UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & COMPANY, INC.,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	
-vs-	)	2:06-CV-06-WMA-1752-S
	)	
CORI RIGSBY MORAN and KERRI RIGSBY	)	
	)	
Defendants.	)	

RENFROE'S RESPONSE TO DEFENDANTS' AND SCRUGGS' MOTIONS TO DISQUALIFY THE COURT

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RENFROE'S RESPONSE TO DEFENDANTS' AND SCRUGGS' MOTIONS TO DISQUALIFY THE COURT

Plaintiff E. A. Renfroe & Company, Inc. ("Renfroe") responds to Defendants' Cori and Kerri Rigsbys' Motion to Disqualify the Court Pursuant to 28 U.S.C. § 455 (Dkt. 205 and 206) ("Defendants' Motion') in which the Defendants seek to disqualify Judge Acker and all the judges of the Northern District of Alabama from adjudicating this case. Renfroe also responds to the Motion to Disqualify Judge William M. Acker, Jr. and the Judges of the United States District Court for the Northern District of Alabama from Adjudicating Plaintiff's Motion for Compensatory Sanctions for Civil Contempt (Dkt. 200) ("Scruggs' Motion") filed by Richard F.

Scruggs and the Scruggs Law Firm ("Scruggs") seeking to disqualify Judge Acker and all the judges in the Northern District of Alabama from considering Renfroe's pending Motion for Compensatory Sanctions for Civil Contempt (Dkt. 188). (The Defendants/Rigsbys and Scruggs may be referred to collectively as the "Movants.") In response to Movants' Motions, Renfroe would respectfully show the Court that disqualification is unwarranted for the following reasons:

I. MOVANTS' CLAIMS

The Movants seek to disqualify Judge Acker based on 28 U.S.C. § 455(a)[1] and § 455(b)(4)[2]. (Dkt. 206 at pp. 5-6; Dkt. 200 at p. 1-2).

The Rigsbys allege that Judge Acker has an "interest" in "prosecuting"[3] the pending criminal contempt charge against Scruggs and additional potential criminal contempt charges against Scruggs and the Rigsby sisters for their conduct in response to the December 8, 2006 Preliminary Injunction. They point out that Judge Acker acted in the

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[1] Sec. 455(a) provides: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned."

[2] Sec. 455(b)(4) provides: "He shall also disqualify himself in the following circumstances: ... (4) He knows that he, individually or as fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

[3] See Dkt. 206 at pp. 6,8. Of course, Judge Acker is not "prosecuting" the charge; the Special Prosecutors on behalf of the United States are prosecuting the pending criminal contempt charge.

capacity similar to a grand jury and issued the equivalent of a true bill when it referred Scruggs for prosecution in its Memorandum Order of June 15, 2007 (Dkt. 145). Subsequently, through pleadings filed with the Eleventh Circuit, Scruggs provided the Court a copy of the Rigsbys First Amended Complaint for Damages under the False Claims Act, 31 USC § 3729 Et Seq.[4] in which they pled that they had sent additional documents to the United States Attorney on December 8, 2006, the date Scruggs, by his own admission, learned that the Preliminary Injunction had been issued. This Court then amended its earlier order to leave open its inquiry as to whether this admission meant that any or all of the Movants had further violated the Injunction. (Dkt. 150). The Movants allege that Judge Acker's continuing role in the criminal contempt proceedings against Scruggs creates the appearance of partiality and demonstrates Judge Acker's "interest" in the contempt proceedings.

Similarly, Scruggs claims that Judge Acker's disqualifying "interest" is his alleged continued involvement in the criminal contempt proceedings against him. He also contends that the civil contempt matters before Judge Acker will affect the actions of whatever court the Eleventh Circuit appoints to hear the criminal contempt case and will prejudice his defense in the

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[4] *Unites States of America ex rel. Rigsby v. State Farm Mutual Ins. Co.*, Case No. 1:06-cv-433, United States District Court for the Southern District of Mississippi.

criminal case. Scruggs and the Rigsbys both claim that the civil and criminal contempt proceedings arise from the same conduct regarding their actions in response to the Injunction.

