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	
Vs.	CASE NO. 1:06cv433-LTS-RHW
STATE FARM MUTUAL INSURANCE COMPANY DEFENDANT/COUNTER-PLAINTIFF, et al.	

MEMORANDUM IN SUPPORT OF RELATORS' MOTION FOR RECONSIDERATION

I INTRODUCTION

On May 19, 2008, this Court entered an Order disqualifying Relators' undersigned counsel. In entering this Order, the Court mistakenly assumed that Relators' counsel knew about the relationship between the Rigsbys and the attorneys for the Scruggs Katrina Group ("SKG") before State Farm Mutual Insurance Company ("State Farm") did. In point of fact, as shown below, both State Farm—and indeed, this Court—knew of the relationship first, before it was ever revealed to undersigned counsel. As a result, to the extent there was any duty to inquire further into the nature of the relationship and take any remedial action that duty rested with State Farm.

By failing to conduct a hearing on these important matters, the Court denied counsel an opportunity to set the record straight prior to ruling. Accordingly, just as counsel for

State Farm sought reconsideration of the disqualification order in *McIntosh*, Relators' counsel seeks reconsideration of disqualification order in this case.

II. FACTUAL BACKGROUND

A. The Scruggs Katrina Group/Rigsby Consulting Arrangement

After Cori and Kerri Rigbsy were fired by State Farm for blowing the whistle on the wholesale fraud the company committed against taxpayers and citizens of the United States, SKG hired the Rigsbys to work as consultants on the numerous non-State Farm cases the group was handling. There was never any attempt to keep this relationship a secret. In fact, it was reported in the popular press:

> After the sisters resigned, Scruggs [Katrina Group] hired them to help his legal team with lawsuits filed on behalf of hundreds of policyholders. The Rigsbys wouldn't say how much Scruggs is paying them, but they say it's less than what they earned from their insurance jobs.

M. KUNZELMAN, *Sisters Blew Whistle on Katrina Claims*, August 27, 2006 (See Document 166-2, page 2)

> Now they consult for Scruggs Group.
> They say their work as consultants for the Scruggs Katrina Group, which is suing on behalf of thousands of policyholders, doesn't pay as well as claims adjusting. But they're not complaining.

A. LEE, *Sisters Copied State Farm Files, Insurer Underpaid on Purpose They Believe*, Sun Herald, August 26, 2006 (See Document 166-3, page 4)

As set forth in the declarations of counsel, (See Exhibits 2, 3, 4 and 5) Relators' counsel did not learn of the arrangement between the Rigsbys and SKG from SKG or the

Relators, but rather, from these and other newspaper reports. (See Supplemental Declaration of Robertson, Exhibit 2, at ¶ 6). The Scruggs firm represented that the consulting arrangement was related to claims other than those for State Farm, and Scruggs indicated that he had an expert opinion that such arrangement was ethical.

Although apparently overlooked by the Court, counsel from Missouri was not present in Mississippi and did not participate at any level in the *McIntosh* case before the District Court. They were not party to the arrangement between SKG and the Rigsby sisters. They received no information, other than the original media disclosures, that would have triggered any suspicion on their part that there was a problem with the payment relationship beyond that identified by the Missouri counsel. *See* Supplemental Declarations of Robertson and Winter.

B. The Use of the Rigsby Agreement by State Farm

As shown by the exhibits filed with their Motion to Disqualify, State Farm was aware of the payment to the Rigsby's on August 26, 2006[1]. It was aware of the Rigsby's relationship with Scruggs as of June 6, 2006. It waited until June 19, 2007, one year and 13 days after learning of the removal of documents from State Farm, and almost 10 months after learning of payments to the Rigsby's by Scruggs Katrina Group to file its first motion to disqualify Scruggs in the *McIntosh* case.

[1] Full disclosure of the relationship, including the amount of their compensation, between the Rigsby sisters and the Scruggs Katrina Group was made by the Rigsbys in their answer on October 2, 2006 in the Alabama case. Neither the Bartimus firm nor the Graves firm represented the Rigsbys in Alabama. Missouri counsel was not served copies of those pleadings; State Farm apparently was.

During the intervening period between the time that State Farm learned of the relationship it now says was tainted, and the time it filed its motion to disqualify, State Farm settled scores of cases with Scruggs Katrina Group. (See Exhibit 1). It did not play its trump card on these lower-value cases. It instead held that card in reserve and played it only when it suited a tactical purpose in the *McIntosh* case.

