IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-IA-00421-SCT
CONSOLIDATED WITH
No. 2008-IA-00788-SCT

DON BARRETT, INDIVIDUALLY;
BARRETT LAW OFFICE, P.A.;
AND LOVELACE LAW FIRM, P.A.

DEFENDANTS-APPELLANTS

versus

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC

PLAINTIFF-APPELLEE

BRIEF OF APPELLANTS

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

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ORAL ARGUMENT IS REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-IA-00421-SCT
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DON BARRETT, INDIVIDUALLY;
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LOVELACE LAW FIRM, P.A. APPELLANTS

VS.

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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:

1. The Honorable William F. Coleman - Special Circuit Court Judge of Lafayette County.

2. John W. ("Don") Barrett - Defendant/Appellant.

3. Barrett Law Office, P.A. - Defendant/Appellant.

4. Lovelace Law Firm, P.A. - Defendant/Appellant.

5. Dewitt M. Lovelace - Principal member of Lovelace Law Firm, P.A.

6. Larry D. Moffett - Attorney for Don Barrett, individually; Barrett Law Office, P.A., and Lovelace Law Firm, P.A.

7. Wilton V. Byars, III - Attorney for Don Barrett, individually; Barrett Law Office, P.A., and Lovelace Law Firm, P.A.

8. Shea S. Scott - Attorney for Don Barrett, individually; Barrett Law Office, P.A., and Lovelace Law Firm, P.A.

9. Daniel Coker Horton & Bell, P.A. – Attorney for Don Barrett, individually; Barrett Law Office, P.A., and Lovelace Law Firm, P.A.

10. Jones, Funderburg, Sessums, Peterson & Lee, LLC - Plaintiff/Appellee.

11. Grady F. Tollison - Attorney for Jones, Funderburg, Sessums, Peterson & Lee, LLC.

12. William K. Duke - Attorney for Jones, Funderburg, Sessums, Peterson & Lee, LLC.

13. Tollison Law Firm – Attorney for Jones, Funderburg, Sessums, Peterson & Lee, LLC.

THIS the 9th day of December, 2008.

Larry D. Moffett

LARRY D. MOFFETT
ATTORNEY FOR APPELLANTS DON BARRETT, INDIVIDUALLY; BARRETT LAW OFFICE, P.A.; AND LOVELACE LAW FIRM, P.A.

STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns highly-publicized events. Very substantial and important issues relating to the sanctions that may be imposed by a court through its inherent powers are involved, including whether a court may unnecessarily punish innocent parties. Appellants respectfully suggest that oral argument will be helpful to the Court and significantly aid the decisional process.

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I. STATEMENT OF THE ISSUES

A. Whether a court, in exercising its inherent powers, may sanction and punish an innocent party who has not engaged in any wrongful conduct and who had no knowledge of, never authorized, and never ratified the wrongful conduct of another party.

B. Whether innocent co-venturers can be sanctioned and punished for the unauthorized and criminal conduct of another venturer committed outside the ordinary course of the business of the joint venture.

C. Whether a court abuses its discretion when it fails to apply the mandatory "lesser sanctions" analysis, and thereby unnecessarily sanctions and punishes innocent parties.

D. Whether a court's sanctioning and punishment of innocent parties violates their constitutional rights.

E. Whether a court may deny arbitration as a sanction after finding that the issues in the case are subject to arbitration and that the parties seeking to compel arbitration have not waived their arbitration rights.

F. Whether a settlement with an active wrongdoer releases, as a matter of law, those persons who are allegedly vicariously liable for the wrongdoer's conduct.

II. STATEMENT OF THE CASE

A. Nature of the case and the course of the proceedings and its disposition in the court below.

The plaintiff, Jones Funderburg, Sessums, Peterson & Lee, LLC ("Jones Firm"), filed suit in the Circuit Court of Lafayette County on March 15, 2007, against the Scruggs Law Firm, P.A. ("Scruggs Firm"); Richard F. Scruggs, individually; Nutt & McAlister, PLLC ("Nutt Firm"); Don Barrett, individually; Barrett Law Office, P.A. ("Barrett Firm"); and the Lovelace Law Firm, P.A. ("Lovelace Firm"). (R. 1-30). Richard F. Scruggs and the Scruggs Firm will sometimes herein be referred to collectively as "the Scruggs Defendants."