Each and every argument raised by the Movants relates to actions taken by the Movants or rulings by Judge Acker in this litigation. Alleged bias arising from the litigation itself is not sufficient to require recusal. *Loranger v Stierheim,* 10 F3d 776 , 780 (11th Cir 1994) (citations omitted).

II. DISQUALIFICATION STANDARDS

A. Movants' Claims Do Not Meet The Requirements For § 455(a).

Disqualification under § 455(a) is warranted if a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. *Liljeberg v Health Servs. Acquisitio Corp.* 486 U.S. 847, 865 (1988); *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir.1983). This is an objective standard viewed from the perspective of a well-informed, thoughtful observer rather than an unduly sensitive person. *Id.* A recusal or disqualification motion is committed to the sound discretion of the trial judge himself and the standard of review on appeal is whether the judge abused his or her discretion. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir.1982, *cert. denied,* 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1983).

Under Section 455(a), actual partiality or knowledge of the disqualifying circumstances on the part of the judge is not required. *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir.1989). The general rule is that "a federal judge should reach his own determination [on recusal], without calling upon counsel to express their views." *Id.* at 745 (emphasis and citations omitted).

However, Section 455(a) does **not** require the judge to accept as true any and all allegations in determining whether a reasonable person would harbor doubts concerning his impartiality. *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir.1986). For "[i]f a party could force recusal of a judge by factual allegations [alone], the result would be a virtual 'open season' for recusal." *Id.* A charge of the appearance of partiality must be supported by the facts. *Id.* A trial judge has a duty to **not** recuse himself if there is no objective basis for recusal. *In re United States*, 441 F.3d 44, 64-68 (1st Cir. 2006). A disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking. *Id.*

1. Bias must be from sources outside the case.

Further, disqualification under § 455 is required only when the alleged bias is personal in nature. *Loranger v. Stierheim,* 10 F.3d at 780; *Phillips v Joint Legislative Committee,* 637 F.2d 1014, 1020 (5th Cir. 1981). For a bias to be personal, and therefore disqualifying, it must stem from an extra-judicial source. *United States v Grinnell Corp.,* 384 U.S. 563, 583 (1966); *Loranger v. Stierheim,* 10 F.3d at 780. An extrajudicial source for a bias is a source other than that which the judge learned by participating in the case. *Jaffe v. Grant,* 793 F.2d 1182, 1189 (11th Cir.1986), *cert. denied,* 480 U.S. 931, 107 S.Ct. 1566, 94 L.Ed.2d 759 (1987).

For example, in *McWhorter v. City of Birmingham*, 906 F.2d 674, 678-79 (11th Cir. 1990), plaintiff McWhorter argued that the fact the judge knew the mayor of the defendant city and had previously issued evidentiary rulings adverse to the plaintiff in the case required the judge to recuse himself. The Eleventh Circuit found that McWhorter's allegations of bias stemmed from disagreement with several evidentiary rulings throughout the course of the trial instead of an extrajudicial bias. The Eleventh Circuit found that the district court did not abuse its discretion in denying the recusal motion based on the alleged partiality of the trial court.

2. Bias must be toward the party, not the attorney.

Additionally, a judge's personal bias must be toward the party, not the party's attorney. Antipathy toward a party's attorney is not a sufficient ground for disqualification without a showing of bias or prejudice against the party. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (11th Cir. 1975); *Gilbert v. City of Little Rock*, 722 F2d 1390, 1398-99 (8th Cir. 1993); *United States v. International Business Machines Corporation,* 475 F.Supp. 1372, 1383 (S.D.N.Y.1979).

