

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

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY
RELATORS/COUNTER-DEFENDANTS
Vs.
STATE FARM MUTUAL INSURANCE COMPANY
DEFENDANT/COUNTER-PLAINTIFF, et al.

CASE NO. 1:06cv433-LTS-RHW

**RELATORS’ RESPONSE TO DEFENDANT STATE FARM’S
MOTION TO DISQUALIFY THE LAW FIRM OF
BARTIMUS, FRICKLETON, ROBERTSON & GORNY, PC**

A disqualification inquiry, particularly when instigated by an opponent, presents a palpable risk of unfairly denying a party the counsel of his choosing.... When for purely strategic purposes, opposing counsel raises the question of disqualification, and subsequently prevails, public confidence in the integrity of the legal system is proportionately diminished.

Federal Deposit Ins. Corp v. United States Fire Ins. Co., 50 F.3d 1304, 1316 (5th Cir. 1995).

I. Introduction

This is a false claims case. The complaint avers that State Farm Mutual Insurance Company (“State Farm”) defrauded the United States of America by causing the National Flood Insurance Program to pay insureds’ claims for damage caused by Hurricane Katrina as flood claims when State Farm knew that the damage claimed was wind damage. As a result of State Farm’s fraud, the complaint avers that United States of America and its taxpayers have paid millions of dollars of public money that should have been paid by State Farm to its insureds.

It comes as no surprise that State Farm does not want this case ever to come to trial. The first step in its effort to convince this Court that State Farm should never have to answer Relators’ claims that it committed fraud on the Government is to seek to disqualify both the Relators and

their counsel, claiming that the very evidence of the fraud must be disqualified and the Relators muzzled because the Relators were hired to work for other counsel, in other cases, to perform work to assist in preparing cases for other parties and, perhaps, to serve as fact witnesses.

This Court has decided that the actions of the other counsel requires disqualification of those counsel in those other cases precisely because the Court concluded that the Rigsby sisters would be **fact** witnesses in those cases. That decision is made and this Court knows both its reasons for its disqualification order as well as its scope. No amount of braying by either side can broaden or narrow the Court's Order beyond what the Court intended. Relators are, however, unwilling to tell the Court (or the press) what the Court meant by its own words. Rather, Relators believe that the Court is interested in the facts of this matter, will judge the conduct of the attorneys accused here by State Farm according to those facts and the applicable law, and will render a decision on matters relating to disqualification that will reflect the facts of this matter, not guilt by distant and uninformed association.

There are two fundamental differences that distinguish this case and the insurance claim cases pending in this District. First, the Rigsby sisters are **parties** in this case, not mere fact witnesses. As such they are the **clients** of the law firms that State Farm seeks to disqualify. The prohibition against payment of money to a **client** is well known in both Missouri and Mississippi. There is no gray area. “(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation....” Ms.R.P.C. 1.8. For this reason, counsel in this case expressly disavowed any and all willingness to pay any funds to their clients in this case. (Robertson Declaration at ¶ 16). And for this reason, counsel in this case never paid, agreed to pay, ratified any payment to or participated in any agreement to pay the Relators, whatever decisions

might have been reached by Scruggs Katrina Group and/or the Katrina Litigation Group for whatever purposes those decisions were reached.

Second, this is a False Claims Act case brought by the Relators on behalf of the United States Government, pursuant to express statutory authority. See, 31 U.S.C. § 3729. In seeking to disqualify both Relators and their counsel, State Farm seeks no less than to disqualify the Government from pursuing claims of fraud committed against it.

State Farm has leveled serious charges against Bartimus, Frickleton, Robertson & Gorny, P.C. (BFRG) and its individual members as well as against Graves, Bartle and Marcus (“GBM”), which is answering in a separate response. Perhaps State Farm is still smarting from the multi-million dollar punitive damages verdict BFRG obtained against State Farm for malicious prosecution in Missouri courts, recently affirmed on appeal and final. See, *Hampton v. State Farm Mut. Ins. Co.*, --- S.W.3d ----, 2008 WL 65107 (Mo.Ct.App. 2007). But the fact that BFRG obtained such a judicially affirmed verdict based on State Farm’s malicious conduct in another case certainly does not permit this Court to assume that all of State Farm’s conduct in every case is also malicious without independent evidence of that malice in each case. Just as this Court cannot presume such malice against State Farm here, this Court may not presume that the acts of other attorneys in other cases involving other parties are attributable to BFRG attorneys here without a factual basis for those claims.

