IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DON BARRETT, INDIVIDUALLY; BARRETT LAW OFFICE, P.A. and LOVELACE LAW FIRM, P.A. — APPELLANTS

v.

CAUSE NO. 2008-IA-00421
CONSOLIDATED WITH
CAUSE NO. 2008-IA00788

JONES, FUNDERBURG, SESSUMS, PETERSON & LEE, PLLC — APPELLEE

BRIEF OF APPELLEE

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI, CAUSE NO. L07-135

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The actual specific issue presented by this appeal is a matter of first impression in Mississippi, and it is believed, a matter of first impression nationally. It is respectfully suggested that oral argument will be helpful to the court .

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Trial Judge
Honorable William F. Coleman
Senior Status Judge
Non-Financial Interest

John W. (Don) Barrett– Appellant
Barrett Law Office P.A.– Appellant
Dewitt M. Lovelace - Appellant
Lovelace Law Firm P.A.– Appellant

Mr. Wilton V. Byars, III
Mr. Larry Moffett
Mr. Shea S. Scott
Daniel Coker Horton & Bell
Attorneys for Appellant

Jones, Funderberg, Sessums, Peterson and Lee PLLC– Appellee

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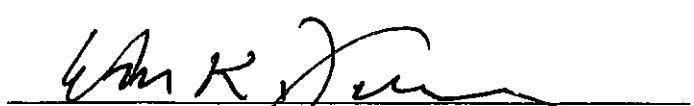

WILLIAM K. DUKE Attorney of Record for
Jones, Funderburg, Sessums, Peterson and Lee LLC

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B. Whether a refusal to compel arbitration entered because of a fraud committed against the court by a co-defendant may be applied to all co-defendants where those co-defendants are members of a joint venture and/or joint defense and the fraud against the court would have benefitted all the defendants, especially when all defendants are attorneys at law.

C. Whether the defendants have been or will be prejudiced by the trial court's order.

II. STATEMENT OF THE CASE

A. Nature of the Case and the Course of the Proceedings and the Disposition in the Court Below

This case is an Interlocutory Appeal from an Order of the Circuit Court of Lafayette County that struck the pleadings of all defendants and entered an order against all defendants because (at least) two of the five defendants conspired to bribe the court. The sordid facts of the conspiracy to bribe the trial judge are notorious and will not be set forth in great detail herein, other than to state that Richard F. Scruggs, who was an individual defendant in this case, and two members of the Scruggs Law Firm, the firm also a defendant in this case, eventually pleaded guilty in federal court to offenses arising out of the attempted to bribery. As is well known, the trial judge at the time reported the attempted bribe to authorities, and thereafter cooperated with federal law enforcement to bring the conspirators to justice. Plaintiff filed a Motion for Sanctions when indictments were made public.

The case below was essentially a dispute over the division of attorney fees between members and principals of members, all attorneys at law, who had formed a joint venture to represent Hurricane Katrina plaintiffs against their insurance carriers.

The chronology of the legal proceedings set forth by Defendant/Appellants' in

their Statement of the Case is essentially correct, except for characterization and argument.

After the fact of the bribe was conclusively established by guilty pleas, the special judge appointed to hear the case first entered an order that indicates that while the defendants could have obtained an order compelling arbitration, no such order would be entered pending the court's determination of the Motion for Sanctions. (R. 581-582, Appellants' R.E. Tab 4). The court subsequently imposed the sanction of striking the defendants' pleadings including the motions to compel arbitration, which *ipso facto* denied the request to refer the matter to arbitration, and entered an order mandating a future hearing to determine the amount of attorney fees the plaintiff was entitled to from the joint venture, and whether it is entitled to attorney fees and punitive damages arising out of the actions of the joint venture perpetrated against the plaintiff. The Order specifically preserves the defendants' rights to "raise issues of law, such as whether the facts establish a legal basis for recovery." (R. 759-760, Appellants' R.E. Tab 7)

It was at this juncture in the proceedings that the Supreme Court reconsidered a former denial and granted an interlocutory appeal that the defendants had requested earlier.

B. Statement of the facts relevant to the issues presented for review.

There is no dispute as to the reason that the order striking defendants'

pleadings and thus, denying arbitration, was entered. The bribery is conclusively established. However, in addition to the factual matters set forth above in the Statement of the Case, certain other matters may also be pertinent.

