

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

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THOMAS C. and PAMELA McINTOSH, :  
 :  
 Plaintiffs, : CIVIL ACTION NO. 1:06-CV-  
 : 1080-LTS-RHW  
 - against - :  
 :  
 STATE FARM FIRE & CASUALTY CO. and :  
 FORENSIC ANALYSIS & ENGINEERING :  
 CO., et al., :  
 :  
 Defendants. :  
----- X

**DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MEMORANDUM  
OF LAW IN SUPPORT OF DEFENDANT'S SECOND MOTION TO DISQUALIFY THE  
BARRETT LAW OFFICE, P.A., NUTT & MCALISTER, P.L.L.C.,  
THE LOVELACE LAW FIRM, P.A., AND THE MIKE MOORE LAW FIRM, LLC**

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Defendant State Farm Fire and Casualty Company (“State Farm”) respectfully submits this memorandum of law in support of its Second Motion to Disqualify the Barrett Law Office, P.A., Nutt & McAlister, P.L.L.C., the Lovelace Law Firm, P.A., the Mike Moore Law Firm, LLC, the entity formerly known as the Scruggs Katrina Group and now known as the Katrina Litigation Group, and all of the lawyers associated with these entities from representing Plaintiffs Thomas C. and Pamela McIntosh in this case.

### **INTRODUCTION**

This is State Farm’s second motion to disqualify Plaintiffs’ counsel. State Farm filed its first motion to disqualify attorney Richard F. Scruggs (“Scruggs”) and his partners in the co-venture called the Scruggs Katrina Group (the “SKG”) on June 19, 2007. On September 13, 2007, this Court declined to reach the merits of State Farm’s motion, observing that “[a]ll of [the] misconduct State Farm charges relates, in one way or another, to the relationship between Scruggs . . . and two former employees of Defendant E.A. Renfroe and Company (Renfroe), Kerri and Cori Rigsby (Rigsbys).” (Order at 1.) The Court held instead that State Farm waived its right to seek disqualification based on this conduct because the company was aware that the Rigsbys had stolen thousands of State Farm’s confidential documents and given them to Scruggs and the SKG for use in their civil litigations against State Farm for “at least a year prior to filing” its disqualification motion. (Order at 2.)

Since this Court’s order was entered, numerous events have transpired and facts that the SKG has labored intensively to keep hidden have been uncovered. These facts and events confirm that counsel’s conduct with respect to the Rigsbys’ theft of State Farm’s documents was not an isolated event. Rather, it was part of a much larger pattern of highly unethical – and in many cases, blatantly illegal – tactics employed by the SKG in this and other Katrina-related cases. This second motion for disqualification is based on these new facts and events, which are

independently more than sufficient to warrant disqualification of the SKG lawyers in this case.

As this Court is well aware, on November 28, 2007, the co-founder and leader of the SKG, Scruggs, was indicted on six counts of conspiracy to bribe a judge. Two additional SKG members, David Zachary Scruggs (“Zach”) and Sidney A. Backstrom (“Backstrom”), as well as two others, alleged co-conspirators Timothy R. Balducci (“Balducci”) and Steven Patterson (“Patterson”), were also indicted on the same charges.<sup>1</sup> Balducci has since pleaded guilty to the charges and is reported to be cooperating in the government’s prosecution.

Faced with these criminal indictments, Scruggs’s SKG partners recognized immediately that Scruggs, Zach, and Backstrom’s continued participation in these cases was untenable. On November 29, 2007, Don Barrett wrote the Court a letter explaining that Scruggs and his law firm were withdrawing from the Katrina cases and that Don Barrett would be taking over as lead counsel. After initially disputing Barrett’s assertions, Scruggs apparently relented and withdrew from all of the Katrina cases being litigated by the SKG.

But the mere withdrawal of Scruggs, Zach, and Backstrom from the joint venture and the change of its name from the “Scruggs Katrina Group” to the “Katrina Litigation Group” (the “KLG”) does not absolve the SKG members of responsibility for the highly unethical acts that they have committed. First, government filings in the criminal case strongly suggest that the money used to bribe the judge came from the SKG’s common fund. In particular, Scruggs “hired” Balducci as a jury consultant and gave him \$50,000 to bribe the judge by “falsely creating documents to show that he hired [Balducci] to do jury selection work and preparation of jury instruction” for his law firm. *See* Scruggs Indictment, Count I, ¶ 4. This money was

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<sup>1</sup> A copy of the criminal indictment is attached hereto as Ex. 1.

apparently then charged back to the SKG.<sup>2</sup> The SKG knew or should have known that these jury consultant payments were bogus because the SKG's joint venture agreement required that all payments from the SKG's common fund be reviewed and approved by Nutt & McAlister, which served as the treasurer for the venture. *See Joint Venture Agmt. at 2 (Ex. 3).*

Notably, the SKG's long-standing practice of hiring bogus "consultants" is well documented in State Farm's original disqualification motion, which details how the SKG attempted to legitimize its annual payment of \$150,000 to each of the Rigsbys by hiring them as "consultants." Indeed, the parallels between the misfeasance exhibited by the SKG in connection with the Rigsbys and the alleged attempts to obfuscate the true purpose of the payments to Balducci are striking.

Recently uncovered evidence has also brought to light the fact that the Rigsbys are not the only State Farm "insiders" that the SKG has attempted to put on its payroll. State Farm has learned that SKG attorneys – including those who are still in this case – have also offered another material fact witness, engineer Brian Ford, hefty sums to do "consulting" work for them. Ford was formerly employed by Forensic Analysis & Engineering Corporation ("Forensic") and *prepared the original October 12, 2005 engineering report* which is at the heart of this lawsuit.

The SKG's practice of hiring material fact witnesses as litigation consultants unquestionably violated numerous ethical rules. Courts addressing analogous facts have consistently condemned this practice, explaining that it violates state and federal analogues of Rule 4 of the Mississippi Rules of Professional Conduct ("MRPC"), which prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third party or the discovery rules (MRPC 4.4(a)); and Rule 8.4 of the MRPC, which prohibits an attorney from

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<sup>2</sup> *See Gov't Resp. to Defense Mot. for Continuance at 2* (stating that "the government provided to the defense certain documents related to expense transmittals from the Scruggs Katrina Group") (Ex. 2).

engaging in conduct involving dishonesty or deceit, or that is prejudicial to the administration of justice (MRPC 8.4(c) and (d)).