C. State Farm's Initial Motion to Disqualify

State Farm's initial Motion to Disqualify, like its Petition for a Writ of Mandamus later filed in the Fifth Circuit, sought to impute numerous ethical transgressions on the Scruggs-Rigsby relationship, including a claim that by representing the Rigsby's, Scruggs was breaching the rule regarding represented parties. State Farm's motion to disqualify Scruggs clearly raised the issue of the payments to the Rigsby's (See pages 11 and 23, State Farm's Motion to Disqualify in *McIntosh*).

D. This Court's Initial Ruling on the Motion to Disqualify

In its first opinion on disqualification in *McIntosh* this Court stated:

> State Farm has identified February, 2006 as the date that Scruggs first engaged in the conduct State Farm contends to be unethical. By August 2006, the relationship between Scruggs and the Rigsby's was public enough to include an appearance on ABC's 20/20 television program. Thus, State Farm has known of this relationship and of its alleged impropriety for at least a year prior to the filing of this motion. During this time State Farm has defended hundreds of claims in which Scruggs represented State Farm policyholders; State Farm and Scruggs have successfully negotiated mutually-satisfactory settlements in most of these cases; and State Farm has negotiated with Scruggs and his law firm in an attempt to fashion a class action settlement of all State Farm-Katrina property damage claims. Given this history, I am at a loss to understand why State Farm has waited so long to invite the Court's attention to the issues raised in this motion.

Order, September 12, 2007.

This Court expressed no opinion on the merits of the underlying arguments, and instead found waiver a sufficient basis upon which to deny State Farm relief. The court was provided with an ethical opinion that stated that the arrangement between SKG and the Relators was ethical. The Court did not inquire further into the arrangement.

E. The Fifth Circuit's Denial of Extraordinary Relief

After this Court's Order stating that State Farm had waived its right to seek disqualification, State Farm sought extraordinary relief from the Fifth Circuit Court of Appeals. State Farm's request was met with skepticism:

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

Order Denying Mandamus, November 19, 2007

F. Asserted Grounds for Disqualification in This Case

Although State Farm has offered numerous suggestions regarding other misconduct, the primary basis for State Farm's request for disqualification is that the Relators counsel

failed to take sufficient action to repudiate payments made by SKG to the Rigsby's. Indeed the State Farm brief on disqualification states:

> On April 4, 2008, this Court granted State Farm's and Renfroe's respective disqualification motions in the *McIntosh* case. (*McIntosh* Dkt. 1172.) The Court determined that disqualification was required because the "consulting" payments to the Rigsby's – who were material witnesses in *McIntosh* and numerous other Katrina-related cases – were sham payments made in violation of Mississippi's strict prohibition against paying fees to non-expert witnesses (other than certain enumerated, reasonable fees and expenses actually incurred). (*McIntosh* Disqualification Mem. Opinion at 2.) The Court observed: "While the other ethical misconduct alleged by State Farm and Renfroe [is] substantial, the payments to the Rigsby sisters are, in and of themselves, sufficient to warrant disqualification." (*Id.*)
> In this case, the Rigsbys' remaining counsel have similarly engaged in substantial misconduct…
>
> ***
>
> The same facts that mandated disqualification in McIntosh are present in this case. Like the SKG, the Rigsbys' lawyers in this case are treated as a joint venture and are subject to the same vicarious liability rules as a partnership. *See Duggins v. Guardianship of Washington ex rel. Huntley*, 632 So. 2d 420, 427-28 (Miss. 1993) (lawyers who associate themselves for the purpose of bringing a lawsuit are treated as a joint venture). These lawyers "were aware or should have been aware" that Scruggs was paying the Rigsby's, who, as the Relators in this qui tam case, are indisputably the key fact witnesses. Yet they "did nothing to prevent their continued payment." (*McIntosh* Disqualification Mem. at 3.) Instead, the Rigsbys' remaining counsel ratified Scruggs's malfeasance by using the documents and information that the Rigsby's illegally obtained from State Farm in order to profit in this case. Accordingly, "disqualification is required." (*Id.* at 2.)
>
> (Document 104 at 9-10).

G. The Court's Disqualification Order

In ruling on the Motion for Disqualification this Court focused on one thing: the payments by SKG to the Rigsby's. The Court's holding imposes a duty of inquiry as shown below:

> That said, once the current attorneys learned that there was a financial arrangement between Scruggs and the Rigsby sisters, they had a duty, in my opinion, to inquire into the arrangement in sufficient depth to determine its true nature, i.e. to determine the particulars of that arrangement. This inquiry would necessarily have included the question whether the compensation Scruggs was paying the Rigsby sisters was for legitimate work, at a fair rate of compensation, and whether the arrangement was compatible with the ethical duties of an attorney undertaking representation of the Rigsby sisters, along with Scruggs as co-counsel, on a claim under the False Claims Act.