The Complaint filed below accuses the defendants of each being an active participant in the events that led to the Complaint, that is, that they colluded and unlawfully conspired to deny the plaintiff its due share of attorneys fees earned in Hurricane Katrina litigation, that the defendants continually denied the plaintiff its right to fairly and neutrally arbitrate the division of fees after plaintiff expressly invoked that right numerous times, and then unjustly removed or "squeezed out" the plaintiff from the joint venture after benefitting from its work, thereby denying the plaintiff its share of future profits of the joint venture as well. The plaintiff's argument before the trial court at the time was that all of the defendants had expressly waived the right to arbitration by refusing to arbitrate when such was requested by plaintiff multiple times before the suit was filed.

The defendants chose to mount a singular, collective defense against plaintiff's complaint and submitted singular, collective pleadings in the case. All of the defendants were collectively represented by Daniel Coker Horton & Bell, P.A. (Tr. 313). Daniel Coker Horton & Bell was singularly paid by Nutt & McAlister, the firm that also served as treasurer of the SKG. (Tr. 326). Defendant Sparky Lovelace testified that even as late as the April 2008 sanctions hearing, he still had not paid his

portion of the attorney fees to Daniel Coker Horton & Bell. (Tr. 338). The focus of the bribe was to get the case into arbitration for which all defendants would have benefitted. (Tr. 320). Though Don Barrett submitted an affidavit to the court in the April 2008 sanctions hearing, the trial court sustained an objection to its admission (Tr. 338-339); as the admission is not an issue in this appeal, the appeals court should not consider the testimony contained within Don Barrett's affidavit.

The bribe money paid to Judge Lackey was reimbursed out of SKG joint venture funds. Defendant David Nutt of defendant Nutt & McAlister testified that pursuant to the joint venture agreement, his firm served as the treasurer of the joint venture SKG and was responsible for paying expenses and costs arising from the litigation of SKG. (Tr. 309-310, 321, 323). The $40,000 in bribe money paid by Timothy Balducci to Judge Henry Lackey was invoiced by Scruggs to the joint venture SKG ostensibly to conduct voir dire in a Katrina case called Lisanby; Scruggs attached documentation from Balducci's law firm to the invoice manifest for reimbursement. (Tr. 309-310, 321, 323). The Nutt firm accepted the invoice on behalf of SKG and reimbursed Scruggs for a $40,000 payment to Balducci to conduct voir dire or to prepare documents for voir dire, and even though the Lisanby case had never been tried. (Tr. 309-310, 321, 323, 325). Nutt testified that a $40,000 payment to a lawyer to conduct voir dire was "reasonable" even though each of the joint venture's firms with the exception of one had multiple lawyers who could have

completed the same voir dire work and even though other expenses of Scruggs had been questioned in the past. (Tr. 309-310, 321, 323).

The Honorable Judge Lackey testified that Timothy Balducci stated that the defendants had "changed tactics" and wanted to delay the proceedings because the plaintiff was having financial difficulties, and the four defendant firms thought that if the case was delayed, the delay would encourage the plaintiff to settle the lawsuit. (Tr. 247).

III. SUMMARY OF THE ARGUMENT

Mississippi courts must protect the integrity and dignity of the state justice system, and public policy supports the trial court's order denying all of the defendants arbitration as a sanction. The trial court not only had the inherent authority to impose the sanction, it was positively obligated to do so. Bribery is a fraud upon the court. The law permits outright dismissal or the granting of default judgment for far less egregious conduct than that which occurred in this case.

The application of the sanctions order to all defendants is not repugnant to the law. The defendants are not actually deprived of anything by the trial court's order. They are not being punished. The effect of the order is that the trial court itself, sitting without a jury, in Oxford, Mississippi, will itself speedily and summarily determine the percentage or amount of attorney fees Jones, Funderburg, Sessums,

Peterson and Lee, PLLC is entitled to from the joint venture. It will do so, obviously, with no more burden on the defendants than they would have complying with the AAA arbitration guidelines. As stated, Judge Coleman has simply appointed himself arbitrator. There is no allegation that he is not impartial. It is the least possible exercise of power adequate to the end proposed.

IV. ARGUMENT

A. Fraud upon the court differs in degree from other sanctionable offenses and demands sanctions that also differ in degree.

