

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 OF LAW IN SUPPORT OF ITS MOTION TO DISQUALIFY
BARTIMUS, FRICKLETON, ROBERTSON & GORNY, PC
AND GRAVES BARTLE & MARCUS, LLC**

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Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint (“FAC”) as “State Farm Mutual Insurance Company” (“State Farm” or “Defendant”), respectfully submits this memorandum of law in support of its motion to disqualify Bartimus, Frickleton, Robertson & Gorny, PC and Graves Bartle & Marcus, LLC, and all of the lawyers associated with these firms, from representing Relators Cori Rigsby and Kerri Rigsby in this civil suit brought pursuant to the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3732.

INTRODUCTION

A. Procedural History and Summary of Argument

On April 26, 2006, Relators Cori Rigsby and Kerri Rigsby filed their original Complaint that forms the basis of this case. The Complaint was filed under seal and was submitted on their behalf by three law firms – The Scruggs Law Firm, Bartimus, Frickleton, Robertson & Gorny, and Graves Bartle & Marcus. On May 22, 2007, the Rigsbys filed their FAC, amending the Complaint to add additional Defendants and to include further claims and allegations against all Defendants. Pursuant to 31 U.S.C. § 3730(b) of the FCA, the FAC was kept under seal until August 1, 2007, when this Court unsealed it. (Dkt. 25.)¹ On February 7, 2008, after the United States declined to intervene, the Court ordered the Rigsbys to serve the Amended Complaint within sixty days. (Dkt. 57.)

¹ Despite the fact that there was a seal in place, the February 28, 2007 written testimony of Congressman Gene Taylor, regarding “Insurance Claims Payment Processes on the Gulf Coast,” states unequivocally that “[t]he Scruggs Law Firm represents the [Rigsby] sisters in a False Claims Act filing against State Farm and [their former employer, E.A. Renfroe & Company]. That federal fraud case is still active.” Taylor Testimony at 6 (Ex. 1 to Mtn.). Congressman Taylor’s testimony raises several very troubling questions, including: (i) how he knew of a False Claims Act suit by the Rigsbys five months before the seal was lifted; and (ii) how he knew that Renfroe was to be a defendant in the suit in February 2007, when Renfroe was not even added to the suit until three months later, in May 2007, when the Rigsbys filed their FAC.

On March 17, 2008, after he pleaded guilty to conspiracy to bribe a judge, Scruggs and his law firm withdrew from this case. (Dkt. 62.) This withdrawal cannot erase the myriad unethical – and in many cases, illegal – acts that Relators’ counsel committed in conjunction with this lawsuit. As State Farm previously chronicled for this Court in its disqualification motion filed in *McIntosh v. State Farm Fire & Casualty Co.*,² the Relators in this case, Cori Rigsby and Kerri Rigsby, are two former State Farm³ “insiders” who admittedly stole thousands of State Farm’s confidential documents – including those at the heart of this case – and turned them over to Scruggs and his former partners at the joint venture f/k/a the Scruggs Litigation Group and now known as the Katrina Litigation Group (collectively, the “SKG”) for use in their civil litigation against State Farm. Scruggs, in turn, rewarded the Rigsbys for their cooperation by giving them an annual stipend of \$150,000 each to serve as “litigation consultants.” He also pays all of their legal bills and has agreed to fully indemnify them in a separate action brought by their former employer, E.A. Renfroe & Company (“Renfroe”), for breach of their respective employment contracts.⁴

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 Rigsbys – 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

² No. 1:06-cv-01080-LTS-RHW (S.D. Miss. filed Oct. 23, 2006).

³ The Rigsbys were Renfroe employees who were detailed to provide services to State Farm on Renfroe’s behalf.

⁴ See Def. [Cori and Kerri Rigsbys’] Reply to Pl. Resp. to Defs.’ Mot. to Disqualify the Court, filed in *E.A. Renfroe & Co, Inc. v. Cori Rigsby*, No. 2:06-cv-1752-WMA (N.D. Ala. filed Dec. 21, 2007) (“The Rigsbys and Mr. Scruggs have confirmed that each understands and has understood since this case began that Mr. Scruggs will satisfy any liability the Rigsbys might have to pay[,] fees, expenses or any other obligation, including satisfaction of a judgment.”) (Ex. 2 to Mtn).

(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 Rigsbys’ recent testimony makes clear that at least four of their remaining attorneys in this case – Edward “Chip” Robertson, Tony DeWitt, Mary Winter, and Todd Graves – attended secret meetings where the Rigsbys arranged for them to have unfettered access to State Farm’s password-protected confidential databases.⁵ This activity violates, on multiple levels, the federal Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030. *See Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1123-24, 1126-27 (W.D. Wash. 2000).

Counsel’s violation of the CFAA is by definition a violation of Mississippi Rule of Professional Conduct (“MRPC”) 8.4(b), which makes it “professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MRPC 8.4(b). Counsel’s conduct further violates MRPC 4.4, which prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third party, and MRPC 8.4, which prohibits an attorney from engaging in conduct involving dishonesty or deceit or that is prejudicial to the administration of justice.

In addition to their own independent violations of federal law and the ethical rules, this Court’s Memorandum Opinion in *McIntosh* leaves no doubt that all of Relators’ lawyers are also

⁵ See November 19, 2007 Cont. of Dep. of Cori Rigsby in *McIntosh*, (“C. Rigsby *McIntosh II* Dep.”) at 392:16-403:7; November 20, 2007 Dep. of Kerri Rigsby in *McIntosh*, (“K. Rigsby *McIntosh II* Dep.”) at 454:1-5, 454:25-456:13. Pertinent excerpts of the C. Rigsby *McIntosh II* Dep. and the K. Rigsby *McIntosh II* Dep. are respectively attached as Exhibits 3 and 4 to the Motion.

subject to accessorial liability under MRPC 5.1(c), which provides that “[a] lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if . . . the lawyer . . . ratifies the conduct involved.” MRPC 5.1(c). In *McIntosh*, the Court held that even though Scruggs had already withdrawn from the case, the SKG lawyers must also be disqualified pursuant to MRPC 5.1(c) because “the other members of the joint venture were aware or should have been aware that the payments [to the Rigsbys] were being made and did nothing to prevent their continued payment.” (*Id.* at 3.)

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 Rigsbys, 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 Rigsbys illegally obtained from State Farm in order to profit in this case. Accordingly, “disqualification is required.” (*Id.* at 2.)

McIntosh further demonstrates that, in this case, the FAC should be dismissed. In *McIntosh*, the Court recognized that merely disqualifying counsel would not, in itself, be sufficient to ameliorate the damage to State Farm or the judicial process caused by counsel’s ethical violations. Thus, the Court further: (i) disqualified the Rigsbys from serving as witnesses in any Katrina-related case against State Farm pending before this Court; and (ii)

excluded from evidence any documents supplied by the Rigsbys to the SKG unless the plaintiffs can show that the documents were obtained through ordinary methods of discovery. (*McIntosh* Disqualification Order at 1 (*McIntosh* Dkt. 1173).)

