

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

THOMAS C. and PAMELA McINTOSH

PLAINTIFFS

VS

**CIVIL ACTION NO. 1:06cv1080-LTS-
RHW**

**STATE FARM FIRE & CASUALTY
COMPANY, FORENSIC ANALYSIS &
ENGINEERING CORPORATION, and E. A.
RENFROE & COMPANY, INC. and DOES 1
THROUGH 10**

DEFENDANTS

**DEFENDANT E.A. RENFROE & COMPANY, INC.'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISQUALIFY THE
BARRETT LAW OFFICE, P.A., NUTT & MCALLISTER, PLLC,
THE LOVELACE FIRM, HESSE & BUTTERWORTH, PLLC
AND THE KATRINA LITIGATION GROUP**

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Defendant E.A. Renfroe & Company, Inc. (“Renfroe Company”) respectfully submits this Memorandum of Law in support of its Motion to Disqualify the Barrett Law Office, Nutt & McAllister, PLLC, the Lovelace Firm, Hesse & Butterworth, PLLC, and all members of the Katrina Litigation Group from representing Plaintiffs in this action.¹

INTRODUCTION

Before the Court are the numerous and increasingly serious ethical violations and criminal allegations leveled against the Katrina Litigation Group (“KLG”), formerly the Scruggs Katrina Group (“SKG”), by the bench and bar, regarding the KLG’s handling of Hurricane Katrina-related insurance litigations.² (Because the KLG is responsible under the rules for the ethical violations of the SKG, as noted *infra*, the Renfroe Company makes no distinction herein between the two unless noted.) Specifically, Plaintiffs’ counsel has violated a host of ethical rules, including violations resulting from the fact that the KLG:

- has hired and is paying material witnesses, Cori and Kerri Rigsby (the “Rigsby Sisters”), \$150,000 annually as “litigation consultants,” despite explicit ethical rules and case law prohibiting counsel from giving anything of value to a material witness;

¹ The Renfroe Company hereby joins in support of Defendant State Farm Fire and Casualty Company’s Motion and Memorandum of Law In Support of Defendant’s Motion to Disqualify the Barrett Law Office, P.A., Nutt & McAllister, P.L.L.C., and the Lovelace Law Firm, P.A. and the arguments and authorities contained therein. (Dkt. Nos. 97-98.)

² Plaintiffs’ counsel was first named the Scruggs Katrina Group or SKG, which consisted of the Scruggs Law Firm, Richard “Dickie” Scruggs, Sidney A. Backstrom and David Z. Scruggs; the Barrett Law Office, Don Barrett, Marshall H. Smith, Jr. and David McMullan, Jr.; the Lovelace Law Firm, Dewitt Lovelace; and Nutt & McAlister, PLLC, David Nutt, Mary E. McAlister and Derek Wyatt. Following the withdrawal of the Scruggs Law Firm, Plaintiffs’ counsel has attempted to reinvent itself as the Katrina Litigation Group or “KLG.” Aside from the attorneys who withdrew from the Scruggs Law Firm, the KLG continues to include all of the foregoing member firms and attorneys that were part of the SKG. The KLG also added Zach Butterworth and the law firm of Hesse and Butterworth, PLLC as new members. See KLG Press Release at: <http://www.katrinalitigationgroup.com/press-release/katrina-litigation-group-forms-to-maintain-momentum-in-rico-and-individual.html>, (Exh. 1.) Although Plaintiffs’ counsel is apparently now attempting to rename itself, it continues to hold itself out to the public as the SKG and maintains the SKG website (www.scruggskatrinagroup.com), which continues to (i) actively solicit additional clients to bring suits against the Defendants in Katrina-related litigation; and (ii) keep Plaintiffs in this and other insurance litigations informed of activity relating to all ongoing cases. (Exh. 2.)

- has, through current KLG member Derek Wyatt, offered to pay another material witness, Mr. Brian Ford, an engineer at former-defendant Forensic Analysis & Engineering Corporation, more than \$10,000 a month to act as a “consultant” to the KLG on Katrina-related litigations;
- received stolen confidential information from the Rigsby Sisters in violation of Defendants’ rights;
- improperly used this stolen information to prosecute this and hundreds of other claims;
- represented the Rigsby Sisters, as well as Plaintiffs, in this and other lawsuits against the Defendants despite conflict of interest rules prohibiting dual representation and a federal court order explicitly recognizing such conflicts;
- continued to prosecute Plaintiffs’ claims despite the fact that members of the KLG will likely be called as material witnesses to rebut allegations that Defendants shredded evidence; and
- retaliated against the Renfroe Company in bad faith because the Renfroe Company has exercised its legal rights against the Rigsby Sisters.

In addition to the foregoing, any one of which alone warrants disqualification, Judge Acker of the Northern District of Alabama has appointed special prosecutors to prosecute Plaintiffs’ former lead-counsel, Richard Scruggs and his firm, for criminal contempt for “brazenly” failing to comply with the court’s order directing counsel to return documents that were stolen by the Rigsby Sisters. Moreover, on December 12, 2007, additional allegations were filed in the Southern District of Mississippi alleging that KLG member firm Nutt & McAlister, and attorneys David Nutt and Mary McAlister individually, also violated Judge Acker’s order requiring return of the stolen documents. Finally, in November 2007, a federal Grand Jury in the Southern District of Mississippi indicted Scruggs and other former members of Plaintiffs’ counsel for conspiring to bribe a Circuit Court Judge with \$40,000 in cash to obtain a ruling favorable to the SKG and current members of the KLG in a case **relating to attorney fees received for handling Katrina insurance claims**. If proven, the criminal contempt and bribery convictions would obviously go well beyond the appearance of impropriety – and would also violate a host of additional ethical rules and criminal statutes, further warranting disqualification.

Although former lead counsel Richard Scruggs and the Scruggs Law Firm recently withdrew from representing Plaintiffs following the bribery Indictment, such a withdrawal does

not cure **any** of the ethical violations committed by Plaintiffs' counsel under the ethical rules or law. In fact, rather than curing the KLG's ethical violations, former lead-counsel's withdrawal is an explicit recognition that these ethical lapses, the criminal contempt charges, and the bribery Indictment render Plaintiffs' counsel unfit and unable to prosecute Plaintiffs' claims. Significantly, even where current members of the KLG did not participate, such withdrawal has *no effect* on, and does not mitigate these ethical lapses, because both the Mississippi ethical rules and well-established case law impute each of Plaintiffs' counsels' ethical violations to all members of the KLG.

Nor should former lead-counsel's withdrawal have any effect under the circumstances present, where all current members of the KLG continue to enjoy the "benefits" of each of their individual ethical violations. For example, the KLG continues to prosecute literally hundreds of lawsuits against the Defendants based in large part on information purportedly gleaned from documents that Plaintiffs' counsel knew to be stolen. Likewise, the KLG continues to enjoy the benefits of unfettered access to the Rigsby Sisters as highly paid "consultants" in the prosecution of this and other Katrina related litigations filed by the KLG. Thus, the KLG's ethical violations are ongoing and pervasive. The fruits of these ill-gotten "benefits" are used by the KLG in their day-to-day prosecution of Plaintiffs' claims at the expense of the ethical rules, the Defendants rights and the judicial system.

