at *2 (S.D. Miss. Aug. 9, 2006). Mississippi federal courts have identified the following factors as relevant to the disqualification analysis: "'whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from

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[57] *See* 6/15/07 *Renfroe* Order at 19; *see also id.* at 7-8; *Renfroe* Hr'g Tr. at 76:24-77:2, 192:17-200:21.

[58] *See, e.g.*, *In re Am. Airlines*, 972 F.2d at 617, 619-20; *Doe v. A. Corp.*, 709 F.2d 1043, 1047-48 (5th Cir. 1983); *Owens v. First Family Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 846 n.2, 850 n.7 (S.D. Miss. 2005) (explaining that "particular rules of the Mississippi Code of Professional Responsibility [and] the rules of the ABA Model Code of Professional Conduct are effectively the same," and relying on out-of-state cases to determine whether a certain rule applies to non-lawyer employees of lawyers).

the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case.'" *Owens v. First Family Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 846 (S.D. Miss. 2005) (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 543, 544 (5th Cir. 1992)). "'[The Fifth Circuit has] applied particularly . . . the admonition of canon 9 that lawyers should "avoid even the appearance of impropriety."'" *Id.* (quoting *Dresser*, 972 F.2d at 543) (alterations in the original).

"A motion to disqualify counsel, such as the one now before the court, 'is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court.'" *Grosser-Samuels v. Jacquelin Designs Enters., Inc.*, 448 F. Supp. 2d 772, 778 (N.D. Tex. 2006) (quoting *Musicus v. Westinghouse Elec. Corp*., 621 F.2d 742, 744 (5th Cir. 1980)). "The law is clear in this Circuit that a District Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it." *In re Am. Airlines*, 972 F.2d at 611; *accord Shelton v. Hess*, 599 F. Supp. 905, 910 (S.D. Tex. 1984). Where, as here, there are "apparent ethical violations," federal courts have repeatedly held that any doubts regarding the existence of the violation and the remedy to impose should be resolved "in *favor* of disqualification." *EEOC v. HORA, Inc.*, No. 03-cv-1429, 2005 WL 1387982, at *8 (E.D. Pa. June 8, 2005) (emphasis in original); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 718 (D. Conn. 1991) (explaining that to preserve the public trust in the litigation process, "'any doubt is to be resolved in favor of disqualification'") (citation omitted).

In this case, Scruggs admits that he: (i) engaged in unauthorized *ex parte* communications with the Sisters; (ii) hired the Sisters as "litigation consultants"; (iii) received stolen confidential documents from them; (iv) continued to represent claimants against State Farm and the Sisters simultaneously; and (v) has firsthand knowledge regarding whether the Sisters gave him the original October 12 Report. As detailed below, these admissions are proof positive that Scruggs violated Rule 4.2, which prohibits attorneys from *ex parte* communications with represented parties; Rule 4.4, which prohibits a lawyer from using methods of obtaining

evidence that violate the legal rights of a third party; Rule 8.4, which prohibits an attorney from engaging in conduct involving dishonesty or deceit or that is prejudicial to the administration of justice; Rule 1.7, which prohibits a lawyer from representing a client when doing so would be adverse to, or materially limit, his or her representation of another client; and Rule 3.7, which prohibits a lawyer from representing a client in a case in which the lawyer is likely to be called as a witness. That these concurrent violations create an appearance of impropriety in contravention of Canon 9 is self-evident.

A. Scruggs Violated Mississippi Rule of Professional Conduct 4.2

Mississippi Rule of Professional Conduct 4.2, entitled "Communication with Persons Represented by Counsel," prohibits lawyers from communicating with represented parties. It states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Miss. Rule of Prof'l Conduct 4.2 (1987). The Comment to the rule specifies that, where the represented party is an "organization," Rule 4.2 prohibits communication with persons "having a managerial responsibility on behalf of the organization or whose statement may constitute an admission on the part of the organization." Rule 4.2 cmt. Rule 4.2 also prohibits communications 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." *Id.* As managers of teams of adjusters, both Rigsby Sisters had supervisory responsibility sufficient to fall into the first category described in the Comments of Rule 4.2. Indeed, the McIntoshes are attempting to impute the conduct of Renfroe's managers and adjusters to prove State Farm's bad faith. *See* Compl. ¶¶ 29-38.[59]

[59] Scruggs cannot circumvent Rule 4.2 by arguing that the Rigsby Sisters were employees of Renfroe, not State Farm. Rule 4.2 applies equally to "a party, or an employee or *agent* of a party." Miss. Rule of Prof'l Conduct 4.2 cmt. (1987) (emphasis added); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991) ("Rule [4.2] presumably covers independent contractors whose relationship with the organization may have placed them in the factual position contemplated by the Comment"); *Camden v. Maryland*, 910 F. Supp. 1115, 1116 n.1 (D. Md. 1996) (rejecting argument that Rule 4.2 did not prohibit unauthorized *ex parte* *(cont'd)*