Here, the FAC is based entirely on documents that the Rigsbys stole from State Farm. Since all of the documentary and testimonial evidence that the Rigsbys have submitted or can submit in support of their claims is tainted by their misdeeds, it should be excluded under *McIntosh*. Where, as here, “plaintiffs have based a substantial number of their allegations against defendants on information provided by an ‘insider,’” dismissal is the only remedy that “prohibits plaintiffs from obtaining an advantage that they would not otherwise have achieved but for the [unethical conduct].” *See Ackerman v. Nat’l Prop. Analysts, Inc.*, 887 F. Supp. 510, 512 (S.D.N.Y. 1993) (disqualifying counsel and dismissing claims that could not have been made without improperly obtained information from company “insider”).

Dismissal is a particularly appropriate remedy in this case because the Rigsbys aided and abetted their counsel’s unethical and illegal conduct. *See Stephen Slesinger, Inc. v. The Walt Disney Co.*, 155 Cal. App. 4th 736, 776 (Ct. App. 2007) (affirming dismissal as sanction; explaining that plaintiff’s conduct in illicitly obtaining documents warranted dismissal).⁶ As one court explained under analogous circumstances, “[t]he demise of [plaintiff’s] lawsuit has one cause only: the deliberate and egregious misconduct of [plaintiff] itself, making any sanction other than dismissal inadequate to ensure a fair trial.” *Id.* at 776.

In short, a straightforward application of this Court’s decision in *McIntosh* to the facts of this case demonstrates conclusively that: (i) the Rigsbys’ remaining counsel should be

⁶ The Rigsbys’ FAC is also subject to dismissal on multiple, independent grounds. These ground are set forth in State Farm’ (i) Motion to Dismiss for Lack of Subject Matter Jurisdiction; and (ii) Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6) and 9(b), which are submitted contemporaneously herewith.

disqualified; and (ii) the Rigsbys' complaint – which is based exclusively on stolen State Farm confidential documents and illicitly obtained information – should be dismissed with prejudice.

B. Relators' Lawyers' Unauthorized Use of State Farm's Password-Protected Databases

Relators Cori and Kerri Rigsby are sisters who worked exclusively on State Farm matters as claims managers and adjusters at Renfroe, a company that provides insurance adjusters to insurers like State Farm following a catastrophic event. When “independents” like the Rigsbys 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.⁷ To protect the confidentiality of State Farm and State Farm policyholder information, Cori and Kerri Rigsby were consistently required by both Renfroe and State Farm to sign various confidentiality agreements, which specifically state they will not “misappropriate” any confidential policyholder information.⁸

As this Court has previously recognized, “[a]t least by February 2006 [while employed by Renfroe], the Rigsbys began copying and/or taking State Farm documents and giving them to Richard Scruggs.” *McIntosh* Dkt. 911 at 2. On June 3-5, 2006, this activity culminated in an extravagantly engineered data-mining operation which the Rigsbys have referred to as a “data dump.”⁹ Kerri testified that the purpose of the data-mining operation was to steal as many State Farm confidential documents as possible over the weekend before State Farm was aware of their

⁷ Deposition of Kerri Rigsby given in *McIntosh* on April 30 and May 1, 2007 at 35:17-36:2, 325:16-25 (all pertinent excerpts of “K. Rigsby Dep.” are attached hereto as Ex. 5); Deposition of Cori Rigsby given in *McIntosh* on May 1, 2007 (“C. Rigsby Dep.”) at 52:17-24 (all pertinent excerpts of “C. Rigsby Dep.” are attached hereto as Ex. 6).

⁸ See Code of Conduct dated 1999 at 2 (Ex. 7); Code of Conduct dated 2004 at 2 (Ex. 8); Employment Agreements ¶ 6 (Exs. 9-10); Access Agreements signed by the Rigsbys (Exs. 11-12).

⁹ K. Rigsby Dep. at 48:19-49:1, 308:14-309:16 (Ex. 5 to Mtn.); C. Rigsby Dep. at 36:17-38:7 (Ex. 6 to Mtn.).

actions.¹⁰ Although she repeatedly gave sworn testimony denying the fact, Cori Rigsby now admits that during the “data dump” weekend, she and Kerri had lists of Scruggs’s then-clients that they used to access Scruggs’s clients’ claim files.¹¹

Notably, when State Farm first deposed the Rigsbys in *McIntosh*, they improperly invoked frivolous privilege objections in order to conceal the fact that they held at least two secret meetings with their counsel in this case, during which the Rigsbys helped their counsel access State Farm’s password protected policyholder databases. On October 1, 2007, this Court overruled the Rigsbys’ objections and ordered that their depositions reconvene. *See McIntosh* Dkt. 563. The Rigsbys’ more recent deposition testimony leaves no doubt that their attorneys – Edward “Chip” Robertson, Tony DeWitt, Mary Winter, and "Todd" – were full participants in the scheme to gain unauthorized access to State Farm’s confidential databases. On this point, Cori Rigsby testified:

MR. ROBIE: At any point in time, did you furnish your State Farm laptop to any lawyer?

CORI RIGSBY: Yes.

Q. Who?

A. Tony DeWitt.

Q. Who’s Tony DeWitt?

* * *

A. He’s my Qui Tam lawyer.

Q. He’s still your lawyer?

A. Yes.

Q. And when did you give Tony DeWitt your laptop?

A. In April.

Q. Did you also give him your password?

A. I don’t remember.

Q. Well, it wouldn’t do much good to have the laptop without the password, would it?

A. Well, I was sitting right next to him.

¹⁰ K. Rigsby *McIntosh II* Dep. at 541:10-542:13, 573:16-574:5 (Ex. 4 to Mtn.).

¹¹ *See* Jan 14, 2008 Dep. of Cori Rigsby at 75-80, taken in *Renfro v. Rigsby*, No. 06-WA-1752-S (N.D. Ala.) (excerpts attached as Ex. 13 to Mtn.).

Q. All right. Did you boot it up for him?
A. I don't remember.
Q. What were you searching for?
A. I'm not – I'm not sure of the exact – that we had a list. There were some documents that we were talking about. We were talking – I'm not sure which documents he retrieved. I let him in the computer, and I can't speak after that.
Q. Where did this take place?
A. It took place in Pascagoula.
Q. Did you print documents as a result of that search?
A. No, sir.
Q. Did he read documents off your computer?
A. I'm assuming he did.