The Jones, Scruggs, Barrett, Nutt and Lovelace Firms were all parties to a Joint Venture Agreement ("Agreement") dated November 8, 2005. (R.E. 2; R. 22-27, 52-59, 245-250). Don Barrett, individually, was not a member of SKG, but is a principal member of the Barrett Firm; and Richard F. Scruggs is a principal member of the Scruggs Firm. The joint venture was designated as the "Scruggs Katrina Group" ("SKG"), and was formed for the sole purpose of bringing lawsuits on behalf of individuals and businesses who were denied insurance coverage for property damage arising out of Hurricane Katrina. (R.E. 2; T. 304-305, 313-314, 333, 336, 340-341; R. 22, 88-91, 755-757). The Agreement contains a mandatory binding arbitration provision which states: "**Disputes** - Any dispute arising under or relating to the terms of this agreement shall be resolved by ***mandatory binding arbitration,*** conducted in accordance with the guidelines of the

American Arbitration Association." (R.E. 2; R. 24).

Notwithstanding the mandatory binding arbitration provision contained in the Agreement, the Jones Firm filed its original Complaint on March 15, 2007, and filed a First Amended Complaint on March 28, 2007, alleging claims relating to the Jones Firm's share of fees and its removal from SKG. (R. 24, 1-30). SKG was not sued and no claims were asserted by the Jones Firm against SKG. (R. 1-30). On April 10, 2007, defendants filed a timely Answer and Demand for Arbitration, and also filed a Motion to Stay Proceedings and Compel Arbitration ("Motion to Compel Arbitration") based on the Agreement's mandatory binding arbitration provision. (R. 31-46, 47-96).

Honorable Henry L. Lackey conducted a hearing on defendants' Motion to Compel Arbitration on July 17, 2007, but never entered an order ruling on defendants' motion. (T. 1-60). Instead, on November 19, 2007, Judge Lackey recused himself, and on November 28, 2007, defendant Richard Scruggs, two other members of the Scruggs Firm (Sidney A. Backstrom and David Zachary Scruggs), Timothy R. Balducci, and Stephen A. Patterson were indicted by the United States Attorney for the Northern District of Mississippi for attempting to bribe and corruptly influence Judge Lackey to enter an order granting defendants' Motion to Compel Arbitration. (R. 326-338). On December 7, 2007, the Jones Firm filed a Motion for Sanctions based upon the allegations of the indictment and requested that the court strike defendants' Answer, strike defendants' Motion to Compel Arbitration, and enter a default judgment against all defendants. (R. 314-316, 326- 342).

The Honorable William F. Coleman was assigned to replace Judge Lackey, and Judge Coleman conducted a hearing on defendants' Motion to Compel Arbitration on January 14-15, 2008. (T. 61-62, 120-187). On January 15, 2008, Judge Coleman found that the Agreement's arbitration provision was valid and enforceable, found that defendants had not waived their right to arbitration, and entered an order stating that defendants' Motion to Compel Arbitration "is well-taken and should be granted," but further stating that "the Order granting defendants' Motion to Stay Proceeding and Compel Arbitration . . . and referring this matter to arbitration shall not be entered at this time and is held in abeyance pending resolution of issues raised by plaintiff's Motion for Sanctions." (R.E. 3, 4; R. 578-582).

On February 26, 2008, the lower court held that it had the authority to deprive defendants of arbitration as a sanction, but ruled that it would hold an evidentiary hearing on the Jones Firm's Motion for Sanctions before deciding whether to impose sanctions. (R.E. 5, 8; T. 204-207; R. 724-725). The Scruggs Defendants filed a Petition for Interlocutory Appeal (No. 2008-IA-00421-SCT) on March 12, 2008, requesting appellate review of the trial court's February 26, 2008, order, and the remaining defendants, including appellants herein, joined in the Scruggs Defendants' petition.

