

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

**GLENDA SHOWS; THOMAS L. ARNOLD
And ANN C. ARNOLD; ESTATE OF
ALFRED PEPPERMAN, Deceased, DAVID
And PENNY JONES; ELLEN SUMMERS and
STEPHEN F. SUMMERS; STEPHEN P.
THOMPSON and PATRICIA B.
THOMPSON; WAYNE HARBOUR;
SHERROD WILLETTE and MARY
WILLETTE; ROBERT C. GIVENS; TED
THOMAS and DONNA THOMAS; ALAN
LIPSKI; SANDRA SIMPSON; CHARLES J.
LINKEY and JOYCE A. LINKEY;
MICHAEL HEITZMANN and PATRICIA
HEITZMANN; DALE M. HILL, SR.; PAUL
GLOYER and CONSTANCE GLOYER;
RONALD E. NUGENT and BARBARA P.
NUGENT; CHET CARTER; GINGER
THACKREY and DEBRA JOINER;
JEFFREY PICKLICH; CRAIG FARON
TROUB and MARION TROUB**

PLAINTIFFS

VS

CIVIL ACTION NO. 1:07-cv-709-LTS-RHW

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, an Illinois
Corporation; STATE FARM FIRE AND
CASUALTY COMPANY, an Illinois
Corporation; FORESIC ANALYSIS &
ENGINEERING CORPORATION, a Florida
Corporation; ROBERT K. KOCHAN,
Individually, as agent of, and d/b/a
FORENSIC ANALYSIS & ENGINEERING
CORPORATION; E.A. RENFROE &
COMPANY, INC., a Georgia corporation;
GENE RENFROE and JANA RENFROE,
Individually, as agents of and d/b/a E. A.
RENFROE & COMPANY, INC.; JOHN and
JANE DOES 1-25**

DEFENDANTS

**PLAINTIFF'S RESPONSE TO E. A. RENFROE & COMPANY, INC.'S
MOTION TO DISQUALIFY THE BARRETT LAW OFFICE, P.A., NUTT &
MCALLISTER, PLLC, THE LOVELACE LAW FIRM, PA., HESSE &
BUTTERWORTH, PLLC AND THE KATRINA LITIGATION GROUP**

I. INTRODUCTION

Renfroe's Motion to Disqualify is dishonest and insufficient for all of the reasons already briefed to the Court in Plaintiffs' Response to State Farm's ("SF's") Motion to Disqualify. Given that Renfroe has joined in SF's Motion to Disqualify and to avoid unnecessary redundancy, Plaintiffs hereby incorporate their Response to SF's Motion in its entirety.

In addition to joining SF's Motion to Disqualify, however, Renfroe has made a few additional arguments and cited additional case law, which will be addressed below.

A. Renfroe's Unsupported Motion Seeks to Harass Plaintiffs and Their Chosen Counsel, As Well As Delay and Obstruct Justice.

Defendants' Motion attempts to: 1) distract Plaintiffs and their counsel from focusing on the merits of this case, 2) deflect the public's and this Court's attention away from the Defendants' wrongdoing, and 3) delay justice for Plaintiffs and their families.

Renfroe has known about the roles of Plaintiffs' current (and former) counsel and their relationships with the Rigsbys for many months and yet only now files its Motion to Disqualify. Renfroe's delay evinces the purpose of this Motion, which is to derail this case from proceeding to trial and thwart Plaintiffs from using their chosen counsel – counsel that is experienced and knowledgeable about the Movant's misconduct. Renfroe's Motion is without legal or factual merit.

B. Overview of Renfroe's Motion

Approximately two years ago, two of Renfroe's employees, the Rigsbys, were so offended and disturbed by the fraud they saw their company and State Farm perpetrating against Gulf Coast policyholders that they took a stand. At the risk of being fired, at the risk of being sued, at the risk of being effectively excommunicated from the insurance industry (an industry in which they had been employed for many years), the Rigsbys approached private attorneys and asked for help in uncovering fraud on the government. Their actions were "authorized by law" as explained in Plaintiffs' Response to SF's Motion to Disqualify.

Renfroe attempts to rely upon mere allegations in other pending cases to somehow "prove" misconduct here. Renfroe's attempts to stir this Court – which is not presiding over the cases Renfroe now belatedly discusses – by juxtaposing unproven allegations, personal attacks and innuendo is unfortunate.

Perhaps more telling than Renfroe's accusations are all of the things Renfroe leaves unsaid – all of the facts that Renfroe purposely avoids admitting. Renfroe failed to admit to this Court that no court has disqualified KLG or its constituent attorneys and firms from any case, anywhere, at any time. Further, Renfroe fails to mention that Richard Scruggs ("Scruggs"), who no longer represents Plaintiffs here, has also not been disqualified by any court, in any case, at any time. Nor have any attorneys at his firm. Additionally, Renfroe neglects to inform the Court that none of the KLG attorneys have ever had their bar licenses suspended or revoked due to misconduct. Likewise, neither Renfroe, nor State Farm, nor their counsel have lodged a single bar complaint for the alleged misconduct upon which they base their untenable motions. Further still, Renfroe fails to respect or mention the rule of law, the U.S. Constitution, and fundamental principles of justice, which hold that individuals are deemed innocent until proven guilty.

