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

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY RELATORS/COUNTER-DEFENDANTS

v. CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY DEFENDANT/COUNTER-PLAINTIFF

and

FORENSIC ANALYSIS ENGINEERING CORPORATION;
EXPONENT, INC.; HAAG ENGINEERING CO.;
JADE ENGINEERING; RIMKUS CONSULTING GROUP INC.;
STRUCTURES GROUP; E. A. RENFROE, INC.;
JANA RENFROE; GENE RENFROE; and
ALEXIS KING DEFENDANTS

DEFENDANT/COUNTER-PLAINTIFF STATE FARM FIRE AND CASUALTY COMPANY'S MEMORANDUM IN RESPONSE TO THE RIGSBYS' MOTION FOR HEARING AND ORAL ARGUMENT

Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint as "State Farm Mutual Insurance Company" ("State Farm"), subject to all its defenses, including its Rule 9 & 12 defenses, submits this Memorandum in Response to Relators' "Motion for Hearing and Oral Argument" ("Motion for Hearing"), ([172]).

INTRODUCTION

The Rigsbys' Counsel have requested a hearing and oral argument on State Farm's "Motion to Disqualify Bartimus, Frickleton, Robertson & Gorny, PC and Graves Bartle & Marcus, LLC" ("Disqualification Motion"), ([103]). State Farm respectfully submits that no

hearing or further argument is necessary in order to adjudicate this threshold issue in accordance with the *McIntosh* Order.[1]

In fact, the *undisputed* facts are alone sufficient to warrant disqualification under the reasoning of *McIntosh*. Even with respect to the disputed facts, the Rigsbys and their Counsel have been provided a more than adequate opportunity to be heard.

Further, as explained below, State Farm believes that holding a hearing on the Disqualification Motion will unduly delay resolution of this threshold issue and likely spawn similar requests by other law firms. Nonetheless, and in the alternative only, should the Court be inclined to hold a hearing, State Farm requests certain preliminary relief, so as to afford State Farm a fair opportunity to present evidence, as well as prior notice of potential testimony by the Rigsbys and their Counsel.

ARGUMENT

I. NO HEARING IS NECESSARY IN ORDER TO APPLY THE REASONING OF THIS COURT'S *MCINTOSH* ORDER TO THE UNDISPUTED FACTS THAT RENDER THE RIGSBYS' COUNSEL DISQUALIFIED

It is undisputed that:

(1) Both GBM and BFRG were in a joint venture with Scruggs[2] and knew or should have known about his unethical conduct – yet they did nothing to stop it, withdraw or disassociate themselves from Scruggs and his firm;

(2) Chip Robertson served as co-counsel with Scruggs and the SKG in the appeal of *Tuepker v. State Farm Fire & Casualty Co.*, No. 1:05cv559-LTS-RHW, 2006 WL

[1] ([1172 & 1173]) in *Thomas C. McIntosh and Pamela McIntosh v. State Farm Fire and Casualty Company, Forensic Analysis & Engineering Corp., E.A. Renfroe & Company, Inc. and David Stanovich*; in the United States District Court for the Southern District of Mississippi, Southern Division; Civil Action No. 1:06cv01080-LTS-RHW.

[2] *See Duggins v. Guardianship of Washington ex rel. Huntley*, 632 So. 2d 420, 427-28 (Miss. 1993) (holding that a group of lawyers who associate themselves for the purpose of bringing a lawsuit is a joint venture and subject to the same vicarious liability rules as a partnership).

2794773 (S.D. Miss. Sept. 27, 2006),[3] and actually argued the appeal before the Fifth Circuit,[4] clearly rendering his firm "associated counsel" under *McIntosh*;

(3) BFRG served as co-counsel with Scruggs and the SKG on behalf of the McIntoshes in *In re State Farm Fire & Casualty Co.*, No. 07-60771 (5th Cir. filed Oct. 2, 2007), which pertained to State Farm's Petition for a Writ of Mandamus from this Court's denial of State Farm's first disqualification motion; and

(4) BFRG also served as co-counsel with The Scruggs Firm in *Cori Rigsby & Kerri Rigsby v. Gene Renfroe & Jana Renfroe*, 1:07cv75-LTS-RHW (S.D. Miss. filed Jan. 26, 2007).

Never once mentioning these undisputed facts, Counsel oddly state that:

> This Court does not know and has never …laid eyes on the Missouri lawyers representing the Relators.
>
> [and]….
>
> [Holding] a hearing would allow the Court to look into counsel's eyes and assess the arguments for disqualification

([172] at ¶¶3 & 5.)

State Farm respectfully submits that no "look into [the Rigsbys'] counsel's eyes" ([172 at ¶5]) is necessary, in order to apply the reasoning of the *McIntosh* Order. Rather, for the reasons explained in State Farm's rebuttal memorandum ([171]), the undisputed facts are alone sufficient to warrant disqualification under the reasoning of the *McIntosh* Order. No hearing or oral argument is necessary on this straightforward matter.

II. IF THE RIGSBYS HAD INDEED MISPOKEN IN THEIR TESTIMONY CONCERNING COUNSEL'S INVOLVEMENT, THEIR LAWYERS COULD HAVE ASKED THEM QUESTIONS TO "CLEAR THE RECORD" -- AND THE FACT THAT THEY DID NOT DO SO SPEAKS FOR ITSELF

Counsel's statement that the Rigsbys' sworn testimony was "improperly conducted in other cases where counsel for [the Rigsbys] were not present and had no opportunity to clear the record[,]" ([172] at ¶10), is preposterous. As the transcripts themselves reflect – and as this

[3] In their Motion, Counsel state "[t]he Missouri firms represent no policyholders…." ([172] at ¶11.) In light of *Tuepker*, that statement could not be truthfully made in the *past* tense.