* * *

Q. Did you go to his office?
A. No.
Q. He came to you?
A. Yes.
Q. He came to your house?
A. No. We met in a trailer.
Q. Pardon me?
A. We met at a trailer.
Q. Okay. Who else was there?
A. Tony DeWitt. There were two meetings in this trailer, and I'm going to get confused as to who was at which meeting.
Q. Well, do your best.
A. Okay. Tony DeWitt, Dick Scruggs, Zach Scruggs, Mary Winters, Chip –
Q. Chip who?
A. I don't remember Chip's last name. Kerri, myself and my mother.
Q. Now, whose trailer was this?
A. I believe it was Dick's trailer.
Q. And where was it at?
A. It seems like it was in the – in a parking lot by the Longfellow house. I could be wrong on that.
Q. How did you know to go there?
A. Dick set up the meeting.

(C. Rigsby *McIntosh II* Dep. at 392:16-395:25.) (Ex. 3 to Mtn.)

At the continuation of Kerri Rigsby's deposition, she similarly testified that she attended secret meet with her "*qui tam* counsel."

MR. ROBIE: You met with Mr. Scruggs in a trailer sometime in '06?

KERRI RIGSBY: I did.

Q. And when was that?

- A. I believe that was March of '06.

- Q. You drove with your mom and your sister?
 A. Correct.
 Q. Anyone else?
 A. It was just the three of us.
 Q. And who did you meet with at the trailer?
 A. We met with several attorneys at that trailer.
 Q. Give me their names, please.
 A. Tony Dewitt, there was an attorney named Mary, Todd, and Chip.
 Q. Mary's last name?
 A. I don't recall her last name.
 Q. Is she an attorney?
 A. She is an attorney. She works with Tony Dewitt.
 Q. Does Tony Dewitt have a law firm name?
 A. It does, but I don't know what the name is.
 Q. How about Todd, was he an attorney?
 A. He's an attorney, but I don't believe he's in the same office.
 Q. Do you know what firm he's with?
 A. I don't.
 Q. And Chip, does he have a last name?
 A. He does, but I don't recall his last name.
 Q. Is he a lawyer?
 A. He's a lawyer. I believe he's the head of that firm that Tony works with.

- Q. And where was this trailer set up?
 A. In Pascagoula, right off the beach.

(K. Rigsby in *McIntosh II* Dep. at 454:1-5, 454:25-456:13.) (Ex. 4 to Mtn.)

When State Farm's counsel asked additional questions regarding the meeting, the Rigsbys' counsel reasserted the same frivolous privilege objection that the Court previously overruled, and instructed them not to answer the questions. For instance, at the continuation of Kerri's deposition, State Farm's counsel inquired as to what took place at the March 2006 meeting that Kerri had described. Although it is axiomatic that the attorney-client privilege only applies to communications or communicative acts, Kerri Rigsby's counsel improperly objected on the ground of attorney-client privilege, and instructed her not to answer State Farm's questions. *See* K. Rigsby *McIntosh II* Dep. at 463:6-466:23 (Ex. 4 to Mtn.); *see also* C. Rigsby

McIntosh II Dep. at 396:23-403:7 (Ex. 3 to Mtn.) But despite counsel’s improper attempts to prevent State Farm from obtaining additional information about these meetings, the Rigsbys’ testimony makes clear that their attorneys in this case violated the CFAA and multiple ethical rules.

ARGUMENT

I. THE LEGAL STANDARD FOR MOTIONS TO DISQUALIFY

“[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) (citation omitted). When deciding motions to disqualify, federal courts in the Fifth Circuit look to both “state and national ethical standards” governing attorney conduct. *Id.* The United States District Courts in Mississippi have adopted the Mississippi Rules of Professional Conduct. *See* Miss. Unif. Dist. Ct. R. 83.5. Mississippi, in turn, models its rules after the American Bar Association (“ABA”) Model Rules of Professional Conduct. *See United States v. Starnes*, 157 F. App’x 687, 693 (5th Cir. 2005), *cert. denied*, 127 S. Ct. 1922 (2007). Because of this uniformity, courts in Mississippi frequently rely on cases interpreting analogue rules in other jurisdictions.¹²

“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

¹² *See, e.g., Am. Airlines*, 972 F.2d at 617, 619-20; *Doe v. A Corp.*, 709 F.2d 1043, 1046-47 & nn.9-10 (5th Cir. 1983); *Owens v. First Family Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 846 n.2, 850-51 & 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).

(5th Cir. 1980)).

II. RELATORS' ATTORNEYS HAVE VIOLATED THE COMPUTER FRAUD AND ABUSE ACT AND MRPC 8.4

As a condition of being permitted to access State Farm's databases, both Cori and Kerri Rigsby executed computer access agreements, which clearly circumscribed the scope of their authorization to use State Farm's proprietary and confidential computer system:

1. You shall keep *strictly confidential any and all information of State Farm . . .* including any business, trade secret, technical, or proprietary or other like information whether or not such information is specifically designated as confidential. You *may not use any information of State Farm . . . for your own benefit or for the benefit of any other person besides State Farm.*

2. You shall use your access to the State Farm Network *solely* for the purpose of facilitating business communications with State Farm, or complying with mutually agreed to contractual obligations to State Farm.

....

4. To enable your access to the State Farm Network, State Farm may assign to you one or more Logon IDs and/or password(s) You are responsible for all actions performed by your Logon Id

....

6. Your use of the State Farm Network, including the State Farm e-mail system is primarily for State Farm business only. **THERE IS NO EXPECTATION OF PRIVACY IN YOUR USE OF THE STATE FARM NETWORK AND THE STATE FARM E-MAIL SYSTEM. THE STATE FARM NETWORK AND THE STATE FARM E-MAIL SYSTEM ARE OWNED BY STATE FARM AND ARE SUBJECT TO BEING MONITORED WITHOUT NOTICE.**

....

7. You shall access only those systems, tools, data and facilities at State Farm that you have been authorized to access. . . .

....

Without a commitment of confidentiality, we cannot make the State Farm Network available to you. Only the signer of this letter may have access to the State Farm Network.

(Access Agreement of Cori Rigsby dated Jan. 25, 2006, Ex. 11 to Mtn.) (bold emphasis added).¹³

¹³ Additional similar or identical (other than the date) access agreements executed by Cori Rigsby are
(cont'd)

The Rigsbys violated these access agreements on numerous occasions. Indeed, as noted above, the level of the Rigsbys' involvement in their illegal access to State Farm's protected computers was not limited to their elaborately engineered data-mining operation in June 2006. They were also integrally involved, as participants, in meetings in Scruggs's trailer, where they allowed their lawyers *in this case* to access and review State Farm's proprietary, confidential, and password-protected computer databases. (*See C. Rigsby McIntosh II* Dep. at 392:16-395:19) (Ex. 3 to Mtn.) Indeed, Cori Rigsby testified that she signed on to her State Farm laptop and gave her "qui tam lawyers" carte blanche to retrieve State Farm documents directly from State Farm's databases. (*See id.*; *see also K. Rigsby McIntosh II* Dep. at 626:6-628:1) (Ex. 4 to Mtn.)