Accordingly, Scruggs's unauthorized *ex parte* communications with the Rigsby Sisters while they were still acting as adjusters for State Farm was in direct violation of Rule 4.2. For instance, in *Larry James Oldsmobile-Pontiac-GMC Truck Co. v. GMC*, 175 F.R.D. 234 (N.D. Miss. 1997), the court found that a communication between defense counsel and the lead plaintiff in a class action violated Rule 4.2. *See id.* at 246. Likewise, a Rule 4.2 violation was found in *White v. Ill. Cent. R.R.*, 162 F.R.D. 118 (S.D. Miss. 1995), where prior to filing suit, the plaintiff's attorney hired an investigator to interview the foreman of the crew on which the plaintiff worked at the time of an accident. *See id.* at 119. Other courts within the Fifth Circuit have reached similar results. *See, e.g.*, *Woodard v. Nabors Offshore Corp.*, No. 00-2461, 2001 WL 13339, at *2-3 (E.D. La. Jan. 4, 2001) (holding that Rule 4.2 precluded communications by opposing counsel with the defendant's crane operator).

Where, as here, the *ex parte* communication results in the lawyer improperly obtaining confidential information from the represented party, courts have not hesitated to disqualify counsel and to prohibit the party from using any evidence obtained through the *ex parte* communication. For example, in *EEOC v. HORA, Inc.*, counsel Barnett represented a former employee in an employment discrimination lawsuit against a hotel operator. Prior to filing suit, Ms. Barnett began communicating with a current hotel employee, who subsequently provided her with numerous documents and confidential information pertinent to the lawsuit. The court found that "Ms. Barnett's pre-litigation tactics far over-stepped ethical boundaries and principles." 2005 WL 1387982, at *1. The court explained:

> Ms. Barnett either sought or received information from Ms. Richardson [defendants' employee] that Ms. Barnett, as an attorney practicing in the field of employment law, knew or should have known was the [defendants'] confidential business and personnel information. As an attorney familiar with employment litigation, Ms. Barnett knew or should have known that some of that information was directly related to the [defendants'] defense of [plaintiff's] complaint. Furthermore, Ms. Barnett knew or should have known at the time of these

(cont'd from previous page)
contact with federal employee "on loan" to state university because the employee was being paid by the federal government, not the university). *See also* Wolfram Decl. ¶¶ 8 to 10.

> communications that Ms. Richardson was a secretly, but vehemently, disgruntled Hotel employee who occupied a position of intimate business trust at the high level of Hotel management.

Id. at *3. The court concluded Ms. Barnett's "unabashed and unreserved . . . exploitation of Ms. Richardson's position and of Ms. Richardson's obvious personal agenda," *id.* at *3, violated several ethical rules, including Pennsylvania's substantively identical version of Rule 4.2. *Id*. at *11-13. The court concluded that "disqualification is warranted because the record clearly shows that the Defendants have been sufficiently prejudiced by being unaware of and without the ability to control the Barnett-Richardson communications to the extent permitted by both the rules of discovery and professional conduct." *Id.* at *17.

Similarly, in *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996), lawyers at the firm Meyers, Billingsley, Rodbell and Rosenbaum ("MBRR") represented a former university employee in an age and race discrimination suit against the university. *See id.* at 1116-17. When the employee first complained to the university, the case was assigned to an internal investigator for review and informal resolution. Sometime after those efforts failed, the investigator left the university on unfriendly terms and proceeded to assist MBRR in preparing its case against the university. The court held that by talking with the disgruntled former investigator, MBRR had clearly "breached the standard of impermissible *ex parte* contact." *Id.* at 1123. In ordering that MBRR be disqualified, the court explained:

> [I]t is not Defendants alone who would be prejudiced if this action were left unredressed. The integrity of the justice system is at risk unless a stand is taken against conduct of the sort that occurred here.

Id.; *see also Weeks v. Indep. Sch. Dist. No. I-89*, 230 F.3d 1201, 1211 (10th Cir. 2000) (affirming trial court's *sua sponte* order disqualifying plaintiff's attorney for violating Rule 4.2 and proscribing plaintiff from using any evidence obtained though the *ex parte* communications); *Faison v. Grant Thornton*, 863 F. Supp. 1204, 1216-17 (D. Nev. 1993) (disqualifying counsel for "attempt[ing] to circumvent the rules of discovery by engaging in *ex parte* communication, and ordering that plaintiff shall be "prohibited from using any information improperly obtained");

Shelton, 599 F. Supp. at 911 (granting motion to disqualify counsel for violating rule prohibiting unauthorized *ex parte* contact with represented party).