Thus, based on the foregoing, and as addressed in greater detail herein, it is clear that members of the KLG are willing to evade ethical, moral, and legal standards to advance their case at any cost, and are enjoying unfair benefits as a result of their violations. Given the KLG's long history of ethical violations, coupled with the strong appearance of impropriety arising from the federal bribery Indictment and criminal contempt charges, the KLG should be disqualified from further prosecuting this case.

FACTUAL BACKGROUND

Following Hurricane Katrina, Plaintiffs' counsel filed lawsuits "against the major insurers on the Coast" to determine "whether homeowners' policies provided coverage."³ Since then, Plaintiffs' counsel has held itself out to the courts, its clients, and the public at large as "a legal team" that "has filed more cases than any other law firm or group of law firms" on this subject.⁴ Much like any law firm or legal partnership, Plaintiffs' counsel entered into a written "Joint Venture Agreement" ("Agreement") to "bring a number of lawsuits on behalf of individuals and businesses who were wrongfully denied insurance coverage for property damage arising out of Hurricane Katrina." (Exh. 3, at 1.) The Agreement appointed the Scruggs Law Firm as "lead counsel." (*Id.*) The Complaint and Amended Complaint in this matter (and in hundreds of other similar cases) are signed as "Attorneys for the Plaintiffs" by the "Scruggs Katrina Group."

A. The KLG Knowingly Obtained Stolen, Confidential Documents in Flagrant Breach of Ethical Duties

With the knowledge, participation, and encouragement of the KLG, Plaintiffs' counsel obtained documents that it knew to be both confidential and stolen from the Defendants by two now-former Renfroe Company employees, the Rigsby Sisters.⁵ In so doing, Plaintiffs' counsel

³ See, e.g., the SKG's website at: <http://www.scruggskatrinagroup.com/about-us/index.php>. A copy of the relevant portions of the SKG website, at Exh. 2.

⁴ See *id.*

⁵ Although the facts relating to the Plaintiffs' counsel's association with the Rigsby Sisters were the subject of "Defendant State Farm Fire and Casualty Company's Motion to Disqualify Attorney Richard F. Scruggs, the Scruggs Law Firm, P.A., and the Scruggs Katrina Group," the Court expressly reserved any opinion regarding the merits of the ethical violations alleged against Plaintiffs' counsel, and denied State Farm's motion because of "State Farm's delay of over a year from the time it learned of these actions before raising the issue of disqualification." See 9/12/2007 Opinion on Motion to Disqualify at 3. Since the Court's decision denying State Farm's motion, numerous additional ethical violations and criminal allegations against Plaintiffs' counsel have surfaced that are relevant to the KLG's fitness to prosecute this action and the growing and overwhelming appearance of impropriety. Moreover, because the Renfroe Company was just added to this action on May 31, 2007, and with Renfroe's counsel being cautious in getting up to speed in all of the dozens - and soon to be hundreds - of various litigations to which the Renfroe Company is now being named, the timeliness of the motion is not an issue. Finally, as provided by the Mississippi Rules of Professional Conduct and case law, the Court should consider **all** of the KLG's ethical violations - both past and present - in deciding the motion to disqualify. See *infra* page 14-15.

violated a number of ethical rules, including those prohibiting lawyers from obtaining confidential documents improperly.

The Rigsby Sisters began employment with the Renfroe Company in approximately 1998, working as independent claims representatives primarily on State Farm catastrophe assignments. From early September 2005 through June 2006, the Renfroe Company assigned the Rigsby Sisters to adjust State Farm claims on the Mississippi coast. As employees of the Renfroe Company, the Rigsby Sisters had access to sensitive and confidential information, were expected to treat such information confidentially, and, consequently, were bound by signed confidentiality agreements memorializing these expectations.⁶ Notwithstanding these confidentiality agreements, the Rigsby Sisters began copying thousands of pages of Defendants' confidential documents in late October 2005.⁷

Members of the SKG began their communications with the Rigsby Sisters no later than February 2006, while the Rigsby Sisters were still Renfroe Company employees and were working on State Farm claims. When Plaintiffs' counsel met with the Rigsby Sisters in February 2006, the SKG had already filed a lawsuit against State Farm and knew State Farm was represented by counsel in connection with Katrina-related insurance claims.⁸ Nevertheless, Plaintiffs' counsel communicated with and began obtaining confidential State Farm documents from the Rigsby Sisters and disseminated the documents throughout the SKG for use in all Katrina-related litigation initiated against the Defendants.

The Rigsby Sisters continued to copy and disseminate confidential documents and, from June 3-5, 2006, copied thousands of pages of documents in what they have described as a "data

⁶ The Rigsby Sisters signed employment agreements and agreed to abide by the Renfroe Code of Conduct that stated that they would neither disclose nor misappropriate any confidential information of either the Renfroe Company or its clients. State Farm also requires Renfroe Company employees to sign an Access Agreement whereby they agree to keep confidential all State Farm information.

⁷ See K. Rigsby Dep. in *Renfroe v. Moran* at 45:3-7, 46:6-47:17, at Exh. 4; C. Rigsby Dep. in *Renfroe v. Moran* at 63:7-16 at Exh. 5.

⁸ See *Best v. State Farm Fire & Casualty Co.*, 1:06-cv-00074-RHW (S.D. Miss. Oct. 21, 2005).

dump.”⁹ The next day, the Rigsby Sisters provided that batch of stolen confidential documents to Plaintiffs’ counsel, which counsel has used - and along with the previous batches, continues to use today - in connection with its prosecution of this case and hundreds of other Katrina-related cases against the Renfroe Company and State Farm Defendants.¹⁰

B. Plaintiffs’ Counsel Has Already Paid Substantial Sums of Money to Two Material Witnesses and Has Attempted to Pay at Least One Other Material Witness

On July 1, 2006, the Rigsby Sisters began officially “working” for Plaintiffs’ counsel as “litigation consultants.”¹¹ The Sisters testified that they each receive \$150,000 a year for their “work,” and that the \$150,000 salary will be paid for an indefinite period. *See* C. Rigsby *McIntosh II* Dep. at 242-247, at Exh. 11; K. Rigsby *McIntosh II* Dep. at 445:5-8, at Exh. 12. These salaries are purportedly paid in connection with “consulting” services rendered by the Rigsby Sisters, though they conceded that they have no set working hours, work their own schedules, and do nothing more than provide deposition testimony in Katrina-related litigation. *Id.* In fact, Kerri Rigsby testified that, from November 1 to November 20, 2007, she only worked approximately five hours for the KLG. *Id.*

In addition to paying the Rigsby Sisters handsomely for their “consulting” services for Katrina-related litigation, Plaintiffs’ counsel also attempted to pay Brian Ford, an engineer at former-defendant Forensic, to serve as a “consultant” to the KLG. Like the Rigsby Sisters, Mr. Ford worked on a number of Katrina-related State Farm matters and, like the Rigsby Sisters, is a material witness.