Instead of admitting any of this, Renfroe attempts to use the recent indictment of Scruggs and attorneys at his firm, who are no longer counsel on this case, to somehow have all of the KLG disqualified. Renfroe fails to inform the Court that not one of the Scruggs attorneys has been found guilty of the criminal charges Renfroe attempts to exploit to its advantage in this Motion, and not a single indictment has been filed nor have allegations of criminal wrongdoing been proffered against any KLG lawyer.

Maybe most telling of all is Renfroe's willingness to use outright falsehoods to support its Motion. For instance, Renfroe and its attorneys (who are supposed to be officers of the Court) claim that Don Barrett, a member of the KLG, possibly retained documents in violation of an injunction issued by the Northern District of Alabama:

Moreover, on January 27, 2007, Don Barrett, Plaintiffs' attorney and current lead-counsel for the KLG, called counsel for the Renfroe Company and offered to return documents, well after Judge Acker's order requiring return of the stolen documents, which may have been covered by the preliminary injunction, as part of a settlement offer. (E.A. Renfroe & Co., 508 F. Supp. 2d at 991.)

Memorandum in Support of Renfroe Motion to Disqualify, p. 10.

This statement by Renfroe and its attorneys was knowingly false. Renfroe had previously asserted this before Judge Acker in the Alabama case between Renfroe and the Rigsbys. In that case, a record was developed and Judge Acker reviewed that record. At the conclusion of his review, Judge Acker found Renfroe's arguments to be unfounded. In his Memorandum Opinion, issued by the Northern District Court of Alabama, Judge Acker found "no evidence" that Mr. Barrett in any way violated the injunction:

Renfroe argues that Scruggs Katrina Group member Don Barrett's offer to provide additional documents to Renfroe . . . constitute[s] further evidence of contumacious conduct that calls for punitive sanctions. **The Court disagrees. There is no evidence that the documents Barrett offered "refer to or relate to any insurance claims involving damage caused or alleged to have been**

caused by Hurricane Katrina in the State of Mississippi” and therefore falls within the scope of this injunction.

Judge Acker’s Memorandum Opinion, June 15, 2007 (Emphasis added) (Attached as Exhibit 1).

If Judge Acker himself found no violation of his own injunction, why is Renfroe claiming that Mr. Barrett may have violated it more than 6 months after the District Court for the Northern District of Alabama already addressed this issue? Renfroe’s dishonest allegations violate Rule 11 and warrant sanctions.

II. Factual and Legal Analysis

The proper analysis of the facts at issue is detailed by outside ethics experts retained by Plaintiffs to review State Farm’s Motion and the issues raised therein. *See* Declaration of Geoffrey Hazard and Letter from Cham Trotter (Attached as Exhibits 2 and 3). One of Plaintiffs’ experts, Geoffrey Hazard, is a leading national authority on ethics and has been cited extensively by courts around the country, including by the Fifth Circuit Court of Appeals. Professor Hazard literally wrote the book on professional ethics. *See The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, Geoffrey C. Hazard and W. William Hodes, (1994); See also The Law and Ethics of Lawyering, Fourth Edition, Geoffrey C., Jr. Hazard, Susan P. Koniak, Roger C. Cramton, and George M. Cohen (4th Edition, 2004), inter alia.* As with Professor Hazard, another of Plaintiffs’ experts, Cham Trotter, possesses impeccable legal credentials, substantial experience and specialized expertise with respect to ethical issues. In particular, Mr. Trotter is one of Mississippi’s foremost experts on the Mississippi Rules of Professional Conduct as well as the Mississippi Supreme Court decisions interpreting and applying such rules. Plaintiffs have also retained Mississippi attorney Mike Martz. Mr. Martz, along with Mr. Trotter, is one of Mississippi’s most knowledgeable ethics

experts. *See* Curricula Vitae for Professor Hazard and Mr. Trotter, attached hereto as Exhibits 4, and 5, respectively.

- a. **The actions of the Rigsbys and Mr. Scruggs comport with mandatory statutory *qui tam* requirements regarding non-disclosure of the case and any assembled material evidence.**

Renfroe, as with SF, criticized communications and exchanges between the Rigsbys and Mr. Scruggs that were necessarily confidential and exclusive of the Defendants, as required by law:

The FCA details certain procedural requirements that a *qui tam* plaintiff must observe:

A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. **The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.**

United States v. Fiske, 968 F. Supp. 1347, 1349-50 (E.D. Ark 1997) (Emphasis Added).

In the *qui tam* action brought by the Rigsbys with the assistance of Richard Scruggs on behalf of the government, the seal had not been lifted at the time of the Alabama litigation nor at the time SF's First Motion was filed. However, the seal has now been lifted by this Court, confirming that Mr. Scruggs and the Rigsbys have had an attorney-relator relationship. (Attached as Exhibit 6)

Thus, SF's and Renfroe's filings, both in this case and in the Northern District of Alabama, were devoid of context. The Defendants have defrauded the government and their insured policyholders. Both civil and criminal investigations by the federal government and state governments are ongoing. *See* federal grand jury subpoena served on Kerri Rigsby on July 2, 2007 (Attached as Exhibit 7). **Most of Renfroe's cited cases, as well as SF's, are NOT qui**

tam cases and are, thus, far removed from the facts of this case relating to the conduct of the Rigsbys. This Court should decline Renfroe's and SF's latest repeat attempt to undermine the very purposes and requirements of the False Claims Act.

b. State Farm Failed to Show Prejudice, As Required by Rule 4.2.