In this case, there is no question that Scruggs had extensive and repeated *ex parte* contact with the Rigsby Sisters without State Farm counsels' knowledge and consent. *See Renfroe* Hr'g Tr. at 133:19-134:5 (Scruggs's testimony that he began talking to the Sisters in February 2006). Indeed, Scruggs boasted to the Associated Press in March 2006 that he had a "highly placed insider" who had given him copies of "coerced and altered engineering reports" that the company tried to keep under "lock and key." *See* Kunzelman, *supra* n. 46. Given Scruggs's unabashed and unreserved violation of Rule 4.2, the Court should, at a minimum, disqualify Scruggs and his associates in order to ameliorate some of the prejudice that his improper conduct has caused State Farm and to protect the integrity of the justice system.

B. Scruggs Violated Mississippi Rules of Professional Conduct 4.4 and 8.4

Scruggs's illicit use of "highly placed insiders" to bypass the discovery process further violated Mississippi Rule of Professional Conduct 4.4, which specifically protects the rights of third persons when a lawyer represents a client. It states in pertinent part, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or *use methods of obtaining evidence that violate the legal rights of such a person.*" Miss. Rule of Prof'l Conduct 4.4 (1987) (emphasis added). The rights of third persons include "legal restrictions on methods of obtaining evidence from third persons." Rule 4.4 cmt.

Mississippi Rule of Professional Conduct 8.4 states in pertinent part:

> 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; . . .*
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
>
> (d) *engage in conduct that is prejudicial to the administration of justice.*

Miss. Rule of Prof'l Conduct 8.4 (1987) (emphasis added).

The *Renfroe* court has already found that Scruggs and the Sisters clearly violated the legal rights of a third party – Renfroe – and "engaged in a cooperative effort" to misuse confidential information. *See* 12/8/06 *Renfroe* Order at 9. Indeed, the court found that "nothing could be more potentially harmful to Renfroe than a breach of the duty to keep its clients' confidential records confidential." *Id.* at 11.

Similarly, Scruggs's use of the Rigsby Sisters to bypass the proper discovery channels is also a serious violation of Rule 4.4. As Professor Wolfram explained in his declaration, "[a]fter having reviewed only the documents that the Rigsby Sisters surreptitiously provided to Mr. Scruggs at their initial meeting in February, any lawyer of ordinary care and prudence would have recognized at once that the documents included confidential and work-product material." Wolfram Decl. ¶ 12. At that point, Rule 4.4 "provided ample and clear warning to Mr. Scruggs against plunging ahead with his extensive dealings with the Rigsby Sisters." *Id.* ¶ 18.

Professor Wolfram further rejected the notion that Scruggs could simply disregard the Federal Rules and his ethical duties based on a "'supervening public good'" argument:

> Here, however, Mr. Scruggs purports to have the power to shortcut such judicial consideration and make his own determination—sitting in final and non-reviewable judgment on his own self-interested actions, and without any notice to or participation by State Farm—that the undisclosed and unanalyzed evidence of purported fraud on the part of State Farm warranted his taking and using its confidential documents. As will be seen, many decisions have denied any such extra-judicial, ex parte power when sought to be exercised by a private practitioner such as Mr. Scruggs.
>
> The issue then becomes whether it was seriously inappropriate for Mr. Scruggs, in effect, to take matters entirely into his own hands, make his own subjective determination that State Farm was not entitled to the protection of confidentiality, and accordingly seek and review State Farm's documents and share them with whomever he might choose, as he admittedly did. In my opinion, Mr. Scruggs' course of action was not only inappropriate, but quite seriously so.

Wolfram Decl. ¶¶ 13, 14.

The case law is in complete accord. For instance, the *EEOC* court found that, in addition to her violations of Rule 4.2, attorney Barnett violated Rule 4.4 and Rule 8.4 by obtaining confidential information in derogation of the defendant hotel's rights under the discovery rules.

"It is clear to this Court that Ms. Barnett obtained evidence by methods that violated the legal rights of the Defendants. Specifically, through Ms. Richardson, Ms. Barnett obtained purported confidential and proprietary information belonging to the Hotel." *EEOC*, 2005 WL 1387982, at *13. The court explained:

> [T]he discovery rules are necessary because once information has been improperly obtained, it is nearly impossible to return the parties to the equitable position that existed prior to the improper disclosure. Here, the Court is in the position of requiring the barn to be locked after much of the livestock has been given away by a farmhand and butchered.

Id. at *14.