The facts do not support State Farm’s allegations.

1. BFRG was never a member of Scruggs Katrina Group (“SKG”) or the Katrina Litigation Group (“KLKG”). (Exhibit A).¹

¹ As noted by the Katrina Litigation Group attorneys in their response to the motion to disqualify, the Bartimus firm is not and never has been a part of either the Scruggs Katrina Group or the Katrina Litigation Group. (Docket # 1106 *McIntosh v. State Farm*).

2. BFRG has not entered an appearance in any case filed by any person having a claim against any insurance company for failure to pay claims following Hurricane Katrina in the Southern District of Mississippi.
3. No member of BFRG participated in any decision to provide any funds to the Relators in this case.
4. No member of BFRG paid any amount or agreed to pay any amount to the Relators for any purpose.
5. No member of BFRG was asked to ratify a decision by others to pay any amount to the Relators for any purpose. BFRG expressly disavowed any participation in payment of any funds to the Realtors and suggested that, as to the qui tam action, such payments would not be proper, and no payments could be made to the Relators except by the United States upon the successful completion of the false claims litigation.
6. Neither BFRG nor any member of BFRG has received any attorneys' fees from either SKG or KLG.

This list is meant to be exhaustive. It is not an attempt to parse words or carefully say things in such a way as to leave one impression while the truth lies elsewhere. It is intended to say that BFRG was in no way connected with and in no way expected to benefit by way of testimony or documents for use in this case as a result of any payment made by SKG to the Relators. Indeed, as State Farm has argued previously to this Court, the documents obtained by the Rigbys were documents that directly related to individual lawsuits already filed, not to the Government's claim of fraud against State Farm that the Relators bring in this action.

That this is the Government's² case is also important.³ As this Court knows, the Rigsby Relators are not the real parties in interest in this case. The United States is the real party in interest. *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775-76 (7th Cir.2004). As the United States said in its previously filed papers, the Relators cannot dismiss this case or any party to this case without the permission and agreement of the United States. (Docket # 56). As Relators, the Rigsby Whistleblowers stand in the shoes of the Government in bringing this action. State Farm completely ignores that legal reality.

The "logic" trail upon which State Farm bases its attempts to disqualify both BFRG and Graves, Bartle & Marcus (who are filing a separate response) goes something like this:

1. This Court held that the Rigsby sisters were fact witnesses in the insurance claim litigation.
2. Payments to fact witnesses are not permitted.
3. This Court concluded that while State Farm's assertions of unethical conduct against SKG and KLG are substantial, "the payments to the Rigsby sisters are, in and of themselves, sufficient to warrant disqualification."

² Although the Defendant here suggests that the Department of Justice declined the case, that is simply not accurate. The Department of Justice pleading states:

The Government's investigation has not been completed, as certain potentially relevant information has not become available. As such, the United States is not able to decide, as of the Court's deadline, whether to proceed with the action. Accordingly, the United States hereby notifies the Court that it is not intervening at this time.

(Docket # 56) Had the government declined to intervene, it would have filed a notice of non-intervention, not a notice of no decision.

³ "Regardless of whether the government opts to control or intervene in a case, the False Claims Act requires that actions `be brought in the name of the Government.' 31 U.S.C. § 3730(b)(1). Thus . . . the United States is a real party in interest even if it does not control the False Claims Act suit. See *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-49 (4th Cir. 1992)."

Searcy v Philips, 117 F3d 154, 41 (5th Cir. 1997).

4. Because BFRG (and GBM) “ratified” payments made to the Rigsbys, BFRG (and GBM) and should also be disqualified.

5. In addition, BFRG (and GBM) engaged in other unethical conduct, specifically:

- a. “secret” meetings with fact witnesses.
- b. gaining “unfettered access to State Farm’s password protected confidential databases.”

The holes in State Farm’s argument are substantial and legally fatal.

First, in this case the Rigsby’s are not fact witnesses but are clients of the law firms, parties, and Relators speaking for and on behalf of the United States.

Second, there have been no payments to fact witnesses (or anyone else) in this case (or in any other case) by or on behalf of BFRG or GBM:

- a. Relators are not fact witnesses, but clients and Relators standing in the shoes of the federal Government.
- b. No payments have been made to Relators by BFRG or GBM.

Third, as previously stated, the fact of ratification by BFRG of payments by SKG does not exist. Indeed, BFRG expressly disavowed the payments when it learned of them after the fact because the ethical rules prohibit payments to clients. See, Ms. R.P.C. 1.8(e) (Robertson at ¶ 16).