Even when grounds for disqualification do exist, which is not the case here, a movant must also show prejudice before obtaining a disqualification. A federal district court was recently reversed by the Third Circuit Court of Appeals for granting a disqualification. The reversed district court initially disqualified attorneys for many of the same alleged ethical violations (including supposed Rule 4.2 violations) discussed by SF in its initial Motion months ago in *McIntosh*, and by both SF and Renfroe in their recent disqualification motions in this case.

In reversing the district court, the Third Circuit Court of Appeals cited the "draconian" nature of disqualifications and, accordingly, the heavy burden borne by any movant seeking such a deprivation of chosen counsel. In particular, the Third Circuit Court of Appeals held that disqualifications under Rule 4.2 and the other ethical rules require a showing of prejudice, not allegations that *ex parte* communications occurred:

Moreover, even if Richardson were covered by Rule 4.2, the district court did not indicate how Defendants were prejudiced by Barnett's communications with Richardson. See *Univ. Patents*, 737 F. Supp. at 329 (stating that, "[i]n determining the proper sanction or remedy [in the case of a Rule 4.2 violation], the court must consider the client's right to be represented by the counsel of his choice, as well as the opposing party's right to prepare and try its case without prejudice," and concluding that **there was "not sufficient evidence ... to conclude that plaintiff has been so severely prejudiced that the draconian measure of disqualification of counsel"** was warranted) (internal quotations omitted). . . . Because Defendants accordingly were not prejudiced by Barnett's communications with Richardson, the draconian measure of disqualification was not warranted.

The district court's reliance on Rule 4.4, which prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third person, similarly suffers from a lack of evidence of prejudice to Defendants.

EEOC v. HORA, Inc., 2007 WL 1875834, *3 (3d Cir. June 29, 2007) (unpublished) (Emphasis Added) (Attached as Exhibit 8).

In the case at bar, Defendants have not produced any evidence showing that they have been prejudiced, much less evidence of the “severe prejudice” that might warrant “the draconian measure of disqualification of counsel.” SF and Renfroe both merely claim they have been prejudiced, but such bare *ipse dixit* statements fall far short of the heavy burden a party must meet to advance a disqualification motion. The only thing severely prejudicing the Defendants are the facts concerning their own wrongdoing. Further, Defendants have not shown that any information obtained by and used by Plaintiffs’ counsel falls outside of the scope of Plaintiffs’ discovery requests.

c. The KLG Has Never Represented the Rigsbys as *Qui Tam* Relators And Has No Conflict of Interest Under Rule 1.7.

Citing Mississippi Rule of Professional Conduct 1.7, which prohibits attorneys from representing one client when such representation will be directly adverse to another client, or where the representation of one client may be materially limited by the attorney’s responsibilities to another client, Defendant asserts that Mr. Scruggs’ contact with the Rigsbys as well as his previous representation of these Plaintiffs violated Mississippi Rule of Professional Conduct 1.7.

First, Renfroe’s argument is directed at the wrong attorneys. None of the attorneys in the KLG represent nor have ever represented the Rigsbys as *qui tam* relators. The Rigsbys were/are represented by the Scruggs Firm and other firms (not within SKG or KLG). Thus, any alleged conflict of interest with the Scruggs firm, which did not exist, is altogether irrelevant to the KLG. The SKG joint venture agreement clearly defines the scope of that group’s litigation efforts, none of which encompassed the *qui tam* litigation. (Attached as Exhibit 9) Instead, the SKG (and

now the KLG) represents Mississippi policyholders, including the Plaintiffs in this case. Further, the KLG does not represent any witnesses in this litigation (*qui tam* relators or otherwise) such that no conflicts of interest exist nor will exist at trial

Second, there is no conflict of interest between these Plaintiffs and the Rigsbys. The Rigsbys are *qui tam* relators who have blown the whistle on the Defendants' fraud on the government and Mississippi policyholders. Thus, the Rigsbys' interests are not "directly adverse" to, but instead directly aligned with, the Plaintiffs' interests. *See* Letter from Cham Trotter, p. 4. (Attached as Exhibit 3) The fact that the Rigsbys are assisting the government as relators, while the Plaintiffs are protecting their private interests in this case does not alter these simple facts. The Defendants' bare allegations and conjecture about supposed conflicts that existed at a former time with former counsel are insufficient to carry their specific factual burden to prove an actual ongoing conflict of interest. SF and Renfroe are adversaries in these proceedings attempting to escape liability for their actions at all costs, rather than disinterested entities nobly pointing out substantiated conflicts of interest. Put simply, there is no conflict.

Third, Renfroe builds its argument on a faulty premise. Mr. Scruggs did represent the Plaintiffs, but he does not and did not represent the Rigsbys as primary parties of interest. Mr. Scruggs has not ever represented the Rigsbys in any litigation in which they were the party of interest. Instead, as discussed above, Mr. Scruggs has assisted the Rigsbys as relators attempting to vindicate and protect the rights of the government. When operating in that capacity, the Rigsbys and Mr. Scruggs were/are actually acting as attorneys for or agents of the government. The government is the party of interest that has been directly injured financially.