These activities violate, on multiple levels, the CFAA. *See* 18 U.S.C. § 1030. For example, "[w]hoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer if the conduct involved an interstate or foreign communication . . . shall be punished as provided in subsection (c)" of this statute. 18 U.S.C. § 1030(a)(2)(C). A "'protected computer' means a computer . . . which is used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B).

The interstate nature of the Rigsbys' and their attorneys' conduct is plain. Indeed, the Rigsbys admit that "State Farm maintains distributed servers in Jacksonville, Florida and Birmingham, Alabama," and that they accessed these computers from Mississippi over the Internet.¹⁴ Computer communications between a laptop computer in Mississippi and a computer server in another state involve interstate communication. Nor can their intent to access State

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attached to State Farm's motion as Ex. 11. The access agreements executed by Kerri Rigsby are attached to State Farm's motion as Ex. 12.

¹⁴ *See* Relator's Evidentiary Disclosure at 30 (Ex. 14 to Mtn.).

Farm's proprietary and confidential computer system in search of State Farm information be questioned. That was the stated purpose of their endeavors.

Likewise, the Rigsbys and their attorneys acted either "without authorization" or "exceed[ed] authorized access." State Farm certainly never authorized the Rigsbys' attorneys to access State Farm computers. And by infiltrating State Farm's proprietary computer system for the purpose of funneling confidential State Farm policyholder information to outsiders, the Rigsbys strayed so far beyond the bounds of their authorization that they not only exceeded their authorization, but acted without authorization altogether. *See, e.g., Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1124-25 (W.D. Wash. 2000).

In *Shurgard*, employees were found to have acted "without authorization" when they accessed their employer's computers to misappropriate proprietary information for the benefit of a competitor. The court applied principles of agency law, and concluded that the employees' authorized access to the employer's computers ended when they became agents of the competitor. *Id.* at 1124-25; *see also Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006) (holding that an employee's access to data became unauthorized when breach of his duty of loyalty terminated his agency relationship); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451 (E.D. Va. 1998) (holding that service users acted without authorization when they violated defined computer access policies). The Rigsbys and their attorneys thus violated § 1030(a)(2)(C).

Similarly, a person violates section 1030(a)(4) who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authoriz[ation] . . . and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period. . . . [T]he CFAA's use of 'fraud'

simply means wrongdoing and not proof of the common law elements of fraud.” *Shurgard*, 119 F. Supp. 2d at 1125-26. The knowing misappropriation of confidential State Farm information constitutes fraud under the CFAA. *Id.* The object of the fraud was not limited to the use of State Farm’s computer system. Rather, the object of the fraud was the unauthorized procurement and dissemination of confidential State Farm information. Accordingly, the Rigsbys and their attorneys violated section 1030(a)(4).

In addition, “[w]hoever . . . intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage . . . and . . . loss to 1 or more persons . . . aggregating at least \$5,000 in value” violates the CFAA. 18 U.S.C. § 1030(a)(5)(A)(iii), (B)(i). “Loss” includes, among other things, “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense.” 18 U.S.C. § 1030(e)(11).¹⁵ State Farm’s investigation, response, and remediation necessitated and caused by the intrusion of its computer system have far exceeded \$5,000. *See* (Affidavit of Vanessa Stanhouse ¶¶ 3-6, Ex. 15 to Mtn.). “[D]amage’ means any impairment to the integrity or availability of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8). The infiltration of State Farm’s computer system and collection and dissemination of confidential information altered its “protected state,” thus impairing the “integrity” of the data and

¹⁵ *See also Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 647 (E.D. Pa. 2007) (out-of-pocket expenses and time spent investigating the intrusion multiplied at hourly rate constitute damages under the CFAA); *Frees, Inc. v. McMillian*, No. 05-1979, 2007 WL 2264457, at *3 (W.D. La. Aug. 6, 2007) (costs of hiring experts to investigate computer problems allegedly caused by breach, as well as costs of the forensic investigation of home or work computers, constitute damages); *P.C. of Yonkers, Inc. v. Celebrations! The Party & Seasonal Superstore, L.L.C.*, No. 04-4554, 2007 WL 708978, at *5 (D.N.J. Mar. 5, 2007) (costs of investigating and responding to the breach and the remedial steps to prevent further breach are recoverable damages).

constituting “damage.” *See, e.g., Shurgard*, 119 F. Supp. 2d at 1126-27. Accordingly, the Rigsbys and their attorneys also violated § 1030(a)(5)(A)(iii).

Counsel’s violation of the CFAA is without question a per se violation of MRPC 8.4(b), which makes it “professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MRPC 8.4(b).

III. THE ETHICAL VIOLATIONS OF RELATORS’ COUNSEL ARE ATTRIBUTABLE TO EACH MEMBER OF THEIR TEAM

In addition to bearing responsibility for their own independent violations of the Mississippi ethical rules, the Rigsbys’ lawyers are subject to disqualification as accessories under MRPC 5.1(c), which provides:

A lawyer shall be responsible for another lawyer’s violation of the rules of professional conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MRPC 5.1(c); *see also* ABA Model Rules of Prof’l Conduct R. 5.1(c).

Lawyers are also liable as accessories if they “knowingly assist” another to violate ethics rules. *See* MRPC 8.4(a); *see also* ABA Model Rules of Prof’l Conduct 8.4(a). Accordingly, co-counsel are jointly responsible for each others’ misconduct if they work and share information with each other during their common representation of a party. If one member of the team improperly accesses and utilizes confidences, the unethical behavior is imputed to co-counsel because of the likelihood that they also accessed or benefited from the improper information.

For example, in *Ackerman v. National Property Analysts, Inc.*, 887 F. Supp. 510 (S.D.N.Y. 1993), lead counsel hired a former company “insider” to assist him in bringing a lawsuit against the company. The former insider provided counsel with some of the company’s confidential information, which was incorporated into the complaint. *Id.* at 513-14.