Public policy supports the order of the court. The authority of the court below is premised on its inherent authority to protect the integrity and dignity of the court. The bribery was a fraud upon the court that generated extreme adverse publicity for the courts and lawyers generally. It called into doubt the integrity of the entire system of justice in Mississippi. It eroded the confidence of the people of this state in the integrity of the system. The spectacle of what played out and is continuing to play out, in the newspapers and web-logs ("blogs") was an insult to the dignity of the courts and bar. It made a mockery of the Rule of Law. The courts ***must*** be in control of every aspect of this debacle. As well, the actions of two of the defendants in bribing the sitting judge in this case violated plaintiff's constitutional rights. Indeed, Miss. Const. Ann. Art. 3, § 24 expressly states that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall

have remedy by due course of law, and **right and justice shall be administered without sale**, denial, or delay." (emphasis added).

The end proposed to be achieved by the imposition of the sanctions in this case is no less than the restoration of public faith in the integrity and dignity of the courts of Mississippi and assurance that no person shall ever profit or benefit from bribing a judge in our state. That goal is not something that should be entrusted to any entity other than the courts of Mississippi. The sanction imposed is the very least exercise of inherent power adequate to achieve the goal.

Since the birth of the Republic, the Courts have had the inherent power to do whatever is "necessary to the exercise of all others."

> To fine for contempt -- imprison for contumacy -- inforce [sic] the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others ....

United States v. Hudson & Goodwin, 11 U.S. 32, 33 (U.S. 1812).

In 1981, the Mississippi Supreme Court declared its inherent authority to promulgate its own procedural rules and abrogate those created by the legislature. ***Newell v. State***, 308 So. 2d 71, 76 (Miss. 1975). The ***Newell*** decision is the cited basis for the adoption of the Mississippi Rules of Civil Procedure in 1982. The Mississippi Rules of Civil Procedure themselves flow from the inherent power of the courts to control their processes and practices. The Mississippi Rules of Civil

Procedure contain at least seven rules that specifically authorize dismissal of actions, or striking of pleadings, setting aside of judgments, or entry of default for actions that interfere with the process of the court or are a fraud upon the court. See Mississippi Rules of Civil Procedure, Rules 12(g), 11, 16(i), 37(b), 41(b), 52, and 60(b). The Mississippi Uniform Circuit and County Court Rules specifically prohibit an attempt to influence the decision of a judge. See U.R.C.C.C. 1.10.[1] Those rules also give this Court the power to impose sanctions, to subject a party to contempt proceedings, or to impose other disciplinary actions. See U.R.C.C.C. 1.03.[2]

All of these rules are based on inherent authority, and all can be drastic to litigants. The Mississippi Supreme Court has allowed an Answer to be struck based on the perjury of a party and also for discovery violations. See Burrough v. Hawn, 1998 Miss. LEXIS 545 (Miss. 1998) (unpublished) (stating that Mississippi trial courts are clearly authorized and empowered to impose sanctions upon parties who commit perjury); see also, Pierce v. Heritage Properties, Inc., 688 So. 2d 1385 (Miss. 1997) (affirming a trial court's imposition of sanctions in the form of a dismissal with

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1 U.R.C.C.C. 1.10 expressly states: "No person shall undertake to discuss with or in the presence or hearing of the judge the law or the facts or alleged facts of any case then pending in the court or likely to be instituted therein, except in the orderly progress of the trial, and the arguments or briefs connected therewith; **nor attempt in any manner, except as stated above, to influence the decision of the judge in any such case or matter.**" (emphasis added).

2 U.R.C.C.C. 1.03 expressly states: "Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings, or other disciplinary actions imposed or initiated by the court."

prejudice against a plaintiff who perjured herself in her answers to interrogatories and in her testimony at her deposition).

The potency of such rules as well as the power to punish for contempt, is the basis for the language requiring them to be exercised with restraint and caution, and employ the least possible power adequate to the end proposed. ***Spallone v. United States***, 93 U.S. 265, 276, 280 (1990), cited by Appellants. However, the vast, vast, majority of sanctions are for relatively minor infractions and most times relatively minor sanctions are imposed – sufficient and not unrestrained.

The enormity of the situation in the case at bar that has been thrust upon the Mississippi judicial system is what distinguishes this case from every case cited by Mr. Barrett, his law firm, and Mr. Lovelace's law firm. One who seeks to bribe a judge, seeks to corrupt the justice system. It is an affront to the honor, dignity, effectiveness, and trustworthiness that are absolutely necessary for the exercise of the court's power. A fraud on the court justifies the most extreme sanctions. As the Seventh Circuit Court of Appeals stated:

> The term [fraud on the court] refers to conduct more egregious than anything here, conduct that might be thought to ***corrupt the judicial process itself, as where a party bribes a judge*** or inserts bogus documents into the record.