On April 15, 2008, the court conducted an evidentiary hearing on the Motion for Sanctions. At the hearing, undisputed testimony was presented by appellants that the appellants had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful conduct by the Scruggs Defendants. (R.E. 6, 9, 10, 11; T. 303-314,

332-336, 338-341; R. 755-757). On April 16, 2008, the court issued a bench opinion and entered an order granting the Motion for Sanctions. (R.E. 7, 13; T. 390-392; R. 759-760). The court found that the Scruggs Defendants conspired with others to influence Judge Lackey and that this plan later developed into a conspiracy to bribe the judge. (R.E. 13; T. 390-391). Even though the court found that "there is little, if any, evidence that [appellants] participated in or were aware of the bribe or part of the conspiracy," the court sanctioned and punished appellants and the Scruggs Defendants in the same manner, by striking defendants' Answer, striking defendants' Motion to Compel Arbitration, entering a default against all defendants, and ordering that defendants pay plaintiffs' reasonable attorney's fees and expenses incurred since July 17, 2007. (R.E. 7, 13; T. 390-392; R. 759-760).

On May 7, 2008, appellants herein filed a Petition for Interlocutory Appeal and for Stay of Proceedings (No. 2008-IA-00788-SCT) appealing from the lower court's April 16, 2008, order and opinion. Appellants' petition and the Scruggs Defendants' prior Petition for Interlocutory Appeal (No. 2008-IA-00421-SCT) were both granted and are consolidated for this proceeding. (*See* Clerk's Notice issued October 30, 2008, Motion #2008-2421 in No. 2008-IA-00421-SCT and in No. 2008-IA-00788-SCT).

The Scruggs Defendants and the Nutt Firm have now settled with the Jones Firm and are no longer parties to the trial court proceedings or this appeal. (*See* Order entered on Joint Motion to Partially Lift Stay and Dismiss Certain Parties to Appeal, Motion #2008-2417 in No. 2008-IA-00421-SCT; and Order entered on Joint Motion to Partially

Lift Stay and to Dismiss Certain Parties to Appeal, Motion #2008-2416 in No. 2008-IA-00788-SCT).

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

The Jones, Scruggs, Barrett, Nutt, and Lovelace firms entered into a Joint Venture Agreement dated November 8, 2005 ("Agreement"). (R.E. 2; R. 22-27, 52-59, 245-250). The joint venture was designated as the "Scruggs Katrina Group" (or "SKG") and was formed for the sole purpose of bringing lawsuits on behalf of individuals and businesses who were denied insurance coverage for property damage arising out of Hurricane Katrina. (R.E. 2; T. 304-305, 313-314, 333, 336, 340-341; R. 22, 88-91, 755-757). Don Barrett, individually, was not a member of SKG, but is a principal member of the Barrett Firm; and Richard Scruggs is a principal member of the Scruggs Firm.

At a meeting of all members of SKG on March 2, 2007, four of the five members of SKG (the Barrett, Nutt, Lovelace and Scruggs firms) approved a distribution of attorneys' fees to SKG's members, and also voted to remove the Jones Firm from SKG. (R. 89-90). SKG thereafter sent a check to the Jones Firm representing its share of fees, but the Jones Firm disagreed with the amount of fees that had been allocated to it and returned the check. (R. 11, ¶ 60).

Rather than initiating arbitration as required by the Agreement's mandatory binding arbitration provision, the Jones Firm filed this suit on March 15, 2007, and filed a First Amended Complaint on March 28, 2007, alleging claims against defendants relating to the Jones Firm's share of fees and its removal from SKG. (R. 1-30). SKG was not sued and

no claims were asserted by the Jones Firm against SKG. (R. 1-30). On April 10, 2007, defendants filed a timely Answer and Demand for Arbitration, and also filed a Motion to Stay Proceedings and Compel Arbitration ("Motion to Compel Arbitration") based on the Agreement's mandatory binding arbitration provision. (R. 31-46, 47-96).