Specifically, on May 20, 2006, members of the Scruggs Law Firm and Derek Wyatt, a former member of the Barrett Law Office (a member of the SKG and KLG) and currently a

⁹ C. Rigsby *Renfroe v. Moran* Dep. at 90, 92, at Exh. 6.

¹⁰ *See* K. Rigsby *Renfroe v. Moran* Dep. at 64-66, at Exh. 7; C. Rigsby *Renfroe v. Moran* Dep. at 112, at Exh. 8; *Renfroe Hr’g Tr.* at 159:9-11; 160:16-24, at Exh. 9.

¹¹ 10/2/06 Rigsby Answer at ¶ 21, at Exh. 10.

member of the Nutt & McAlister firm (also a member of the SKG and KLG), met with Mr. Ford to discuss a possible “consulting” relationship with Plaintiffs’ counsel. (Exh. 13.) Two days later, Mr. Ford agreed to work with Plaintiffs’ lawyers for \$10,000 a month for a minimum of one year, in addition to legal indemnification for Ford and his family, and reimbursement of all expenses incurred in connection with his “consulting” duties. (*Id.*) Mr. Ford also sought as compensation a percentage share of the settlements reached in each Katrina-related case. (*Id.*) On September 6, 2006, Plaintiffs’ counsel called Ford and notified him that “SKG wants [Ford] on team” as a “fact witness” and “consultant,” and that Ford would “be paid for [his] services.” (*Id.* at FORD-SDT-100284.) On June 20, 2007, Derek Wyatt called Ford and told him that counsel could not pay him as a witness, but that they could still pay him as a “consultant.” (*Id.*)

C. Judge Acker of the Northern District of Alabama Has Appointed Special Prosecutors to Prosecute Plaintiffs’ Former Lead-Counsel For Criminal Contempt

To enforce its employment agreements with the Rigsby Sisters and to stop the theft and unauthorized dissemination of confidential information to Plaintiffs’ counsel (and others), the Renfroe Company filed a complaint for breach of the employment contracts against the Rigsby Sisters in the United State District Court for the Northern District of Alabama. *E.A. Renfroe & Co., v. Moran*, CV-06-WMA-1752-S; 2006 WL 4458009 (N.D. Ala. Sept. 1, 2006). On December 8, 2006, Judge Acker found that the Rigsby Sisters violated their employment agreements and granted the Renfroe Company’s motion for a preliminary injunction, which required Plaintiffs’ counsel and the Rigsby Sisters “to deliver forthwith” to Renfroe’s counsel all of the misappropriated documents, and enjoined the Rigsby Sisters and their counsel from further disclosure or use of those documents:

Cori Rigsby Moran and Kerri Rigsby, and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise (with the express exception of law enforcement officials) are hereby MANDATORILY ENJOINED to deliver forthwith to counsel for plaintiff all documents, whether originals or copies, of each document and tangible thing, in any form or medium,

that either of defendants or anyone acting in conjunction with or at the request or instruction of either of them, downloaded, copied, took or transferred from the premises, files, records, or systems of Renfroe or of any of its clients, including, but not limited to, State Farm Insurance Company and which refer or relate to any insurance claims involving damages caused or alleged to have been caused by Hurricane Katrina in the State of Mississippi.

Defendants and their agents . . . are further ENJOINED not to further disclose, use or misappropriate any material described in the preceding paragraph unless to law enforcement officials at their request.

(12/8/06 Order, at Exh. 14, pp. 13-14.)

On June 15, 2007, Judge Acker found that, rather than sending copies of the confidential documents to Renfroe Company attorneys as required by the injunction, “Scruggs promptly sent the documents to [Mississippi State Attorney General James] Hood for the calculated purpose of ensuring noncompliance with or avoidance of the injunction’s clear first paragraph.” (*E.A. Renfroe & Co., v. Moran*, 508 F. Supp. 2d 986, 995 (N.D. Ala. 2007); *see also Renfroe Hr’g Tr.* at 74:4-76:23, 192:17-200:21, at Exh. 15.) Scruggs further attempted to subvert the court’s order by requesting that Hood send him copies of all the documents. (*Renfroe*, 508 F. Supp. at 992.) The court concluded that “[Scrugg’s] brazen disregard of the court’s preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address.” (*Id.* at 996.) The court entered an order “request[ing] that the United States Attorney for the Northern District of Alabama prosecute the criminal contempt of non-parties Richard F. Scruggs and the Scruggs Law Firm, P.A.” and further held that “[i]f the government declines this request, the court will appoint another attorney to prosecute Scrugg’s contempt.” (*Id.* at 998; *see also August 7, 2007 “Allegations of Criminal Contempt”* filed by Judge Acker and special prosecutors against Richard Scruggs and the Scruggs Law Firm, at Exh. 16.) After receiving a letter from Mississippi Attorney General Hood imploring the United States Attorney not to prosecute Hood’s “confidential informant,” the United States Attorney declined involvement. (Exh. 17.) Judge Acker has appointed special prosecutors to prosecute the contempt charges against Plaintiffs’ former lead counsel. These contempt proceedings continue today.

D. KLG Members Don Barrett and the Nutt & McAlister Firm May Have Violated Judge Acker's Order to Return the Confidential State Farm and Renfroe Company Documents Stolen by the Rigsby Sisters

In addition to the pending criminal contempt charges against the Scruggs and his Firm for violating Judge Acker's order to return the pilfered State Farm documents, recent allegations strongly suggest that other members of the KLG have also knowingly violated Judge Acker's order to return the stolen documents.

On December 12, 2007, the plaintiff in *Brown v. Nutt* filed a complaint against Plaintiffs' counsel, Nutt & McAllister, PLLC, David Nutt, and Mary McAlister (all members of the KLG), alleging plaintiff's termination from the Nutt & McAlister firm because, *inter alia*, she "'blew the whistle' and informed [Nutt & McAlister] of illegal activity with regard to utilizing documents in ongoing litigation in violation of Judge Acker's Memorandum Opinion and Preliminary Injunction" requiring return of these same documents. (Case 3:07-cv- 00727 (HTW-LRA) Southern Dist. Ms., Jackson)(Dkt. 1 ¶ 42; *see also* ¶¶ 28-32), at Exh. 18.) Specifically, the complaint provides:

29. In clear violation of the Judge's Order, the Defendants scanned all the documents they were order [sic] to return and not use, and were saved on the Defendants' local server. These scanned images were then electronically copied and then saved again at Business Communications, Inc., which is located at 422 Highland Colony Parkway, Ridgeland, MS 39157

31. After receipt of this injunction by McAllister [], Plaintiff was instructed to contact the Rigsby sisters to set up conferences to review documents prior to the filing of a complaint setting forth RICO claims. Between March and May 2007, Plaintiff was required on several different occasions to conduct additional telephonic conferences to discuss Renfroe adjusters' involvement in Katrina cases. (*Id.* ¶¶ 29, 31.)

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.)