Disqualification Order at 4.

III. ARGUMENT AND AUTHORITY

A. The Rigsby/SKG Consulting Arrangement Was Known To State Farm Before It Was Known To Relators' Counsel

In entering its Order disqualifying the undersigned counsel, this Court mistakenly assumed that Relators Counsel was aware of the consulting relationship between the Rigsby's and SKG prior to State Farm (and this Court) becoming aware of that relationship. As shown by the supplemental disclosures of counsel (See exhibits 2-5), the parameters of the arrangement were not disclosed to Relators Counsel until September or October, 2007, and only when Relators Counsel (BFRG Attorneys Robertson, DeWitt and Winter, acting as appellate counsel at the Fifth Circuit level), were asked to help SKG prepare a response

to the Petition for Mandamus sought by State Farm from the initial denial of their Motion to Disqualify.

Although provided with a disclosure late in 2006 that the Rigsby's were consultants for SKG, as shown in the supplemental declaration of Edward D. Robertson, (See Exhibit 2) the full disclosure of the nature of the relationship and the payments being made was not affected until counsel were retained to help prepare the Fifth Circuit response in the mandamus action. At that time, Relators also were provided with an opinion from Geoffrey Hazard, an ethics expert recognized in numerous jurisdictions and who has testified on legal ethics issues hundreds of times. Mr. Hazard's opinion satisfied Relator's counsel. It also apparently satisfied this Court.

Importantly, and as recognized by this Court when it ruled on State Farm's first motion, there was a tactical motivation for disqualification of SKG (and later, KLG) in that State Farm knew that the *McIntosh* case was the first one set for a jury trial, and it kept its powder dry.

The Fifth Circuit clearly favored this Court's early view that State Farm had waived its argument regarding disqualification by holding it in abeyance. State Farm, because it was involved in a joint venture with Renfroe in the Alabama prosecution of the Rigsby's, arguably knew about the payment relationship and the amount of remuneration as early as October, 2006, and yet held its Motion until June of 2007.

This Court held, with respect to Relator's counsel:

> …once the current attorneys learned that there was a financial arrangement between Scruggs and the Rigsby sisters, they had a duty, in my opinion, to inquire into the arrangement in sufficient depth to determine its true nature, i.e. to determine the particulars of that arrangement.

Disqualification order at 4.

If this duty existed as to Relator's counsel, who had no knowledge of the relationship in advance of media reports, then surely the same can be said as to State Farm's attorneys. If Relator's counsel had a duty to inquire, then State Farm had a duty to inquire and bring this purported ethical violation to the Court at the earliest possible opportunity, which would have been shortly after October 2, 2006.

State Farm's lawyers here also represented State Farm in the *McIntosh* case. Each of those attorneys had a duty to their client to protect its interests, and a duty to the Court in *McIntosh* not to tolerate ethical misconduct. Yet, in spite of knowing about what they now claim were improper payments to witnesses since at least October 2, 2006, the attorneys representing State Farm did not take any action to disqualify the SKG attorneys, but instead, continued to work with them to settle the lower-value cases.

State Farm's attorneys withheld taking action on the purported ethical violation because they believed it gave them leverage in dealing with the *McIntosh* party's lawyers. This can be inferred from the pattern of conduct and the timing of the original Motion to Disqualify. Those lawyers, in an attempt to force settlement on favorable terms for their client, used the threat of disqualification as a "tactical nuclear" option, in violation of MPRC 4.4

When that threat did not bear fruit, those lawyers then filed their Motion to Disqualify which this Court overruled and the Fifth Circuit, on appeal by extraordinary writ, upheld. Unlike Relators' counsel in this case, the attorneys representing State Farm in this case were always and actively involved in the *McIntosh* case, knew of the alleged ethical violations at a time when such ethical violations could have been addressed in a timely manner[2], and yet failed to take timely remedial action.