In *Arnold v. Cargill, Inc.*, No. 01-2086, 2004 WL 2203410 (D. Minn. Sept. 24, 2004), the court disqualified plaintiffs' law firm, which cultivated a relationship with an ex-employee of the defendant in order to elicit confidential information about the defendant. *See id.* at *14. The court held that such conduct violated both Rule 4.4 and Rule 4.2, and that disqualification was the "only remedy" that would preserve "the public trust both in the scrupulous administration of justice and in the integrity of the bar." *Id.*

Other courts have also recognized that general rules of fair play do not permit parties to circumvent formal discovery procedures. *See In re Shell Oil Refinery*, 143 F.R.D. 105, 108, *amended*, 144 F.R.D. 73 (E.D. La. 1992). In *Shell Oil*, class action plaintiffs' counsel had *ex parte* communications with a current employee of the defendant and received confidential information and proprietary documents from the employee. The court found plaintiffs' counsel had "effectively circumvented the discovery process" and that the receipt of defendant's proprietary documents in this manner was "inappropriate and contrary to fair play." *Id.* at 108.[60]

[60] In *Shell Oil*, defendant did not seek disqualification. Rather, it sought to learn the identity of the employee who had provided the information to plaintiffs' counsel. *See Shell Oil*, 143 F.R.D. at 108. The court declined to grant this relief. In subsequent proceedings arising out of the same incident, the lawyer who was responsible for obtaining the documents from the Shell Oil employee was ultimately suspended from practicing law for three years. *See In re Bruno*, No. 2006-B-2791, 2007 WL 1377644, at *5 (La. May 11, 2007).

Scruggs's conduct is strikingly similar to the conduct of the attorneys who were disqualified in *EEOC* and *Cargill*. Rather than follow the discovery rules, Scruggs used the Rigsby Sisters as his surrogates to obtain thousands of confidential and proprietary State Farm documents for use in his policyholder cases, thereby severely prejudicing the legal rights of State Farm in violation of Rule 4.4, and engaging in conduct prejudicial to the administration of justice in violation of Rule 8.4. Accordingly, his disqualification is warranted here.

C. By Hiring the Rigsby Sisters as "Litigation Consultants," Scruggs Further Violated Rules 4.2, 4.4, and 8.4, and Canon 9 of the Code of Professional Responsibility

Scruggs's ethical transgressions are compounded exponentially by the fact that he hired the Rigsby Sisters – whom he has repeatedly described as material witnesses whose testimony he intends to offer against State Farm – to serve as highly paid litigation consultants for the SKG. The pertinent case law universally and resoundingly condemns this practice as both violative of Rules 4.2, 4.4, and 8.4, and inimical to Canon 9 of the Code of Professional Responsibility, which requires that attorneys "avoid even the appearance of impropriety." Model Code of Prof'l Responsibility Canon 9 (1980); *cf. In re Dresser*, 972 F.2d 540, 543 (5th Cir. 1992) ("[The Fifth Circuit has] applied particularly . . . the admonition of canon 9 that lawyers should 'avoid even the appearance of impropriety.'") (citation omitted).

In a closely analogous case, *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995), the court granted a motion to disqualify counsel on the basis that there was an appearance of impropriety. *Id.* at 658. There, opposing counsel hired as a paid "trial consultant" a former highly placed employee, Mr. Canales, of defendant Transamerica Rental Finance Corp. ("TRFC"). The court found that this "consulting arrangement" violated Florida's analogues to Rules 4.2, 8.4(c) and 8.4(d), and created a strong appearance of impropriety:

> The appearance of professional impropriety resulting from the attorney-"trial consultant" relationship in this case takes two general forms. First, there is the appearance that [opposing counsel] Trenam, Simmons, through its payments to Canales, has induced Canales to disclose to it confidential matters relating to TRFC's managerial practices and relating to TRFC's strategies, theories and

> mental impressions in this and/or substantially related litigation. *An irrefutable presumption of such inducement flows from the fact that Canales, who was privy to confidential and proprietary information belonging to TRFC, is now on retainer for Trenam, Simmons.* Such inducement violates: (a) Fla. Bar Code of Prof. Cond., 4-1.6, which requires attorneys to maintain confidentiality and imposes upon attorneys a correlative duty to refrain from inducing others to disclose confidential matters; (b) Fla. Bar Code of Prof. Cond., 4-4.2, which prohibits attorneys from directly communicating with adverse parties, including employees or former employees of the corporate parties represented by counsel; and (c) Fla. Bar Code of Prof. Cond., 4-8.4(d), which prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice.
>
> Second, there is the appearance that Canales is being paid for his factual testimony as opposed to his work as a "trial consultant." Such conduct violates: (a) Fla. Bar Code of Prof. Cond., 4-8.4(c), which prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and (b) Fla. Bar Code of Prof. Cond., 4-8.4(d), which prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice.