E. Plaintiffs' Counsel Has Brought Claims Against the Renfroe Company in Bad Faith

The claims asserted against the Renfroe Company in this and hundreds of other similar cases appear to be a part of a broad scheme of bad faith retaliatory litigation intended to punish Renfroe Company for: (i) bringing suit against the Rigsby Sisters in *Renfroe v. Moran*¹² – the Alabama litigation initiated by the Renfroe Company to enforce the confidentiality provisions of the Rigsby Sisters' employment agreements and secure the return of stolen documents; and (ii) the action taken by the Alabama court requesting prosecution of Plaintiffs' former lead-counsel for contempt. The Renfroe Company believes that the KLG intends to bury it with meritless lawsuits to coerce them into dismissing the *Renfroe v. Moran* litigation.

Among the facts supporting the conclusion that the claims in this case (and others) against the Renfroe Company are retaliatory is that the litigation initiated against the Renfroe Company by the KLG has coincided with significant events in *Renfroe v. Moran* and other litigation between the parties. For example, prior to the Renfroe Company's filing of the *Renfroe v. Moran* matter, the Renfroe Company was not a defendant in any Katrina litigation filed by Plaintiffs' counsel. However, on March 19-20, 2007, a contempt hearing was held in the *Renfroe v. Moran* litigation involving the Rigsby Sisters and the Scruggs Law Firm. Two days after the contempt hearing, the KLG filed a motion seeking leave to amend the Complaint in the *McIntosh v. State Farm* litigation to add the Renfroe Company. Similarly, in May 2007, the parties in the *Renfroe v. Moran* litigation submitted briefing on whether Richard Scruggs and the Scruggs Law Firm should be held in contempt for violating the court's preliminary injunction; on May 22, 2007, the Rigsby Sisters added the Renfroe Company as a defendants in a *Qui Tam* action, and on May 31, 2007, the plaintiffs in the *McIntosh v. State Farm* filed their Amended Complaint, adding the Renfroe Company. Further, on June 15, 2007, the court in *Renfroe v. Moran* entered an order requesting that the United States Attorney for the Northern District of

¹² At the time of the commencement of the *Renfroe v. Moran* matter, Cori Rigsby was formerly known by her married name, Cori Rigsby Moran. She is now divorced and goes by her maiden name.

Alabama prosecute Richard Scruggs and the Scruggs Law Firm for criminal contempt. Five days later on June 20, 2007, Plaintiffs' counsel filed the *Shows* action naming the Renfroe Company as a defendant. On September 26, 2007, the Eleventh Circuit Court of Appeals affirmed the issuance of the preliminary injunction in the *Renfroe v. Moran* litigation, and, on the same day, the KLG filed a Complaint in the case of *J.A. Willis, Jr. v. State Farm Fire*,¹³ naming the Renfroe Company as a Defendant. Finally, the KLG has begun adding the Renfroe Company to all of the 178 "Abney" group of cases brought in the Southern District of Mississippi. *See, e.g., Abney v. State Farm*, No. 1:07cv710-LTS-RHW. The timing of the KLG's changes in strategy is not a coincidence.

F. Members of Plaintiffs' Counsel Have Been Indicted For Bribing a Judge Presiding Over an Attorney's Fee Dispute Arising From Katrina-Related Litigation

Members of the KLG are no strangers to allegations of criminal and unethical conduct by members of both the bench and bar. Most recently, on November 28, 2007, a federal Grand Jury in the Northern District of Mississippi indicted Plaintiffs' former lead counsel, Richard F. Scruggs, David Z. Scruggs, and Sidney A. Backstrom on federal bribery charges. (*See* "Indictment," at Exh. 19.) The six-count Indictment charges Plaintiffs' former counsel with attempting to bribe the Honorable Henry L. Lackey, a Circuit Judge for the Third Circuit Court District of Mississippi, to gain a favorable ruling on behalf of the Plaintiffs' counsel in *Jones v. Scruggs et al.* The *Jones v. Scruggs* case involved a claim brought by the law firm Jones, Funderberg – a former member of the SKG – against the other members of the SKG alleging, *inter alia*, that they conspired to freeze plaintiff out of \$26.5 million in attorneys' fees arising from the SKG's work on Katrina insurance litigation. (*Id.* at 2, ¶ 2.)¹⁴ Significantly, the Federal

¹³ The *Willis* case is pending in the United States District Court for the Southern District of Mississippi, Southern Division, in Civil Action No. 1:07cv1109 LG-RWH.

¹⁴ The complaint alleges, in part, that after performing substantial work on behalf of the SKG, the Scruggs Law Firm conspired with other members of the SKG (who remain members of the KLG today) to fraudulently underpay and freeze out the Jones Firm. (*See* Complaint, at Exh. 20 ¶¶ 20-27.)

Bureau of Investigation reported that “the case remains under investigation” – leaving open the possibility that additional defendants could be named and/or that additional charges could be filed.¹⁵

The Indictment charges that, from March to November 2007, Plaintiffs’ former lead counsel and other members of Plaintiffs’ counsel conspired with two others to bribe Judge Lackey with \$40,000 in cash to “obtain a favorable result in the lawsuit.”¹⁶ The Indictment further charges that Richard Scruggs paid an additional \$10,000 to co-conspirator Timothy Balducci (“Balducci”) for his services in furtherance of the conspiracy, and created false documentation to cover up the bribery.¹⁷ Balducci has pleaded guilty to a charge of conspiracy to commit bribery, and agreed to cooperate fully with the United States Attorney.¹⁸

The bribery Indictment may implicate more than just former lead-counsel Richard Scruggs and members of his firm. Rather, government filings in the criminal bribery prosecution strongly suggest that the cash Plaintiffs’ counsel allegedly used to bribe the court was paid from the SKG’s common fund. (*See* Gov’t Resp. to Defense Mot. for Continuance at 2 (“the government provided to the defense certain documents related to expense transmittals from the Scruggs Katrina Group”)(Exh. 23).

If found guilty, these members of the SKG face penalties of up to 75 years in prison, \$1.5 million in fines, and 18 years of supervised release,¹⁹ plus disciplinary action from the Mississippi Bar, including suspension and disbarment.²⁰ Moreover, if true, these allegations

¹⁵ *See* FBI Press Release of Indictment, at Exh. 21, and available at <http://jackson.fbi.gov/dojpressrel/pr essrel07/bribery112907.htm>.

¹⁶ Indictment, at Exh. 19, p. 3, ¶ 2; p. 4, ¶ 1; p. 5, ¶ 9; p. 6, ¶¶ 12-13; p. 10, ¶ 3.

¹⁷ *Id.* at p. 3, ¶ 4; p. 5, ¶ 9; p. 6, ¶¶ 16-17; p. 12, ¶ 3.

¹⁸ *See* Balducci Plea Agreement, at Exh. 22.

¹⁹ *See* FBI Press Release, at Exh. 21.

²⁰ Bribing a judge generally results in disbarment. *See, e.g.*, ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 6.3. “Disbarment is generally appropriate when a lawyer . . . (b) makes an *ex parte* communication with a judge or juror with intent to affect the outcome of the proceeding;” *In re R.M.W.*, 486 F. Supp. 2d 518, 533 - 534 (D. Md. 2007). Criminal convictions for offenses involving the legal system such as bribery or perjury

amount to numerous ethical violations of the Mississippi Rules of Professional Conduct and other guidelines governing civility and the practice of law.