Finding that the lead attorney’s relationship with the former insider and use of improperly obtained confidential information violated multiple ethical rules, the court disqualified the lead attorney *and* dismissed the complaint. The court further disqualified co-counsel’s law firm, explaining that regardless of whether co-counsel’s firm was complacent in hiring the former insider in the first instance, it was now seeking to “improperly benefit[]” from the inside information and took “no steps to insulate itself” from the lead counsel or from the insider. *Id.* at 518. The court concluded that co-counsel’s misconduct was “indistinguishable” from the lead counsel’s misconduct because the complaint in the case was based in large part on the information obtained from the insider. *Id.*

The parallels between counsel’s misconduct in this case and in *Ackerman* are striking. In both cases, the offending attorneys obtained confidential documents from an adversary through an insider, failed to insulate themselves from the improper information, and used the information in the complaint. “It is undisputed that plaintiffs have based a substantial number of their allegations against defendants on information provided by an ‘insider’” *Ackerman*, 887 F. Supp. at 512. In this case, Relators’ counsel go farther than simply “basing” their allegations on State Farm’s confidences: They wholly reproduce them in the body of their Amended Complaint. (*See, e.g.*, FAC ¶¶ 68-69, 72-74.)

Other courts have similarly disqualified all co-counsel for one counsel’s misconduct, particularly “where some evidence exists of the possibility that disclosures were made” between

co-counsel. See *NCK Org. Ltd. v. Bregman*, 542 F.2d 128, 134-35 (2d Cir. 1976); see also *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 236 (2d Cir. 1977) (“It is inevitable that Meister [local counsel], who dealt closely with Morgan Lewis [regional counsel] throughout this entire period, was afforded the *opportunity* to benefit from this privileged information” (emphasis added)); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983) (holding co-counsel lacks standing to appeal its disqualification because it was “disqualified not for anything it did or failed to do but simply because as Schwartz & Freeman’s co-counsel it had access, *actual or potential*, to whatever confidential information Schwartz & Freeman had obtained” (emphasis added)).

Here, there is much more than “some evidence” of a “possibility,” “opportunity,” or “potential” access to confidences. The Rigsbys *admit* that they held secret meetings with Robertson, DeWitt, Winter, and Graves during which they accessed State Farm’s password-protected databases. (See C. Rigsby *McIntosh* Dep. on November 19, 2007 at 392:16-395:25.) Relators’ counsel further ratified the misconduct by *reproducing*, in the text of their FAC, several confidential documents that were wrongfully obtained from State Farm. (See, e.g., *id.* at ¶¶ 68-69, 72-74.) When Relators’ counsel used these documents as the foundation of their FAC, they plainly ratified the misconduct and “knowingly assisted” the original ethical violations as the term is used in MRPC 8.4(a). See also MRPC 5.1(c).

In addition to accessory liability for the ethical violations, all of Relators’ lawyers are responsible for each others’ individual violations under the doctrine of imputed liability under MRPC 5.1(c)(2). As in *McIntosh*, counsel in this case “knew or should have known that the payments [to the Rigsbys] were being made” (*McIntosh* Disqualification Mem. at 2) at a time when they could have taken effective remedial steps but failed to do so. To be sure, Rule

5.1(c)(2) requires that each of those other lawyers also be “a partner or [have] comparable managerial authority in the law firm in which the other lawyer [Scruggs] practices.” MRPC 5.1(c)(2). But the definitional section of the MRPC makes clear that “firm” is not limited to a traditional law firm. Rather, “[f]irm’ or ‘law firm’ denotes a lawyer or lawyers in a partnership, professional corporation, professional association, professional limited liability company, sole proprietorship, governmental agency, *or other association whose members are authorized to practice law*; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” MRPC, Terminology section (emphasis added); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123(1) (2000) (explaining that imputed disqualification rules cover “a law partnership, professional corporation, sole proprietorship, *or similar association*” (emphasis added)). Although the definition of “firm” does not specifically mention joint ventures, the comprehensive definition clearly includes joint ventures.

The Mississippi Supreme Court has determined that where, as here, a group of lawyers associate themselves for the purpose of bringing a lawsuit, that group is treated as a joint venture and is 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). In *Duggins*, the Mississippi Supreme Court held that a lawyer who associated himself with another lawyer for the purposes of bringing a single medical malpractice case was vicariously liable for that lawyer’s misconduct under established partnership principles. In so holding, the court explained: “There is no difference between a partnership and a joint venture except the latter has limited and circumscribed boundaries.” *Duggins*, 632 So. 2d at 427.

Similarly, in the fee dispute litigation that gave rise to Scruggs's judicial bribery, his former co-venturers at the SKG argued that they could not be held vicariously liable for Scruggs's illegal acts. The court summarily rejected this argument, holding that "the conduct on the part of one or more of the defendants in this matter, the actions for one, if shown to have occurred in the furtherance of the purpose of the joint venture, are the action for all, and the Court may order sanctions accordingly." Feb. 26 Order, entered in *Jones, Funderburg, Sessums, Peterson & Lee, PLLC v. Scruggs*, Civ. A. No. L07-135 (Miss. Cir. Ct. Lafayette County) (Ex. 16 to Mtn.).

Under the imputed disqualification rules, "all 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 § 123 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").

IV. COUNSEL VIOLATED MRPC 4.4 AND 8.4 AND CANON 9 OF THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY BY HIRING THE RIGSBYS AS "LITIGATION CONSULTANTS"

Counsel violated multiple ethical rules by hiring the Rigsbys – who are key material witnesses in this and other cases against State Farm – to serve as highly-paid litigation consultants. As the Court recognized in *McIntosh*, the pertinent case law universally and resoundingly condemns this practice as both violative of MRPC 4.4, which prohibits an attorney from "us[ing] methods of obtaining evidence that violate the legal rights of [third persons],"

MRPC 4.4(a), and MRPC 8.4, which states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] engage in conduct that is prejudicial to the administration of justice,” MRPC 8.4(c) and (d). It is also inimical to Canon 9 of the Model Code of Professional Responsibility, which requires that attorneys “avoid even the appearance of professional impropriety.” ABA Model Code of Professional Responsibility Canon 9 (1983); *cf. In re Dresser Indus., Inc.*, 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), opposing counsel hired as a paid “trial consultant” a former highly placed employee, Mr. Canales, of defendant Transamerica Rental Finance Corp. (“TRFC”). *See* 811 F. Supp. at 653. The court granted TRFC’s motion to disqualify, explaining that the hiring of Mr. Canales raised the appearance that the consulting arrangement: (1) induced him to disclose confidential information relating to TRFC’s managerial practices and litigation strategy; and (2) induced him to testify favorably for Rentclub. *Id.* at 655. The court concluded that “the likelihood of public suspicion outweighing the social interest that will be served by counsel’s continued representation[] is self-evident.” *Id.* at 656.