Rentclub, 811 F. Supp. at 654 (emphasis added).

Likewise, in *In re Complaint of PMD Enterprises, Inc.*, 215 F. Supp. 2d 519 (D.N.J. 2002), plaintiffs' counsel hired defendants' former employee, who was a fact witness in the case, to review documents to aid the attorney in litigating the case. The court found that this relationship violated the rules prohibiting *ex parte* contact and "created a clear appearance of impropriety." *Id.* at 530 (revoking attorney's *pro hac vice* admission as sanction for *ex parte* contact with former employee).

In *American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas, Inc.*, No. CV-LV-82-26-HDM, 1986 WL 57464 (D. Nev. Mar. 11, 1986), a party's counsel (Cozen) was disqualified because he attempted to hire as a trial consultant a former officer and current expert of an opposing party. *See id.* at *1. The former officer, who had had access to confidential information and the litigation strategy of his employer, offered his services for a high fee. *See id.* at *2. The court found that by even negotiating with the former officer, Cozen improperly "facilitat[ed] [the former officer's] scheme to collect a bonanza for being disloyal to his former employer (and then present contractee)." *Id.* at *6. The court concluded that "the impropriety of attorney Cozen's participation in the nefarious transaction was manifest. Mr. Cozen's

impropriety affects both the public's view of the judicial system and the integrity of the court." *Id.*

Similarly, in *Esser v. A.H. Robins Co.*, 537 F. Supp. 197 (D. Minn. 1982), the court disqualified the plaintiff's law firm for violating Canon 9 by hiring defendant's former senior claims adjuster. *See id.* at 200, 203. In doing so, the court stated that permitting the attorney to "profit financially in view of his violations of the ethical code of the profession would be to make a mockery of the ethical standards that have been violated and further impair the integrity of and the public confidence in the legal system." *Id.* at 203; *see also United States v. SAE Civil Constr., Inc.*, No. 4:CV95-3058, 1996 WL 148521, at *5 (D. Neb. Jan. 29, 1996) (disqualifying attorneys who retained opposing party's former president as a trial consultant); *MMR/Wallace*, 764 F. Supp. at 727-28 (disqualifying attorneys based upon retention of the former office manager of the opposing party as a trial consultant).

D. Scruggs's Representation of the Rigsby Sisters as Well as Plaintiffs in Lawsuits against State Farm Violates Mississippi Rule of Professional Conduct 1.7

Mississippi Rule of Professional Conduct 1.7 prohibits attorneys from representing one client when such representation will be directly adverse to another client, or where the representation of one client may be materially limited by the attorney's responsibilities to another client. *See* Miss. Rule of Prof'l Conduct 1.7 (1987). The Comments to Rule 1.7 explain that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." *Id.* The situation is further complicated in this case by the fact that Scruggs is also the Sisters' employer. Here, Scruggs's representation of hundreds of Mississippi plaintiffs – including the McIntoshes – is directly adverse to his representation of the Rigsby Sisters. The conflict in this case is neither hypothetical nor speculative; it has already become manifest in this litigation.

Specifically, as this Court is well aware, State Farm had reached a preliminary class action settlement in *Woullard v. State Farm*, Civ. A. No. 1:06cv01057, which would have settled

the McIntoshes' claims. 2007 WL 1170358 (Apr. 13, 2007). Scruggs, as lead counsel for the *Woullard* class, was principally responsible for negotiating on behalf of the class. Scruggs reached an agreement with State Farm, which he represented to the Court to be fair, adequate, and in the best interest of the class. *Id.* Notwithstanding these representations, Scruggs wrote to State Farm's attorneys threatening to withdraw his support for the *Woullard* settlement unless State Farm successfully exerted influence on Renfroe to dismiss its claims against the Rigsby Sisters in the Alabama action:

> Our disappointment in your lack of resolve in securing dismissal of the *Renfroe* matter cannot be overstated. Nor will it be without consequences given that its dismissal was a *sine qui* [sic] *non* to our settlement. While State Farm recently alleges "that no such promise was made," the six of us in the room at the time, the two of you included, know better.
>
> If State Farm's lack of commitment and follow through on *Renfroe* is intended to illustrate its integrity in the proposed class settlement, our group will have no choice but to withdraw the *Woullard* motion.

Letter from Richard F. Scruggs to Jeffrey Jackson and Sheila L. Birnbaum, dated February 19, 2007, attached hereto as Exhibit 29.[61]

As State Farm pointed out in its response, conditioning his continued support of the settlement on the dismissal of the *Renfroe* action created a clear conflict of interest:

> We simply cannot understand why the interest of class members would be subordinated to the interest of you, Cori Moran and Kerri Rigsby. How can you condition a settlement that would result in substantial benefits to class members on the dismissal of a lawsuit pending in Alabama, in which class members have no interest, without creating a conflict of interest?