Fourth, there was no unethical conduct because:

- a. confidential meetings between clients and their attorneys are protected by the attorney-client privilege, a privilege that does not flow to fact witnesses.
- b. Neither BFRG nor GBM attorneys ever accessed any State Farm database.

There being no factual basis for State Farm's motion and assertions of unethical conduct, the Motion to Disqualify BFRG and GBM should be denied.

II. Facts

A. State Farm's Suggestions of Impropriety are Factually Incorrect

1. The Meetings With The Rigsbys Relators in April 2006

In April of 2006, lawyers from BFRG and GMB met with the Relators. (DeWitt Declaration at ¶ 7, hereafter DeWitt at ___). The substance of those meetings is protected by the attorney client privilege. *Jackson Medical Clinic for Women, P.A. v. Moore*, 836 So.2d 767 (Miss.2003) (“the privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client.”).⁴ To the extent that State Farm has raised issues with regard to the behavior of the attorneys at those meetings, the Relators' provision of a factual response is in no way intended to be a waiver of the confidentiality of those communications, any attorney-client privilege, or any work-product privilege.

On April 14, 2006, Edward D. Robertson, Jr., the former Chief Justice of Missouri, Todd P. Graves, the former United States Attorney for the Western District of Missouri, Todd Graves, Anthony L. DeWitt, and Mary D. Winter, members of BFRG, traveled to Pascagoula, MS, and met Cori and Kerri Rigsby to discuss their claim that State Farm was defrauding the United States. (DeWitt at ¶ 7; Winter at ¶ 6) Like most first meetings between attorneys and clients, this meeting

⁴ See also, MCCORMICK, Evidence § 89, 183 (1972) “a confidential communication may be made by acts as well as by words.” Courts have interpreted the scope of the attorney-client privilege under Mississippi law broadly, stating: the privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client. Included are communications made by the client to the attorney and by the attorney to the client. In that sense it is a two-way street. *Barnes v. State*, 460 So.2d 126, 131 (Miss.1984). Further: “[t]he privilege does not require the communication to contain purely legal analysis or advice to be privileged.” *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir.1991) (applying Mississippi law)

was confidential in order to assure the potential Relators that their identity would not be prematurely disclosed to State Farm.

The meeting was held in a temporary housing unit due to the damage caused to so many structures by Katrina. Counsel and Relators entered into a representation agreement (Winter at ¶ 6), and Relators provided photocopies of the Mullins and McIntosh engineering reports and no other documents. The Relators did not bring their computers to the meeting. (DeWitt at ¶ 9)

In the intervening week, counsel finished drafting a complaint under 31 USC § 3729, based on information provided first hand by the Relators. Several phone calls between Relators and their counsel ensued, discussing changes and modifications to their complaint.

On April 20, 2006, Mary D. Winter and Anthony L. DeWitt returned to Mississippi. (DeWitt at ¶ 10; Winter at ¶ 8) Again they met with the Relators, this time for the purpose of putting together an evidentiary disclosure (required by 31 USC § 3730), for presentation to the United States Attorney at a meeting set for April 21, 2006 in Jackson, MS. (DeWitt at ¶ 12)

At that April 20, 2006 meeting, Relators indicated they had electronic mail received by them on their computers. (Winter at ¶ 10; DeWitt at ¶ 13) Cori Rigsby believed these emails were evidence of State Farm's scheme to make the National Flood Insurance Program pay damages State Farm should have paid. Cori Rigsby opened her laptop computer and located the emails on her desktop. (DeWitt at ¶¶ 13-18) Mary Winter debriefed Kerri Rigsby while Cori Rigsby found the electronic mail messages, all of which were addressed to Cori Rigsby.

The evidentiary disclosure included production of these emails. 31 USC § 3730 states in relevant part “(2) A ... written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.” (*Id.* emphasis supplied). The Rigsbys possessed the emails and were lawful

recipients of the same. Mary Winter asked Cori Rigsby if the emails were on the computer's hard drive, or had to be obtained from a State Farm server. Rigsby stated that they were on the laptop, and that they did not have to connect to a server at State Farm to retrieve them. (Winter at ¶ 12)

DeWitt asked Rigsby to drag those emails onto a USB or "jump" drive. (DeWitt at ¶ 18, 19) The drive was unlike devices Rigsby had previously used, and she asked DeWitt if he would copy the emails to the drive. (DeWitt at ¶ 19) DeWitt took the mouse, dragged the emails to the drive, and returned control of the mouse to Rigsby. (DeWitt at ¶ 19) DeWitt took no other action on the computer. (DeWitt at ¶ 20) Rigsby then disconnected the jump drive, and powered off the computer. DeWitt took the documents to Mary Winter's computer where counsel and the Rigsbys reviewed the emails and the documents attached to those emails. Sections of the emails were captured for use in a PowerPoint presentation to the United States Attorney on April 21, 2006.