The only explanation for the failure to take action is that State Farm's attorneys were intending to wait until SKG (and later, the Katrina Litigation Group) had invested substantial time and resources in the matter and had the most to lose in order to pressure those lawyers to make a settlement that disadvantaged their clients and favored State Farm. Since State Farm asserts this fact pattern as grounds for dismissal against lawyers who were not representing the McIntoshes, who were not entered in the McIntosh case, who did not participate in the *McIntosh* depositions, and who were never in a position (by virtue of a court order holding the *qui tam* case under seal) to notify the Court or take other remedial action in a separate policyholder case where they had no financial or legal interest, then surely this Court must recognize that State Farm's own lawyers, whose client State Farm did have a direct and substantial interest in the litigation, who were entered as attorneys of record in *McIntosh*, who did participate as attorneys of record in the depositions in the *McIntosh*, who apparently read the media reports of the Rigsbys' employment at the time they came out in the media and in the Rigsbys' answer in Alabama, and who always were

[2] Had the State Farm lawyers raised the ethical issue in October, 2006, after the Rigsby answer was filed, this Court could have undertaken the review that it elected not to take in September, 2007. If addressed at that time, the payments would likely have been immediately stopped, and relator's counsel would have had no action to take.

the only lawyers who had a direct and independent duty to their client to alert this honorable Court at the earliest opportunity to a purported ethical breach, at the worst used the breach as a threat to extort settlement and at the very least acquiesced in the payment arrangement for nearly 11 months before taking any action to disqualify the SKG lawyers[3].

B. State Farm's Knowledge and Use of the Agreement Violates MPRC 4.4

The MPRC requires respect for the rights of third persons. Rule 4.4 states:

> **4.4. Respect for Rights of Third Persons**
>
> 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.

Model Rules of Professional Conduct

In removing the blanket prohibition against using threats of criminal prosecution to gain leverage in civil litigation, the drafters of the MRPC believed that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically."[4]

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[3] A motion to disqualify is of an equitable nature and should be made with promptness and reasonable diligence once the facts are known. *Milone v. English*, 306 F.2d 814 (D.C. Cir. 1962); *In re Internet Navigator Inc*., 293 B.R. 198 (Bankr. N.D. Iowa 2003), *decision aff'd,* 301 B.R. 1 (B.A.P. 8th Cir. 2003). A court may focus on whether the disqualification motion was delayed for tactical reasons rather than the mere length of the delay. *Cassidy v. Lourim*, 311 F. Supp. 2d 456 (D. Md. 2004). "[l]eveling the charge of impropriety at opposing counsel, which if sustained would require withdrawal, should not be a standard part of counsel's offensive armament to be used routinely or without reasonable and good faith belief in its necessity." *First Wis. Mortg. Trust v. First Wis. Corp*., 584 F.2d 201, 206 (7th Cir. 1978). The MPRC's ethical precepts should be applied to ensure "protection of . . . lambs, (and) not . . . wolves", should there be any "in the lamb-fold." *Acorn Printing Co. v. Brown*, 385 S.W.2d 812, 819 (Mo.App.1964).

[4] ABA Comm. on Ethics and Prof'l Responsibility. Formal Op. 92-363 (1992) (citing "C.W. Wolfram, Modern Legal Ethics (1986) @ § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981").

The new rule with respect to criminal prosecution threats seems to be that a lawyer may use the threat of prosecution only where the threat is designed to address actual criminal behavior, and not for any fraudulent, extortionate or abusive reason. It is reasonable to assume that a threat of disqualification is similar and that the use of the threat to extort settlement or pressure an opposing party during settlement negotiations falls under Rule 4.4. In other words, if the threat of disqualification was legitimate, premised on a good faith basis in fact and law, and not asserted solely for tactical purposes, it is not unethical[5]. However, where a motion to disqualify is asserted for a reason not directly related to preserving the honor of the bar (as this court essentially found with respect to State Farm's original and very tactical motion to disqualify SKG) then, such a threat violates rule 4.4.

C. This Court Acted Reasonably In Denying Disqualification in *McIntosh* on the Basis of Waiver

The Fifth Circuit, reviewing this Court's original order refusing to disqualify Scruggs, acted with dispatch in finding the Court within its discretion to base its opinion on waiver. As the opinion clearly states, State Farm did not make its case for disqualification. This Court, having two ethical opinions in hand from experts (one a national expert and one a Mississippi expert), acted reasonably in not inquiring further into the nature of the relationship between SKG and the Rigsby's.

[5] But, again, if that had been the case, State Farm would have raised it in October 2006, not June, 2007.