Letter from Sheila L. Birnbaum to Richard F. Scruggs, dated February 21, 2007, at 2, attached hereto as Exhibit 30. State Farm further reiterated that the company – which was not and is not a party in the *Renfroe* case – did "not control Renfroe and cannot and will not apply pressure on them to abandon what they believe is in their best interest." *Id.* at 1.

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[61] Of course, settlement discussions are generally highly confidential and inadmissible under Federal Rule of Evidence 408. However, Scruggs waived whatever confidentiality might have attached to his letter by sending a copy to numerous federal and state officials.

Scruggs's need to have the Rigsby Sisters provide him with evidence of State Farm's alleged wrongdoing has also conflicted with his duty to protect the Rigsby Sisters' legal interests. For example, Plaintiffs affirmatively assert "the Renfroe employees [including Kerri Rigsby] consciously chose to hide the existence of [the October 12 Report] from the policyholders and thereby defraud them into receiving an inadequate adjustment of their claim." *See* 1st Am. Compl. ¶ 46. It is highly unlikely that an attorney who was representing Kerri Rigsby exclusively would endorse the inclusion of such language in a court filing.

Kerri similarly testified – with Scruggs present – that she personally engaged in wrongful conduct in connection with the McIntoshes' claim:

> MR. WEBB: Did you – and I'm talking about you, Ms. Rigsby, did you wrongfully, wrongfully characterize the vast majority of the McIntoshes' home as flood damage while knowing that the damage was wind damage?
>
> THE WITNESS: Well, I did once the report came in and showed that it was wind and I still allowed [the adjuster] to pay it as water, yes.
>
> Q: Okay. So you're admitting that you engaged in wrongful conduct relative to this particular claim?
>
> A. I knew – yes.

K. Rigsby Dep. at 238:6-17.

Scruggs's use of the stolen State Farm documents in various insurance lawsuits on behalf of his policyholder clients, while the Rigsby Sisters have to defend themselves in the *Renfroe* suit in Alabama, is further proof of Scruggs's violation of Rule 1.7. A case that illustrates the impropriety of Scruggs's conduct is *Dauro v. Allstate Ins. Co.*, Civ. A. No. 1:00cv138Ro, 2003 WL 22225579 (S.D. Miss. Sept. 17, 2003), *aff'd*, 114 F. App'x 130 (5th Cir. 2004). In *Dauro*, the plaintiff sued Allstate for bad faith refusal to settle a claim. Three Allstate employees who handled the claim retained Dauro's attorney to represent them in a suit against Allstate for claims following their termination by Allstate. *See id.* at *4-5. Although the court found that communication between Dauro's attorney and Allstate's former employees was not technically

proscribed by Rule 4.2, it nonetheless expressed grave concern over the improprieties inherent in the situation. The court recognized that impermissible conflicts existed:

> [T]here are inherent conflicts with the plaintiff's counsel's representation of these key former Allstate Employees. For example, should Allstate presently desire to converse or question their former employees, the former employees have a right to have their counsel present during any conversation with Allstate. Their counsel is, of course, plaintiff's counsel. Thus trial strategies might be revealed. When these former key employees are questioned on the stand by their retained counsel about actions that this same counsel thought were reprehensible enough to attempt to have had them individually brought to suit as defendants, what might their answers be? Would presently retained counsel advise them how to answer and would the advice be what would be in the best interest of the former employees or what would be in Ms. Dauro's best interest? This inherent conflict will not preserve the integrity of the judicial process or maintain public confidence in the legal system or enforce ethical standards of professional conduct . . . .

Id. at *7.[62] Here, as in *Dauro*, Scruggs's representation of the Rigsby Sisters directly conflicts with his representation of Mississippi policyholders. Already, his actions have had a detrimental effect on the legal rights of the Rigsby Sisters. They continue to face court action in the *Renfroe* case for their role in handing over State Farm confidential documents and information to Scruggs. Indeed, the *Renfroe* court found that the Sister were "controlled by [Scruggs],"[63] which, of course, is the antithesis of the proper lawyer-client relationship. Clearly, Scruggs abused his position of trust to his advantage by using the information and documents he received from the Rigsby Sisters in his capacity as their counsel to further his policyholder clients' interests, all to their detriment. As the *Dauro* court recognized, the inherent conflict of interest present in this situation must be resolved by disqualifying Scruggs and his law firm.