3. Movant cannot create grounds for disqualification.

Furthermore, a lawyer or litigant cannot create the grounds on which he seeks recusal. *Sullivan v. Conway,* 157 F3d 1092, 1096 (7th Cir 1998) (lawyer made public a letter from opposing counsel telling his client that after removal they had "a much better judge" and then sought recusal on the grounds that such fulsome praise would cause the judge to favor his opponent). To allow a lawyer or litigant to create the grounds on which he seeks recusal is "arrant judge-shopping." *Id.*

Similarly, in this case, the Defendants and Scruggs created the grounds on which they now try to disqualify Judge Acker by taking out of context and interpreting for themselves the comment that Judge Acker made in the Response of William M. Acker, Jr. to Order Entered on August 31,

2007[5] ("Judge Acker's Response"). Additionally, the Defendants' announcement (Dkt. 206 p. 9-10) that Scruggs is indemnifying the Defendants is an issue that the Movants have created and injected into this litigation. The issues they have created cannot be used an excuse for disqualification or court shopping. *Sullivan,* 157 F3d at 1096.

4. Movants' claims relate solely to litigation issues.

In this case, the crux of Movants' complaints is solely about Judge Acker's orders stemming from their actions in response to the Preliminary Injunction. All of the events at issue arose as a part of this litigation. None of the Movants raise any allegation that Judge Acker had some preconceived bias against them based on any set of factors outside of this litigation.

Furthermore, Scruggs has already tested his theories of the impropriety of this Court's actions when he applied to the Eleventh Circuit for mandamus regarding the allegedly improper appointment of the special prosecutors. *In re Richard F. Scruggs et al*, Case No. 07-13591-J, In the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit did not accept his argument.

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[5] *In re Richard F. Scruggs et al*, Case No. 07-13591-J, In the United States Court of Appeals for the Eleventh Circuit.

B. Movants' Claims Do Not Meet The Requirements For § 455(b)(4).

1. "Other interest" must be financial in nature.

The focus of § 455(b)(4) is primarily the conflict created by a financial or ownership interest. A "financial interest" is defined by the statute as: "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a **party**..." (with certain exceptions that are not at issue here). 28 U.S.C. § 455(d)(4) (emphasis added). None of the Movants allege that Judge Acker has any financial interest at stake. They must, therefore, establish that Judge Acker (not the Movants) has an "other interest that could be substantially affected by the outcome of the proceeding." § 455(b)(4).

Further, that "other interest" must be a financial, legal or equitable ownership interest that "could be substantially affected by the outcome of the proceeding." *See, Hill v. Rent-A-Center*, 398 F.3d 1286, 1289 (11th Cir. 2005). Applying the *ejusdem generis* rule of statutory construction, "general words following specific words in statutes should be interpreted to be similar in nature to the specific words they follow." *Id.* In this statute, the general words "other interest" follow the specific words "financial interest." The "other interest" must, therefore, relate to a financial or ownership interest.

2. Proceeding must have a "substantial effect" on the judge's interest.

The § 455(b)(4) test is not whether the judge's financial "interest" may affect the proceedings, but the reverse. The test is whether the civil proceedings could have a "substantial" effect on the judge's financial interest.

After extensive review, the undersigned has not found any case interpreting § 455(b)(4) that did not address a financial or ownership-related interest. For example, in an Eleventh Circuit case, the fact that the judges on the panel all had Delta Air Lines Frequent Flyer points did not give them a "financial interest" in the litigation as contemplated by 455(b). The "points" were not a financial interest such as could be "substantially affected" by the outcome of the case. *Delta Air Lines v. Sasser*, 127 F.3d 1296 (11th Cir. 1997). There is no evidence of, and not even any intimation by Movants, that Judge Acker has any financial interest in the outcome of either the contempt proceedings or this case in general. There is no demonstration that any such financial interest could be "substantially affected" by the criminal court proceedings.