DeWitt did nothing else on the Rigsby laptop. (DeWitt at ¶ 20) During the meeting with the Rigsby's, Mary Winter never touched the Rigsby computer. (Winter at ¶ 14) She interviewed Kerri Rigsby.

2. The Document Protection Action

Before Relators met with the United States Attorney's Office in Jackson Mississippi, Relators raised the concern that State Farm was shredding documents in order to conceal its wrongdoing. They inquired about taking additional documents. Counsel told Relators that they would raise these issues with the Department of Justice, but that they should not go looking for additional documents. Relators later reported an upsurge in the amount of data destruction by State Farm.⁵ Again, counsel told them that this information had been passed on to the Department of Justice.

⁵ Thousands of reams of documents were destroyed by State Farm after subpoenas were issued to it for documents related to Katrina litigation. Defendants used a company called Shred It to destroy this evidence. At some

On Monday, June 5, 2006, *qui tam* counsel for the Rigsbys received a call indicating that the Relators had become concerned about the increased shredding and had copied numerous documents from State Farm's files. (Robertson at ¶ 14) Edward D. Robertson, Jr., who received the call, indicated that the documents must be turned over to law enforcement and used only for that purpose. (Robertson at ¶ 14) Robertson did not request a copy of those documents. (Robertson at ¶ 14). None of the BFRG attorneys were consulted by the Rigsbys prior to them engaging in the document protection exercise. (DeWitt at ¶ 36) Counsel did not request these documents and did not receive these documents until after E. A. Renfroe filed its retaliatory lawsuit in Alabama. (DeWitt at ¶ 39) At that point Relators were concerned that the documents, which had been provided to the United States' Attorney for its criminal investigation into State Farm, would not be available to the Department of Justice civil attorneys because of a "Chinese Wall" erected between the two sides of the department. Because the statute requires that all the evidence in the possession (or constructive possession) of the Relators be disclosed to the Department of Justice, Relators made an additional disclosure to the government on December 8, 2006, because the evidence was, by that point in time, in the possession of the Relators' local counsel. (DeWitt at ¶ 39) In making the disclosure counsel obtained and turned over four compact discs. Counsel did not view, copy or catalog the contents of the electronic data on the CDs before turning them over to the Justice Department.

3. Payments to Relators

Relators are clients of BFRG. Relators have never had an employment relationship with BFRG. The relationship has remained that of counsel and client. That relationship prohibits payments of any sort to the client. Miss.R.P.C. 1.8. BFRG has not reimbursed any of their

point the Rigsbys intend to offer and demonstrate that this spoliation was intentional and aimed at preventing evidence of State Farm's misconduct from falling into the hands of either the Government or private counsel, through the course of discovery.

expenses, and has not compensated them in any way. (Robertson at ¶ 17) BFRG was also not consulted about or involved in the decision of SKG to employ the Rigsbys under a consulting contract. (DeWitt at ¶ 44) Because the Rigsbys were not clients of the SKG or KLG, this Court has held that the compensation to them as witnesses lends the appearance of compensating witnesses for testimony.

The joint venture agreement at Exhibit 1 establishes the membership of SKG, and BFRG is nowhere mentioned in that document. The operations of the SKG joint venture were located in Mississippi and aimed at the ongoing civil litigation related to property damage claims by individual homeowners and policyholders in Mississippi. BFRG was not aware until several months after SKG agreed to compensate Relators that Relators were being compensated. (DeWitt at ¶ 41; Robertson ¶ 16). At the time BFRG was informed of the arrangements, BFRG expressly disavowed any participation in any payment arrangement. (Robertson ¶ 16). BFRG never provided any funds to any of the SKG or KLG law firms, and never ratified the payments to the relators. (Robertson at ¶¶ 17, 18)