If this Court, reviewing the ethics involved, was acting reasonably and did not impose upon itself a duty of further inquiry, even where State Farm had raised these issues directly in its Motion, then how can the Court say that Relators' counsel should be held to a higher standard? This Court is imposing the onerous burden of omniscience on Relators counsel, because that's the skill that would have been required. At the time when Relators counsel learned of the relationship between the Rigsby's and SKG, the following was true:

> (1) Relators counsel did not know of any impropriety in the relationship;
>
> (2) Relators counsel had no information that would have triggered a duty to inquire further;
>
> (3) Relators counsel had been told there was an ethical opinion from two well-recognized ethics experts that the arrangement between Scruggs and the relators was in fact ethical; and
>
> (4) Relators counsel were under a statutorily-imposed court order that prohibited them from even acknowledging that the case existed until August 6, 2007.

D. Relators Counsel Were Not Joint Venturers with SKG or KLG

By the time State Farm renewed its Motion to Disqualify, SKG was gone, having withdrawn from *McIntosh* and all other policyholder litigation. The Motion to Disqualify filed by State Farm was aimed at KLG and attorney Don Barrett. Barrett and all the members of KLG were prior partners and joint venturers with SKG. KLG was formed directly from the corpus of SKG.

The Court disqualified KLG primarily because of this relationship with SKG. Yet, the Court did not properly examine the relationship between SKG, KLG, and Relator's counsel.

The Court stated:

> The current attorneys were not part of the SKG joint venture, but from the time they agreed to associate themselves with Scruggs to represent the Rigsby sisters in this action they were engaged in a cooperative effort equivalent to a joint venture under Mississippi law. See: *Duggins v. Guardianship of Washington ex rel. Huntley,* 632 So.2d 420 (Miss.1993).

Opinion at 3, 4.

Duggins involved a pair of attorneys who were jointly representing a client in a personal injury case, and the court's holding imposed vicarious liability on the joint venture. While Scruggs Law Firm, and Bartimus Frickleton could likely be liable to the Relators under the doctrine of vicarious liability under Mississippi law, the opinion overlooks the fact that Scruggs Law Firm, and not SKG or KLG was on the pleadings in the qui tam, and that the BFRG lawyers were not on the pleadings and were not entered in the District Court in *McIntosh*.

The two lawyers in *Duggins* were involved in a joint venture as to their client. SKG and later KLG were indeed joint venturers as to the *McIntosh* case. But BFRG and GBM were not joint venturers in *McIntosh* because they never entered any appearance in that case, and were never contractually obligated to the McIntosh family[6].

[6] BFRG (but not GBM) did help prepare the mandamus response in the Fifth Circuit. Counsel were hired by Scruggs Law Firm on behalf of SKG specifically and solely for appellate assistance.