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. *Id.*

The court held that by talking with the disgruntled former investigator, MBRR had clearly “breached the standard of impermissible *ex parte* contact.” *Id.* at 1122-23. 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.* at 1123. Other cases have reached the same conclusion as *Rentclub* and *Camden*.¹⁶

V. COUNSEL HAVE VIOLATED THE ANTI-GRATUITY PROVISION OF THE FEDERAL BRIBERY STATUTE AND MRPC 3.4 AND 8.4

Paying material fact witnesses annual “consulting fees” of \$150,000 that were in no way tied to reasonable witness expenses¹⁷ is also a facial violation of the anti-gratuity provision of the federal bribery statute, 18 U.S.C. § 201, which, *inter alia*, criminalizes the giving of something of value (other than certain enumerated costs) for or because of past or potential testimony before any court, Congress, agency or commission. *See* 18 U.S.C. § 201(c)(2), (d).¹⁸ An

¹⁶ *See In re Complaint of PMD Enters. Inc.*, 215 F. Supp. 2d 519, 530 (D.N.J. 2002) (attorney’s hiring of opposing party’s former employee, who was a fact witness in the case, warranted disqualification); *Am. Prot. Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, No. CV-LV-82-26, 1986 WL 57464, at *1, *6-7 (D. Nev. Mar. 11, 1986) (denying motion to reconsider prior order granting disqualification because attorney’s participation in negotiations to hire opposing party’s former employee as a trial consultant “affects both the public’s view of the judicial system and the integrity of the court”); *Esser v. A.H. Robins Co.*, 537 F. Supp. 197, 200, 203 (D. Minn. 1982) (granting law firm’s motion to withdraw in lieu of disqualification, but conditioning consent to withdrawal on firm’s receiving no financial remuneration where plaintiff’s law firm had hired defendant’s former senior claims adjuster); *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 Power*, 764 F. Supp. at 714-17, 727-28 (disqualifying attorney and law firm based upon retention of the former office manager of the opposing party as a trial consultant).

¹⁷ In Mississippi, a fact witness may be paid “the statutory witness fee, plus reasonable expenses incurred for mileage, meals and lodging, plus reasonable compensation for his loss of time in attending or testifying.” Miss. Bar Ethics Comm., Op. No. 145 (1988). In this case, the Rigsbys’ testimony confirms that their biweekly paychecks were not tied to “loss of time in attending or testifying” at trial or the like. The Rigsbys had no set office hours, did not keep track of their time, and often failed to show up at the office at all. Indeed, Kerri Rigsby recently testified that between November 1 and November 20, 2007, she only worked about five hours for the SKG. *See* K. Rigsby in *McIntosh II* Dep. at 445:5-8 (Ex. 4 to Mtn.)

¹⁸ 18 U.S.C. § 201(c) states, in pertinent part:

(cont'd)

attorney who violates 18 U.S.C. § 201(c) is subject to revocation or suspension of his or her license to practice law. *See, e.g., Disciplinary Counsel v. Blaszak*, 819 N.E.2d 689, 694 (Ohio 2004) (license suspended for two years; citing cases where license suspended indefinitely).

In addition to criminal liability, a violation of the statute also violates MRPC 3.4(b), which provides that “[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law,” MRPC 3.4(b), and MRPC 8.4(b), which makes it “professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MRPC 8.4(b).

Under Fifth Circuit precedent, counsel’s ethical violations in this case mandate disqualification at a minimum. In *Sealed Appellant 1 v. Sealed Appellee 1*, 211 F.3d 252 (5th Cir. 2000), attorney Joseph Bruno represented plaintiffs in a federal class action arising out of an explosion at a Shell Oil Company refinery. *See In re Bruno*, 956 So. 2d 577, 577 (La. 2007).¹⁹ During the course of that representation, Bruno was introduced to a company “insider.” *Id.* at 577-78. The insider expressed a willingness to help Bruno with the case, but wanted to be paid for his time. *Id.* at 578 & n.1. Bruno paid him \$5,000 “with the agreement that [the insider] would keep track of his time and expenses.” *Id.* at 578.

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(2) [Whoever] directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person’s absence therefrom; . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2).

¹⁹ Because the Fifth Circuit’s opinion in this case was based upon a record that was under seal, many of the underlying facts are culled from the Louisiana Supreme Court’s decision addressing the same conduct, which was not under seal. *See In re Bruno*, 956 So. 2d at 577-81.

The Fifth Circuit affirmed Bruno’s one-year suspension from practicing law in the federal courts, holding that his payment to the “insider witness” violated Louisiana’s Rule 3.4(b), which provides that “[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law,”” *Sealed Appellant 1*, 211 F.3d at 255-56 & nn.3, 4 (quoting La. Rules of Prof’l Conduct R. 3.4(b)), and Rule 8.4(c) and (d), which makes it ““professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] that is prejudicial to the administration of justice””), *Sealed Appellant 1*, 211 F.3d at 255-56 & n.4 (quoting La. Rules of Prof’l Conduct R. 8.4(c), (d)).²⁰

The Louisiana Supreme Court reached the same conclusion in ordering Bruno’s eighteen-month suspension from practicing in the Louisiana state courts. *See In re Bruno*, 956 So. 2d at 582-83. The court held that Bruno “made a prohibited monetary payment to a witness,” which “violated the integrity of the judicial system and undermined the proper administration of justice, causing a potentially adverse effect on the legal proceeding.” *Id.* at 582. The court affirmed the hearing committee findings, which held that “the payment was a potential cause of interference with the outcome of the proceeding.” *Id.* at 579. Notably, the committee recommended a one-year suspension even though it concluded that Bruno’s “motive in paying [the insider] was to ensure that justice would be served.” *Id.* at 579-80 & n.3.

Similarly, in *In re PMD Enterprises, Inc.*, 215 F. Supp. 2d 519 (D.N.J. 2002), the court revoked the *pro hac vice* admission of an attorney under highly analogous facts. *See id.* at 529-30. There, the attorney’s investigator offered to pay a company’s former “insider,” who was “a key fact witness,” an hourly fee of \$100 “to review and organize certain documents and records.” *Id.* at 522. Citing New Jersey’s Rule 3.4(b) and 18 U.S.C. § 201(d), the court held that

²⁰ Bruno was also sanctioned for making misleading statements about the payment to the courts. *In re Bruno*, 956 So. 2d at 582.

revocation was warranted, *see PMD Enters.*, 215 F. Supp. 2d at 529-30, because, *inter alia*, the attorney “approved the payment of compensation to fact witnesses for reasons other than their time lost traveling to Court and physically testifying.” *Id.* at 524.

Notably, counsel violated 18 U.S.C. § 201(c)(2) regardless of whether they asked the Rigsbys to testify in any particular way. *See United States v. Blaszak*, 349 F.3d 881, 887 (6th Cir. 2003) (rejecting defense that payment to witness was made to secure truthful testimony, explaining that plain language of statute prohibited sale of all testimony).

Of course, in this case, the Court is not called upon to decide the issue of counsel’s criminal liability. But this Court is charged with safeguarding the integrity of the adversarial process. Here, the fact that the Relators in this Action were highly paid “consultants” perverts the truth-seeking process, and threatens State Farm’s due process right to a fair trial.