Attempting to advance their claim that the KLG has a conflict of interest, Defendant asserts that Plaintiffs' former counsel's conduct in negotiating a settlement approximately one

year ago gives the appearance of impropriety and demonstrates a possible conflict of interest. *Renfroe Memorandum*, pp. 23-24. Renfroe is simply wrong. Again, Mr. Scruggs obtained documents from the Rigsbys as an attorney bringing a *qui tam* suit on behalf of the United States in which the Rigsbys served as government whistleblowers uncovering a massive fraud perpetrated by the Defendants. Further, nothing allegedly done by Mr. Scruggs worked to the detriment of either the Rigsbys or represented policyholders.¹

Fourth, just as there is no conflict between the Rigsbys interests and the Plaintiffs here, there is also no conflict between the government's interests and these Plaintiffs' interests. Both the government and the Plaintiffs seek a recovery of any illegally obtained revenues held by SF, among other remedies.

Perhaps due to its misunderstanding of the facts, Renfroe improperly relies upon *Dauro v. Allstate Ins. Co.*, Civ. A. No. 1:00cv138Ro, 2003 WL 22225579 (S.D. Miss. Sept. 17, 2003), *aff'd*, 114 F. App'x 130 (5th Cir. 2004). *Renfroe Memorandum*, p. 9. In *Dauro*, the plaintiff brought suit against Allstate for breach of good faith in an uninsured motorist claim. The attorney in *Dauro* was privy to the work product and litigation strategy of the defendants before

¹ In both SF's and Renfroe's Motions, lacking actual facts necessary to advance their impropriety arguments against the KLG attorneys, the Defendants rely heavily upon "appearance of impropriety" arguments. Defendants point to alleged, unproven improprieties in other cases committed principally by attorneys who are not members of the KLG. However, an attempt to seek disqualification based upon an attorney's alleged improprieties committed in a separate case should be disregarded. *See Herwig v. Marine Shale Processors*, 1994 U.S. Dist. LEXIS 231, *3 (D. La. 1994) (Unfounded allegations of improper conduct in another suit are irrelevant to the question of qualification of counsel.). Likewise, Defendants' attempt to have members of the KLG disqualified based upon the indictment of attorneys who are not members of the KLG should be denied. The indictment or investigation of a litigant's counsel does not ipso facto result in disqualification. *See United States v. Pizzonia*, 415 F. Supp. 2d 168 (E.D.N.Y. 2006) (finding that the investigation of defense counsel by the federal government on a matter unrelated to the issues before the court was not a sufficient basis for disqualification and that the right to counsel of one's own choosing outweighed public perception); *See also United States v. Gambino*, 838 F. Supp. 749 (finding that the investigation of defense counsel for tax evasion and obstruction of justice did not mandate his disqualification).

representing the plaintiffs in that case. The Rigsbys and Scruggs, unlike the employees of Allstate in *Dauro*, never met with SF attorneys nor were they privy to their work product or litigation strategy information. Renfroe's reliance on *Dauro* is misplaced.

III. The Declaration of Mr. Wolfram Is Unreliable

The Declaration of Charles Wolfram, a lawyer whose bar license is inactive and who retired nine years ago, suffers from several deficiencies. First and foremost, the declaration **assumes** alleged "facts" that have not been established and which are either inaccurate or at least in dispute. Mr. Wolfram's own words are telling:

I have no personal information that would permit me to swear to the existence of the facts on which I base my opinions.

Wolfram Declaration, ¶ 6. (Emphasis Added).

Despite this lack of information, Mr. Wolfram makes numerous assumptions in favor of the Defendants. For instance, Mr. Wolfram assumes that the relationship between SF and Renfroe is a principal-agency relationship rather than an independent contractor relationship. Then, based on this unsupported assumption, Mr. Wolfram assumes that the Rigsbys were subagents of SF. Nowhere does Mr. Wolfram's declaration reflect that he was informed of SF's formal disavowals of an agency relationship between itself and Renfroe (and the Rigsbys). Mr. Wolfram did not discuss the official statements regarding the nature of the relationship between SF and Renfroe, including, *inter alia*: 1) Sheila Birnbaum's February 21, 2007 letter;² 2) State Farm's Answer;³

² In her letter, Ms. Birnbaum flatly declared that SF and Renfroe were/are independent companies: "Renfroe is a separate company and makes its own decisions. Indeed, we have repeatedly told you that we do not control Renfroe and cannot and will not apply pressure on them to abandon what they believe is in their best interests." February 21, 2007, Letter from Sheila L. Birnbaum to Richard Scruggs. (Emphasis Added) (Ex. 10). This letter was not some singular or obscure admission in error. Instead the letter was written by one of the lead attorneys for SF

3) Renfroe's Answer;⁴ 4) the Rigsbys' deposition testimony; 5) SF's attorneys' statements during depositions;⁵ and 5) the contract between SF and Renfroe.⁶

and was sent to Scruggs, with copies sent to counsel for the Rigsbys, Attorney General Jim Hood, two Congressmen, and Mississippi's Insurance Commissioner, George Dale.

As addressed in Plaintiffs' Response to SF's Motion to Disqualify, SF (and Renfroe, who joins in SF's Motion) should be estopped now from arguing the exact opposite of what they have represented repeatedly in their contracts, during depositions, and through their senior counsel.

³ SF denied agency in Paragraph 101 of its Answer to Plaintiffs' First Amended Complaint. (Attached hereto as Ex. 11).