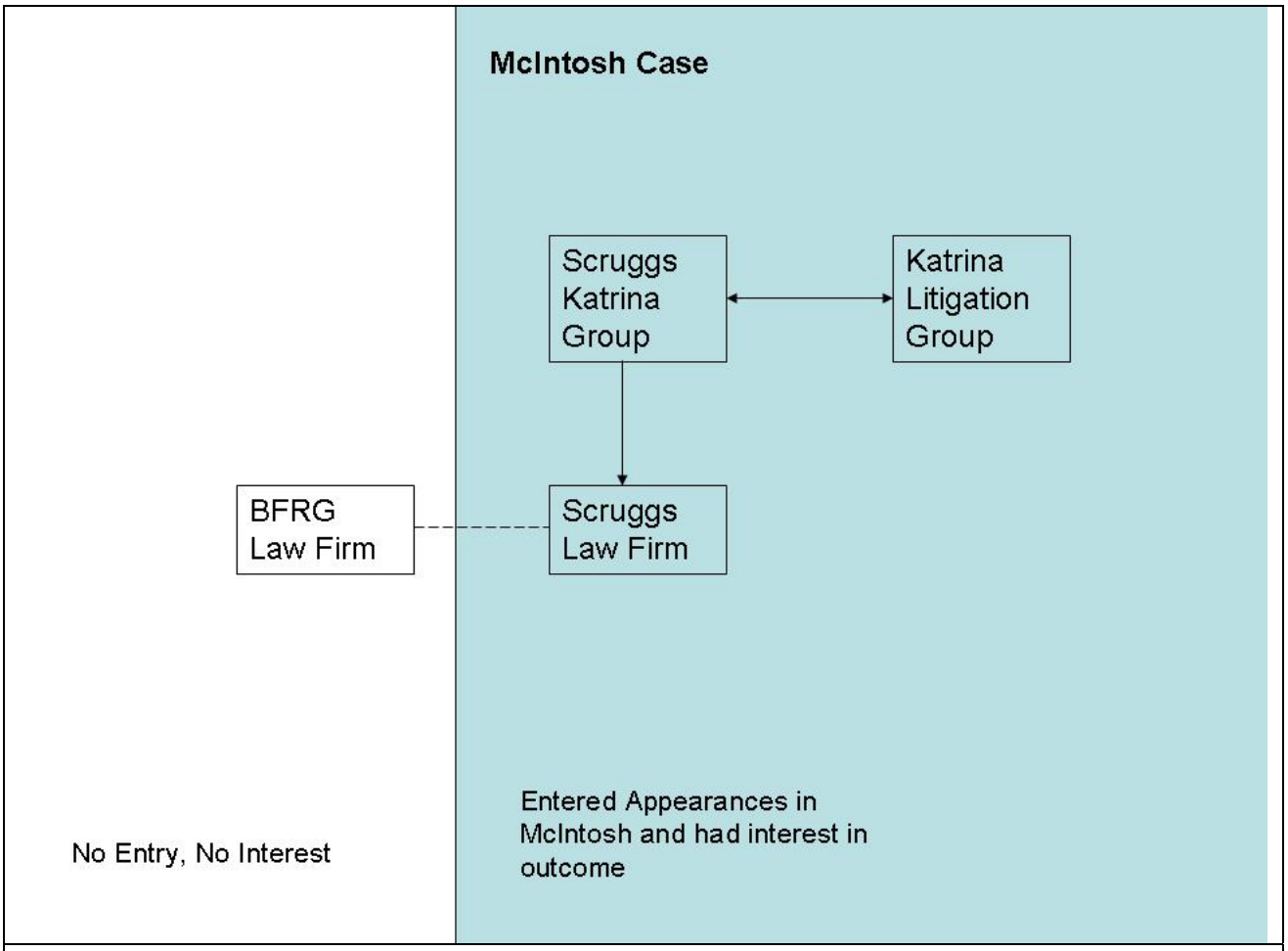

Figure 1 – A graphic representation of the relationships of counsel in McIntosh and qui tam counsel. The only connection from BFRG to SKG or KLG is attenuated through Scruggs presence on the initial pleading.

The Relators' counsel was never joint venturers with the SKG or KLG in *Mcintosh* where this Court held there was ethical misconduct. These entities were both disqualified. Relators' counsel had no joint venture or other legal relationship with either entity. The Court overlooked the fact that the *McIntosh* litigants could not recover from BFRG for any misconduct on the part of SKG or KLG in the way that the *Duggins* plaintiff's recovered from the joint-venturer attorneys in that case. BFRG was not in privity with the *McIntosh* litigants, and this Court's failure to recognize that key distinction requires reconsideration.

E. Disqualification of Co-Counsel is Not Supported By Case Law

The undersigned counsel does not challenge the disqualification of KLG. Instead, they challenge their disqualification on the basis of mere untethered association with KLG. This Court effectively ruled that because KLG and SKG engaged in behavior it found objectionable, *and* because Scruggs Law firm was part of SKG, *and* because Scruggs also represented the Relators as local counsel in this case, the taint attached to the Scruggs Law Firm creates a presumption of impropriety as to BFRG and GBM. It should bother this Court that the link to the misconduct, as shown in Figure 1, is so badly attenuated.

In situations where co-counsel enjoy separate relationships, as is the case here, when one lawyer is disqualified for a breach of ethics in another matter, the disqualification should not be imputed to co-counsel simply because they represent the same parties. *State of Ark. v. Dean Foods Products Co., Inc*., 605 F.2d 380, (8th Cir. 1979). In *Dean Foods* the Eighth Circuit said:

> Without more, we do not think a member of the public or of the bar would see an apparent impropriety in the continued representation of C against B by a lawyer whose co-counsel had been disqualified early on in the case, solely because the disqualified co-counsel's former firm represented B in a related suit. The normal public and professional perception of co-counsel envisions two or more attorneys or firms working together in a particular case while continuing to retain their individual identities and institutional independence. The same appearance of impropriety present when an attorney and his firm represent conflicting interests, and when a disqualified former lawyer's staff members continue in a case after his disqualification, is not present in the mere act of a disqualified lawyer's co-counsel continuing in the case after his co-counsel's disqualification.