One of the most extensive discussions of § 455(b)(4) is from a case in which Judge Acker was a named defendant. In *Jefferson County v. Acker et al*, 92 F.3d 1561 (11th Cir. 1996) *reversed on other grounds* 520 U.S. 821

(1997), the County attempted to impose a tax on the income federal judges earned while sitting in a court located in Jefferson County. The defendants challenged the tax on the grounds that it violated the intergovernmental tax immunity doctrine. *Id.* at 1567. On appeal, the Eleventh Circuit *en banc* decided, as a threshold matter, it needed to determine whether its twelve judges had a disqualifying "financial" or "other interest" in the potential impact of the tax. *Id.* at 1581. The *en banc* court asked whether the possibility of a tax on their income should they ever sit in Jefferson County was an "other interest" which "could be substantially affected by the outcome of the proceeding." *Id.* at 1582. The judges concluded that "the term 'financial interest' is limited to *direct* interests and does not include remote or contingent interests." *Id.* (emphasis in the original). They found that the possibility that the tax at issue could possibly affect them was too remote and contingent to be a disqualifying "interest." *Id.*

The Movants claim that Judge Acker's "confessed interest," as stated in the Judge Acker's Response at p. 2 in the outcome of the criminal contempt proceedings triggers § 455(b)(4). Judge Acker's "interest" is not the sort of financial or ownership "interest" contemplated by § 455(b)(4).

Furthermore, an "interest" that applies to everyone in common cannot be a disqualifying interest. For example, a judge's mere status as a taxpayer

does not trigger the application of § 455. *Booth v. Internal Revenue Service*, 37 F.3d 1509 (10th Cir. 1994). The fact that the United States government paid the judge's salary from tax revenues was not a disqualifying interest. *United States v. Zuger*, 602 F.Supp. 889, 892 (D. Conn. 1984), *aff'd* 755 F.2d 915 (2nd Cir. 1985), *cert. denied* 474 U.S. 805.

3. General interest is not § 455(b)(4) "interests."

Because of the extensive publicity generated by the Movants, this case is widely of interest to the media, to the public, and certainly to its participants. It cannot be surprising that the same interest extends to the criminal contempt charge. It is difficult to imagine any judge not being curious about the outcome of such a proceeding. General interest is not a disqualifying event. "Judges cannot be expected to remain blind to events around them, and statements of the judge simply let the parties know of his concerns." *Moideen v. Gillespie*, 55 F.3d 1478, 1482 (9th Cir. 1995) (in an ERISA case the judge's comments about the risks of a self-funded health benefit plan did not rise to a level requiring recusal).

4. Judge Acker has divested himself of authority in the criminal contempt proceedings.

Even if, *arguendo*, Judge Acker's "confessed interest" in the outcome of the contempt proceedings could be bootstrapped into a § 455(b)(4) "interest," Judge Acker has divested himself of that "interest" as provided by

§ 455(f) by surrendering the prosecution of the case to the special prosecutors. Disqualification is not required if the judge "divests himself or herself of the interest that provides the grounds for disqualification." § 455(f). Judge Acker promptly and completely separated himself, divested himself, from any prosecution of Scruggs.

5. Substantial judicial time is already invested.

The § 455(f) exception to the preceding sections of § 455 applies in particular "after substantial judicial time has been devoted to the matter... ." *See also, In re Certain Underwriter*, 294 F.3d 297, 303 (2nd Cir. 2002). In *Certain Underwriter*, investors brought a class action against issuers, underwriters and brokers for several initial public offerings ("IPO's"). The court refused to disqualify a judge who has participated in those IPO's after she divested herself of the IPO investments because it found *inter alia* that she had devoted substantial judicial time to the complex securities case. *Id.* at 304. The court also found that the judge's involvement with the IPO was not sufficient to trigger disqualification for questionable partiality under § 455(a). *Id.*

In the year and three months that this matter has been pending before Judge Acker, substantial judicial time has been devoted to the numerous hearings, including two extensive evidentiary hearings lasting for three days

and a massive amount of briefing of the myriad issues that have been raised. Judicial economy would not be served by moving this case to another court.