VI. COUNSEL’S USE OF THE RIGSBYS TO ACCESS DOCUMENTS VIOLATED MRPC 4.4 AND 8.4

Counsel’s illicit use of “highly placed insiders” to obtain documents and information regarding State Farm outside of the discovery process, and unauthorized access to State Farm’s password-protected databases, further violated MRPC 4.4, which prohibits an attorney from “us[ing] methods of obtaining evidence that violate the legal rights of [third persons].” MRPC 4.4(a). The rights of third persons “include legal restrictions on methods of obtaining evidence from third persons.” MRPC 4.4 cmt. MRPC 8.4, in pertinent part, states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] . . . engage in conduct that is prejudicial to the administration of justice.” MRPC 8.4(c) and (d).

The *Renfroe* court has already found that Scruggs and the Rigsbys clearly violated the legal rights of a third party – Renfroe – and “engaged in a cooperative effort” to misuse

confidential information. (See *E.A. Renfroe*, Op. at 9, Ex. 17 to Mtn.) 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.)

In *Arnold v. Cargill Inc.*, No. 01-2086 (DWF/AJB), 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 *1-3, *14. The court held that such conduct violated Minnesota’s substantively identical version of Rule 4.4, 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.* at *14; *see also In re Shell Oil Refinery*, 143 F.R.D. 105, 108 (finding that plaintiffs’ counsel had “effectively circumvented the discovery process” by obtaining documents from employee of defendant), *amended*, 144 F.R.D. 73 (E.D. La. 1992).

VII. THERE IS NO “PUBLIC POLICY” JUSTIFICATION FOR COUNSEL’S MISCONDUCT

Counsel have previously proffered a series of “public policy” arguments to justify the Rigsbys’ theft of thousands of confidential documents. The underlying premise of all of these arguments is that Scruggs’s conduct should be excused because he was aiding the Rigsbys in exposing insurance fraud. But even if the Rigsbys’ assertions are fully credited - - (which, as discussed below, would be contrary to Kerri Rigsbys’ deposition testimony, demonstrating conclusively that there was no insurance fraud) – counsel’s conduct was still not justified. This is made clear by the *Bruno* cases. There, the hearing committee expressly found that Bruno’s “motive in paying [the insider] was to ensure that justice would be served.” *In re Bruno*, 956 So. 2d at 579 n.3. Notwithstanding this “public policy” argument, Bruno was found to have violated the ethical rules and was suspended from practicing law in both state and federal court. *Id.* at

582-83; *Sealed Appellant 1*, 211 F.3d at 254, 256. In this case, the much milder sanction of disqualification is clearly warranted – at a minimum.

A recent report issued by the court-appointed Special Master in *Carpenters Health & Welfare Fund v. The Coca-Cola Company*, No. 1:00-CV-2838 (N.D. Ga. filed Oct. 27, 2000), similarly rejected virtually identical “public policy” excuses. There, two former Coca-Cola executives who were fired by the company approached class counsel, offering to assist them in the prosecution of the lawsuit. *See* (Special Master’s Report & Recommendation Regarding Plaintiffs’ Motion for Class Certification at 49-51, Ex. 18 to Mtn.). After interviewing them, Plaintiffs’ counsel concluded that the two former executives could provide meaningful assistance in the litigation and hired them as “consultants.” Under the terms of the consulting agreement, the former executives were each guaranteed a minimum payment of \$75,000. One “consultant” also agreed to give Plaintiffs’ counsel numerous confidential documents that he took from Coca-Cola prior to leaving the company. *Id.* at 51.

The Special Master found that this so-called consulting arrangement constituted an improper agreement to purchase stolen company documents. Finding that counsel’s conduct violated several ethical rules, the Special Master recommended that the attorneys and their law firm be disqualified from serving as class counsel. In reaching this result, the Special Master specifically rejected counsel’s attempt to justify their conduct on public policy grounds:

The only argument of Plaintiffs’ counsel that comes close to addressing this critical and controlling issue is their contention that [the former executive] is a whistleblower who has provided assistance to private Plaintiffs relative to the enforcement of securities laws and that because his actions are in furtherance of stopping corporate fraud, the theft of documents as well as their subsequent purchase is justified. They argue that the public policy embodied in the whistleblower laws such as the Sarbanes-Oxley Act, 15 U.S.C. § 7201 *et seq.*, is to encourage reporting of corporate misconduct and further, note that many whistleblower statutes provide monetary compensation to encourage the reporting of misconduct (e.g. a *qui tam* plaintiff may be paid up to 30% of the recovery).

Thus, they apparently conclude that payments to whistleblowers such as [the former executive] for the stolen documents are consistent with the intent of whistleblower statutes and the public policy they reflect.

That argument is also rejected. The argument conflates two separate concepts – the public policy to deter corporate fraud and other misconduct as reflected in numerous statutes and court decisions on the one hand, and the means that may be employed in furtherance of such public policy. The Sarbanes-Oxley Act encourages employees of public traded companies to assist in, among other things, prosecution of violation of securities laws. It does so by providing them protection against retaliation. But it nowhere gives license to whistleblowers to violate the law themselves in connection with their assisting in prosecuting those who violate the securities laws.

Plaintiffs cite to nothing that supports the proposition that in the furtherance of any public policy a party is authorized to use unlawful means, and certainly has pointed to nothing that would authorize the purchase or use of stolen documents in this case.

Id. at 62-63.

In this case, the Rigsbys could be expected to argue (as they have done previously) that the fact that they are *qui tam* plaintiffs allegedly exposing insurance fraud justifies their misconduct. But the FCA manifestly does *not* permit a litigant or its lawyers to disregard the ethical rules or to bypass the discovery process. Rather, “[o]nce a False Claim Act suit is filed, discovery generally proceeds under the Federal Rules of Civil Procedure, *as in any other civil action*, [subject to certain distinctions that are inapplicable here].” 2 John T. Boese, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS § 5.07 & n.452 (3d ed. 2006) (emphasis added). Here, the Rigsbys admittedly stole thousands of State Farm’s confidential documents in June 2006, which was two months *after* they filed this lawsuit.

VIII. THE TESTIMONY OF KERRI RIGSBY ESTABLISHES THAT NO ALLEGED WRONGDOING ON THE PART OF STATE FARM CAN JUSTIFY THE RIGSBYS’ ACTIONS AND THEIR LAWYERS’ UNETHICAL CONDUCT

In the *Renfro* and *McIntosh* actions, Scruggs repeatedly claimed that his malfeasance was justified because State Farm was committing fraud. This argument is flawed for a number

of reasons.