Paying a fact witness hefty “consulting” fees further violates the federal bribery statute, which makes it a felony to offer anything of value to a fact witness for her testimony (except for certain nominal witness fees expressly permitted by law). *See* 18 U.S.C. §§ 201(c)(2), (d); *Mataya v. Kingston*, 371 F.3d 353, 359 (7th Cir. 2004) (Posner, J.) (“To pay a witness, other than an expert witness, for his testimony is irregular and in fact is unlawful in federal trials . . . .”). Not surprisingly, a violation of the bribery statute constitutes an ethical breach under both MRPC 3.4(b), which provides that “[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law,” and MRPC 8.4(b), which makes it “professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

Indeed, the inherent impropriety of hiring Brian Ford as a “litigation consultant” was immediately apparent to Mississippi Special Assistant Attorney General Courtney Schloemer. Documents that State Farm recently obtained from Brian Ford – which the SKG sought to keep hidden, and only released after this Court overruled their ad hoc privilege objections – reflect that on October 25, 2006, Schloemer called Ford to “develop” a State Farm “strategy.” Ford-00011.<sup>3</sup> During that “strategy” call, Schloemer told Ford that she did “not want Brian to be a paid consultant prior to testifying before grand jury.” Ford-00012. Ford’s notes further state: “Courtney talked to Derek [Wyatt] – they agree that a criminal conviction could help civil cases.” *Id.*

The SKG further violated the ethical rules when it sought to exploit its close working

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<sup>3</sup> All pertinent portions of Brian Ford’s supplemental production are attached hereto as Ex. 4.

relationship with the Mississippi Attorney General's office by threatening criminal prosecution of State Farm and its officers and employees in order to coerce State Farm into settling claims of dubious merit. This conduct violated MRPC 8.4(e), which provides that it is professional misconduct to "state or imply an ability to influence improperly a government agency or official." MRPC 8.4(e).

Finally, it is of no moment that much – but by no means all – of the unethical activity in this case was initiated by Scruggs. In addition to their own independent violations of the ethical rules, all of the SKG lawyers are subject to accessorial liability under MRPC 5.1(c), which provides that "[a] lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if . . . the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved." MRPC 5.1(c)(1). Here, the SKG ratified Scruggs's misfeasance when its members hired the Rigsbys to serve as litigation consultants, utilizing the documents they stole from State Farm in the SKG cases, and sought to exploit Scruggs's relations with the Attorney General's office to increase the profits of the joint venture.<sup>4</sup>

In short, State Farm respectfully submits that when the conduct of the SKG is measured against the pertinent rules of professional responsibility and the case law applying those rules, the Court will conclude that Scruggs's withdrawal is insufficient to remedy the manifest ethical violations committed by the SKG in this case. Accordingly, disqualification of Plaintiffs' attorneys and their law firms is more than warranted.

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<sup>4</sup> To be sure, additional evidence of the SKG's misfeasance is still coming to light. For instance, a recent lawsuit filed by a former paralegal at the Nutt & McAlister firm raises serious questions regarding whether attorneys at that firm made secret copies of the State Farm documents stolen by the Rigsbys in order to circumvent the preliminary injunction entered by the court in *E.A. Renfroe & Co. v. Moran*. See *Brown v. David Nutt, P.A. et al.*, 3:01-cv-0727-HTW-LRA (S.D. Miss. filed Dec. 12, 2007) (Ex. 5). There will also undoubtedly be additional information gleaned from the pending criminal prosecutions that will shed light onto the SKG's multiple ethical violations in this case. Moreover, State Farm's investigation of counsel's multiple ethical violations is ongoing.

## FACTUAL BACKGROUND

### **I. THE FORMATION OF THE SKG**

On December 14, 2005, the Scruggs Law Firm, the Barrett Law Office, P.A., Nutt & McAlister, P.L.L.C., and the Lovelace Law Firm, P.A., entered into a joint venture agreement to form the SKG. *See* Joint Venture Agmt. at 1.<sup>5</sup> Pursuant to its terms, the SKG was formed to “bring a number of lawsuits on behalf of individuals and businesses who were wrongfully denied insurance coverage for property damages arising out of Hurricane Katrina.” *Id.* As Scruggs testified at the *Renfroe* contempt hearing, the SKG is a separate entity from the Scruggs Law Firm. Hr’g Tr. at 144:7-10 (all pertinent excerpts of the *Renfroe* contempt hearing are attached hereto as Ex. 6).

Pursuant to the joint venture agreement, “Nutt & McAlister will serve as the treasurer for the venture.” *See* Joint Venture Agmt. at 2. The agreement further provided that Nutt & McAlister would establish a centralized common fund to “be used only for expenses that are common to the joint venture firms in prosecuting the litigation.” *Id.* “Expenses that are not common fund expenses . . . shall not be reimbursable out of the common fund account.” *Id.* Nutt & McAlister was charged with making the initial determination of whether an expense is a common fund expense. *Id.*

The SKG holds itself out as a legal team<sup>6</sup> whose members work together on behalf of policyholders<sup>7</sup> and will share fee income. Under Mississippi law, “[w]here a joint venture exists,

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<sup>5</sup> The SKG originally consisted of six firms. *See* Joint Venture Agmt. at 1. However, by the time this litigation was filed, only these four member firms remained.

<sup>6</sup> According to the SKG website, “[t]he Scruggs Katrina Group is a legal team consisting of Mississippi attorneys who joined together soon after Hurricane Katrina ravaged the Mississippi Gulf Coast.” Scruggs Katrina Group, *About Us*, <http://www.scruggskatrinagroup.com/about-us/index.php> (last visited Dec. 30, 2007).

<sup>7</sup> *See id.* (“The Scruggs group quickly filed suits against the major insurers on the Coast . . . . [T]he Scruggs group developed the case to be brought against the insurers.”).

its members are bound by the acts of other members acting in the course and scope of the joint venture.” *Braddock Law Firm, PLLC v. Becnel*, 949 So. 2d 38, 50 (Miss. Ct. App. 2006), *cert. granted*, 946 So. 2d 368 (Miss. 2006), and *cert. dismissed as improvidently granted*, No. 2004-CT-01237-SCT, 2007 Miss. LEXIS 135 (Miss. Feb. 15, 2007).

## **II. THE SKG’S ATTEMPT TO PAY OFF OTHER FACT WITNESSES**

The SKG’s lavish payments to the Rigsbys to serve as “litigation consultants” are well documented in State Farm’s first disqualification motion. But the Rigsbys are not the only State Farm “insiders” that the SKG has attempted to put on its payroll. Recently obtained documents establish conclusively that the SKG has also offered engineer Brian Ford, who worked for Forensic on numerous State Farm matters, large sums to do “consulting” work for them. *See Exs. 4, 7-8*. In fact, Ford is the engineer who prepared the original October 12, 2005 engineering report on the McIntosh property, which this Court has already recognized “has become a critical point in this litigation, as it appears to be the linchpin of Plaintiffs’ bad faith claims.” 12/11/2007 Order at 3 (Doc. 911). By definition, Ford is a key material fact witness in this case. Nevertheless, the SKG has offered him vast sums of money to “consult” for them.

Specifically, on May 20, 2006, Scruggs, Derek Wyatt (formerly of the Barrett Law Office, currently with Nutt & McAlister) and their colleagues traveled to Bethlehem, Georgia, where they spent several hours meeting with Ford. *See Ford Dep. at 211:9-213:3* (all pertinent excerpts of Ford’s deposition are attached hereto as Ex. 7); Ford-SDT-100280 (excerpts of Ford original production are attached as Ex. 8). On May 22, 2006, Ford agreed to work for the SKG based on Scruggs’s offer to provide indemnity and legal representation to Ford and his family, reimbursement of his expenses, and a monthly retainer of \$10,000 for a minimum of twelve months. *See Ford-SDT-100254*. For his “participation in joining the team,” Ford also sought to be compensated with a percentage share of the settlement of each case, and requested Scruggs’s

“suggestions in how to structure” such payments. *Id.*

On August 8, 2006, Wyatt forwarded materials to Ford in *Mullins*, a case in which “State Farm refused to pay damage and . . . the house . . . was essentially without damage.” Ford-SDT-100234. Wyatt confirmed that Ford would be paid “on the consulting terms that Dick Scruggs and I discussed with you in Georgia a while back.” Ford-SDT-100234.