⁴ Renfroe denied agency in Paragraph 101 of its Answer to Plaintiffs' First Amended Complaint: "Renfroe cannot be held vicariously liable for any actions or omissions of Cori and Kerri Rigsby which this defendant did not authorize, ratify or was even aware of regarding the adjustment of Plaintiffs' claim by State Farm." (Attached hereto as Ex. 12).

⁵ In the deposition of Kerri Rigsby in *McIntosh v. State Farm*, **Dan W. Webb** (attorney for SF) disagreed with a statement that Kerri Rigsby was SF's "employee." (413:12). Mr. Webb responded to the assertion of employment/agency by stating, "I disagree with that and move to strike." (413:17). (Attached hereto as Ex. 13).

In *Marion v. State Farm*, SF attorney **John Banahan** stated that Kerri Rigsby was always an employee of Renfroe (not SF) and asked Ms. Rigsby to verify that statement: "During the entire tenure working catastrophe claims on behalf of SF, you were always a Renfroe employee; correct?" Ms. Rigsby's response was: "Correct." (67:9-12). (Attached hereto as Ex. 14).

In a deposition of Cori Rigsby in *Marion v. State Farm*, referring to Cori Rigsby, SF attorney **John Banahan stated, "She was never an employee of State Farm."** (165:25-166:1).⁵ (Attached hereto as Ex. 15).

⁶ In Section 4 to that "Independent Adjuster" agreement, the relationship between the two companies is described in detail as being strictly an independent contractor arrangement:

INDEPENDENT CONTRACTOR

ADJUSTING FIRM [Renfroe] warrants and represents that it is an independent contractor and employer of all ADJUSTERS assigned to provide STATE FARM Services under this Agreement so as to **relieve STATE FARM of any responsibility or liability whatsoever** for treating ADJUSTING FIRM'S workers as employees of STATE FARM, that ADJUSTING FIRM is responsible for the withholding and payment of all taxes (local, state, and federal) including, but not limited to, federal and state income taxes . . . **Further, ADJUSTING FIRM understands and agrees that neither it nor its adjusters or other employees are entitled to STATE FARM's employment or benefits.**

State Farm – Renfroe "Agreement For Independent Adjuster Services," p. 5 (Attached hereto as Ex. 16) (Emphasis Added). The SF – Renfroe independent adjuster agreement emphasizes the fact that Renfroe adjusters such as the Rigsbys are employees of Renfroe, and NOT SF: "WHEREAS, ADJUSTING FIRM is in the business of providing independent claim adjusting services to clients such as STATE FARM through claim adjusters working as ADJUSTING FIRM's employees." *Id.* at 1.

Similarly, Mr. Wolfram discusses the impropriety of payments for the alteration of testimony AND for providing honest testimony, but without any factual evidence that such payments for testimony occurred:

. . . A lawyer's activity would be equally objectionable even if the lawyer accompanied the offer of payment to the witness with the statement, "**now, this is to assure that you testify truthfully, and you understand that, right?**" *LEL, Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1525-26 (S.D. Fla. 1994) ("Golden Door"); *In re Howard*, 69 HI. 2d 343, 372 N.E.2d 371 (1977) (ordering disciplinary suspension of lawyer who paid money to police officer who had arrested lawyer's client, assertedly to assure that officer testified truthfully); see generally Restatement of the Law Governing Lawyers § 117, cmt. b, rep. note, at 214-15.

Wolfram Affidavit, ¶ 34.

*The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee **for testifying**.* (Emphasis supplied.)

Id. ¶ 35. (Emphasis added).

The sworn affidavits of both Mr. Ford and Mr. Wyatt (Exs. 17 and 18, respectively) contradict Mr. Wolfram's unsubstantiated assumption that any such *quid pro quo* of money for testimony was ever offered, much less accepted. He glosses over the fact that the Mississippi Rules do not prohibit payments for time and consultation. Similarly, the Rigsbys have not been, nor would ever be paid by KLG to testify.⁷ Further, neither the Rigsbys nor Mr. Ford, nor any other fact witnesses are being paid by KLG. Mr. Wolfram's analysis is divorced from the facts.

Under Defendants' and Mr. Wolfram's analysis, it would be improper in a medical malpractice case, for instance, for attorneys to pay treating physician fact witnesses for meeting with them to discuss a case. Defense firms that defend medical malpractice cases, such as Mr. Banahan's, would be subject to

⁷ The Rigsbys have been deposed on multiple occasions and the Defendants have had many opportunities to explore the facts. However, they continue to ignore those facts. The Rigsbys have unambiguously stated under oath that they were NEVER paid for testimony:

21 Q. Have you been compensated for your
22 testimony in any way?
23 A. No.

Cori Rigsby Deposition, *Renfroe v. Rigsbys*, Case No. 06-WMA-152-S (Northern District of Alabama), January 14, 2008, p. 92.

disqualification if they ever paid a treating physician for his/her "time." This happens all of the time, all over the United States. Defendants and Counsel must know this, but attempt to ignore it to somehow turn the Rigsby interaction into "bribery." Notably absent from Defendants' and their Counsels' attack on Plaintiffs is a broad claim that none of them, nor any attorneys at their firms, have ever paid any fact witness (treating physician or otherwise) for any time or consultation on any case. I doubt the Court will find affidavits to that effect from Mr. Banahan and all of Defendants' Counsel attached to their Reply Brief.