4. State Farm Has Offered No Evidence of Any Intrusion By The Rigsbys Or Anyone Else.

A close look at the deposition answers that State Farm suggests show there was an intrusion into their protected computer system provides no evidence of that claim. The Rigsbys' answers range from "I don't remember" to "I assume." At no time did either Cori or Kerri affirmatively testify that they witnessed, permitted or provided a means for any intrusion by their attorneys into State Farm's password protected computer systems. For example, in its counterclaim, State Farm cites this section of deposition transcript focusing the court not on the answers, but the questions:

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

A. In April.

Q. Did you also give him your password?

A. I don't remember.

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

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

Q. All right. Did you boot it up for him?

A. I don't remember.

Q. What were you searching for?

A. I'm not -- I'm not sure of the exact -- that we had a list. There were some documents that we were talking about. We were talking -- I'm not sure which documents he retrieved. **I let him in the computer, and I can't speak after that.**

(Dp. at 392-95.)

In other words, it is State Farm's questions, and not Cori Rigsby's answers, that attempt to convey evidence of a trespass to a password protected State Farm database by counsel. Cori Rigsby, by her own testimony, did not have a clear recollection of what happened at that meeting. Counsel, who was present and involved, has a clear memory. See DeWitt Declaration, Winter Declaration, and Robertson Declaration.

These are the facts: After the Rigsby's completed the document protection exercise, they immediately informed State Farm that they had accessed the State Farm database and downloaded documents. They did not try to keep their actions secret. What is also true is that while the Rigsbys had access to the databases, they never improperly accessed or exceeded their access to these systems. Their counsel never used their computers or accessed their data base. State Farm offers

no facts, only innuendo unsupported by a careful reading of the very evidence State Farm provides as “proof.”

III. There Is No Legal Basis Exists For Disqualification of Counsel or Relators

A. No Violation of Rule 8.4

As set forth above, none of the attorneys associated with BFRG are subject to disqualification under Rule 8.4 for two independently sufficient reasons. First, the allegations of unauthorized access are false. Second, the Computer Fraud and Abuse Act, 18 USC § 1030 does not apply unless the Rigsbys “knowingly and with the intent to defraud, accesse[d] a protected computer without authorization.” 18 USC § 1030(a)(4). The Rigsbys had authorized access to the State Farm database, but never allowed an unauthorized person access. 18 USC § 1030 does not apply.

First, as noted, the Rigsbys were authorized users and State Farm cannot suffer legal damages as a result of its fraud and criminal conduct being revealed to law enforcement.⁶ Second, as set forth in the declarations of counsel, the lawyers never engaged in any conduct that violated the Act. There is no basis for disqualification of counsel based on this factually inaccurate claim by State Farm. Unless the attorneys themselves violated the Computer Fraud and Abuse Act, no violation of MPRC Rule 8.4 could have occurred.^{7, 8}

⁶ State Farm raises the interesting question of whether the Rigsby laptop, the only computer that counsel ever touched, was a computer used in interstate commerce or communication. Since it was used to adjust claims only in Mississippi, arguably it is not a protected computer. However, even if the Court concluded that it was, the Rigsby’s intent was not to defraud, as required by the statute, but to preserve evidence of fraud by the defendant. CFAA simply does not apply here.

⁷ As to the Rigsbys, the use of the information from the computer system for purposes of bringing a False Claims Act case cannot be contractually limited because it impacts the government’s right to recover for fraud. See, e.g., *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 956, 963 (9th Cir. 1995)(enforcement of private agreement would impair a significant governmental interest).

⁸ It is also worth mentioning that Relators first raised the issue of discovery being taken in other cases for the purpose of defending the qui tam case in their response in August 2007 asking this Court for a lift of the discovery stay imposed solely against the Relators. The defendants used their access to the relators in *McIntosh* and in the Alabama action to generate discovery responses that had nothing to do with the defense of those claims, and everything to do

This is not a case like *Shurgard Storage Ctrs. Inc. v. Safeguard Self Storage, Inc.*, 119 F.Supp.2d 1121 (W.D. Wash 2000). There the defendant lured away an employee with access to the company's trade secrets and business plans that had considerable economic value. Here, Relators were lawfully possessed of the emails⁹ that disclosed evidence of fraud on the United States, and turned what they were in lawful possession of over to their counsel for the purposes of advice and for the purposes of bringing a False Claims Act case. *Shurgard* involved litigation between two private parties; State Farm's analysis of *Shurgard* misses the mark for that reason.