On September 1, 2006, Ford received a call from the SKG stating that “Dickie needs me” and would be calling. Ford-SDT-100283. On September 6, Scruggs called Ford, telling him that the “SKG wants [him] on team” as a “fact witness” and “consultant,” and he would “be paid for [his] services.” Ford-SDT-100284. Scruggs agreed to review the terms Ford set forth in his May 22, 2006 e-mail – i.e., requesting, *inter alia*, indemnity, a monthly retainer, and a percentage share of each settlement – and said he would call the next day. *Id.* On September 7, Scruggs called Ford, telling him “yes, we want [to] go ahead” and that the SKG “can meet your wishes and expectations.” Ford-SDT-100285.

More recently, on June 20, 2007, Wyatt called Ford to tell him of the filing of a RICO action against State Farm, captioned *Shows v. State Farm Fire & Casualty Co.*, No. 1:07-cv-00709-WHB-LRA (S.D. Miss.). *See* Ford-SDT-100293-94. Wyatt explained that they intended to portray Ford as a “sacrificial lamb” and that his “role” as a “witness” would be “somewhat of a victim.” *Id.* On June 25, 2007, Wyatt again spoke to Ford, telling him that while the SKG could not pay him as a “fact witness,” it could pay him as a “consultant,” ultimately prompting Ford to ask, “Do I need to move assets?” *Id.*

### **III. THE TESTIMONY OF DAVID LEE HARRELL, DEPUTY COMMISSIONER OF INSURANCE**

The recent testimony of Mississippi Deputy Commissioner of Insurance David Lee Harrell further confirms that the SKG never had any intention of litigating its cases against State

Farm by the rules. Rather, the SKG's strategy was to obtain documents outside of the normal discovery process and assist law enforcement officials with the circumvention of the Fourth Amendment. This strategy required the SKG to resist disclosing documents to State Farm as long as possible so that it could make unchallenged statements in the press about "highly placed insiders" and deprive the company of any opportunity to confront the so-called evidence that it claimed to have, while at the same time using its law enforcement connections and the threat of criminal prosecution to create insuperable pressure to settle its speculative claims for high-dollar amounts.

In particular, Harrell testified that in mid-December 2005 (which was shortly after the SKG was formed), Scruggs called the Mississippi Commissioner of Insurance, George Dale, and requested a meeting.<sup>8</sup> On December 15, 2005, Scruggs met with Commissioner Dale and Deputy Commissioner Harrell. At that meeting, Scruggs demanded that Dale "make State Farm put up \$500 million for him to administer to pay claims [to clients of the SKG]." Harrell Dep. at 318:14-18. When asked why the Mississippi Department of Insurance should set aside or require State Farm to pay a half billion dollars for the SKG to administer as it saw fit,

[Scruggs] said he was going to do it the same way he did in the tobacco case, that he had a couple insiders, high-ranking State Farm representatives working for him as insiders, and he was going to work it the same way he and [former Mississippi AG] Mike Moore worked the tobacco case.

Harrell Dep. at 320:10-16. When questioned further on this point, Harrell confirmed that Scruggs said "he had a couple of . . . insiders" and "whistle blower[s]" with knowledge of "claims files [and] engineer reports" who were "working for him" at State Farm. *Id.* at 324:13-325:24.

Scruggs further threatened "that if Commissioner Dale didn't go along with trying to

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<sup>8</sup> October 31, 2007 Deposition of David Lee Harrell at 313:5-6 ("Harrell Dep.") (Ex. 9).

make State Farm put up \$500 million, . . . Scruggs was going to attempt to get Mr. Dale beat [in the upcoming election].” *Id.* at 323:9-13. When Commissioner Dale refused and “advised Mr. Scruggs that he didn’t think that was legal to do that,” (*id.* at 324:9-12), Scruggs did, in fact, spend \$250,000 to help defeat Dale in his re-election bid.

Harrell further testified that Attorney General Jim Hood was equally adamant that State Farm reach a settlement with the SKG, threatening that “[i]f they [State Farm] don’t settle with us, I’m going to indict them all, from Ed Rust [State Farm’s Chairman and CEO] down.” *Id.* at 340:21-22. In other words, Hood worked with the SKG and the Rigsbys to take documents from State Farm, without a warrant, for use in a criminal investigation. In return, Hood used the threat of criminal indictments as a means of coercing settlements in the SKG’s civil cases.

Harrell also recounts meetings with former Mississippi Attorney General Mike Moore (“Moore”). Although Moore is now representing Plaintiffs in *this* action, he had *previously* acted as an agent of Attorney General Hood. In particular, Harrell testified that he met with Moore and that Moore stated that “he was helping Jim Hood with the Grand Jury process” which was investigating possible criminal charges against State Farm and its officers and employees. Harrell Dep. at 333:24-334:10. When Harrell inquired further into whom Moore was representing, Moore stated that “he was serving as resolution counsel,” (*id.* at 332:17-18), and would be “paid at the end of the day,” (*id.* at 333:8-9).

The close working relationship between the Attorney General’s office and the SKG is further evidenced by additional documents recently obtained from Brian Ford. These documents indicate that, at the behest of Derek Wyatt and others at the SKG, Ford was put in contact with Mississippi Special Assistant Attorney General Courtney Schloemer to develop a “strategy” for dealing with State Farm. Ford-00011. Ford’s notes further reflect the fact that prior to presenting Ford to the state grand jury empanelled to investigate possible criminal charges

against State Farm, Schloemer called Ford and told him that she “talked to Derek [Wyatt] – *they agree that a criminal conviction could help civil cases.*” Ford- 00012 (emphasis added). Ford further noted: “Courtney does not want Brian to be a paid consultant prior to testifying before grand jury.” *Id.*

The fact that Plaintiffs’ attorneys held regular “strategy” sessions with the Special Assistant Attorney General to create a synergy between the SKG’s civil litigations and the Mississippi criminal investigation is particularly troubling in light of the fact that on March 29, 2006, the Circuit Court of Harrison County, Mississippi, entered a protective order requiring AG Hood to erect and maintain a “Chinese wall” separating the criminal investigation from civil litigation against State Farm, and prohibiting the disclosure of materials obtained by AG Hood in the criminal investigation to persons in the AG’s office involved in pursuing civil litigation against State Farm. *See* March 29, 2006 Order (Ex. 10).

The interaction between AG Hood’s office and the SKG was also apparent to the *Renfroe* court. In commenting on what possible motive Hood had to intervene in the *Renfroe* action, ostensibly on behalf of the State of Mississippi, to ensure that the court’s injunction included a protective order which precluded Renfroe’s attorneys from providing documents to State Farm, Judge Acker stated:

[E]ven if the court had not issued a protective order with the preliminary injunction, and even if Renfroe’s counsel had promptly disclosed the documents to State Farm, the court does not understand how this would have jeopardized a criminal investigation of State Farm. *Unless, as Renfroe has hinted at, Scruggs and Hood teamed up to bully State Farm into civil and criminal settlements by telling State Farm that they had 15,000 inculpatory documents but not allowing State Farm to see them, the court does not see why it was worth it to Scruggs to risk contempt.*

*E.A. Renfroe & Co., Inc. v. Moran*, No. Civ. A. 06 14 1752S, 2007 WL 1748655, at \*9 (N.D. Ala. June 15, 2003).