Id. at 388 citing *Fred Weber, Inc. v. Shell Oil Co.,* 566 F.2d 602, 609 (8th Cir. 1977), Cert.

denied, 436 U.S. 905, 98 S.Ct. 2235, 56 L.Ed.2d 403 (1978)(footnotes omitted). Although *Dean* dealt with disqualification for confidentiality purposes, the authority is persuasive here where the relationship between Relators' counsel and co-counsel was at arms length, and where Relators' counsel were never a part of nor party to anything that happened in McIntosh. It cannot comport with due process to disqualify attorneys whose only connection to the purportedly unethical conduct is mere association with one of the law firm in another case.

Said another way, it is clear that in performing their duties as counsel in this case Relators' counsel have violated no ethical prohibitions. They have not breached any duties they owe to their client or to State Farm, and the Court's opinion does not state otherwise. They are being denied the right to act for the Relators here not on the basis of what they did in this case, or even what they knew about in this case, but rather, on the basis of what other counsel did in a completely different case involving completely different parties. Counsel is being disqualified on the basis of mere association. The cases state that disqualification of one firm does not automatically compel disqualification of the firm's co-counsel. See *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 235 (2 Cir. 1977); *Akerly v. Red Barn System, Inc.*, 551 F.2d 539, 543 (3 Cir. 1977). Rather, the particular facts of each case must be considered in order to determine whether disqualification is warranted. *In re Airport Car Rental Antitrust Litigation,* 470 F.Supp. 495, 502 (D.C. Cal. 1979).

Importantly, the Court here imposed a duty to inquire, but did not tether that duty to case law or any rule. The duty to inquire imposed by the Court in this case does not find

any basis in case law that counsel can find. State Farm cited no such authority. The Court incorporated no authority into its holding on this point. Indeed, by imposing this duty to inquire beyond the ethics opinion provided to counsel, the Court seems to have imposed a duty that finds no support anywhere in case law. As shown above, there is ample authority that disqualification of co-counsel is not universally imputed to other counsel. As the *Airport Rental* court stated:

> If this Court were to impute the knowledge of Fujiyama to co-counsel, the Court would be very close to adopting a rule of automatic disqualification of co-counsel. Such a rule would not accord sufficient weight to factors counseling against disqualification. Although courts must preserve the high standards of the legal profession, courts should also consider the client's right to choose his counsel and the harm to the client caused by an order of disqualification.

Id. at 502

> The Court of Appeals for the Second Circuit also stressed this consideration:
>
> "A client whose attorney is disqualified incurs a loss of time and money in being compelled to retain new counsel who in turn have to become familiar with the prior comprehensive investigation which is the core of modern complex litigation. The client moreover may lose the benefit of its longtime counsel's specialized knowledge of its operations."

Government of India v. Cook Industries, Inc., 569 F.2d 737, 739 (2 Cir. 1978). Certainly in this case, disqualification of relators counsel who have built this case steadily from day one, and who know the case better than any replacement counsel can hope to, works a strategic benefit for State Farm and the other defendants.

The Court of Appeals for the Third Circuit reached a very similar conclusion in *Akerly v. Red Barn System*:

> "This Court is urged to adopt a Per se rule that if one co-counsel is disqualified for ethical reasons, all co-counsel must be barred from representation. We decline to follow such a path. Instead, we adhere to the mode of analysis employed in earlier attorney disqualification controversies a careful sifting of all of the facts and circumstances."(Footnote omitted.)

In *Fund of Funds*, the court relied heavily upon the unusual factual circumstances of the case. The disqualification issue arose in Fund of Funds because Morgan, Lewis and Bockius ("Morgan Lewis"), a firm that had served as Arthur Andersen's regional counsel for fifteen years, accepted a retainer from Fund of Funds, knowing that it might lead to litigation against Andersen, in addition to other defendants. Although aware of the ethical problems this situation presented, Morgan Lewis continued to represent Fund of Funds, but asked Robert Meister of Milgrim, Thomajan & Jacobs to assist in the matter. Meister's law firm had maintained a close working relationship with Morgan Lewis for some time. Eventually, Fund of Funds brought a separate action against Andersen, with Meister's firm serving as counsel. Meister reviewed documents concerning Andersen that were supplied by Morgan Lewis, reviewed and revised the complaint with a Morgan Lewis attorney, and in various other respects worked in conjunction with Morgan Lewis. The Court of Appeals for the Second Circuit found that Meister was "the extension of Morgan Lewis's continuing involvement in the underlying action." *Id.*, 567 F.2d at 234. Significantly, the court emphasized that "Meister accepted the retainer from Orr to sue Andersen knowing of the Morgan firm's ethical dilemma. Indeed, his retention as counsel was premised on and resulted from the Morgan firm's incapacity to pursue the claim itself."Ibid. (footnote omitted). The court acknowledged the "generally stated rule that a 'co-counsel' relationship