State Farm states the object of the Rigsby's so-called fraud "was the unauthorized procurement and dissemination of confidential State Farm information." (Def. Memo at 14). While *Shurgard* takes a broad view of the term "intent to defraud" to mean general wrongdoing, this reading is not appropriate here. *Shurgard* is not a False Claims Act case like this one where the Relators provided evidence of a crime and of civil fraud to the Government. Reporting a crime and a fraudulent scheme to the Government is itself not a fraudulent scheme. See, *U.S. v. Czubinski*, 106 F.3d 1069, 1079 (1st Cir 1997) (finding no liability where "Czubinski has not obtained valuable information in furtherance of a fraudulent scheme for the purposes of section [18 U.S.C.] 1030(a)(4)").

B. No Disqualification Under Rule 5.1

1. No Connection Between SKG/KLG and BFRG

Rule 5.1 of the MPRC provides in relevant part:

with the defense of this action. Relators counsel was not party to those depositions and did not defend them. Relators counsel do not have access to the depositions. Nevertheless, the equivocal answers given by the Relators to questions about events occurring nearly 18 months earlier do not support the contentions that State Farm advances, and the declarations of counsel attached hereto clearly refute them.

⁹ In the normal course of their employment with State Farm they adjusted claims. They were authorized to access claims files. They acted for State Farm's benefit in this regard. None of the engineering reports they took were marked as confidential or trade secrets, and in fact, were not trade secrets because State Farm routinely provided the copies of these reports to homeowners who requested them. See Exhibit 3, State Farm's Letter to the McIntosh plaintiffs reflecting their agreement with Attorney General Hood.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

MPRC 5.1

State Farm's assertions of disqualification on the basis of this rule are factually incorrect and therefore legally impotent. First, no partner or lawyer in BFRG had managerial authority or any voice at all in the conduct of SKG or KLG. No lawyer from BFRG (or GBM) ordered that the Relators copy documents to protect them from destruction, and when this was disclosed, BFRG did not ratify that conduct but directed that the evidence be turned over to law enforcement. BFRG was informed only that the data were turned over to law enforcement. BFRG did not learn that there was another copy of the documents until SKG took possession of the documents at some time in November, 2006. Even E. A. Renfroe, in its pleadings before the court in Alabama, admitted that the Rigsbys were privileged to turn over evidence of a crime to both their attorneys (for advice) and to law enforcement¹⁰ (for action).

2. There was No Violation of MPRC 5.1

At the time that the Relators came to BFRG and GBM neither firm was involved in the Katrina litigation. As noted, neither firm was a member of SKG. As such, when Relators came to the attorneys with information about criminal and civil fraud being committed by State Farm, neither firm was in an adversarial relationship with E. A. Renfroe (the company everyone agrees had an employment relationship with the Rigsbys) or State Farm (who arguably exercised such day-to-day control over the Rigsbys' work that they were essentially shared employees). Unlike *Ackerman v. National Property Analysts, Inc.*, 887 F.Supp. 510 (S.D.N.Y. 1993), where the

¹⁰ E. A. Renfroe, in its pleadings before the Alabama Court, sought only to prevent the use of the documents by the private attorneys in the Katrina litigation. Nothing in the E.A. Renfroe lawsuit ever suggested that the federal government could not use the documents. See, e.g., Exhibit 2, Renfroe Alabama Complaint, at ¶ 30).

lawyers approached an insider and hired that insider to bring them information, the Relators came to the BFRG and GBM attorneys as clients, not the other way around.

One purpose of the False Claims Act is “to encourage any individual knowing of Government fraud to bring that information forward.” S. REP. 99-345, 1986 U.S.C.C.A.N. 5266. Because the Relator is bringing a case that can bind the United States to an adverse result, it must be brought by an attorney, not by a Relator acting *pro se*. *Stoner v. Santa Clara County Office of Educ.* 502 F.3d 1116, (9th Cir. 2007 (Cal.)) *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775-76 (7th Cir.2004); *see also Safir v. Blackwell*, 579 F.2d 742, 745 n. 4 (2^d Cir.1978); *United States v. Onan*, 190 F.2d 1, 6 (8th Cir.1951).

Yet, under State Farm’s analysis, because BFRG used and relied upon documents in the lawful possession of the Relators (and not accessed by counsel from any protected database) to craft a complaint and evidentiary disclosure – as mandated by the statute – they have somehow committed an ethical violation in dealing with these E. A. Renfroe employees¹¹. Were this canard adopted as the law, Relators in False Claims cases would never be able to secure counsel or provide evidence of fraud on the Government. Since a False Claims Act case cannot be brought by a Relator *pro se*, the argument advanced by State Farm suggesting that attorneys should not have seen the documents would effectively render the False Claims Act a nullity. No court in the country has ever adopted such a convoluted reading of the ethical and legal rules regarding False Claims Act cases.