Regardless of their practices, the law states that Pursuant to rule 3.4(b), "occurrence witnesses may be reasonably compensated for time spent in attending a deposition or trial; for time spent in pretrial interviews with the lawyer in preparation for testifying; and for time spent in reviewing and researching records that are germane to his or her testimony." *Centennial Mgmt. Servs. v. Axa Re Vie, et al.*, 193 F.R.D. 671, 682 (D. Kan. 2000), citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996). A witness may also be compensated for "consulting on a litigation matter in addition to the time spent providing testimony in a deposition or trial." *Prasad, et al., v. MML Investors Servs, Inc.*, 2004 U.S. Dist. LEXIS 9289, *17-18 (S.D.N.Y.), citing *Centennial Mgmt. Servs., Inc. v. Axa Re Vie*, 193 F.R.D. 671, 679-80 (D. Kan. 2000) and *New York v. Solvent Chemical Co.*, 166 F.R.D. 284, 289 (W.D.N.Y.).

Aside from its other deficiencies, Mr. Wolfram's long-winded discussion centers almost entirely on alleged actions taken by Mr. Scruggs, who is no longer representing Plaintiffs in this case. Mr. Wolfram's focus on Scruggs demonstrates that the Defendants lack information about any wrongdoing by the KLG. In an effort to gloss over this deficiency, Mr. Wolfram summarily and flatly states that "the KLG apparently operates and holds itself out as a law firm with respect to this and other Katrina-related insurance claims litigation." He has no basis for

claiming this and should not have written it because it is simply wrong. SKG did not hold itself out as a law firm and neither does the KLG. See Affidavits of Don Barrett, Dewitt Lovelace, Meg McAlister, and Derek Wyatt, attached hereto as Exhibits 19, 20, 21, and 22, respectively. Mr. Wolfram's analysis conflating cooperating, but separate, law firms with a single firm disregards their legal structures. Under Mr. Wolfram's analysis, State Farm Mutual and State Farm Fire would unquestionably be treated as a single entity under the law rather than as separate companies (as the State Farm Defendants vigorously argue).

In addition to these false assumptions, Mr. Wolfram declares that "The attempt of the KLG lawyers to promote their policyholder lawsuits against State Farm based on purloined confidential documents of the company is entirely wrongful and insupportable." Wolfram Declaration, ¶ 32. How would Mr. Wolfram know this? He has not seen the so-called "purloined documents" to know what they consist of or if any have been used. The facts are that no such documents are the basis of KLG's cases. See Affidavits of Don Barrett, Dewitt Lovelace, Meg McAlister, and Derek Wyatt, attached hereto as Exhibits 19, 20, 21, and 22, respectively.

In paragraph 47 of his declaration, Mr. Wolfram discusses other alleged "incidents of wrongdoing":

I understand that State Farm's disqualification motion will also be based on other recent incidents of wrongdoing on the part of the remaining KLG lawyers and law firms in this litigation. . . . If the asserted events occurred, they too would be deeply troubling, lending additional weight to a portrayal of the remaining KLG lawyers as over-the-top litigators who care little for the constraints under which lawyers should operate.

Id., ¶ 47 (Emphasis added). Such conjecture by an expert, much less an expert in the subject of ethics, is unfortunate and has no place in an expert declaration. Mr. Wolfram should have

restricted his opinions to events that have occurred and not assumed facts without support or that were directly contested by Plaintiffs and their Counsel.

At another point in his declaration, Mr. Wolfram attempts to predict the future. Without ever having met any of Plaintiffs' Counsel, or their former counsel (Mr. Scruggs), and without having personal knowledge of the facts of any arrangements between such counsel, Mr. Wolfram swears under oath that:

Moreover, despite the absence of Mr. Scruggs and his firm from the courtroom in this litigation, I am unaware of any basis for thinking that Mr. Scruggs and his colleagues will not continue to consult with the remaining KLG lawyers.

Wolfram Declaration, ¶ 43. (Emphasis Added) This type of "logic" is extraordinary; Mr. Wolfram's thought process is upside down. It would be akin to Plaintiffs' expert saying "I am unaware of any basis for thinking that State Farm executives will not commit murder," which would be true and, yet, ridiculous.

Mr. Wolfram's predictions about the future without "any basis" do not stop there. Mr. Wolfram also seems to have his crystal ball out when he writes:

Among other considerations, Mr. Scruggs is likely to seek compensation from the KLG lawyers remaining in this litigation, giving him a strong and continuing economic interest in their success as advocates.

Id. What possible basis does Mr. Wolfram have for saying that "Mr. Scruggs will likely seek compensation from the KLG lawyers"? None. It is raw speculation.