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[62] The *Dauro* court did not decide the motion to disqualify because it already granted Allstate's motion for summary judgment, thereby obviating the need to decide the disqualification motion. While the court indicated this issue was not ripe for adjudication at this time, it did state that the motion should be re-urged in the event there is a successful appeal of its decision and the matter goes to trial. *See Dauro*, 2003 WL 22225579, at *7.

[63] 6/15/07 *Renfroe* Order at 24.

E. Scruggs Should Be Disqualified under Rule 3.7 Because He Is a Material Witness in the Case

Mississippi Rule of Professional Conduct 3.7 provides that "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness [except in certain circumstances inapplicable in this case]." *See* Miss. Rule of Prof'l Conduct 3.7 (1987). In this case, the cornerstone of Plaintiffs' claims against State Farm is the October 12 Report that allegedly had a "sticky note" on it which stated: "Put in Wind file – Do not pay. Do not discuss." *See* Am. Compl., Ex. C. Plaintiffs allege that State Farm improperly failed to give them a copy of the October 12 Report. *Id.* ¶ 47. They further allege that State Farm continued to conceal the report in August 2006. *Id.* ¶¶ 49-53. Indeed, Kerri Risgby testified that she believes that State Farm might have intentionally shredded the October 12 Report in the early part of 2006. K. Rigsby Dep. at 430:5-20.

At trial, State Farm intends to prove that the Rigsby Sisters took the October 12 Report out of the McIntoshes' claim file and gave it to Scruggs at their first meeting in February 2006. This, of course, would repudiate Kerri's suggestion that State Farm destroyed the report in January 2006, and Plaintiffs' allegation that State Farm concealed the report from them in August 2006. The three individuals with firsthand knowledge of what transpired during their February meeting are Kerri Rigsby, Cori Rigsby, and Scruggs. Kerri Rigsby denies that she took the original October 12 Report from the McIntosh file. *See* K. Rigsby Dep. at 430:20-23. On the other hand, Cori testified that she gave Scruggs the engineering report with a "handwritten sticky note on it" at the February meeting. *Renfroe* Hr'g Tr. at 128:11-24. And Scruggs testified that he was given the report with the "sticky note":

> MR. HELD: There is an exhibit in the pleadings in this case, the *McIntosh* document that's in the *McIntosh* case, and it's, I think, an engineer's report with a sticky on it. Do you recall that?
>
> MR. SCRUGGS: Yes, sir, I do. I recall it.
>
> Q: And the document actually came from the Rigsby sisters and was one of the first documents delivered to you in February 2006, was it not?

A: If I'm being instructed to answer.

THE COURT: I think you can be fairly instructed to answer that one.

A: Yes.

Renfroe Hr'g Tr. at 140:8-19. Clearly, at trial State Farm is entitled to elicit the testimony of Scruggs and the Rigsby Sisters to establish that the Sisters gave Scruggs the October 12 Report in February 2006.

Courts have repeatedly held that Rule 3.7 mandates disqualification in cases such as this where the attorney has firsthand knowledge of material facts and is likely to be called as a witness. *See Bellino v. Simon*, No. Civ. A. 99-2208, 1999 WL 1277535, at *3-4 (E.D. La. Dec. 28, 1999) (disqualifying attorney and his law firm from representing plaintiff in matter where it was likely that he would be called as a witness); *Lange v. Orleans Levee Dist.*, No. Civ. A. 97-987-88, 1997 WL 668216, at *3 (E.D. La. Oct. 23, 1997) ("[T]here is precedent in this District for disqualifying not only the lawyer-witness, but his entire firm, from representation at *any stage* of the proceedings, where the lawyer-witness's testimony is likely to be prejudicial to his client.") (emphasis in original). The same result is warranted in this case.

II. THE SERIOUS IMPROPRIETIES COMMITTED WARRANT DISQUALIFICATION OF SCRUGGS, HIS LAW FIRM, AND THE SKG

Scruggs's blatant misfeasance in this case is extreme and ongoing. It took place over the course of several months, involved numerous third parties, and is unprecedented in scale. As was the case in *EEOC*, Scruggs "has engaged in and exhibited what can be termed nothing less than reckless behavior, with regard to respecting the legal rights of others, including [his] client's adversaries." *EEOC*, 2005 WL 1387982, at *18. In this emotionally charged litigation, where media interest is high, the slightest appearance of impropriety by any of the parties is likely to cast public suspicion on the judicial system. Moreover, State Farm has been severely prejudiced: Thousands of confidential and possibly privileged documents have been placed in the hands of its adversaries outside of the discovery process.