will not alone warrant disqualification", but concluded that "the extraordinary, Sui generis facts" of the case compelled disqualification of Meister's law firm. *Id* at 235. Here no such extraordinary concerns exist. When Relators' counsel was contacted to represent the Rigsbys, there was no ethical problem. The problem arose in the context of other litigation. The Rigsby's were serving as consultants in other cases, not in the *McIntosh* litigation. The practice had been blessed by at least two notable ethics experts, and counsel affirmatively disclaimed any participation in any payments. The unusual circumstances calling for disqualification in *Fund of Funds* are not present here.

In a case involving confidences and not ethical lapses of co-counsel in an unrelated case, the Court of Appeals for the Fifth Circuit reversed an order of disqualification of co-counsel that was based upon the trial court's imputing the knowledge of one member of a firm to another member of the firm and then further imputing that knowledge to co-counsel. This is important here because it is the purported knowledge of the impropriety and the rather ill-defined "duty to inquire" that this Court bases its disqualification of relators' counsel upon.

In essence this Court says that because Scruggs Law Firm knew of the conduct that it now describes as in violation of the rules regarding payments to witnesses, that this knowledge must be either imputed, or imposed by a duty to inquire, in order to protect public confidence in the bar.

The Fifth Circuit rejected this double imputation, noting that it "could lead to extreme results in no way required to maintain public confidence in the bar," and would

result "in wasted time and unnecessary expense." *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5 Cir. 1971). The Fifth Circuit drew the distinction between the relationship among law partners (where imputation of knowledge is proper) from the relationship between co-counsel (where it is not):

> These firms acted as co-counsel, each responsible to and compensated by American Can, not the other. Consequently knowledge admittedly imputed to Allison should not then be re-imputed to Miller. Disqualification of Miller and the Covington firm must fail on this ground.

Id. (citations omitted).

Although the court in *American Can* did not consider whether disqualification of co-counsel would have been appropriate if the knowledge of the member of the first firm had been actual rather than imputed, for purposes of this litigation that is not an issue. The tenor of the court's opinion suggests that the Court of Appeals for the Fifth Circuit would find a presumption of knowledge of any improprieties by counsel in some unrelated case to co-counsel in the present case unwarranted. That is the decision that logic compels here.

As the Court will recall, counsel for the Relators specifically asked for oral argument on the motion to disqualify. The Court did not rule on this motion, and instead, proceeded simply to rule on disqualification. Counsel was thus unfairly denied even an opportunity to point out these obvious distinctions to the Court in oral argument. Under our system of justice, opportunity to be heard is the most fundamental due process requirement. *New York Life Ins. Co. v. Brown*, 84 F.3d 137 (5th Cir. 1996). Relators and their counsel were denied this right.

F. If Disqualification Is Proper As To Relators Counsel, It is Proper As To State Farm's Counsel

Finally, if the duty to inquire and act at some earlier time applies to Relators' counsel, who did not learn the particulars of the compensation arrangement until 2007 (and who were supplied with an ethics opinion by two experts at that time), then the duty to act should also apply to State Farm's lawyers, and this Court must, in order to treat the lawyers on both sides fairly, disqualify all the attorneys entered in *McIntosh* and this case for State Farm from further representation in this case. As pointed out in the motion, State Farm's lawyers had a duty to their client not to waive the disqualification argument. They had a duty to act for State Farm's best interests. That duty required that they raise the ethical issues at the earliest possible time. That would have been sometime between August 26, 2006 and October 2, 2006 when their knowledge of the Rigsby's compensation was full. They were under a duty to advise the Court, and they failed to honor that obligation. Instead, as a tactical matter, they held the arguments in reserve. This waiting – this waiver – is a matter of judicial fact and is set forth in the Court's original disqualification opinion in *McIntosh*.

IV. CONCLUSION

For the reasons set forth above, it is clear that the Court made assumptions of fact that were unwarranted, and reached conclusions of law at odds with both the facts and the settled law of disqualification. Relators' counsel respectfully request that this Court

reconsider its opinion, reverse its disqualification order, and allow this matter to proceed forward.

BARTIMUS, FRICKLETON,
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Dated: June 3, 2008

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Certificate of Service

I hereby certify that on June 3, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel registered on ECF, and I hereby certify that I have mailed by United States Postal Service the document to

non CM/ECF participants.

/s/ Anthony L. DeWitt