Likewise, Mr. Wolfram has not properly respected the Movants' substantial burden on a motion to disqualify; he has not assumed that Plaintiffs' contentions are true. He has not even seen the documents that he talks about at length. His assumptions, made without personal knowledge, are directly contradicted by those with personal knowledge. *See* Affidavits of Don Barrett, Dewitt Lovelace, Meg McAlister, and Derek Wyatt, attached hereto as Exhibits 19,

20, 21, and 22, respectively, as well as the Affidavit of Mr. Greg Hawley (Exhibit 23). It is one thing to consider the arguments made by the opposition as true and then offer opinions, but Mr. Wolfram's improper method in the case at bar is to assume only the unsubstantiated facts favorable to the party paying him.⁸

Second, Mr. Wolfram's declaration is devoid of balance and context. In his first declaration filed months ago, he failed to discuss or make allowance for *qui tam* claims. Now, he attempts to address his prior deficiency by downplaying and casting aside the *qui tam* context. Under Mr. Wolfram's analysis, if an employee discovers widespread crime and fraud at their company, he/she is supposed to talk to the company about it so as to honor confidentiality agreements. This is precisely the opposite of what the False Claim Act ("FCA") encourages and requires. The reality is that *qui tam* whistleblowers do turn to the government AND private attorneys all the time for assistance in these cases, and the Rigsbys and Mr. Scruggs' actions were in line with the law and common practice. Turning to private attorneys helps not only protect the government interests at stake but also their own as individuals. These concerns were balanced by Plaintiffs' expert, Geoffrey Hazard, in his affidavit, which provides the proper analysis here. Mr. Wolfram's overbroad presentation of fiduciary and confidentiality duties is contrary to the False Claims Act, the case law, and common sense – all of which expect and encourage the transmission of information to private attorneys and the government without the knowledge of the company being investigated. *See, e.g., Meyerhofer v. Empire Fire & Marine*

⁸ Mr. Wolfram also attempts to fault the Rigsbys consulting relationship as consisting of a "no show" job, with no "set hours," as well as hefty overpayments. Notably, Mr. Wolfram fails to point out that his own job for the Defendant State Farm is also a "no show" consulting job with no set hours. Further, Mr. Wolfram has not informed the Court of how much he has received or invoiced for his work in putting together the two largely overlapping declarations in this case.

Ins. Co., 497 F.2d 1190 (2nd Cir. 1974). Such activity is a necessary cornerstone of whistleblower cases. Mr. Wolfram should have conducted the same dispassionate, “serious and thorough review of the facts” that the United States Attorney for the Northern District of Alabama performed as part of her decision to decline prosecution of Mr. Scruggs and his firm. *See* United States Attorney Alice H. Martin’s July 25, 2007 Letter to Judge Acker (Attached hereto as Exhibit 24).

Third, Mr. Wolfram cites his own publications, various Restatement sections, and selected ethics rules, while failing to mention the express limitations and exceptions to those provisions. For instance, he fails to mention that Rule 4.2 allows *ex parte* communications “authorized by law.” He also fails to mention that disclosures can be made lawfully when a lawyer or employee anticipates the need for legal “self defense.” Similarly, he fails to mention that the Restatement of Agency and its comments delimit an agent’s duty of confidentiality and allow for the revelation of confidential information in appropriate circumstances such as those pertaining to the Rigsbys and Mr. Scruggs: “An agent’s privilege to reveal such information also protects the agent’s revelation to a private party who is being or will be harmed by the principal’s illegal conduct. Many statutes provide protection against termination to employees who engage in ‘whistle-blowing.’” Restatement (Third) of Agency § 8.05 cmt. c (2006). (emphasis added).

Thus, Mr. Wolfram’s declaration is a house of cards built on inaccurate assumptions and overbroad pronouncements that even contradict his own writings. If Mr. Wolfram’s analysis had been complete and correct, there already would have been a disqualification back in the Fall of 2007. Instead, Mr. Wolfram utterly failed to address all of the delays that led Judge Senter to properly conclude that waiver applied and that led the Fifth Circuit Court of Appeals to uphold that denial of State Farm’s first disqualification motion based on the same allegations. In

addition to the waiver and estoppel analysis (*See* Response to SF's Second Motion to Disqualify), the proper authority and reasoning is cited and supported by the Declaration of Professor Geoffrey Hazard and Cham Trotter's Letter. *See* Attached Exhibits 2 and 3.

IV. CONCLUSION

Renfroe's Motion to Disqualify largely consists of a new spin on old facts. The Rigsby-Scruggs relationship was the centerpiece of SF's first Motion to Disqualify in the instant case. In that first Motion to Disqualify, SF alleged ethical violations, including supposed violations of MPRC 1.7, 3.7, 4.2, 4.4, 8.4, and Canon 9, *inter alia*. Now, months later, Renfroe files this disqualification motion making the same arguments and citing the same alleged rule violations. As briefed above and in the Response to State Farm's Motion to Disqualify, Renfroe's Motion is unsupported, dishonest, and must be denied for numerous compelling reasons.

First, Renfroe's waiver is even clearer than State Farm's. In the *McIntosh* case, when SF filed its first Motion to Disqualify, Renfroe did not file its own disqualification motion, nor did it join in SF's. Despite knowledge of the alleged conduct for more than a year, Renfroe did nothing – not a single bar complaint, not a single motion to disqualify. Only now does Renfroe file a Motion to Disqualify. After months and years of inexcusable delay, Renfroe has waived its right to seek disqualification.

Second, the substance of Renfroe's arguments has been heard by Judge Senter and reviewed by the Fifth Circuit Court of Appeals. A nearly identical Motion to Disqualify filed months ago by SF in the *McIntosh* case has already been heard and DENIED. Renfroe had a full and fair opportunity to litigate this issue at that time and chose to add nothing to SF's briefing; Renfroe did not join in SF's Motion nor did it file its own motion. Renfroe and SF should now be estopped from re-litigating the exact issue that was already decided and reviewed.