STANDARD OF REVIEW

“[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 that have been “adopted by the court.” *Id.* The United States District Courts of Mississippi have adopted the Mississippi Rules of Professional Conduct (“MRPC”). (Uniform Local Rule 83.5.) Like many states, Mississippi has adopted in large part the American Bar Association Model Rules of Professional Conduct. *See United States v. Starnes*, 157 Fed. Appx. 687, 693 (5th Cir. 2005), *cert. denied*, 127 S. Ct. 1922 (2007). Because of this uniformity, Mississippi courts rely on cases interpreting analogous rules in other jurisdictions.

“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.*, 448 F. Supp. 2d 772, 778 (N.D. Tex. 2006)(quoting *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1980)). “The law is clear in this Circuit that a District Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it.” *In re Am. Airlines*, 972 F.2d at 611; *accord Shelton v. Hess*, 599 F. Supp. 905, 910 (S.D. Tex. 1984). Where, as here, there are numerous apparent ethical violations, federal courts have repeatedly held that any doubts regarding the existence of the violation and the remedy to impose should be resolved in

frequently result in “permanent disbarment.” *See also Ky. Bar Assn. v. VanMeter*, 176 S.W.3d 692-93 (Ky. 2005)(entering “an order of permanent disbarment” after attorney pled guilty to felony offenses for “Perjury, Tampering with Physical Evidence, Tampering with Public Records, and three counts of Second Degree Criminal Possession of a Forged Instrument”); *Cleveland Bar Assn. v. Jurek*, 581 N.E.2d 1356, 1357 (Ohio 1991)(holding attorney's conviction for bribery to avoid random judicial assignments warranted permanent disbarment).

favor of disqualification. *MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991)(to preserve the public trust in the litigation process, “*any doubt is to be resolved in favor of disqualification*”)(emphasis added).

Finally, “[a]lthough a party's right to counsel of her choice is important, it is secondary in importance to preserving the integrity of the judicial process, maintaining the public confidence in the legal system and enforcing the ethical standards of professional conduct.” *Dauro v. Allstate Ins. Co.*, 2003 WL 22225579, at *7 n.7 (S.D. Miss. 2003); *see also Rembrandt Technologies, LP v. Comcast Corp.*, 2007 WL 470631, at *4 (E.D. Tex. 2007)(finding ethical violations warranted disqualification notwithstanding plaintiff's choice of counsel); *Lange v. Orleans Levee Dist.*, 1997 WL 668216, at *4 (E.D. La. 1997)(disqualifying plaintiff's lawyer and lawyer's entire law firm where ethical violations were serious and discovery was in early stages); *Claudia Schuth v. LSU Medical Center*, CA No. 87-4191, 1988 U.S. Dist. LEXIS 15859 (E.D.La.1988)(motion to disqualify filed a year after complaint, two months after notice of conflict and within three months of trial date was timely.)

ARGUMENT

I. THE KLG SHOULD BE DISQUALIFIED AS A RESULT OF NUMEROUS ETHICAL VIOLATIONS, CRIMINAL CONTEMPT CHARGES, AND FRESH ALLEGATIONS OF BRIBING A JUDGE

The Mississippi Rules of Professional Conduct and well-established case law recognize that the Court should consider all ethical violations - both past and present - as relevant to counsel's willingness and ability to practice law within the ethical bounds established by the Rules. *See United States v. Gonzalez-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005)(in determining whether to grant admission *pro hac vice*, it is appropriate “for the court to consider the effect of the attorney's past actions (especially past ethical violations) on the administration of justice within the court.”), *aff'd* 126 S. Ct. 2557 (2006); *In re Complaint of PMD Enterprises Inc.*, 215 F. Supp. 2d 519, 532 (D.N.J. 2002)(examining past ethical violation before revoking attorney's

pro hac vice status); ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 9.2 (allowing consideration of prior disciplinary offenses in deciding what sanction to impose for attorney misconduct). The official Comment to MRPC 8.4 also recognizes that “[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” Of course, the ethical and criminal allegations lodged against Plaintiffs’ counsel are hardly of “minor significance.” Rather, these previous actions constitute a pattern of significant deviations from the ethical rules and are violations of numerous Mississippi Rules of Professional Responsibility Rules, including at least Rules 3.4, 4.4, 5.4, 8.4, 3.7, and 1.7.

A. The Ethical Violations of Plaintiffs’ Counsel Are Attributable to Each Member of the KLG

In addition to bearing responsibility for their own independent violations of the Mississippi ethical rules, each member of the KLG is subject to disqualification as accessories under MRPC 5.1(c), which provides:

(c) 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 . . . knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

In addition to accessory liability for the ethical violations, all members of the KLG are similarly responsible for each other’s individual violations under the doctrine of imputed liability. As a joint venture partnership, Plaintiffs’ counsel (both the SKG and the KLG), which holds itself out to the courts and the public as a single legal team much like any firm, is considered by the Rules to be a single partnership with respect to imputed liability. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123(1)(2000)(imputed disqualification rules cover “a law partnership, professional corporation, sole proprietorship, or similar association”); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128-29 (5th Cir. 1971)(“authorities agree that all members of a partnership are barred from participating in a case from which one partner is disqualified”); *Grosser-Samuels*, 448 F. Supp. 2d at 779 (“irrebutable

presumption that confidences presumably obtained by an individual lawyer will be shared with the other members of his firm”); *Mustang Enters., Inc. v. Plug-In Storage Sys., Inc.*, 874 F. Supp. 881, 888-89 (N.D. Ill. 1995)(disqualification of constituent firms in joint venture warranted where firms shared confidential information); *supplemented by* No. 94 C 6263, 1995 WL 55226 (N.D. Ill. Feb. 3, 1995).²¹ As such, the many ethical violations of the individual attorney-members of the KLG are attributable to the entire KLG under both the accessory liability rules and the doctrine of vicarious liability.

The fact that the ethical violations of the individual members are attributable to each member of the KLG should come as no surprise, as all members of the KLG enjoy the “benefits” of most of their individual ethical violations. For example, the KLG is in the process of prosecuting hundreds of lawsuits against the Defendants based on information purportedly learned from documents that Plaintiffs’ counsel knew to be stolen. The KLG also has unrestricted access to the Rigsby Sisters, who are highly paid “consultants” to Plaintiffs’ counsel, in the prosecution this action and all of the Katrina-related litigations that the KLG is prosecuting. Thus, the fruits of these ill-gotten “benefits” are used by the KLG in their day-to-day prosecution of Plaintiffs’ claims at the expense of the ethical rules, the Defendants’ rights, and the integrity of the judicial system. In addition to the tactical benefits that the KLG has manufactured for itself at the expense of the ethical rules, the KLG hopes to realize substantial financial gain from the ethical shortcuts that it has taken through the settlement and other resolutions of the Plaintiffs’ claims in this suit and the others that the KLG has brought against the Defendants. Thus, the KLG is already realizing real litigation advantages as a consequence of its transgressions and is attempting to position itself to recover substantial financial rewards from their numerous ethical violations.

²¹ *See also* official Comment to Rule 1.10, which defines attorneys acting together as a firm: “if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.”