On January 15, 2008, after conducting a hearing on defendants' Motion to Compel Arbitration, Judge Coleman found that the Agreement's arbitration provision was valid and enforceable, found that defendants had not waived their right to arbitration, and entered an order stating that defendants' Motion to Compel Arbitration "is well taken and should be granted," but further stating that "the order granting defendants' Motion to Stay Proceedings and Compel Arbitration . . . and referring this matter to arbitration shall not be entered at this time and is held in abeyance pending resolution of issues raised by plaintiffs' Motion for Sanctions." (R.E. 3, 4; T. 61-62, 120-187; R. 578-582).

On April 15, 2008, the court conducted an evidentiary hearing on the Jones Firm's Motion for Sanctions. (T. 213-404). It was undisputed, based on, *inter alia*, testimony presented by appellants, that appellants had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful conduct by the Scruggs Defendants. (R.E. 6, 9, 10, 11; T. 303-314, 332-336, 338-341). Further, the Jones Firm did not even assert that appellants were personally involved in any wrongdoing, but instead sought to have sanctions imposed on appellants vicariously, based on the proposition that appellants, as co-venturers and/or co-defendants, were liable for the wrongful actions of the Scruggs Defendants. (R. 314-316, 326-342).

On April 16, 2006, the court issued a bench opinion and entered an order granting the Jones Firm's Motion for Sanctions. (R.E. 7, 13; T. 390-392; R. 759-760). The court found that the Scruggs Defendants conspired with others to influence Judge Lackey and that this plan later developed into a conspiracy to bribe the judge. (R.E. 13; T. 390-391). Even though the court found that "there is little, if any, evidence that [appellants] participated or were aware of the bribe or part of the conspiracy," the court sanctioned and punished both appellants and the Scruggs Defendants in the same manner. (R.E. 7, 13; T. 391; R. 759-760). Specifically, the court entered an order striking defendants' Answer, striking defendants' Motion to Compel Arbitration, entering a default against all defendants, and ordering that defendants pay the Jones Firm's reasonable attorneys' fees and expenses incurred since July 17, 2007. (R.E. 7; R. 759-760).

III. SUMMARY OF THE ARGUMENT

First, a court may only impose sanctions through its inherent powers when there is a finding of bad faith personal to the offender. If there is no finding of bad faith or willful intent by the party against whom sanctions are sought, then the court cannot impose sanctions against that party. Appellants did not engage in any wrongful or bad faith conduct. It is undisputed that appellants had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful and criminal conduct of the Scruggs Defendants. Bad faith cannot be attributed to another through vicarious liability; therefore a court cannot impose inherent power sanctions on an innocent co-venturer or co-defendant for the bad faith of another co-venturer or co-defendant.

Second, even if the doctrine of vicarious liability were potentially available, which it is not, sanctions against appellants are not appropriate. Don Barrett is not a member of SKG, so no principles of vicarious liability can be applied to or imposed upon him. As to the other appellants, no vicarious liability could be imposed, because the wrongful acts of the Scruggs Defendants were not in the ordinary course of business or with the authority of SKG. The "ordinary course of business" is what is "usually done in the management of trade or business." The criminal conduct of the Scruggs Defendants is extraordinary and well beyond what is "usually done in the management of trade or business." Furthermore, a lawsuit between joint venturers over the division of fees is certainly not in the ordinary course of the business of the joint venture, and the members of a joint-venture are, therefore, not responsible for the wrongful acts of another member in the context of such a suit.

Third, a court's inherent power to impose sanctions is limited and must be exercised with restraint and discretion. A court must use "the least possible power adequate to the end proposed." The punishments imposed against Mr. Scruggs and other responsible parties in the criminal proceedings and the sanctions that could have been imposed in the civil case against the Scruggs Defendants alone, are severe punishments that sufficiently punish the wrongdoers and deter others from engaging in the same conduct. There is absolutely no need to punish or sanction these innocent appellants. The lower court was required to use the least possible power to accomplish its purpose, but erred and abused its discretion in failing to do so.