Third, the argument that the separate law firms of the KLG are responsible for the actions of the Scruggs Firm is overbroad and unfounded. Law firms that agree to work on litigation together and jointly represent clients ARE NOT somehow responsible for the alleged criminal actions of one another. Nor is their relationship akin to lawyers in the same law firm, same professional association, or other legal entity. In the American legal system, criminal conduct must be proven and the intent/scienter requirements of the law cannot be disposed of with the two-step 1) “presumed guilty” (Scruggs) and 2) “guilt by association” (the KLG) argument made by the Defendants. There is no evidence that any lawyer in the KLG knowingly violated any laws or knowingly assisted any other person in so doing. Further, no charges or indictments have been filed against any KLG attorneys, much less a conviction. Under the Defendants’ proposed disqualification standard, every time an attorney is charged with a crime, every other attorney that the accused attorney works with as co-counsel becomes fair game for disqualification. This expansive theory is contrary to the law and fundamental principles of fairness and due process.

Fourth, Renfroe fails to recognize the ethical rules, statutes, and applicable case law that all allow for the revelation of conduct such as that perpetrated by SF and its cohorts, whether or not such revelations involve otherwise confidential information. **Fifth**, the Defendants fail to recognize that the duties of agents, even if applicable, which is not the case here, are bounded. Agents are entitled to protect their own legal interests and act in anticipation of legal self-defense. **Sixth**, the Fifth Circuit Court of Appeals has long recognized that disqualification motions are often abused by opposing parties to harass and delay, and should rarely be granted. **Seventh**, the substantial burden for justifying the drastic remedy of disqualification requires a specific showing of facts, not bare contested allegations such as those offered by Renfroe.

In this important case, the State of Mississippi and its residents need: 1) the adversarial process to continue, 2) a full and fair presentation of the facts before a jury, and 3) a final decision on the merits. Only then will all of the Parties and the public be served. Only then, will Mississippi be able to truly move on and put Hurricane Katrina behind it.⁹

⁹ Renfroe has now joined in SF's Motion to Disqualify. Given that Renfroe has joined in that Motion, which, in part, centers upon alleged FRCP 45 violations, Plaintiffs advise the Court of the Defendants' improper citation of authority. In its briefing, SF cites *United States v. Santiago-Lugo*, 904 F. Supp. 43 (D.P.R. 1995) as support for its assertion that Plaintiffs' counsel abused the subpoena power and should be sanctioned. In *Santiago-Lugo*, the defendant's counsel was found to have issued subpoenas under Fed. R. Civ. P. 45 to the police department in Puerto Rico for the personnel files of police officers, which were private and confidential under Puerto Rico law. *Id.* at 47. However, the court found that these files were "marginally relevant" to the civil case pursuant to which the subpoenas were issued and that defendant's counsel had in fact issued the civil subpoenas in order to circumvent the requirements of Fed. R. Crim. P. 17, under which information obtained pursuant to a criminal subpoena must first be presented to the court before the subpoenaing party may view it. *Id.* Defendants here should not have relied upon this case for numerous reasons. **First**, the facts before this Court are totally inapposite to those before the court in *Santiago-Lugo*; here Plaintiffs' counsel mistakenly failed to notice the subpoena in question, just as State Farm has done numerous times in Katrina litigation, and did not issue the subpoena to intentionally circumvent the criminal procedure rules. **Second**, SF's counsel was at the deposition where the documents requested pursuant to the subpoena in question were produced, but failed to raise an objection to either the production of the documents or the manner in which the subpoena was issued. **Third**, Defendants fails to inform the Court that the court in *Santiago-Lugo*, when faced with an admitted misuse of the subpoena power in order to escape the strictures of the criminal discovery process, declined to impose any sanction upon the offending party, finding instead that "...the right to counsel and to effective legal representation overrides the immediate need for imposition of sanctions." *Id.* at 48. Rather than assist the Defendants, *Santiago-Lugo* exhibits that Defendants are misguided in their efforts to disqualify Plaintiffs' counsel.

Equally misguided are Defendants' allegations that Plaintiffs' counsel improperly used the threat of criminal prosecution in an earlier Katrina case. For example, Defendants improperly cite *In re Pstrak*, 575 S.E.2d 559 (S.D. 2003), a case in which the court suspended an attorney who had written three separate letters to clerks of court representing himself as a prosecutor and demanding favorable rulings on behalf of individuals whom he represented. *Id.* at 559-560. In one of the letters, the attorney falsely intimidated that he was a friend of local government officials and implied that if his demands were not met he would seek reprisal through those individuals. *Id.* In another letter, the attorney stated that if a favorable ruling were granted his client would make a contribution to the local police. *Id.* at 560. To compare this case to those at bar is ridiculous. Likewise, Defendants also improperly cite the case of *State ex. rel. Okla. Bar Ass'n v. Egans*, 747 P.2d 277, 279 (Okla. 1987), a case wherein an attorney inquired into whether his client would be willing to make a campaign contribution to a public official in order to avoid the filing of charges against the client for lewd molestation. *Egans* too is wholly inappropriate to the issues before the Court. To the extent that the Defendants continue to conflate the allegations against Scruggs with the actions of Plaintiffs' current counsel, such conflation is improper.

Respectfully submitted, this the 1st day of February, 2008.

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I hereby certify that on the 1st day of February, 2008, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to the following counsel of record:

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