III. NONE OF MOVANTS' OTHER PROFESSED REASONS WARRANT DISQUALIFICATION

A. No Adverse Impact on Criminal Contempt Proceedings.

1. The Court's opinions are already known on key questions.

Movants claim that the prosecution of the current and potential criminal proceedings will be adversely affected by Judge Acker's future rulings in this civil matter. They claim that the determination of whether the Injunction "allowed" documents to be turned over to the Mississippi Attorney General ("AG") after December 8, 2006 is a central issue in both the criminal and civil matters. (Dkt. 200 pp. 4-5; Dkt. 206 p. 9). This Court has already made plain its ruling that the Injunction did not allow either Scruggs or the Rigsbys to send the documents to the AG instead of Renfroe's counsel. (Dkt. 145 p. 20) Furthermore, the Eleventh Circuit has tacitly endorsed that ruling when it denied Scruggs Mandamus. The Court's opinion that the Injunction did not allow Scruggs to hide the documents with the AG will not be a surprise to the criminal contempt court.

2. No preclusive effect because of criminal trial's heightened burden of proof.

Additionally, any such civil court rulings will not have a preclusive effect on the criminal matter. While a decision in a criminal matter may have a preclusive effect on a subsequent civil matter, because of the difference in burdens of proof, the reverse is not true. *See, e.g. United States v. Jean-Baptiste*, 395 F.3d 1190 (11th Cir. 2005) (collateral estoppel bars a defendant convicted in a criminal trial from contesting his conviction in a subsequent civil trial). "A criminal case presents considerations different from those in civil cases." *Zeigler v. Alabama*, 731 F.2d 737, 739 (11th Cir. 1984) (citations omitted).

Even if Movants were correct, which Renfroe strongly denies, that rulings in this civil matter could affect the criminal contempt trial, that impact would then be true regardless of which judge may be called upon to hear the remainder of this case. Changing judges will not stop rulings from being made in this case.

B. Public Policy

1. Disqualification because of a contempt referral would eviscerate a court's power to protect the dignity of the tribunal.

Movants' claim that Judge Acker should be disqualified because it has or may yet find Scruggs and/or the Defendants in criminal contempt and

may, therefore, have a role to play in any criminal contempt proceedings. Movants' theory carried to its logical conclusion would preclude any judge from holding any party or attorney in contempt unless he was willing to be disqualified from hearing the underlying case. Movants have not offered evidence of any particular animus by Judge Acker against them.[6] They merely claim that Judge Acker's role as a possible witness in the contempt proceedings and the Court's possible decision regarding additional criminal contempt charges call into question his impartiality. If, however, a court cannot discipline litigants and lawyers for contemptuous behavior without being disqualified from the case, its inherent power to govern and control the conduct of its proceedings would be eliminated. Such a result would create an inherent conflict for a judge knowing that by taking appropriate action in response to contemptuous behavior he would have to recuse himself from the entire case. Any litigant or lawyer who wanted a different judge in his case would only have to behave badly and then use his contemptuous actions to have the judge disqualified.

"Federal courts would be incapable of functioning were they not vested with the authority necessary to prevent abuse of their process." *Reshard v. Britt*, 839 F.2d 1499, 1503 (11th Cir. 1988) Tjoflat, J. dissenting.

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[6] Indeed, such a claim would require a motion for recusal under 28 U.S.C. § 144 and require an affidavit of supporting facts. No such pleading has been made in this case.

"Courts possess the inherent power to protect the orderly administration of justice to preserve the dignity of the tribunal." *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1209 (11th Cir. 1985) *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980). "The authority of a court over officers of its bar is as least as great as its power over litigants." *Id.*

The Movants are, in reality, asking this Court to remove from federal judges the power to hold litigants or lawyers in criminal contempt and participate, if necessary, as a witness in the subsequent criminal proceeding unless the judges are required to step down from the underlying case in which they were exercising their authority to prevent abuse of their tribunal. Such a precedent would be an impermissible limit on a court's inherent power that is derived from Article III of the United States Constitution. *Reshard v. Britt*, 839 F.2d at 1503.