In re Met-L-Wood Corp., 861 F.2d 1012, 1018-19 (7th Cir. 1988); ***In re Whitney-Forbes, Inc.***, 770 F.2d 692, 698 (7th Cir. 1985); ***Baltia Air Lines, Inc., v. Transaction Management, Inc.***, 98 F.3d 640, 642-43 (D.C. Cir. 1996); ***Oxxford Clothes XX v. Expditors Int'l***, 127 F.3d 574, 578 (7th Cir. 1997)(emphasis added).

An Illinois United States District Court has discussed fraud upon the court at great length in the context of a ***sanction of dismissal of a civil §1983 lawsuit***, which was indeed dismissed for the plaintiff's misconduct for failure to give his real identity and other discovery abuses, i.e. repeated perjury and obstruction. The discussion, though lengthy, is worthy of reproduction in whole.

> Fraud upon the court should ... embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct. Succinctly stated, fraud on the court requires an intent to deceive or defraud the court, and "involves circumstances where the impartial functions of the court have been directly corrupted."
>
> Courts distinguish "fraud upon the court" from fraud on an adverse party, and reserve the former "to fraud which seriously affects the integrity of the normal process of adjudication." Cases dealing with fraud on the court often turn on whether the egregious conduct is that of the parties alone, or if the attorneys in the case are involved. Fraud on the court is more serious than fraud on the litigants. Whatever else it embodies, fraud on the court "is not fraud between the parties or fraudulent documents, false statements or perjury." Indeed, "courts have uniformly held that perjury of a single witness, false evidence (in the absence of attorney involvement) or mere nondisclosure are insufficient to establish fraud upon the court." ***Fraud on the court is generally thought of as conduct that corrupts "the judicial process itself, as where a party bribes a judge or inserts bogus documents into the record".***

Dotson v. Bravo, 202 F.R.D. 559, 569 (D. Ill. 2001) (footnotes omitted, emphasis added).

> The "fraud on the court" concept is construed very narrowly by the courts. As noted above, it involves a particular type of fraud which is "directed to the judicial machinery itself." It is reserved for those situations where the court or a juror has been corrupted or influenced or where a judge has otherwise not performed his judicial functions impartially. Also included under the guise of fraud on the court are those situations where attorneys, as officers of the court, have violated their duty of honesty to the court.

***Id.* at 571** (footnotes omitted).

> Trial judges are accorded considerable latitude in dealing with serious abuses of the judicial process. Dismissal as a sanction is reserved for instances where the offending party's misconduct is egregious.
>
> In determining whether dismissal is appropriate, a trial "judge should carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct."

Id.

> Trial courts have the inherent power to fashion and impose appropriate sanctions for conduct which abuses the judicial process. ***The trial court's inherent powers exist even where procedural rules govern the same conduct.*** "When a litigant's conduct abuses the judicial process, dismissal of a lawsuit is a remedy within the inherent power of the court." "***This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers.***" Because of their potency, inherent powers must be exercised with restraint and discretion, and discretion in sanctioning litigants is not unfetted. [emphasis added]

Id. at 574 (D. Ill. 2001)

B. Denying the defendants' attempts to remove this case to arbitration after Scruggs's fraud upon the court is proper under the circumstances.

Before this litigation started, the remaining defendants in this action in December 2006 chose to collude with the other defendants in denying the plaintiff its rights under the joint venture agreement including denial of plaintiff's rights to its fair distribution of fees and to fairly and neutrally arbitrate the distribution of fees due to the internal conflict over the fees. The remaining defendants then removed the plaintiff from the joint venture in March 2007 for demanding its fair share of the fees and for invoking its rights to arbitration. At this point, plaintiff no longer had any duties of performance under the joint venture agreement.

Subsequently, after litigation started in March 2007 and in furtherance of this collusion, the Scruggs defendants then attempted to criminally corrupt the proceedings. The Scruggs defendants then had the joint venture SKG - of which all defendants still belonged - reimburse Scruggs for the $40,000 paid as a bribe. Though defendant David Nutt testified that the $40,000 reimbursement to SKG non-partner Timothy Balducci for voir dire in the Lisanby case was "reasonable," all of the remaining defendants had either actual or constructive notice that **something** was awry. A simple glance at an invoice manifest reflecting that any attorney that was not a part of the venture was to be paid $40,000 for voir dire in a case that had not yet been tried would raise questions in any reasonable attorney's mind.