[4] *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 347 (5th Cir. 2007).

Court has previously noted[5] - in each of those proceedings the Rigsbys were represented by counsel (usually from The Scruggs Firm).

Further, Counsel's attempt to annul the Rigsbys' testimony by stating that State Farm has "misread the relators' answers to deposition questions…" (*Id.* at ¶1), does not hold water. If the Rigsbys' testimony was indeed mistaken, during their depositions their lawyers could have asked them questions intended "to clear the record…." (*Id.* at ¶10.) For example, Richard Scruggs conducted his own examination of Kerri Rigsby in her April 20, 2007 *McIntosh* deposition (Ex. B to Resp. at 406-427) and Zach Scruggs conducted his own examination of Cori Rigsby in *McIntosh* on May 1, 2007, (Ex. C to Resp. at 215-19 & 223-27.) Yet despite having personally witnessed the Rigsbys giving the testimony now cited by State Farm, very tellingly, they did not do so.

Finally, Counsel argue that they "should have the opportunity to present rebuttal to the allegations brought against them…." (*Id.* at ¶12.) Yet Counsel have already had such an opportunity – and they in fact submitted four separate declarations[6] and some 39-pages of argument in opposition to State Farm's Disqualification Motion -- and it is worth noting that State Farm's rebuttal did not advance any argument concerning the Rigsbys' testimony about Counsel that had not been previously raised. Although it is now obvious that Counsel do not like their own clients' testimony about their involvement, that testimony speaks for itself.

[5] In a January 8, 2008 Order in *McIntosh*, Your Honor noted the Scruggses' representation of the Rigsbys in connection with the referenced depositions. (*McIntosh*, No. 1:06cv01080-LTS-RHW at [998], ex. A to Resp.)

[6] ([140-2 & 141-2, 3 & 4].)

III. NEITHER THE LOCAL RULES NOR THE CONSTITUTION ENTITLE THE RIGSBYS TO A HEARING ON THE DISQUALIFICATION MOTION

Counsel's suggestion that they – and the Rigsbys – have a right to a live hearing on State Farm's motion is simply wrong. Under Miss. Unif. Dist. Ct. R. 7.2(F)(1), motions are typically "decided by the court without a hearing or oral argument…."

Additionally, Counsel's argument that due process entitles them – and the Rigsbys – to a hearing is also mistaken. Even in the context of Rule 11 motions, the Fifth Circuit has held that no live hearing is required. *E.g., Merriman v. Security Ins. Co. of Hartford*, 100 F.3d 1187, 1192 (5th Cir. 1996) ("Although the district court never conducted an evidentiary hearing on the award or the amount of sanctions, due process does not demand an actual hearing. In Rule 11 cases, the opportunity to respond through written submissions usually constitutes sufficient opportunity to be heard").[7] Here, due process has already been satisfied.

IV. IN THE ALTERNATIVE ONLY, SHOULD THE COURT CONCLUDE THAT A HEARING IS NECESSARY, STATE FARM REQUESTS LEAVE TO DEPOSE THE RIGSBSYS, THEIR COUNSEL AND THE SCRUGGSES ON DISQUALIFICATION ISSUES IN ADVANCE

The Rigsbys' motion suggests that their Counsel and perhaps the Rigsbys themselves intend to offer evidence at the hearing they now request. State Farm reiterates that it does not believe a hearing is necessary. However, if the Rigsbys and their Counsel are to be permitted a hearing, State Farm requests certain preliminary relief.

First, in the event the Rigsbys are granted a hearing, State Farm requests leave to depose the Rigsbys and their counsel on disqualification issues in advance, so it may have fair notice of their potential testimony at the hearing. Second, State Farm requests leave to take the "trial

[7] *See Taylor v. County of Copiah*, 937 F.Supp. 580, 584 (S.D. Miss. 1995) ("Simply giving the individual accused of a Rule 11 violation a chance to respond through the submission of a brief is usually all that due process requires"); *see generally Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)("Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits").

depositions" of Richard F. and Zachary Scruggs – who are beyond the subpoena power of the Court - so their testimony on disqualification-related issues may also be presented.

The live testimony the Rigsbys and their Counsel appear poised to offer, as well as the depositions State Farm alternatively requests, would almost certainly generate numerous privilege battles – ones which could delay a decision on the Disqualification Motion and multiply this litigation on issues potentially collateral to the merits. Further, it is likely that other counsel formerly associated with SKG and/or KLG will face disqualification issues in the future, in this or other State Farm Katrina-related cases. Holding a hearing on the Disqualification Motion in this case, might open a Pandora's Box generating similar requests by numerous other firms.

CONCLUSION

In summary, the undisputed facts should alone be sufficient to warrant disqualification under the reasoning of the *McIntosh* Order. In the alternative only, should the Court be inclined to hold a hearing, State Farm requests leave to depose the Rigsbys, their Counsel, Richard Scruggs and Zach Scruggs in advance, on issues related to disqualification. State Farm also prays for such further, alternative or supplemental relief as may be appropriate in the premises.

This the 13th day of May, 2008.

Respectfully submitted,

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PRO HAC VICE

CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for State Farm Fire and Casualty Company herein 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 13th day of May, 2008.

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