Fourth, the sanctions imposed by the lower court on these innocent appellants have deprived appellants of their property interests, including their contract rights and their right to defend the Jones Firm's claims, even though appellants had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful and criminal conduct of the Scruggs Defendants and even though the Jones Firm has suffered no damages as a result of appellants' actions. The sanctions imposed on these innocent appellants are unjust and excessive, "shock the conscience," are outside the bounds of legitimate governmental activity, and, therefore, violate appellants' constitutional rights. These constitutional violations are even more egregious when applied to Don Barrett, individually, who was not even a member of SKG.

Fifth, the Federal Arbitration Act ("FAA") requires a court to compel arbitration after it has determined that the parties agreed to arbitrate their disputes. Once the lower court determined that the parties' dispute was subject to arbitration, it could not delve further into the dispute according to the FAA and Mississippi common law, and could not deprive appellants of their arbitration rights nor effectively dispose of the merits of the dispute via the entry of a default judgment. Instead, the lower court should have separated the arbitration issue from the sanctions issue by compelling arbitration of the merits of the dispute and fashioning appropriately severe monetary or other sanctions against the Scruggs Defendants alone.

Finally, the Jones Firm has settled with the Scruggs Defendants. As a matter of law, any vicarious liability appellants could possibly have (if any) for the wrongful actions

of the active wrongdoers (the Scruggs Defendants) has been extinguished, and appellants have been released from any such vicarious liability and released from the lower court's sanctions order as a matter of law.

This Court should reverse the lower court and remand this action, directing the lower court to enter an order compelling arbitration of the parties' disputes.

IV. ARGUMENT

A. Standard of Review

This Court applies an abuse of discretion standard when it reviews a decision to impose sanctions pursuant to the court's inherent powers. *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997). This Court applies a de novo standard of review to denials of motions to compel arbitration. *Magnolia Healthcare, Inc. v. Barnes*, 2008 *LEXIS* 392, *3 (Miss. Aug. 6, 2008).

B. The Jones Firm is not entitled to sanctions against Don Barrett, Barrett Law Office, P.A., or Lovelace Law Firm as a matter of law.

A court's inherent power to issue sanctions is confined to instances of bad faith. *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990). Without bad faith there can be no sanctions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980); *Alyeska Pipeline Inc. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975).

A finding of bad faith is personal to the offending party and cannot be attributed to another party through such legal doctrines as vicarious liability. *Wolters Kluwer Financial Services, Inc. v. Scivantage,* 525 F.Supp.2d 448, 539, n.331 (S.D.N.Y. 2007) (*citing* G.

Joseph, SANCTIONS - The Federal Law of Litigation Abuse 446 (Matthew Bender 2000) (*citing, inter alia, Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977)). *See also Hall v. Cole*, 412 U.S. 1, 5 (1973) (bad faith is personal to the offender); *Dow Chem. Pacific, Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986) (there must be clear evidence of bad faith by a particular party, and a finding that one defendant has acted in bad faith in conducting litigation does not justify imposition of sanctions against a co-defendant); *Bower v. Weisman*, 674 F.Supp. 109, 112 (S.D. N.Y. 1987) (bad faith is personal; since there was no showing that Bower's counsel knew or aided in the misconduct, sanctions were only appropriate against Bower). If there is no finding of bad faith or willful intent by the party against whom sanctions is sought, then the court cannot impose sanctions against that party. *Hayes v. Entergy Miss., Inc.*, 871 So. 2d 743, 747 (Miss. 2004); *Arista Records, LLC v. Tchirhart*, 241 F.R.D. 462, 464-65 (W.D. Tex. 2006) (*citing Pressey v. Patterson*, 898 F.2d 1018 (5th Cir. 1990)).