A fraud upon the court may require the imposition of sanctions that may adversely impact other parties who did not participate in the criminal act simply to remove the taint or the appearance of impropriety of whatever wrongdoing justified the sanction against the guilty. In the ***Eppes*** case cited below, the court discusses this aspect. In war, "collateral damage" inflicted upon the innocent in the defense of one's country is regrettable but sometimes necessary. Likewise, such is true when the integrity of the judicial system must be defended. The defendants herein were active participants in the events that resulted in the bringing of this action against them, and there are excellent policy reasons for allowing the sanction to stand.

The Federal Arbitration Act itself allows for the denial of arbitration in this case. Arbitration is required "unless the agreement to arbitrate is not part of a contract evidencing interstate commerce **or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract**. Miss. Care Ctr. of Greenville, LLC v. Hinyub, 975 So. 2d 211, 214 (Miss. 2008) (citing 9 U.S.C. § 2) (emphasis added). Practically, the court below used the inherent judicial equitable powers to strike the arbitration provision from the SKG joint venture agreement and denied the remaining defendants the right to invoke that provision once it was struck.

Senior United States District Court Judge L. T. Senter, a former Circuit Judge of the First Circuit District of Mississippi, and universally respected, and United States District Court Judge William Barbour, another learned and esteemed jurist,

have both disqualified every lawyer and law firm that was even so much as associated with Scruggs from participating in any Katrina litigation against State Farm Insurance Company because of the wrongdoing of Scruggs in paying fact witnesses, and/or paying them to "purloin" the records of their employer. ***McIntosh v. State Farm Ins. Co.***, Cause No. 1:06CV1080, United States District Court for the Southern Distrioct of Mississippi, 2008 U.S. Dist. LEXIS 1080 ; ***United States Ex Rel. Rigsby v. State Farm Ins. Co.***, Cause No. 1:06CV0433, 2008 U.S. Dist. LEXIS 40296 and 86656; ***Shows v. State Farm Fire and Casualty Co.,*** Cause No. 1:07CV709, PACER Doc. 354, J. Barbour adopting Judge Senter's opinion. Disqualification of all these lawyers adversely impacted a large number of innocent parties, who then had to find new counsel, or represent themselves *pro se.*

Disqualification of all lawyers in the above cited federal cases was done because the representation of clients was a joint venture under ***Duggins v. Guardianship of Washington ex rel. Huntley,*** 632 So.2d 420 (Miss. 1993), and because the Rules of Professional Conduct prohibit the appearance of impropriety. In ***Duggins***, an innocent attorney was held legally responsible for the egregious, dishonest and surreptitious conduct of another attorney he had associated, because the mere act of association constituted a joint venture.

When looking at partnership liability, the Mississippi Supreme Court has quite affirmatively stated:

> If the partner acted within the course and scope of actual or apparent authority, then even liability for fraudulent wrongs can be imputed to the partnership. **The other partners, though innocent without knowledge of the act or omission, can be vicariously liable.**

W. B. Duggins, Jr. v. Guardianship of Washington, 632 So.2d 420, 429 (Miss. 1993), (internal citations omitted, emphasis added). The Court goes on to find that liability is imputed when the actions of a partner or agent is "*in furtherance of the partnership.*" Id. at 428, (emphasis in original). Though the Mississippi Code has been revised and new partnership laws have been adopted, see Miss. Code Ann. §§ 79-13-101 et seq., those revisions do not change the court's previous rulings extending liability.

There can be no argument that the alleged actions of Scruggs in procuring, facilitating and/or funding the attempted bribery of a sitting judge - using SKG funds to do so - was calculated to further the position, finances, and purposes of the remaining members of the joint venture. An alleged attempt was made to secure a decision, through illegal and non-judicial means, that would inure to the benefit of not just Scruggs, but to the other members of the joint venture involved in this litigation. In the instant case, right up until Scruggs's indictment was made public, and at all times when the overt acts of bribery were being committed, the defendant law firms through formal agreement, and the individual defendant, Don Barrett through participation, were engaged in a joint venture, still representing Katrina

clients, and were also engaged in a joint defense of plaintiff's lawsuit. If Scruggs had succeeded, all would have benefitted in the litigation, and all could have benefitted financially: if Scruggs would bribe a judge in this case, and essentially pay witnesses in all the State Farm cases, it is reasonable to believe he might also attempt to corrupt an arbitrator. And no evidence indicates that any of the defendants inquired as to why the court kept delaying its decision on the Motion to Compel Arbitration.