The illegally gained confidential knowledge Scruggs now possesses regarding State Farm makes his continued representation of Plaintiffs in this case untenable. He may be ordered to return State Farm's documents, he may be told to cease his relationship with the Rigsby Sisters, but the damage is already done. He has in his memory a large amount of information that he received outside of discovery. In the spirit of fair play that is so central to our adversarial system of litigation, Scruggs should be disqualified. *See Camden*, 910 F. Supp. at 1124 (ordering disqualification of plaintiffs' law firm: "MBRR has listened in at the legal confessional. It has gained access to confidential information that is damaging to Defendants whether or not it becomes formal evidence in the case."); *accord EEOC*, 2005 WL 1387982, at *14. Therefore, unless Scruggs is disqualified, "[t]he integrity of the justice system is at risk." *See Camden*, 910 F. Supp. at 1123.

The Court should also disqualify the Scruggs Law Firm. "[A]ll authorities agree that all members of a partnership are barred from participating in a case from which one partner is disqualified." *Am. Can Co. v. Citrus Feed Co*., 436 F.2d 1125, 1128 (5th Cir. 1971). This is so because there is an "irrebuttable presumption that confidences presumably obtained by an individual lawyer will be shared with the other members of his firm." *Grosser-Samuels*, 448 F. Supp. 2d at 779; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("Restatement") § 123, Reporter's Note, cmt. c. (2000) (explaining that "[t]he general presumption is well settled that confidences imputed to one lawyer in a firm are shared among all firm lawyers").

Likewise, the SKG and its affiliate firms must be disqualified as well. As the Restatement makes clear, the imputation rules are not limited to law partnerships. Rather, they cover "a law partnership, professional corporation, sole proprietorship, *or similar association.*" *See* Restatement § 123(2) (emphasis added). Where, as here, the constituent firms share confidential information and hold themselves out to be "affiliated," disqualification is warranted. *See, e.g., Mustang Enters., Inc. v. Plug-In Storage Sys., Inc.*, 874 F. Supp. 881, 888-89 (N.D. Ill. 1995); *see also* Restatement § 123, cmt. b (explaining that the rationale for the imputation rule is

that affiliated lawyers "ordinarily have access to files and other confidential information about each other's clients").

The SKG falls squarely within this rule. As Scruggs testified at the *Renfroe* contempt hearing, the SKG is a separate entity comprised of four member firms.[64] *Renfroe* Hr'g Tr. at 144:7-10. While Scruggs is "the lead counsel in the Scruggs Katrina Group," *id.* at 145:23-24, the SKG holds itself out as a legal team[65] whose members work together by filing suits against insurance companies[66] and will presumably share fee income. Crucially, the Rigsby Sisters work for all of the SKG attorneys, and they all had access to State Farm confidential materials that the Sisters pilfered. *See Renfroe* Hr'g Tr. at 148:10-21, 160:16-161:25. Therefore, the SKG and its affiliate firms should be disqualified as well.

Notably, the only remedy that can even begin to ameliorate the harm to State Farm inflicted by Scruggs's actions is disqualification. As noted above, the *Renfroe* injunction mandates that Scruggs and the Rigsby Sisters hand over all of the pilfered State Farm documents to Renfroe's counsel. Because of the compromise reached to accommodate Attorney General Hood's concerns, State Farm is not permitted to see or use those documents absent express authorization of the court.[67] Thus, unless Scruggs, his firm, and the SKG are disqualified, State Farm will be in the Kafkaesque position of having to defend itself in lawsuits where its adversary had access to thousands of pages of State Farm confidential documents, and State Farm is not

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[64] The four member firms are the same four firms that purport to represent the McIntoshes in this case, i.e., the Scruggs Law Firm, Barrett Law Office, Nutt & McAlister, and Lovelace Lawfirm. In addition, Michael Moore, who has recently entered an appearance in this case, has previously appeared with Scruggs and the SKG in the *Woullard* case. To the extent that Mr. Moore was privy to the documents that Scruggs and the Sisters illicitly obtained from State Farm, his disqualification would also be required.

[65] According to the SKG website, "[t]he Scruggs Katrina Group is a legal team consisting of Mississippi attorneys who joined together soon after Hurricane Katrina ravaged the Mississippi Gulf Coast." http://www.scruggskatrinagroup.com/about.asp.

[66] *See id*. ("The Scruggs group quickly filed suits against the major insurers on the Coast . . . the Scruggs group developed the case to be brought against the insurers.").

[67] 12/8/06 *Renfroe* Order at 13-15.

even permitted to review them. This would be a clear violation of State Farm's due process rights.

CONCLUSION

For the foregoing reasons, Defendant State Farm respectfully requests that the Court grant in its entirety its motion for an order to disqualify Plaintiffs' counsel, Mr. Richard F. Scruggs; his law firm, the Scruggs Law Firm, P.A.; and the Scruggs Katrina Group and its affiliate law firms.

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Respectfully submitted,

/s / John A. Banahan

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