Appellants are not accused of bad faith or willful intent. It is undisputed that appellants engaged in no wrongful conduct -- they had no knowledge of, did not participate in, did not authorize, and did not ratify the subject wrongful conduct of the Scruggs Defendants. The lower court made no finding of bad faith by appellants. Instead, the court punished appellants based solely on the (erroneous) proposition that appellants are vicariously liable for the wrongful conduct (bad faith acts) of the Scruggs Defendants. The imposition of sanctions on these innocent parties through vicarious liability is foreclosed as a matter of law since a finding of bad faith personal to the offender is required.

In ruling that appellants could be sanctioned along with the Scruggs Defendants, the lower court apparently relied on a case cited by the Jones Firm, *Estate of Washington v. Duggins*, 632 So. 2d 420 (Miss. 1993), in which this Court affirmed punitive damages against one partner for the acts of another partner performed in the ordinary course of the business of the partnership. The *Duggins* decision, however, was obviated when the Mississippi Legislature amended the punitive damage statute now found at MISS. CODE ANN. § 11-1-65: "This statute absolutely forecloses vicarious liability for punitive damages in actions arising after [its] effective date." *Duggins*, 632 So. 2d at 433 (Lee, J., dissenting, referring to the statute as it reads today).

Under Mississippi law, punishment in the form of punitive damages, which serve the same ends as sanctions, cannot be imposed through vicarious liability. MISS. CODE ANN. § 11-1-65(1)(a) (punitive damages may not be awarded without a finding of bad faith acts committed by "the defendant against whom punitive damages are sought"). *See* App. "A." Likewise, sanctions cannot be imposed vicariously on innocent parties – such as appellants – who have engaged in no wrongful conduct.

Mississippi's Uniform Partnership Law recognizes that the "vicarious liability" of a partner for the acts of another partner is subject to certain limitations as provided by law. For example, under § 79-13-305(a) of the Act, a partnership is liable for the wrongful acts of a partner acting in the ordinary course of the business of the partnership or with the authority of the partnership, and § 79-13-306 specifies the extent to which the partners, themselves, are liable for any liability the partnership may have pursuant to § 79-13-305.

See App. "A." In pertinent part, § 79-13-306(a) provides that "all partners are liable jointly and severally for all obligations of the partnership unless otherwise . . . provided by law." (Emphasis added.) The circumstances under which a partner can be sanctioned by a court exercising its inherent powers are "otherwise provided by law." As discussed above, within the realm of sanctions that are sought to be imposed under a court's inherent powers, a finding of bad faith is a necessary and indispensable predicate to the imposition of sanctions. This law on sanctions controls the issue before the Court, and the general principles of vicarious liability have no application. A court cannot impose inherent powers sanctions on innocent parties based on principles of vicarious liability, and, therefore, cannot impose sanctions on an innocent co-venturer for the bad faith of another co-venturer.

C. There is no factual or legal basis for the imposition of sanctions against Don Barrett, Barrett Law Office, P.A., or Lovelace Law Firm even if general principles of vicarious liability were to apply.

General principles of partnership law also prevent the imposition of sanctions against appellants. Under the Mississippi Uniform Partnership Act, a partnership is liable for loss caused by a wrongful act or omission "of a partner acting in the ordinary course of the business of the partnership or with the authority of the partnership." MISS. CODE ANN. § 79-13-305(a).[1] This does not provide an adequate predicate for the imposition of

[1] SKG was a "joint venture," but a joint venture is simply a "single-shot" partnership or a partnership with a limited purpose, and the Mississippi Uniform Partnership Act applies. *Hults v. Tillman*, 480 So. 2d 1134, 1143, 1145 (Miss. 1985).

sanctions on appellants for at least two reasons. First, the filing and defense of this civil action is not in the ordinary course of the business of SKG. Second, the subject wrongful actions of the Scruggs Defendants were not taken by them in the ordinary course of the business of SKG nor authorized by SKG.