In ***Eppes v. Snowden***, 656 F. Supp. 1267 (D. Ky. 1986), a defendant produced forged letters during an actual trial. The fraud against the court was revealed when his lawyers attempted to withdraw without giving a reason. The trial Court thereupon recessed and conducted hearings, during which the perjurer's attorneys "begged" the court not to force him to testify, apparently pleading the Fifth Amendment, though this is not stated. The trial court satisfied himself with the facts, and entered ***default judgment*** against both the perjurer, ***and his partner who had not even participated in the proceedings in any way. In addition the court struck the silent partner's counterclaim as well.*** The court's reasoning based on Kentucky law including the Uniform Partnership Act, which has no discernable difference to Mississippi, is that even the fraudulent acts of a partner are imputed to his other partners. The reason that this is so is because it is virtually impossible to prove *scienter* in a partner who isn't actively participating, and the law must regard confidential relationships (such as partners) with great suspicion and diligence. Furthermore, the court reasoned that

if the silent partner was innocent, he could seek redress from his agent, the guilty partner. The court said:

> But in a larger sense the institution this Court represents demands exemplary conduct from all those who are a part of it. And this includes ***parties***. It includes laymen untrained in the law. Many times our Courts appear indulgent and many would say, to a fault. On rare occasions it appears to be unforgiving and that makes it unfortunate for those caught in its wake. The conduct found to exist in this litigation cannot be ignored.

Eppes v. Snowden, 656 F. Supp. 1267, 1282 (D. Ky. 1986) (the court having imposed financial sanctions of perhaps 10% of the perjurer's net worth)(emphasis in original).

It is sometimes necessary to protect the integrity of the court by imposing sanctions that prejudice the rights of non-offending parties to litigation, though practically, the remaining defendants in this action will suffer no prejudice. The United States District Court for the Northern District of Indiana recently reviewed a decision of the bankruptcy court wherein an order amending an order of sale of assets was entered because a bidder had colluded with the debtor. ***The Trustee sought to have the original sale order amended to remove the anti-collusion findings, but leave it in effect so he could pursue his state court remedies.*** The district court held that for fraud on the court, the order could not be amended but ***must be vacated in its entirety,*** the effect of which was to probably foreclose state court remedies for other creditors and to impact bona fide bidders. The district court said:

> The limited case law on the question of whether a judgment procured by fraud on the court may be allowed to stand leads this Court to conclude that fraud on a court requires the judgment be vacated. "[A] decision produced by fraud on the court is not in essence a decision at all, and never becomes final." ***Drobny v. C.I.R.***, 113 F.3d 670, 677 (7th Cir. 1997). "If it is found that there was fraud on the court, the judgment should be vacated and the guilty party denied all relief." Charles Alan Wright et al., Federal Practice & Procedure § 2870. Fraud on the court, distinguished from ordinary fraud identified in Rule 60(b)(3), involves more than an injury to a single litigant; "[i]t is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944). The nature of fraud on the court is such that a court has "inherent power to inquire into the integrity of its own judgments and to set them aside when fraud or corruption of its officers has been shown." ***Chi. Title & Trust Co. v. Fox Theatres Corp.***, 182 F. Supp. 18, 38 (D.C.N.Y. 1960). One court stated that the facts before it "not only justify the inquiry but impose upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, if any should be found to exist." ***Root Refining Co. v. Universal Oil Prods. Co.***, 169 F.2d 514, 523 (3d Cir. 1948).
>
> This Court reads these cases to require judgments procured by fraud on the court to be vacated, because fraud on the court compromises the integrity of the judicial process. This is different than a Rule 60(b)(3) motion for relief from judgment because in that case, the fraud involves only injury to a party--it does not compromise the integrity of the judicial process to the same extent--and so a remedy can be fashioned to suit the injured party. The court and the public interest are not at issue to the same degree.... [A]llowing the [order to] sale... the assets to stand would allow the taint of fraud to remain.

Boyer v. GT Acquisition LLC, 2007 U.S. Dist. LEXIS 58450, 12-14 (D. Ind. 2007).