In fact, Scruggs and his SKG co-venturers have not only confirmed Judge Acker's suspicions, they have bragged about such tactics. For example, Scruggs has boasted of using "every trick in the book, political, public opinion and legal" to force State Farm into resolving civil cases in which Scruggs represents State Farm policyholders, including a class action settlement reached in a case captioned *Woullard v. State Farm*, Civil Action No. 1:06-cv-1057 (S.D. Miss.).<sup>9</sup> He specifically credited the Rigsbys with providing him with leverage to cajole State Farm into settling claims.<sup>10</sup>

Even prior to the *Woullard* class action settlement, on January 18, 2007, Don Barrett wrote a letter to State Farm's counsel stating that going forward with a proposed State Farm-SKG civil settlement "vastly reduces the chance that [Attorney General] Hood would go forward with an indictment."<sup>11</sup> Similarly, in the context of an argument over how attorneys' fees from an SKG settlement with State Farm should be divided among various SKG member law firms, another SKG lawyer asserted that Scruggs's firm deserved a larger piece of the pie because "the whistleblowers came to Dick and they were the sole basis for Hood's interest which was really the 80% of why [State Farm] wanted to settle."<sup>12</sup> The SKG's disturbing belief that such tactics represent an appropriate way to pursue litigation continues to this day and implicates this very lawsuit. In fact, rather than being chagrined by the prospect of criminal contempt, Don Barrett actually bragged that "Judge Acker has turned out to be quite a client-recruiting agent for us." Barrett further threatened: "If State Farm or any of its employees are indicted, then the value of

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<sup>9</sup> Tr. of 2/28/07 Hr'g in *Dennis Woullard v. State Farm Fire & Casualty Co.* in the United States District Court for the Southern District of Mississippi, Civil Action No. 1:06-cv-1057-LTS-RHW, at 10 (Ex. 11).

<sup>10</sup> *Id.* at 13.

<sup>11</sup> 1/18/07 Letter from Don Barrett (Ex. 12).

<sup>12</sup> 1/25/07 E-mail from Sidney Backstrom (Ex. 13).

our cases skyrocket[s].”<sup>13</sup>

#### **IV. THE SKG’S GROSS AND REPEATED MISUSE OF THE SUBPOENA POWER**

The evidence further shows that Plaintiffs’ counsel, Derek Wyatt, repeatedly and egregiously abused the subpoena power in this and other Katrina cases to improperly obtain privileged materials. By way of background, Plaintiffs’ counsel had previously used improper subpoenas to obtain evidence in *McFarland v. State Farm Fire and Casualty Co.*, No. 1:06-cv-466-LTS-RHW (S.D. Miss. filed on May 9, 2006). There, the Court held that Mr. Wyatt’s subpoenas “were improperly issued and void when served” – “thereby depriving Defendant . . . of any notice or opportunity to object thereto.” See Aug. 30, 2006 Order in *McFarland* (Doc. 35) at 1, 4 (Ex. 15). As the Court aptly recognized, “[t]his is a fact which was or should have been known to Plaintiffs’ attorney when he issued the subpoenas.” *Id.* at 4. The Court was also taken aback by counsel’s “improper and offensive” *ex parte* communications with the Court, which sought “the Court’s complicity in the acts leading to the production of the documents . . . .” *Id.* at 3 & n.2. Ultimately, the Court warned that it “is deeply troubled by the conduct of Plaintiffs’ counsel in this case.” *Id.* at 5.

Undeterred by that cautionary note, in yet another case before this Court, *Mullins v. State Farm Fire & Casualty Co.*, No. 1:06-cv-457-LTS-RHW (S.D. Miss. filed on May 5, 2006), Plaintiffs’ counsel repeatedly set depositions unilaterally, causing the Court to find that Plaintiffs’ counsel “chose to ignore the clearly stated objection of Forensic’s counsel, made no effort to determine an agreeable date, and proceeded to set the depositions of Forensic’s employees.” Oct. 20, 2006 Order in *Mullins* (Doc. 44) at 3 (Ex. 16). Though the Court was “dismayed by the lack of civility and professional courtesy exhibited in this case,” *id.*, Plaintiffs’

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<sup>13</sup> 8/23/07 Letter from Don Barrett to Sheila L. Birnbaum (Ex. 14).

counsel, still undeterred, unilaterally set the deposition of Ms. Nellie Williams, a former employee of Forensic, after which the Court ordered all pending depositions cancelled. *See* Jan. 3, 2007 Text Only Order in *Mullins* (Ex. 17).

Significantly, when Plaintiffs' counsel deposed Ms. Williams on December 14, 2006, Plaintiffs' counsel badgered and browbeat her to produce a multi-disk set of CDs even though privilege was asserted over some of their content. *See* Williams Dep. at 177:5-17.<sup>14</sup> Though Ms. Williams was, as Plaintiffs' counsel acknowledged, not represented by counsel in her first-ever deposition, *see id.* at 8:1-3, 153:2-3, 175:13-14, Plaintiffs' counsel repeatedly and aggressively threatened her, and told her that she was "in contempt" unless she immediately turned over those CDs in response to the subpoena.

- "You can either turn over the documents that you brought here today pursuant to this order [i.e., referring to the subpoena], or you can choose to be in contempt of this order. Which do you choose?"
- "I'm asking you again, do you choose to be in contempt of this subpoena or are you turning over the documents commanded by the subpoena?"
- "[Y]ou're choosing to do so [not comply] at your peril. . . . What happens next will be a proceeding in the United States District Court, District of Nevada, to hold you in contempt."
- "Are you familiar with the United States District Court subpoena? Do you know what the power and import of it is?"
- "Let me just inform you that what you will find out from here on will be a lot more poignant than what you're finding out right now. This . . . is a court order that you are to produce what is asked for in this subpoena."
- "It orders you to produce it to us today at the designated time and place. So if you choose not to do that [comply], you're choosing to be in contempt of the subpoena."
- "If you choose not to do it, then you choose not to do it, and you need to understand you are in contempt of the order."

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<sup>14</sup> All pertinent portions of Nellie Williams's Deposition in *Mullins* are attached hereto as Ex. 18.

- “So as of this moment, if you are choosing to refuse to produce the information to us, you’re in contempt.”

*Id.* at 175:13-17; 176:1-2, 14-16; 180:9-14; 181:3-5, 7-12, 16-20; 182:22-24; 183:16-18. After this long and uncomfortable exchange, Ms. Williams simply surrendered wholesale all the data she had, including data Forensic claimed was outside the scope of the subpoena. *See id.* at 184.