First and foremost, Relators' lawyers are manifestly not free to disregard their ethical duties and the discovery rules because they believe that State Farm is acting fraudulently. Moreover, when the unvarnished facts underlying Relators' claims are examined, it is readily apparent that the assertion that State Farm regularly procured fraudulent engineering reports to avoid paying for wind damage is a fabrication. For instance, Relators in this case merely repeat the same allegation made by the plaintiffs in the *McIntosh* case, namely, that State Farm defrauded them by concealing the existence of the initial engineering report pertaining to their property dated October 12, 2005. (*See* FAC ¶¶ 66-77.) Relators further contend that State Farm was not happy with the October 12 report (which they claim indicated that their house was completely destroyed by wind), so State Farm demanded that Forensic issue a second, more favorable report dated October 20, 2005, which indicated wind *and flood* damaged the property. (*Id.* ¶¶ 68-77.)

However, Relator Kerri Rigsby's own testimony establishes conclusively that the October 20 report was not improper, let alone fraudulent. In fact, her testimony established that: (i) the second report was both more accurate and more complete than the first; (ii) it was consistent with her own conclusions based on her personal inspection of Plaintiffs' house; and (iii) State Farm had good reason to be concerned with the first report's lack of completeness. (*See* Dep. of Kerri Rigsby in *Melissa and Andrew Marion v. State Farm Fire & Casualty Co.*, Case No. 1:06-cv-00969 LTS-RHW (U.S.D.C. So. Dist. Miss. filed September 21, 2006) ("K. Rigsby *Marion* Dep. at 138-143)²¹

First, there is no question that Kerri Rigsby – who personally inspected the McIntoshes'

²¹ All pertinent portions of Kerri Rigsby's deposition testimony in *Marion* are attached to State Farm's Motion as Ex. 19.

property – found both “flood and wind damage.” (Dep. of K. Rigsby in *Marion* on June 20, 2007 at 140:9-15.) This is why a determination was made to pay the \$250,000 policy limit under their flood policy – which the McIntoshes received and accepted – and also to pay for damage that could be determined to have been caused by wind. (*See id.* at 132:23-133:6.) But the conclusions in the October 12 report did not mention *any* flood damage to the house. (*See id.* at 138:8-139:7.) Kerri Rigsby admits that the October 12 report, standing alone, did not support the \$250,000 flood payment that she authorized and she believed “there was \$250,000 worth of flood damage to that home.” (*Id.* at 139:9-23.)

Kerri Rigsby further testified that, based on her personal involvement in the adjustment of the McIntoshes’ claim, State Farm had good reason to be concerned that the October 12 report was incomplete because it failed to address all of the damage to their home. (Dep. of K. Rigsby in *Marion* on June 20, 2007 at 139:25-140:8, 143:1-9.) Finally, Kerri Rigsby admitted that the October 20 report did *not* fraudulently “alter” the conclusions of the October 12 report, as the SKG has repeatedly contended. Rather, the October 20 report is simply more fulsome than the earlier report and includes *accurate* additional details regarding the wind damage as well as *accurate* conclusions about flood damage. (*See id.* at 141:4-142:24.)

Kerri Rigsby’s testimony demonstrating that there was no fraud is bolstered significantly by the testimony of engineer Brian Ford. Ford was formerly employed by Forensic Analysis & Engineering Corporation (“Forensic”) and worked on several State Farm matters. In fact, he *wrote* the original October 12 report. Ford testified that the supposedly fraudulent October 20 report is, in fact, more accurate and complete than the October 12 report. (Dep. of B. Ford in *McIntosh* at 302:7-303:8, Ex. 20 to Mtn.) In fact, Ford confirmed that he agreed with all three conclusions reached in the October 20 report. (*Id.*)

In short, Kerri Rigsby and Brian Ford's testimony establishes that there was no fraud involved in the handling of the McIntoshes' claim. There is similarly no merit to Relators' conclusory allegations of coerced engineering reports in this case. Therefore, Relators cannot justify their attorneys' multiple violations of the ethical rules with shadowy allusions to nefarious deeds by State Farm which Kerri Rigsby's own testimony disproves. If anything is clear, it is that Scruggs and his cohorts have time and again distorted the record, exalted their own personal interest above the integrity of the judicial process (and their own clients), and wrongly accused State Farm of egregious fraudulent activity, all for personal gain.

IX. COUNSEL'S SERIOUS IMPROPRIETIES WARRANT DISQUALIFICATION OF THE FIRMS AND DISMISSAL OF THE ACTION

The same factors that mandated disqualification in *McIntosh* are present in this case. Here, counsel's malfeasance was blatant, it took place over the course of several months, and it involved repeated violations of the prohibition against paying non-expert witnesses. As in *McIntosh*, these sham payments to the Rigsbys – while independently sufficient to warrant disqualification – are merely part of a much larger pattern of ethical misconduct. In *McIntosh*, the Court recognized that merely disqualifying counsel would not, in itself, be sufficient to ameliorate the damage to State Farm or the judicial process. Thus, the Court further ordered that the Rigsbys be disqualified as witnesses and all of the illicitly obtained documents be excluded from the Katrina-related cases against State Farm.

In this case, the proper remedy for counsel's malfeasance is disqualification and dismissal of the action. Here, the Rigsbys' FAC is wholly derived from their illicit conduct. In *Ackerman*, the court found that where, as here, "plaintiffs have based a substantial number of their allegations against defendants on information provided by an 'insider,'" dismissal is the

only remedy that “prohibits plaintiffs from obtaining an advantage that they would not otherwise have achieved but for the [unethical conduct].” *Ackerman*, 887 F. Supp. at 512.

This rule applies with special force in this case because the Rigsbys aided and abetted their counsel’s unethical and illegal conduct. In *Stephen Slesinger, Inc. v. The Walt Disney Co.*, 155 Cal. App. 4th 736 (Ct. App. 2007), plaintiff employed a private investigator to obtain documents from defendant outside of the discovery process, and it then gave the documents to its attorneys to use in prosecuting the case. Affirming the trial court’s dismissal of the action, the court explained, “[t]he demise of [plaintiff’s] lawsuit has one cause only: the deliberate and egregious misconduct of [plaintiff] itself, making any sanction other than dismissal inadequate to ensure a fair trial.” *Id.* at 776. The same can be said about this case.

CONCLUSION

For all of the foregoing reasons, State Farm respectfully requests that the Court: (i) disqualify Bartimus, Frickleton, Robertson & Gorny, PC, Graves Bartle & Marcus, LLC, and all of the lawyers associated with these firms from representing Relators Cori Rigsby and Kerri Rigsby in this case; and (ii) dismiss the First Amended Complaint with prejudice.

This the 8th day of April, 2008.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Jeffrey A. Walker, one of the attorneys for State Farm Fire and Casualty Company, 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 8th day of April, 2008.

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