B. The KLG’s Payment of Hundreds of Thousands of Dollars to Material Witnesses is Unquestionably Improper and Violates MRPC 3.4, MRPC 4.4, and MRPC 8.4

Plaintiffs’ counsel’s payment of \$150,000 a year to each of the Rigsby Sisters and their attempted payment to Mr. Ford, each a **material witness** to this and hundreds of other similar Katrina-related insurance cases, violate a host of ethical rules and laws. Such blatant attempts to buy witness testimony also squarely violates MRPC 3.4, which prohibits an attorney from “offer[ing] an inducement to a witness that is prohibited by law,”²² MRPC 4.4, which prohibits an attorney from “us[ing] methods of obtaining evidence that violate the legal rights” of a third person, and MRPC 8.4, which prohibits a lawyer “from engag[ing] in conduct that is prejudicial to the administration of justice.” Such conduct also appears to violate the federal bribery statute, which criminalizes the giving of “anything of value” (*sans* specified costs) “for or because” of testimony to be given at trial. 18 U.S.C. § 201(c). Moreover, aside from perhaps bribing a judge, one could not imagine a more blatant example of the appearance of impropriety than a lawyer paying material witnesses hundreds of thousands of dollars to serve as “consultants” on the very cases in which those witnesses will most certainly testify. *See Dresser Indus.*, 972 F.2d at 543 (“[The Fifth Circuit has] applied particularly . . . the admonition of canon 9 that lawyers should ‘avoid even the appearance of impropriety.’”)

Paying material witnesses exorbitant sums for favorable testimony clearly violates the Defendants’ rights and is certainly prejudicial to the administration of justice and often results in disqualification. For instance, in *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, Transamerica Rental Finance Corp. (“TRFC”) moved to disqualify Rentclub’s Counsel because opposing counsel hired a former TRFC employee, Mr. Canales, as a “trial consultant.” 811 F. Supp. 651, 654 (M.D. Fla. 1992), *aff’d* 43 F.3d 1439 (11th. Cir. 1995). The court granted the

²² The Mississippi State Bar expounded on the attorney’s prohibition of offering a witness an impermissible inducement. (See Opinion No. 145 of the Mississippi State Bar Ethics Committee, March 11, 1988, at Exh. 24.) In its opinion, the Mississippi State Bar stated that a lawyer is limited to paying a non-expert witness “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.” (*Id.*) Moreover, the client, and not the attorney, must ultimately be responsible for the witness’s fees. Compensation beyond these guidelines violates Rule 3.4. (*Id.*)

motion to disqualify. *Id.* The court reasoned that the hiring of Mr. Calanes raised the appearance that: (1) counsel's employment induced him to disclose confidential information relating to TRFC's managerial practices and litigation strategy; and (2) counsel's employment induced him to testify favorably for Rentclub. *Id.* at 655. The court noted 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; *see also American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, Nos. Civ.-LV-82-26 HEC, LV-82-96 HEC, 1983 WL 25286 (D. Nev. Dec. 8, 1983)(disqualifying opposing counsel based on allegations opposing counsel offered large sums of money to former MGM Grand Hotel employee to work as trial consultant); *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996)(disqualifying counsel where counsel had *ex parte* communications with opposing party's former employee); *MMR/Wallace Power & Indus.*, 764 F. Supp. at 714-17, 727-28 (disqualifying attorney and firm based upon retention of former office manager of opposing party as trial consultant); *In re Complaint of PMD Enters.*, 215 F. Supp. 2d 519 (revoking plaintiff attorney's *pro hac vice* admission as sanction for hiring defendants' former employee and fact witness, to review documents to aid attorney in litigation).

Here, not only does Plaintiffs' counsel's employment of the Rigsby Sisters raise the appearance of impropriety but, in fact, the employment is a violation of the MRPC and appears to violate federal law. As noted, the Rigsby Sisters each currently receive yearly salaries of \$150,000 for an indefinite period for "working" as "litigation consultants" for Plaintiff's counsel. Notwithstanding this employment arrangement, the Rigsby Sisters have no set hours, no set responsibilities, and they do nothing more than provide deposition testimony in Katrina-related litigation. (*See C. Rigsby McIntosh II* Dep. at 242-247, at Exh. 11; *K. Rigsby McIntosh II* Dep. at 445:5-8, at Exh. 12.) In fact, Kerri Rigsby testified that, from November 1 to November 20, 2007, she only worked approximately five hours for the KLG. *Id.* There is no question that the Rigsby Sisters' salaries have no relation to their actual work or expenses.

Of course, in addition to the KLG's cash-for-testimony payments to the Rigsby Sisters, the KLG's attempt to pay Mr. Ford, another material witness and employee of former defendant

Forensic Engineering, \$10,000 a month to serve as a “consultant” on Katrina-related litigation violates these same rules.²³ Indeed, Derek Wyatt, who met with and engineered the offer to make these substantial cash payments to Mr. Ford, is a former member of the Barrett Law Office (member of the SKG and lead counsel of the KLG) and is currently a member of the Nutt & McAlister firm (also a member of the SKG and KLG). However Plaintiffs’ counsel responds to these ethical violations, counsel is unable to explain away the appearance, let alone actual existence, of impropriety that it raises in this very public case.

C. Plaintiffs’ Counsel Violated MPRC 4.4 and 8.4 By Circumventing the Discovery Rules and Obtaining Confidential Documents Known to Be Stolen

The KLG’s discovery tactics also violate MRPC 4.4, which prohibits a lawyer from using “methods of obtaining evidence that violate the legal rights of” a third person. The KLG violated this rule in two ways. First, the KLG obtained the stolen, confidential evidence by encouraging the Rigsby Sisters to breach their confidentiality agreements with Renfroe Company. Indeed, the Northern District of Alabama has already found that Plaintiffs’ counsel and the Rigsby Sisters violated the legal rights of a third party – the Renfroe Company – and “engaged in a cooperative effort” to misuse confidential information. (12/8/06 *Renfroe* Order, at Exh. 14, p. 9.) 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.)

Second, the KLG used its unethical relationship with the Rigsby Sisters to obtain thousands of confidential and stolen documents not only violates MPRC 4.4, but also MRPC 8.4 and the Rule’s admonishment that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” It is also axiomatic that “discovery” of this kind is not permitted by the Federal Rules of Civil Procedure. Courts faced with similar

²³ Mr. Ford also made his agreement to work for the KLG contingent on a fee sharing arrangement with the KLG where Ford’s compensation would be based in part on the settlements reached in the Katrina-related litigations. (*See* Exh. 13.) Such a fee sharing arrangement between the KLG and Ford, a non-lawyer, would also violate MRPC 5.4(a), which prohibits a lawyer from “shar[ing] legal fees with a nonlawyer [exceptions omitted as irrelevant].”

facts have disqualified attorneys for such violations on these grounds alone. *Arnold v. Cargill, Inc.*, No. 01-2086, 2004 WL 2203410 (D. Minn. Sept. 24, 2004)(disqualifying plaintiffs' law firm after counsel cultivated relationship with ex-employee of defendant to elicit confidential information about defendant); *see also In re Shell Oil*, 143 FRD 105 (E.D. La. 1992). In addition, as set forth more fully above, Plaintiffs' counsels' ethical violations are exacerbated by the fact that they hired the Rigsby Sisters to serve as highly paid "litigation consultants" for Plaintiffs' counsel when, in fact, the Rigsby Sisters hardly work at all.