These unfortunate episodes merely laid the groundwork for the startling events that were to happen in this case. Plaintiffs’ counsel served a subpoena on Ms. Williams *without* (once again) giving any notice to the Court or counsel. *See, e.g.*, Forensic’s Oct. 10, 2007 Sur-Reply to Pls.’ Mot. for Permission to Comply with Fed. Grand Jury Subpoena, Etc. (Doc. 721) at 6-8. The subpoena required Ms. Williams to bring her personal computer to a computer technician, who opened her computer and physically extracted her hard drive. *See* Ex. 19, Williams Dep. in *McIntosh* at 273:1-6. Depriving Ms. Williams of the custody of her hard drive, he then placed it in a pre-addressed and pre-paid shipping box, sealed it, and instructed Ms. Williams to deliver it to a private mail location to dispatch it to Plaintiffs’ forensic computer consultants. *See id.*

To be sure, Ms. Williams was reluctant to relinquish her computer because it contained her personal and private records. *See id.* at 273:16-17. Yet Ms. Williams, a recent widow, was reluctant to object to the subpoena because of two things.

First, the browbeating that Plaintiffs’ counsel gave her during the *Mullins* deposition – an experience that Mr. Wyatt chose to revisit with her in this case – led her to believe that she had to follow the terms of the July 2007 subpoena for her computer’s hard drive no matter what, or be “in contempt.”

Q. [Y]ou were reluctant to produce [the CDs] . . . and we had to go through a little process of explaining what the consequences were to not complying with the subpoena. Do you remember that?

A. Yes.

Q. So you knew about all of that when this subpoena came, this one here that came in July of 2007. You already knew about the procedures for the subpoena and everything, and what you could do and couldn't and so forth, right?

\* \* \*

A. As far as complying with what was said on the subpoena?

Q. Complying, or not complying, or complaining, or doing anything you wanted to do, right?

A. Well, complaining didn't enter into it, but I knew that I had to turn it in as per the subpoena.

*Id.* at 276:9-25. Not only did that experience apparently mislead Ms. Williams into believing that she had no ability to object to a subpoena and had no alternative other than to comply with its terms, but she also retained counsel when she learned that Mr. Wyatt would again be taking her deposition. As Ms. Williams told Mr. Wyatt, “*you* were the reason I sought to have representation.” *Id.* at 278:17-18.

Second, Ms. Williams assumed that Forensic's counsel received a copy of the subpoena and assumed that “if there was a problem with that, they would notify [her].” *Id.* at 278:24-279:2. But, of course, those assumptions were rendered void by the actions of Plaintiffs' counsel. Notice was *never* given.

After Ms. Williams complied with the terms of the illicitly issued July 2007 subpoena, Plaintiffs' counsel forensically harvested **18.8 gigabytes** of data from her hard drive. *See* Forensic's Oct. 25, 2007 Mem. in Support of Mot. for Protective Order, Etc. (Doc. 604-3) at 2. Plaintiffs' counsel have yet to produce this data.

Next engaging in a game of “hide and seek” when Plaintiffs' counsel suddenly sprang Forensic e-mails in a deposition in this case – e-mails that neither Forensic's counsel nor any other defense counsel had previously seen – Forensic's counsel asked Wyatt how he acquired them, but he refused to answer.

MR. CANADA: And you shouldn't have it [i.e., the e-mail] to begin with.

MR. WYATT: We shall see.

MR. CANADA: How did you get it?

MR. WYATT: We shall see.

MR. CANADA: How did you get it?

Ex. 20, Kelly Dep. in *McIntosh*, at 107:17-22. When Forensic's counsel pieced together the fact that Plaintiffs' counsel improperly possessed these e-mails, a multi-track set of motion practice ensued.

First, Forensic moved to have the evidence suppressed and for sanctions. *See* Forensic's Oct. 8, 2007 Mem. in Supp. of Mot. for Protective Order, Etc. (Doc. 604) at 2-3. The *next day* this Court issued an Interim Order "pending full briefing on the motion," finding there was "no notice of intent to issue a subpoena duces tecum to Williams, nor proof of service of any such subpoena" in the docket. *See* Oct. 9, 2007 Interim Order (Doc. 613) at 1-2 (attached hereto as Ex. 6). In the meantime, the Court ruled "[t]hat dissemination of, or use or reference to, any information obtained from Ms. Williams' computer is **prohibited** pending further order of this Court," *id.* at 2 (emphasis in original), and ordered Plaintiffs' counsel to "retrieve any and all forms and copies of such information," *id.*, and to "place all information, which exists in any form whatsoever (including any and all copies and the hard drive itself), which came from Williams' computer into a sealed container which shall not be opened for any purpose pending further order of this Court," *id.*

Second, Plaintiffs initiated another track of motion practice, seeking exemption from the Interim Order because they wished to deliver the hard drive to a federal grand jury in response to a subpoena. *See* Pls.' Oct. 11, 2007 Mot. for Permission to Comply with Fed. Grand Jury Subpoena, Etc. (Doc. 629) at 2. By taking this route, Plaintiffs attempted to circumvent any

substantive ruling on the propriety of counsel's conduct. *See, e.g.*, Forensic's Oct. 25, 2007 Sur-Reply to Pls.' Mot. for Permission to Comply with Fed. Grand Jury Subpoena, Etc. (Doc. 721) at 1-2.

Third, Plaintiffs also sought to depose Forensic's counsel, accusing them of misleading the Court. *See* Pls.' Oct. 31, 2007 Emerg. Mot. to Permit Discovery for Ltd. Purposes (Doc. 751). Those accusations were strongly and cogently rebuffed. *See* Forensic's Nov. 5, 2007 Resp. in Opp. to Pls.' Emerg. Mot. to Permit Discovery for Ltd. Purposes (Doc. 776).

A few days later, on November 9, 2007, these events culminated in a global settlement with Forensic in this case and other related cases. *See* Notice of Settlement (Doc. 797) in *McIntosh*; Notice of Settlement (Doc. 56) in *Shows* (Ex. 21). Pursuant to the (known) terms of the settlement, the prior motions challenging Plaintiffs' counsel's conduct were withdrawn and the orders were abated. *See* Joint Nov. 9, 2007 Notice of Withdrawal of Mots. [524] [603] [605] [727] and [751] (Doc. 795) at 1. But this sudden settlement cannot cover up their counsel's unethical deeds.

## **V. STATE FARM'S FIRST DISQUALIFICATION MOTION**

On June 19, 2007, State Farm filed a motion to disqualify Scruggs, his law firm, and the SKG. On September 13, 2007, this Court declined to reach the merits of State Farm's motion, observing that "[a]ll of [the] misconduct State Farm charges relates, in one way or another, to the relationship between Scruggs . . . and two former employees of Defendant E.A. Renfroe and Company (Renfroe), Kerri and Cori Rigsby (Rigsbys)." (Order at 1.) Although the Court recognized that State Farm's "motion raises very serious ethical concerns," the Court held that State Farm waived its right to seek disqualification based on this conduct because the company was aware that the Rigsbys had stolen thousands of State Farm's confidential documents and given them to Scruggs and the SKG for use in their civil litigations against State Farm for "at

least a year prior to filing” its disqualification motion. (Order at 2.) The Court’s dismissal was “without prejudice to State Farm’s right to pursue relief for the misconduct it has alleged in any other forum having authority to reach the merits of its claims.” *Id.* On November 19, 2007, the Fifth Circuit denied State Farm’s petition for a writ of mandamus “[w]ithout deciding the contested issue of ethics.” *In re State Farm Fire & Cas. Co.*, No. 07-60771, 2007 WL 4105160, at \*2 (5th Cir. Nov. 19, 2007) (per curiam).