C. There is no due process issue: the court below has authority to impose financial sanctions in addition to striking pleadings and entering default.

In addition to striking pleadings and entering default judgment against all the defendants, the court possessed the inherent authority to impose additional financial sanctions including attorney fees but also "compensatory" civil sanctions of money awarded to the innocent party, in this case Jones, Funderburg, Sessums, Peterson, and Lee, which it did by including a determination of attorney fees for a specified period of time.

In the California federal case of ***F.J. Hanshaw Enters. v. Emerald River Dev., Inc.***, 244 F.3d 1128 (9th Cir. 2001), two brothers became embroiled in a dispute that ultimately turned into a partnership dissolution. The Court appointed a receiver to handle the affairs of the partnership. Near the end of the receivership process, one of the brothers met with the receiver for lunch and offered him $100,000 and future business "to get this case resolved." After two evidentiary hearings -- including hearing testimony from the three individuals present at the lunch meeting, the brother, the receiver and his assistant, the district court found the offer to be an attempted bribe made "corruptly and in bad faith" and an attempted fraud on the court. The FBI was called in, but declined to pursue the criminal aspect. Relying on its inherent and equitable powers, the district court sanctioned $500,000 (payable to the United States) and imposed a $200,000 "surcharge" in favor of the innocent party. The issue

before the Court was the appropriateness of the fine and surcharge as being akin to a criminal penalty.

The Ninth Circuit categorized the conduct as **"arguably a bribe and fraud on the court"** Id. at 1137, but disapproved the money ordered paid as a fine to the federal government as indeed being in the nature of a criminal penalty for which the party had not been afforded due process. The "surcharge" it categorized as "civil and compensatory" and upheld, although clearly the innocent party had received no "real" injury. Furthermore, the matter was remanded so that the procedural issues of the $500,000 sanction could be remedied. The court specifically states that the general rules of civil litigation are perfectly adequate due process if the financial sanction is deemed compensatory.

D. The defendants are not prejudiced.

There is no dispute that plaintiff was entitled to compensation for its work. The dispute was over the amount. The "sanctions" order states: " The court will conduct a hearing to take an account and to determine the amount due the plaintiff under the joint venture agreement." The order specifically preserves the defendants' rights to "raise issues of law, such as to whether the facts establish a legal basis for recovery." The order specifically allows the defendants to conduct discovery "regarding the issue of the amount of plaintiff's damages as well as issues connected to the

plaintiff's claim for punitive damages." (R. 759-760, Appellants' R.E. Tab 7).

The damages, contractual and punitive, are those sought in plaintiff's first amended complaint. The punitive damages issue arises out of the conduct of Don Barrett during the meeting of the joint venturers at which he dictated the amount to be paid to Jones, Funderburg, Sessums, Peterson & Lee, PLLC.

Although these defendants claim their liability is vicarious, they were active participants in the event described in the underlying complaint. They all stand individually accused of breach of contract and breach of their fiduciary duty to a partner. The defendants who settled their cases with plaintiff settled their individual cases for their own active participation. In that regard, defendants' rantings about a violation of substantive due process and the sanction shocking the conscience simply do not hold up to examination under the light.

V. CONCLUSION

The defendants colluded to deny the plaintiff's rights under the joint venture agreement. Unfortunately for the remaining defendants, their civil conspiracy to cheat the plaintiff out of its fair share of fees went awry when civil co-conspirator Scruggs and members of his firm then acted criminally in court proceedings. All defendants had constructive notice of the criminal acts as the $40,000 in bribe money was reimbursed out of joint venture funds.

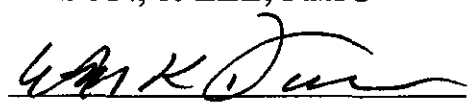
The court had the inherent power to deny the remaining defendants their

demand for arbitration. The court's power does not fly in the face of federal law as the Federal Arbitration Act allows for denial of arbitration when equity commands such. And practically, the remaining defendants have not been punished as the court will now arbitrate the dispute in the open air of the public. This case should remain there in an attempt to restore the integrity and dignity of these proceedings.

This Court should affirm the orders of the court below and remand this action for a bench trial on the remaining issues before it.

Respectfully submitted,

JONES, FUNDERBURG, SESSUMS, PETERSON, & LEE, PLLC

By: 

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CERTIFICATE OF SERVICE

I, William K. Duke, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing to:

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This, the 10th day of February, 2009.

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