The KLG will likely attempt to reinvent the erroneous argument asserted previously that it need not comply with the normal discovery procedures and ethical standards applicable to all other litigants because the Rigsby Sisters are purported "whistleblowers." The KLG's argument, however, misconstrues the fact that neither the Federal Rules of Civil Procedure, nor the MRPC, nor the False Claims Act, nor the case law on which it has relied permit a litigant or its counsel to bypass the discovery process or ethical rules. 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 exceptions that are inapplicable here.²⁴ Here, however, the Rigsby Sisters filed a *qui tam* action in April 2006, but nonetheless continued, "in a cooperative effort" with Plaintiffs' counsel, to steal thousands of pages of confidential documents and distribute them to the KLG. The KLG then used these stolen documents until, at the earliest, August 2006 *in hundreds of separate civil suits* against the Defendants. The KLG can point to no authority holding that the False Claims Act sanctions this activity.²⁵ In fact, the Eleventh Circuit rejected Plaintiffs' counsel's petition for a writ of mandamus challenging Judge Acker's order, which was

²⁴ 2 John T. Boese, *Civil False Claims and Qui Tam Actions* § 5.07 & n.452 (3d ed. 2005).

²⁵ *See* Plaintiffs' Response to Defendant State Farm's Motion to Disqualify Plaintiffs' Counsel in *McIntosh v. State Farm, et al.*, 1:06-cv-01080-LTS-RHW Dkt. No. 347, at pps. 10-15. It should come as no surprise that, contrary to the KLG's past assertions, the False Claim Act does not permit disposal of normal discovery rules and procedures. As Judge Acker of the Northern District of Alabama has already held, Plaintiffs' counsel and the Rigsby Sisters violated the Renfroe Company's rights - and therefore MRPC 4.4 - by engaging in this "cooperative effort" to misuse the stolen confidential documents. (12/8/06 *Renfroe* Order, at Exh. 14, p. 9.)

based, in part, on arguments that counsel's conduct was lawful under the False Claims Act. *See E.A. Renfroe & Co. v. Moran*, No. 06-16561, 2007 WL 2404719, at *3-*4 (11th Cir. Aug. 24, 2007).

D. Plaintiffs' Counsel Has Violated MRPC 1.7 By Simultaneously Representing Both the Rigsby Sisters and the Plaintiffs

Plaintiffs' counsel's dual representation of both Plaintiffs in this case and the Rigsby Sisters in their *qui tam* suit, *United States of America ex rel. Cori and Kerri Rigsby v. State Farm Insurance Company et al.*, No. 1:06cv 433, creates a conflict of interest in violation of MRPC 1.7. Rule 1.7 provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person" ²⁶ This conflict has been apparent throughout the pending Katrina-related litigation. Indeed, Magistrate Judge Walker has addressed the conflict caused by Plaintiffs' counsel's dual representation of the Rigsby Sisters and Plaintiffs noting that "[t]he multiple relationships involved have repeatedly resulted in situations where it became difficult to determine just whose interests the Scruggses were purportedly representing." ²⁷

For instance, after reaching a preliminary settlement agreement in the case of *Woullard v. State Farm*, Civ. A. No. 1:06cv01057, which would have also settled many claims now brought by plaintiffs against State Farm and the Renfroe Company (including, *inter alia*, the *McIntosh* Plaintiffs' claims and, potentially, the *Shows, Abney* and over 250 other plaintiffs' claims), Richard Scruggs allowed his firm's representation of the Rigsby Sisters to conflict with the

²⁶ Notably, Rule 1.10 provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.4. The official Comment to Rule 1.10 defines attorneys acting together as a firm: "if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve." Here, it is undisputable that the KLG presents itself to the public as a "firm," have a formal Agreement defining themselves as such, and have mutual access to and share confidential information.

²⁷ See Order Denying Plaintiffs' Motion for Protective Order, *McIntosh v. State Farm*, No. 1:06cv1080, at Exh. 25.

Plaintiffs' interests. Although Plaintiffs' counsel represented that the settlement was fair, adequate, and in the best interest of the class, 2007 WL 1170358 (S.D. Miss. Apr. 13, 2007), Plaintiffs' counsel threatened to withdraw support for the settlement unless State Farm successfully exerted influence on the Renfroe Company to dismiss its claims against the Rigsby Sisters in the Alabama action. (2/19/2007 ltr. from Scruggs to Jackson, at Exh. 26.) Plaintiffs' counsel's conduct in this respect is yet another example of the appearance of impropriety that, in conjunction with the host of other violations, warrants disqualification.

E. As Material Witnesses to Allegations Central to This Case, Plaintiffs' Counsel Should Be Disqualified Pursuant to MPRC 3.7

MRPC 3.7 provides that “[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness [except in certain circumstances inapplicable in this case].” Based on the fact that Plaintiffs' counsel personally injected themselves into the facts of this case, the members of the KLG should also be disqualified as likely trial witness pursuant to MRPC 3.7.

In particular, Kerri Rigsby alleged that State Farm destroyed an allegedly damaging October 12, 2005 engineering report in January 2006 in order to conceal potential insurance claims from Plaintiffs. (K. Rigsby Dep. *McIntosh I* at 400: 5-20, at Exh. 27.) In direct conflict with the Rigsby Sisters' allegations, Richard Scruggs has already testified that he was given the **original** report in February 2006, and disseminated the report to each member of the KLG. (*Renfroe Hr'g Tr.* at 140:8-19, at Exh. 28.) The Defendants intend to prove, contrary to the representations of the Rigsby Sisters, that the report was never destroyed but, rather, that the Rigsby Sisters stole the report from State Farm claim files and gave it to the KLG during their meeting with Plaintiffs' then lead-counsel in February 2006 or before. At trial, State Farm and the Renfroe Company are entitled to prove that Defendants did not destroy this evidence and must be permitted to refute this allegation by eliciting the testimony of the KLG members who received this critically important evidence.

Indeed, Magistrate Judge Walker has already noted the importance of Plaintiffs' former counsel's testimony in allowing the Renfroe Company to depose them.²⁸ Rule 3.7 provides yet another reason why Plaintiffs' counsel, as necessary witnesses, must be disqualified. *See, e.g., Bellino v. Simon*, No. Civ. A. 99-2208, 1999 WL 1277535, at *3-*4 (E.D. La. Dec. 28, 1999)(disqualifying attorney and his law firm from representing plaintiff in matter where it was likely that he would be called as a witness); *Lange*, 1997 WL 668216, at *3 (“[T]here is precedent in this District for disqualifying not only the lawyer-witness, but his entire firm, from representation at *any stage* of the proceedings, where the lawyer-witness’s testimony is likely to be prejudicial to his client.”)