## ANALYSIS

### **I. LEGAL STANDARD**

“[M]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under *federal law*.” *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992) (citation omitted). When deciding motions to disqualify, federal courts in the Fifth Circuit look to both “state and national ethical standards” governing attorney conduct. *Id.* The United States District Courts in Mississippi have adopted the Mississippi Rules of Professional Conduct. *See* N. & S.D. Miss. Unif. Local R. 83.5 (2007). Mississippi, in turn, has adopted the American Bar Association (“ABA”) Model Rules of Professional Conduct. *See United States v. Starnes*, 157 F. App’x 687, 693 (5th Cir. 2005), *cert. denied*, 127 S. Ct. 1922 (2007). Because of this uniformity, courts in Mississippi frequently rely on cases interpreting analogue rules in other jurisdictions.<sup>15</sup>

“A motion to disqualify counsel, such as the one now before the court, ‘is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court.’” *Grosser-Samuels v. Jacquelin Designs Enters., Inc.*, 448 F. Supp. 2d

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<sup>15</sup> *See, e.g., In re Am. Airlines, Inc.*, 972 F.2d 605, 617, 619-20 (5th Cir. 1992); *Doe v. A Corp.*, 709 F.2d 1043, 1046-47 & nn.9-10 (5th Cir. 1983); *Owens v. First Family Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 846 n.2, 850-51 & n.7 (S.D. Miss. 2005) (explaining that “particular rules of the Mississippi Code of Professional Responsibility [and] the rules of the ABA Model Code of Professional Conduct are effectively the same,” and relying on out-of-state cases to determine whether a certain rule applies to non-lawyer employees of lawyers).

772, 778 (N.D. Tex. 2006) (quoting *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1980)). Where there are apparent ethical violations, “any doubt is to be resolved in favor of disqualification” in order to preserve the public trust. *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 718 (D. Conn. 1991) (citation omitted).

## **II. THE SKG HAS VIOLATED THE FEDERAL BRIBERY STATUTE AND MRPC 3.4 AND 8.4**

The SKG’s repeated pattern of paying or negotiating to pay material fact witnesses hefty “consulting” fees is a facial violation of the federal bribery statute, 18 U.S.C. § 201, which, *inter alia*, criminalizes the giving of something of value (other than certain enumerated costs) for or because of past or potential testimony before any court, Congress, agency or commission. *See* 18 U.S.C. §§ 201(c)(2), (d).<sup>16</sup> An attorney who violates the federal bribery statute is subject to revocation or suspension of his or her license to practice law. *See, e.g., Disciplinary Counsel v. Blaszak*, 819 N.E.2d 689, 693-94 (Ohio 2004) (license suspended for two years; citing cases where license suspended indefinitely).

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

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<sup>16</sup> 18 U.S.C. § 201(c) states, in pertinent part . . .

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

18 U.S.C. § 201(c).

fitness as a lawyer in other respects,” MRPC 8.4(b).<sup>17</sup>

As one court discussing the policy behind the federal bribery statute recently explained, the testimony of any witness with a pecuniary incentive

is necessarily open to scrutiny and challenge. It is fair to question whether any witness would not tailor his or her testimony when that person’s own financial condition could be affected by the testimony – not because the witness is a plaintiff or defendant, but because a special relationship had been created with the witness by the plaintiff or defendant by reason of the reimbursement incentive.

*In re Telcar Group, Inc.*, 363 B.R. 345, 355 (Bankr. E.D.N.Y. 2007).

Notably, the SKG violated 18 U.S.C. § 201(c)(2) regardless of whether it asked Ford or the Rigsbys to testify in any particular way. *See United States v. Blaszak*, 349 F.3d 881, 888 (6th Cir. 2003) (rejecting defense that payment to witness was made to secure truthful testimony, explaining that plain language of statute prohibited sale of all testimony). However, there is every indication that the SKG was paying Ford and the Rigsbys to play a particular preordained role in its cases against State Farm. For instance, Ford’s notes reflect the fact that on June 20, 2007, SKG lawyer Derek Wyatt called Ford to retain him as a “consultant” on this case, and explained that the SKG intended to portray Ford as a “sacrificial lamb” and that when he was called upon to testify, his “role” as a “witness” would be “somewhat of a victim.” *See Ford-*

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<sup>17</sup> Case law holding that opposing counsel who hires a former company’s “insider” as a trial consultant has committed numerous ethical violations is legion. *See Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), *aff’d*, 43 F.3d 1439 (11th Cir. 1995); *Camden v. Md.*, 910 F. Supp. 1115 (D. Md. 1996); *In re Complaint of PMD Enters., Inc.*, 215 F. Supp. 2d 519, 530 (D.N.J. 2002) (attorney’s hiring of opposing party’s former employee, who was a fact witness in the case, warranted disqualification); *American Prot. Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, No. CV-LV-82-26-HDM, 1986 WL 57464, at \*1, \*6-7 (D. Nev. Mar. 11, 1986) (denying motion to reconsider prior order granting disqualification because attorney’s participation in negotiations to hire opposing party’s former employee as a trial consultant “affects both the public’s view of the judicial system and the integrity of the court”); *Esser v. A.H. Robins Co.*, 537 F. Supp. 197, 203 (D. Minn. 1982) (granting law firm’s motion to withdraw in lieu of disqualification, but conditioning consent to withdrawal on firm’s receiving no financial remuneration where plaintiff’s law firm had hired defendant’s former senior claims adjuster); *United States v. SAE Civil Constr., Inc.*, No. 4:CV95-3058, 1996 WL 148521, at \*5 (D. Neb. Jan. 29, 1996) (disqualifying attorneys who retained opposing party’s former president as a trial consultant); *MMR/Wallace Power*, 764 F. Supp. at 714-17, 727-28 (disqualifying attorney and law firm based upon retention of the former office manager of the opposing party as a trial consultant).

SDT-100293-94. There is also ample evidence that the Rigsbys have shaded their testimony to obfuscate the role that the SKG played in the so-called “data dump” operation. *See* Reply to 1st Disqualification Mot. at 24-25 & Exs. thereto.

Indeed, Ford appears to have known that there was a substantial risk that his “consulting” work for the SKG potentially transgressed legal boundaries. As noted, Ford insisted that the SKG provide indemnity and legal representation to him and his family as a condition of employment. *See* Ford-SDT-100254. And on June 25, 2007, after discussing his “consulting work” with Wyatt, Ford asked: “Do I need to move assets?” *Id.*

The Rigsbys similarly had a tacit understanding that all of their legal fees and liabilities would be covered by Scruggs and the SKG. This fact is confirmed by a recent pleading filed in the *Renfro* action, which states that “[t]he Rigsbys and Mr. Scruggs have confirmed that each understands and has understood since this [the *Renfro*] case began that Mr. Scruggs will satisfy any liability the Rigsbys might have to pay [including] fees, expenses or any other obligations, including satisfaction of a judgment.” Doc. 240 in *Renfro* at 1 (Ex. 22). The Rigsbys further confirmed that the SKG signed two retainer agreements guaranteeing payment of the Rigsbys’ legal fees and expenses. *Id.* at 2.