Unlike *Ackerman*, which involved private litigants and private litigation, this case involves private attorneys general bringing an action to recover tax dollars taken by fraud from the Treasury.

¹¹ When it suits State Farm’s purposes they refer to the Rigsbys in language that asserts that they are State Farm employees. They claim that the Rigsby’s were insiders with access to confidential information, (See Def. Memo at 16) but disclaim that they were State Farm employees even though they had State Farm business cards, jackets, hats, and computers and performed work at the direction of State Farm without exercising any independent decision-making authority. (See Motion for Summary Judgment).

To advance its ethical violation argument under *Ackerman*, State Farm must hope the Court will not read the facts of that case.

The requirement under 31 U.S.C. 3730(2) to provide “substantially all material evidence and information” is mandatory. An evidentiary disclosure is mandated in these cases precisely because Relators routinely come into the possession of documents, memoranda, and other “smoking gun” type evidence that buttresses their claims that defendants are defrauding the Government. The Department of Justice relies on this material to obtain search warrants and issue subpoenas. This information – because it is evidence of a crime or a fraud – is not protected. To have a defendant suggest that the ethical rules prohibit the relators from gathering evidence of a crime and using their attorneys to give that information to the state and federal government betrays a lack of understanding of the law.

3. Public Policy Argues In Favor of Disclosure of Wrongdoing

The legislative history of the False Claims Act, and several commentators have all noted that the attorney’s use of documents provided by a client in an evidentiary disclosure does not implicate any ethical concerns.¹² As noted, the statute provides that the Relator **must** turn over substantially all the material evidence in their possession.¹³ The Rigsbys were in lawful possession of the information sent to them by email, and that possession was authorized by State Farm.

¹² There is one exception. In *United States v. X Corp.*, 862 F. Supp. 1502, 1507 (E.D. Va. 1994) the in-house attorney-relator attempted to blow the whistle on his employer. The court held that the attorney could not disclose the confidences of his former employer in an effort to recover in a *qui tam* action. The basis for the court’s action in that case was a specific ethical rule given the force of law by the state bar: “where an attorney’s disclosure of client confidences is prohibited by state law in a given circumstance, that attorney risks subjecting himself to corresponding state disciplinary proceedings should he attempt to make the disclosure in a *qui tam* suit.” *Id.* at 1507. Here there was no such relationship between State Farm and the Rigsbys.

¹³ The evidentiary disclosure was served on the United States Attorney for the Southern District of Mississippi on April 21, 2006. Therefore, only the documents provided by the Rigsbys on April 20, 2006 (the emails) and those provided on April 14, 2006, (the McIntosh sticky-note documents) formed the basis for the initial complaint. Relators had intended to amend and make their complaint more specific and intended to use a roster of claims found in those initial emails to do so when they filed their First Amended Complaint, however, by that point the Renfroe Alabama lawsuit was under way, and use of those documents might have violated the injunction as it was interpreted at that time.

State Farm suggests that its access agreement muzzles the Relators and prevents them from turning crime and fraud information over to their attorneys (and later, the government) in their False Claims Act case. For obvious reasons it would be wrong to allow the access agreements upon which State Farm relies to thwart public policy as expressed by Congress in 31 USC § 3729. In essence, State Farm is asking this court to adopt contractual misprision of felony.

Agreements that restrain a party from cooperating with criminal investigations or disclosing matters of public consequence are unenforceable on public policy grounds.¹⁴ Courts have refused to enforce private agreements that prohibit signatories from disclosing federally protected matters of public interest, including those addressed by the FCA.

In *Connecticut Light & Power Co. v. Sec’y of the U.S. Dep’t of Labor*, 85 F.3d 89 (2d Cir. 1996) the Second Circuit found that a proposed settlement, which restricted a former employee’s cooperation with the Nuclear Regulatory Commission, violated Section 210 of the Energy Reorganization Act of 1974 (“ERA”), “a remedial statute intended to shield employees from adverse action taken by their employers in response to employees’ complaints of safety violations.” *Id.* The court also found that “[a]lthough the act of inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet.”