F. Plaintiffs’ Counsel Violated MRPC 3.4 By Deliberately Disobeying Judge Acker’s Injunction Order

As recognized by Judge Acker of the Northern District of Alabama, then lead-counsel of the SKG deliberately disobeyed the court’s preliminary injunction order commanding that Plaintiffs’ counsel return the State Farm documents stolen by the Rigsby Sisters. Counsel’s conduct squarely violates MRPC 3.4, which provides: “[a] lawyer shall not . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on assertion that no valid obligation exists.” Here, there can be no debate as to whether Plaintiffs’ counsel violated Rule 3.4, as Judge Acker has already held that, instead of sending the confidential documents to the Renfroe Company’s attorneys as ordered, “Scruggs promptly sent the documents to [Mississippi State Attorney General James] Hood for the calculated purpose of ensuring noncompliance with or avoidance of the injunction’s clear first paragraph.” (*Renfroe*, 508 F. Supp. 2d at 995.) The court concluded that “[Scrugg’s] brazen disregard of the court’s preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address.” (*Id.* at 996.) Based on Plaintiffs’ counsel’s “calculated purpose of ensuring noncompliance with” the order and “brazen disregard of the court’s” order, Judge Acker invited

²⁸ *See* Order Denying Plaintiffs’ Motion for Protective Order, *McIntosh v. State Farm*, No. 1:06cv1080, at Exh. 25.

the United States Attorney to prosecute Plaintiffs' counsel, and subsequently appointed special prosecutors to prosecute Richard Scruggs and the Scruggs Law Firm for criminal contempt. (Exh. 16.) Given Judge Acker's clear order finding Plaintiffs' counsel's "knowing" disobedience of the court's order, there can be no debate but that Plaintiffs' counsel knowingly violated MRPC 3.4.²⁹

In addition, it appears that other members of the KLG may have also violated Judge Acker's Order and, consequently, also independently violated MRPC 3.4 by knowingly disobeying the Alabama District Court's injunction. Indeed, even after the issuance of the court's preliminary injunction, Don Barrett, former member of the SKG and now lead-counsel for the KLG, may have retained documents he was required to turn over. (*E.A. Renfroe & Co., Inc.*, 508 F. Supp. 2d at 991.) Further, as asserted in the *Brown v. Nutt* complaint, both attorneys Nutt and McAllister and other employees of the Nutt & McAllister firm are alleged to have scanned and copied the documents that Judge Acker ordered returned to Renfroe Company after the court ordered the documents returned to Renfroe. Such allegations raise at least the appearance of impropriety, the potential violation of MRPC 3.4 prohibiting the knowing disobedience of a court order, and, as with Richard Scruggs and the Scruggs Law Firm, criminal contempt charges. The other members of KLG are additionally responsible for any of these ethical violations under MRPC 5.1(c), which states that: "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." The fact that the KLG continued to use documents provided by the Rigsby Sisters indicate their ratification and approval of violation of the *Renfroe* court's order.

²⁹ The KLG has argued that the court's decision was in error because Plaintiffs' counsel's possession and retention of the stolen documents was permissible under the "law enforcement exception" of the False Claims Act. As noted, however, neither the Alabama District Court nor the Eleventh Circuit found this argument persuasive. *See supra* notes 24-25 and associated text.

G. The KLG's Bad Faith Lawsuits Against the Renfroe Company Violate MRPC 4.4

Mississippi Rule of Professional Conduct 4.4 prohibits an attorney from bringing a lawsuit in bad faith, or to harass or burden the defendant. Rule 4.4(a) provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Here, the KLG initially filed scores of lawsuits against other defendants relating to Plaintiffs' insurance claims without naming the Renfroe Company. Years later, and only *after* Renfroe Company brought suit against the Rigsby Sisters, did the Plaintiffs' counsel seek to amend all its several hundred already-pending complaints to add the Renfroe Company as a defendant. (*See* Section E of Factual Background). The timing of the SKG's sudden addition of the Renfroe Company is proof positive of a bad faith motive, an unmistakable violation of MRPC 4.4, and further evidence of the SKG's slash and burn litigation tactics that so frequently run afoul of the criminal laws and ethics rules.

H. The Indictment of Plaintiffs' Counsel on Charges of Bribing a Judge Creates a Strong Appearance of Impropriety

The November 28, 2007 Indictment charging Plaintiffs' former lead-counsel with bribing a judge in a case relating to attorney's fees received for handling Katrina insurance claims creates a pervasive appearance of impropriety by Plaintiffs' counsel. Such an appearance of impropriety, in conjunction with Plaintiffs' counsel's violation of a host of serious ethical rules, warrants disqualification. Moreover, if the charges in the Indictment are proven, counsel will have violated a raft of other Mississippi Rules of Professional Conduct, including such basic and self-evident rules prohibiting lawyers from: attempting to influence a judge by means prohibited by law; committing criminal acts; engaging in conduct involving dishonesty or deceit; and communicating *ex parte* with a judge to influence a judicial decision. (MRPC 3.5(a), (b) and (c); 8.4(a), (b), (c), (d), (e) and (f).) If proven, counsel will also certainly face criminal penalties and bar sanctions, including suspension or disbarment.

Here, there can be no honest debate as to whether the bribery Indictment creates the “appearance of impropriety in general.” Plaintiffs’ former lead-counsel has been charged with attempting to bribe a judge to obtain a favorable decision in an action **relating to attorney’s fees received for handling Katrina-related insurance litigation**. Further, given the serious nature of these criminal charges and the potential implications for the hundreds of other litigations initiated by Plaintiffs’ counsel, the “likelihood of public suspicion” is so virtually assured that the appearance of “impropriety outweighs any social interest [that could] be served by the lawyer’s continued participation in the case.” *Rentclub*, 811 F. Supp. at 656.

Significantly, the allegations in the bribery Indictment are not confined solely to former lead-counsel Richard Scruggs and other members of his firm, but also implicate wrongdoing by other members of the KLG. For example, the government’s filings in the criminal bribery prosecution suggest that the \$40,000 in cash payment used to bribe Judge Lackey and \$10,000 used to pay Balducci for his services was paid from the SKG’s common fund. (*See Gov’t Resp. to Defense Mot. for Continuance at 2* (“the government provided to the defense certain documents related to expense transmittals from the Scruggs Katrina Group”)(Exh. 23.) Pursuant to the SKG Joint Venture Agreement, any payment from the SKG’s common fund, including the bribery payment, should necessarily have been approved by Nutt & McAlister, a current member of the KLG, which served as the treasurer for the SKG. *See Joint Venture Agmt. at 2. (See Exh. 3.)* Moreover, as the FBI has announced that its Investigation is still ongoing, there exists the very real possibility that other members of the KLG could be charged in the bribery scheme.

The bribery Indictment also implicates a host of Mississippi’s Rules of Professional Conduct, including MRPC 3.5, which prohibit a lawyer from, among other things: “seek[ing] to influence a judge, juror, prospective juror or other official by means prohibited by law [or] engage[ing] in conduct intended to disrupt a tribunal.” The official Comments to Rule 3.5 further provide that “[t]he advocate’s function is to present evidence and argument so that the cause may be decided according to law.” Similarly, MRPC 8.4 provides that it “is professional misconduct for a lawyer to:

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this day, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants:

NONE

THIS, the 4th day of January, 2008.

s/ Erik T. Koons

Erik T. Koons