Of course, in this case, the Court is not called upon to decide the issue of the SKG’s criminal liability. But this Court is charged with safeguarding the integrity of the adversarial process. Here, the SKG’s pattern and practice of hiring or attempting to hire key fact witnesses to play a preordained “role” in this litigation perverts the truth-seeking process, and threatens State Farm’s due process right to a fair trial.

### **III. THE SKG VIOLATED MRPC 8.4(e) BY THREATENING STATE FARM WITH CRIMINAL PROSECUTION**

The SKG further violated the ethical rules when it used the threat of criminal prosecution by the Mississippi Attorney General's office to coerce State Farm into settling claims of dubious merit. In particular, MRPC 8.4(e) provides that it is professional misconduct to "state or imply an ability to influence improperly a government agency or official." In this case, the SKG repeatedly violated this rule.

For instance, on August 23, 2007 – which was the same day that Attorney General Hood "reopened" his criminal investigation against State Farm – SKG lawyer Don Barrett wrote a letter to State Farm threatening: "If State Farm or any of its employees are indicted, then the value of our cases skyrocket[s]." <sup>18</sup> Barrett and the other SKG attorneys apparently felt at liberty to make such threats based upon their relationship with the Attorney General's office. Indeed, the special prosecutors pursuing criminal charges against Scruggs in the contempt action note:

Scruggs' present and previous listings in Martindale-Hubbell boast a close relationship with the Office of the Attorney General with the State of Mississippi related to civil litigation. Scruggs was hired by the predecessor of Jim Hood, the present Attorney General of Mississippi, Michael Moore, in connection with the Class Action lawsuit against the tobacco industry, which resulted in a Two Hundred Forty-Eight Billion Dollar master settlement agreement in 1998 and a reportedly \$1,000,000,000 fee to Scruggs. According to the Mississippi Secretary of State's office, documents reveal that Scruggs has donated Forty-Four Thousand Dollars to the campaign of Attorney General Jim Hood in direct cash payments. This does not include any contributions to any PACS which may provide support for Attorney General Hood's campaign. <sup>19</sup>

Moreover, recently obtained evidence confirms that State Farm had ample basis to conclude that the SKG's threats were real. Ford's notes state that Wyatt and Schloemer held secret talks to develop a joint "strategy" regarding State Farm. That strategy included presenting

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<sup>18</sup> 8/23/07 Letter from Don Barrett to Sheila L. Birnbaum.

<sup>19</sup> *United States v. Scruggs*, No. 2:07-cr-325 (N.D. Ala.), Outline of Known Facts ¶ 18 (Oct. 12, 2007) (Ex. 23).

Ford – who was actively negotiating with the SKG for a high-paying consulting job – to the grand jury after being advised that “Courtney talked to Derek – they agree that a criminal conviction could help civil cases.” Ford-00012. Ford’s notes also strongly suggest that Schloemer was attempting to conceal from the grand jury the fact that Ford had a potential financial interest in the outcome of the civil litigation by stating that she did “not want Brian to be a paid consultant *prior* to testifying before grand jury.” *Id.* (emphasis added).

Plaintiffs’ lawyers have also used the threat of criminal litigation, in violation of MRPC 8.4(e), to coerce State Farm into somehow making the *Renfroe* lawsuit go away, notwithstanding that State Farm is not a party to that litigation. For example, on February 6, 2007, Moore, acting as an agent of Attorney General Hood, told State Farm: “[C]an we get renfroe [sic] settled, its [sic] holding up progress on my end . . . .”<sup>20</sup> Two days later, Moore communicated the following to State Farm: “I am told that the Renfroe lawyers made unreasonable demands for resolving the issues on the Rigsby sisters issue today . . . . I am going to wait til [sic] tomorrow to report to the Attorney General what they are up to because the response will not be pretty.”<sup>21</sup>

Moore’s activities are especially revealing. Moore acted as a consultant to Attorney General Hood’s investigation of State Farm throughout 2006. Suddenly, however, on February 26, 2007, Moore filed his appearance as co-counsel with the SKG in the *Woullard* case.<sup>22</sup> Only a week before, on February 19, 2006, Scruggs had written to State Farm’s counsel, stating: “Our disappointment in your lack of resolve in securing dismissal of the Renfroe matter cannot be

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<sup>20</sup> 2/6/07 E-mail from Michael C. Moore to Jeffrey W. Jackson (Ex. 24).

<sup>21</sup> 2/8/07 E-mail from Michael C. Moore to Jeffrey W. Jackson (Ex. 25).

<sup>22</sup> Notice of Appearance of Michael C. Moore, at 1, *Woullard v. State Farm Fire & Cas. Co.*, No. 06-0517, (S.D. Miss. Feb. 26, 2007) (Ex. 26).

overstated.”<sup>23</sup> On June 11, 2007, Moore filed a notice of appearance in this case on behalf of the McIntoshes.

Moore knew or should have known that his activities in both the criminal investigation of State Farm and as a private attorney for policyholders suing State Farm are improper. Among other reasons, on March 29, 2006, the Circuit Court of Harrison County, Mississippi, entered a protective order requiring AG Hood to erect and maintain a “Chinese wall” separating the criminal investigation from civil litigation against State Farm and prohibiting the disclosure of materials obtained by AG Hood in the criminal investigation to persons in the AG’s office involved in pursuing civil litigation against State Farm. *See* March 29, 2006 Order (Ex. 10). The court explained that attorneys who had access to the materials collected in the criminal case must be barred from participating in any civil action against State Farm as a matter of sound public policy:

Where, as here, there is related civil litigation conducted by the same office which is investigating the possible criminal activity, the appearance of justice must be served as well as the interest of justice.

*(Id.* at 2.) The same is true in this case.

The SKG’s coercive tactics continued. In an August 23, 2007 letter attempting to use the threat of criminal indictment to coerce settlement, Don Barrett stated: “All of this happened because State Farm could not or would not call off its Renfro dogs in Alabama.”<sup>24</sup> He expressly conditioned settlement of their pending Katrina lawsuits, including this one, on dismissal of the

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<sup>23</sup> 2/19/07 Letter from Richard F. Scruggs to Jeffrey W. Jackson and Sheila L. Birnbaum (Ex. 27).

<sup>24</sup> 8/23/07 Letter from Don Barrett to Sheila L. Birnbaum.

*Renfro* case with prejudice.<sup>25</sup> These patent uses of the threat of criminal prosecution to attempt to coerce State Farm into settling their civil cases is a facial violation of MRPC 8.4(e).<sup>26</sup>

#### **IV. THE SKG HAS ABUSED THE SUBPOENA POWER AND VIOLATED MRPC 4.1(a) AND 4.4**

Plaintiffs' counsel's berating of Ms. Williams and statement that she was "in contempt" were way out of bounds on multiple levels. As the court recognized in *Fox Industries, Inc. v. Gurovich*, No. CV 03-5166, 2006 WL 2882580 (E.D.N.Y. Oct. 6, 2006), instructing a non-party witness as to the effect of a subpoena constitutes "'clear evidence' of his bad faith and vexatious behavior, evincing a deliberate effort to usurp the authority of the court," and warrants the imposition of sanctions. *Id.* at \*10. The court explained: "It is the court's duty to rule on the validity of subpoenas and to direct the recipients to comply or not comply, not the attorney's, and [counsel] has, simply put, usurped the authority of the court. . . . The court will not tolerate such behavior." *Id.* at \*8.