This Court has held that the phrase "course of business" means that which is "usually done in the management of trade or business." *Idom v. Weeks & Russell*, 99 So. 761, 764 (Miss. 1924) (emphasis added). Nothing about this civil action or its subject matter can be properly characterized as what is "usually done" or as the "ordinary course of business" of SKG. In fact, a lawsuit between and among partners and former partners is the very antithesis of the "ordinary course of business of the partnership." *See* App. "A."

SKG is a joint venture with a business purpose limited to a specific undertaking -- to bring lawsuits on behalf of individuals and businesses who were denied insurance coverage for property damage arising out of Hurricane Katrina. This case, on the other hand, does not seek insurance coverage for Hurricane Katrina damage, nor is this action in furtherance of the Hurricane Katrina lawsuits that have been or will be filed. Instead, this case is simply a dispute between law firms over the distribution of the attorneys' fees that were collected in the Hurricane Katrina litigation. SKG is not even a named party in this litigation. *See* MISS. CODE ANN. § 79-13-201(a) ("A partnership is an entity distinct from its partners."); *Id.* ("A partnership may sue and be sued in the name of the partnership.").

The unauthorized criminal conduct of the Scruggs Defendants also cannot be viewed as actions taken "in the ordinary course of the business" of SKG. The subject bribery was certainly not in furtherance of the prosecution of the Hurricane Katrina cases, but instead can only be viewed as actions taken by wrongdoers in their own individual interests (as opposed to SKG's interests). The lawsuits filed by SKG on behalf of its clients would not benefit from the bribery at issue in this case, which only involves a fee dispute between law firms. The Scruggs Defendants' actions were not authorized by SKG nor by appellants. Further, the criminal conduct constituted extraordinary behavior falling well outside what is "usually done in the management of trade or business." *Idom,* 99 So. at 764.

In *Idom,* Weeks and Russell were partners in a retail drug business, which had been the subject of several burglaries. *Id.* at 762. Russell concealed himself in the store one evening to watch for burglars, and shot two men who came to the door. *Id.* The widow of one of the deceased men sued Russell and Weeks, alleging that Weeks was liable for the acts of his partner. *Id.* This Court held that "course of business" is "what is usually done in the management of trade or business," and that the act of Russell was an extraordinary act that was not committed within the course of business of the partnership. *Id.* at 764. This is consistent with MISS. CODE ANN. § 79-13-301(2), which provides that the act of a partner which is not apparently for carrying on the ordinary course of the business of the partnership binds the partnership only if the act was authorized by the other partners. MISS. CODE ANN. § 79-13-301(2).

Similarly, in *Perna v. Electronic Data Systems Corp.*, 916 F. Supp. 388 (D.N.J. 1995), during litigation discovery one partner engaged in unethical conduct of which the other partners were unaware. *Id.* at 392. As a sanction the court dismissed the individual claim of the offending partner, but not the claims of the partnership. *Id.* at 402-03. The court emphasized that the offending partner's "conduct was not within the authorized scope of the partnership affairs. His extraordinary behavior was outside the scope of the business and was an individual act." *Id.* at 402. (emphasis added).

Further, even if the unauthorized and extraordinary criminal acts of the Scruggs Defendants were within the course of business of SKG (which they are not), there would still be no legitimate basis for imposing sanctions on these innocent appellants. The Jones Firm based its claims in this suit on its alleged rights as a member of SKG. While there may be a public interest in requiring a joint venture's members to be responsible to third parties for the tortious acts of one member committed in the ordinary course of the business of the partnership, there is no comparable public interest in imposing liability on an innocent member, like the appellants, when the suit is between joint venturers and former venturers themselves. 46 Am. Jur. 2d *Joint Venture* § 23 (*citing Gramercy Equities Corp. v. Dumont*, 531 N.E. 2d 629 (N.Y. 1988)).

Finally, sanctions certainly could not be imposed on Don Barrett, individually, based on the Jones Firm's vicarious liability argument. Mr. Barrett is not even a member of SKG, and, therefore, no partnership principles of "vicarious liability" can be applied to or imposed upon him.