Undoubtedly, if any of the Movants give further evidence of their violation of the Injunction or other orders, Judge Acker would also consider whether those actions are contemptuous. Similarly, if there was evidence that Renfroe or its counsel had violated the Injunction or disobeyed an order, Judge Acker, either *sua sponte* or on motion of any of the Movants, would consider contempt charges against the alleged Renfroe offenders. The Court

needs that power to "protect the orderly administration of justice and to preserve the dignity of the tribunal." *Kleiner*, 751 F.1d at 1209.

2. Judges are routinely entrusted with distinguishing between permissible and impermissible matters.

Federal judges are called upon regularly to act on some information they have received and put aside or ignore other information. For example, in a bench trial, the judge routinely rules on the admissibility of evidence that, had it been a jury trial, the fact finder would never have seen. There is a presumption that "a judge presiding over a bench trial relies only on properly admissible and relevant evidence applies even when the judge allows presentation of evidence that had no permissible relevance." *United States v. Parcels of Property Located at 14 Leon Drive*, 225 Fed. Appx. 825, 827 (11th Cir. 2007) *citing Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.,* 320 F.3d 1213 (11th Cir. 2003).

An experienced judge who is accustomed to applying only admissible, relevant evidence can also be counted on to apply the proper impartiality to parties and counsel in litigation, regardless of their antics. An experienced judge can also be counted on to be able to distinguish between the Rigsbys and Scruggs and between a principal and an agent. After 25 years of service on the bench, Judge Acker is certainly experienced and can be counted on to

distinguish between admissible, relevant evidence and irrelevant, extraneous matters.

IV. PRAYER

ACCORDINGLY, for the reasons stated above Renfroe respectfully requests that this Court deny both Scruggs' and the Defendants' Motions and decline to disqualify Judge Acker and the judges of the Northern District of Alabama from hearing the pending Motion for Compensatory Sanctions for Civil Contempt and the remainder of this case.

Respectfully submitted this 12th day of December, 2007.

Attorneys for Plaintiff E.A. Renfroe & Company, Inc.

By: **/s/ Jack E. Held**
Jack E. Held
Alabama Bar No. 6188-H65J
jackheld@sirote.com
/s/ J. Rushton McClees
J. Rushton McClees
Alabama Bar No. ASB-8805-C39J
rmcclees@sirote.com

SIROTE & PERMUTT, P.C.
2311 Highland Avenue South
Birmingham, Alabama 35205
205-930-5100
205-930-5101

And

By: **/s/ Barbara Ellis Stanley**
Barbara Ellis Stanley
Admitted Pro Hac Vice

Texas Bar No.: 19043800
bstanley@helmsgreene.com

HELMS & GREENE, LLC
One City Centre, Suite 1290
1021 Main Street
Houston, Texas 77002
713-651-0277
713-651-0288 (Fax)
bstanley@helmsgreene.com

ATTORNEYS FOR PLAINTIFF
E.A. RENFROE & COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel of record pursuant to the Federal Rules of Civil Procedure and the CM/ECF System on December 12, 2007.

/s/ Barbara Ellis Stanley

Mr. William W. Taylor, III
Mr. Michael R. Smith
Zuckerman Spaeder LLP
1800 M Street NW, Suite 1000
Washington, D.C. 20036
wwtaylor@zuckerman.com
msmith@zuckerman.com

Mr. Harlan Winn III
Mr. Robert E. Battle
Battle, Fleenor Green Winn & Clemmer LLP
505 North 20th Street, Suite 1150
Birmingham, Alabama 35203
hwinn@bfgwc.com
rbattle@bfgwc.com

Mr. Bruce Rogers
Mr. Frank Bainbridge
Bainbridge, Mims, Rogers & Smith, LLP
600 Luckie Drive, Suite 415
Birmingham, Alabama 35223
brogers@bainbridgemims.com
fbainbridge@bainbridgemims.com