The Federal Rules of Civil Procedure grant attorneys broad power to issue subpoenas as "officer[s] of [the] court." Fed. R. Civ. P. 45(a)(3). And with great power comes great "responsibility and liability for the misuse of this power." Fed. R. Civ. P. 45, advisory committee's note.

The risks attached to the misuse of the subpoena power are great. Under this delegation of public power, an attorney is licensed to access, through a non-party with no interest to object, the most personal and sensitive information about a

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<sup>25</sup> *Id.*

<sup>26</sup> See *In re Pstrak*, 575 S.E.2d 559 (S.C. 2003) (under analogue of Rule 8.4(e), suspending license to practice law of attorney who represented himself to court clerks as having ties with public officials in order to induce them to convert traffic citations into warnings); *State ex rel. Okla. Bar Ass'n v. Evans*, 747 P.2d 277 (Okla. 1987) (suspending attorney's license to practice of law under [the precursor to Rule 8.4(e)] DR 9-101(C) for offering client the option of making campaign contributions to public officials to prevent the filing of criminal charges); cf. *Realuyo v. Diaz*, No. 98CV7684 (GBD), 2006 WL 695683, at \*12-13 (S.D.N.Y. Mar. 17, 2006) (finding that attorney acted unethically by "using threat of criminal prosecution to gain an advantage in a civil action" and by "engaging in a calculated and deliberate course of conduct aimed at extracting a twenty million dollar settlement by coercive measures").

party. . . .

[M]isuse of the subpoena power . . . compromises the integrity of the court's processes. . . . When the power is misused, public confidence in the integrity of the judicial process is eroded.

*Spencer v. Steinman*, 179 F.R.D. 484, 489 (E.D. Pa. 1998), *vacated in part on other grounds*, No. 2:96-1792, 1999 WL 33957391 (E.D. Pa. Feb. 26, 1999).

Wyatt flagrantly abused this subpoena power, because only a court may find a witness in contempt of a subpoena. *See* Fed. R. Civ. P. 45(e). Wyatt's false representations to Ms. Williams that she was in contempt violated MRPC 4.1(a), which bars an attorney from making "a false statement of material fact or law to a third person" in the course of representing a client. MRPC 4.1(a). "Rule 4.1 has been described as imposing on an attorney the same duty of candor outside the courtroom that governs statements made to the court itself." *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 443 n.8 (D. Md. 2002).

Wyatt's campaign to intimidate and deceive Ms. Williams further violated MRPC 4.4(a), which prohibits using "methods of obtaining evidence" that "embarrass, delay, or burden a third person, or . . . that violate the legal rights of such a person." MRPC 4.4(a). *See, e.g., Louisiana State Bar Ass'n v. Harrington*, 585 So. 2d 514, 520 (La. 1990) (finding violation of Rule 4.4 where lawyer threatened adverse party in a civil suit with criminal charges if she did not respond to a letter, and suspending him from practice for nine months in conjunction with other ethical violations).

As with Plaintiffs' counsel's conduct here, "[t]he mere fact that an attorney abuses the subpoena power directly implicates the court itself and creates an embarrassment for the institution." *United States v. Santiago-Lugo*, 904 F. Supp. 43, 48 (D.P.R. 1995). Thus, the Court has the power to impose sanctions to correct and deter such abuse. *Id.* The Court should do so in this case.

## V. THE SERIOUS IMPROPRIETIES COMMITTED BY THE SKG WARRANT DISQUALIFICATION OF THE FIRMS

The SKG's blatant misfeasance in this case was extreme. It took place over the course of several months, involved numerous third parties, and is unprecedented in scale. Indeed, additional evidence of the SKG's misfeasance is uncovered on an almost daily basis.

Plaintiffs' lawyers will likely attempt to distance themselves from the multiple ethical violations by arguing that many of the unethical acts were orchestrated by Scruggs. This argument is flawed for at least two reasons. First, in addition to their own independent violations of the ethical rules, all of the SKG joint venturers are liable as *accessories*. MRPC 5.1(c) provides that "[a] lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if . . . the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved." MRPC 5.1(c)(1). Here, the SKG ratified and sought to profit from Scruggs's misfeasance.

Second, the SKG must be disqualified under settled principles of *imputed* liability. Joint venture partnerships – like the SKG – that share confidential information and hold themselves out to be "affiliated" are treated as a traditional law partnership for the purposes of the imputed disqualification rules. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123(1) (2000) (explaining that imputed disqualification rules cover "a law partnership, professional corporation, sole proprietorship, or similar association") (emphasis added); *Mustang Enters., Inc. v. Plug-In Storage Sys., Inc.*, 874 F. Supp. 881, 888-89 (N.D. Ill.) (holding that disqualification of constituent firms in joint venture was warranted where they shared confidential information and held themselves out to be "affiliated"), *opinion supplemented by* No. 94 C 6263, 1995 WL 55226 (N.D. Ill. Feb. 8, 1995). Under the imputed disqualification rules, "all authorities agree that all members of a partnership are barred from participating in a case from which one partner

is disqualified.” *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971). This is so because there is an “irrebuttable presumption that confidences presumably obtained by an individual lawyer will be shared with the other members of his firm.” *Grosser-Samuels v. Jacquelin Designs Enters., Inc.*, 448 F. Supp. 2d 772, 779 (5th Cir. 1980); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. c. (2000) (explaining that “[t]he general presumption is well settled that confidences imputed to one lawyer in a firm are shared among all firm lawyers”).

The illegally gained confidential knowledge that the SKG lawyers now possess regarding State Farm makes their continued representation of Plaintiffs in this case untenable. They may be ordered to return State Farm’s documents, they may be told to cease paying the Rigsbys, but the damage is already done; the SKG firms have irreparably perverted the litigation process. *See Camden v. Md.*, 910 F. Supp. 1115, 1124 (D. Md. 1996) (ordering disqualification of plaintiffs’ law firm: “MBRR has listened in at the legal confessional. It has gained access to confidential information that is damaging to Defendants whether or not it becomes formal evidence in the case.”). Therefore, unless the SKG law firms are disqualified, “[t]he integrity of the justice system is at risk.” *Id.* at 1123.

### **CONCLUSION**

For all of the foregoing reasons, State Farm respectfully requests that the Court disqualify the Barrett Law Office, P.A., Nutt & McAlister, P.L.L.C., the Lovelace Law Firm, P.A., the Mike Moore Law Firm, LLC, the entity formerly known as the Scruggs Katrina Group and now known as the Katrina Litigation Group, and all lawyers associated with these entities from representing Plaintiffs in this case, and to further order that Plaintiffs may not use any item

obtained through their counsel's unethical activities as evidence against State Farm in this litigation.

Dated: January 3, 2008

RESPECTFULLY SUBMITTED,

*/s/ John A. Banahan*

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**CERTIFICATE OF SERVICE**

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing with the Clerk of Court using the ECF system which sent notification of such filing to the following to:

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