Additionally, the Tenth Circuit has refused to enforce a non-disclosure agreement against a “whistleblower” where honoring the contract might have allowed a civil wrong against a third party

Although a later ruling in the Scruggs criminal contempt case indicated that the *qui tam* attorneys were not bound by the injunction, Relators did not use the roster obtained during the second meeting or any of the “data dump” documents in creating the first amended complaint.

¹⁴ See *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (“a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement”); see also *Fomby- Denson v. Dept. of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (concluding that “the public policy interest at stake [in] the reporting of possible crimes to the authorities is one of the highest order and is indisputably ‘well defined and dominant’ in the jurisprudence of contract law.”); *Palmateer v. Int’l Harvester Co.*, 421 N.E. 2d 876, 878 (1981) (“parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public”).

to go undetected. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, (10th Cir. 1972) The trial court had dismissed the action finding that public policy “will never penalize one for exposing wrongdoing . . .” and the Tenth Circuit affirmed explaining that:

It is public policy . . . everywhere to encourage the disclosure of criminal activity, and a ruling here in accordance with the argument advanced by appellant would serve to frustrate this policy. . . . By holding that appellee breached its contract we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed.

Of particular relevance here, the Congressional intent in creating the 1986 FCA amendment for whistleblower protection is plain—to encourage the detection and exposure of potential frauds against the United States Treasury. Thus, private agreements that would frustrate the public interest and the Congressional objective of encouraging False Claims cases are unenforceable. For example, *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 956, 963 (9th Cir. 1995) refused to enforce a pre-filing settlement agreement releasing a relator’s *qui tam* claims against the company for alleged double billing. The court refused to enforce that release because to do so “would impair a substantial public interest,” and specifically “threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986.” *Id.* For these reasons neither the State Farm access agreement nor the E.A. Renfroe Code of Conduct can be asserted against the Relators’ use of emails that were sent to them by State Farm.

State Farm suggests Relators exceeded their access to computer-based information to locate evidence of fraud. Relators did not have to go searching through files to discover fraud on the Government – it had been emailed directly to them! That information had been sent out in the open in plain text by electronic mail and without any markings indicating it was secret or even

confidential.¹⁵ The information obtained by Relators and relied on by Relators' counsel in drafting the complaint was information the Relators lawfully possessed. The possession of that information did not suddenly become unlawful when the Relators realized it was evidence of fraud and provided it to their attorneys. State Farm can assert no basis for disqualification of counsel for using email that the Relators lawfully possessed in drafting the complaint and evidentiary disclosure.

4. No Payments to Relators

To the extent that State Farm suggests that Rule 5.1 applies with regard to payments to the Relators, as noted *supra*, BFRG did not make or ratify the payments. BFRG did not contribute to the payments. (DeWitt at 41-47; Robertson at ¶ 17) Moreover, BFRG affirmatively disavowed any participation in any payments to the Relators. (Robertson ¶ 16).

This Court has already determined the propriety of those payments and found them worthy of disqualification of attorneys who actually made or ratified the payments. This Court has taken action against the lawyers who were involved in paying those costs and expenses. It has barred them from continuing in the representation of the Katrina Hurricane victims.

The facts do not show and do not support a finding that BFRG was engaged in or associated with the entities that paid the Relators. There is no basis to bar BFRG from this litigation for that reason alone. In this case, any taint that may have been present in *McIntosh* is absent. Thus, the predicate that allowed disqualification in *McIntosh* is likewise absent in this case.

III. Conclusion

There is no factual, and therefore, no legal basis for disqualification of counsel.

¹⁵ State Farm apparently claims that the roster of engineering reports is somehow a confidential or trade secret document. State Farm routinely provided copies of these reports to policy holders when it suited their purposes. A roster of all the claims with engineering reports simply allowed the Relators to identify with specificity the claims where an engineering report was requested. It is hardly the secret formula for Coca-Cola.

/s/ Anthony L. DeWitt
Edward D. Robertson, Jr., PHV
Anthony L. Dewitt, PHV
Mary Doerhoff Winter, PHV
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
573-659-4454
Fax: 573-659-4460

Jim Frickleton, PHV
Michael Rader, Miss Bar # 100205
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
11150 Overbrook Road, Suite 200
Leawood, KS 66211
913-266-2300
913-266-2366

David L. Marcus
Todd Graves
Jonathan Whitehead
Graves Bartles & Marcus
1100 Main St., Suite 2600
Kansas City, MO 64105
816-256-3181

Counsel for Relators

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of the Southern District of Mississippi by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Anthony L. DeWitt
Counsel for Relators