D. Sanctions against Don Barrett, Barrett Law Office, P.A., and Lovelace Law Firm are not necessary.

While a court has the inherent power to fashion an appropriate sanction for conduct which abuses the judicial process, there are limits on these inherent powers. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44-45, 50 (1991). The United States Supreme Court has cautioned that, "because of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* at 44. The sanction chosen by a court must employ "the least possible power adequate to the end proposed." *Spallone v. United States*, 493 U.S. 265, 276, 280 (1990) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 231 (1821)).

Before making a decision to impose sanctions, including striking an answer and entering a default, a court is required to consider lesser sanctions and impose only those lesser sanctions if they would have the desired effect of punishment and deterrence. *Spallane*, 493 U.S. at 280. *See also Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996) (court must use least restrictive measure); *Rose v. Batson*, 765 F.2d 511, 515-16, n.2 (5th Cir. 1985)(dismissal of action as a sanction is "draconian" remedy and "remedy of last resort" only to be applied in extreme circumstances; court should first consider "whether less drastic sanctions would equally serve the punishment and deterrence aspects"); *Paulk v. Balboa Ins. Co.*, 2006 U.S. Dist. *LEXIS* 53796 (S.D. Miss. 2006)(sanction of default judgment denied as lesser sanction would serve as a sufficient deterrent).

The conduct upon which the sanctions were imposed in this matter was a conspiracy entered between Richard F. Scruggs, Sidney Backstrom, Timothy Balducci, and Steve Patterson pursuant to which Judge Henry Lackey was offered money in exchange for entering an order that would send this case to arbitration. Richard F. Scruggs was a named defendant in this action, and Mr. Scruggs, Mr. Backstrom and Mr. Zachary Scruggs were, at the time of the alleged conduct, employees of the Scruggs Law Firm, a named defendant in this action. Richard Scruggs, Sidney Backstrom, and Zachary Scruggs have all entered guilty pleas in the subject criminal proceedings, lost their licenses to practice law, been sentenced to prison terms and fined hundreds of thousands of dollars, and are currently serving prison terms as punishment for their conduct.

The criminal sentences imposed are sufficient, in and of themselves, to vindicate the integrity of the court and advance the administration of justice and the public's confidence in the judicial system. For example, Mr. Scruggs received imprisonment of five years, a monetary fine of $250,000.00, the loss of his law license, the destruction of his (and his law firm's) law practice, humiliation and embarrassment (both publicly and privately), the loss of his good name and reputation, and the very serious collateral injury and damage that is being suffered by his family. The sanctions at issue in this civil proceeding were non-compensatory sanctions sought for the purpose of punishing the wrongdoers and deterring others from engaging in the same type of wrongful conduct. This goal has been accomplished sufficiently through the very highly publicized downfall and punishments of Mr. Scruggs and the other defendants in the criminal proceeding.

In *Natural Gas Pipeline Co. Of America v. Energy Gathering, Inc.*, 86 F.3d 464 (5th Cir. 1996), the trial court held an attorney in civil contempt and ordered his incarceration for the attorney's failure to produce documents as ordered by the court. *Id.* at 466-67. The opposing party subsequently sought monetary sanctions for losses the party had allegedly sustained because of the attorney's failure to produce the subject documents, and the trial court awarded the requested monetary sanctions. *Id.* at 467. The Fifth Circuit Court of Appeals concluded that the trial court had abused its discretion in imposing the monetary sanctions:

> We hold that the District Court exceeded its inherent powers in imposing a monetary fine under the facts presented herein. The court's imposition of a compensatory fine was excessive and unreasonable. We conclude that Fox's incarceration was sufficient punishment in itself to effectuate obedience to the court's legitimate orders and to deter future similar behavior by Fox or other litigants and lawyers. We find the mandated restraint in the exercise of inherent powers lacking in the imposition, in this case, of an additional monetary sanction.

Id. at 468 (emphasis added).

Because sanctions and punitive damages serve the same basic purpose – punishment and deterrence – Mississippi's punitive damages statute is also instructive. Pursuant to MISS. CODE ANN. § 11-1-65, in determining whether a punitive damages award is excessive, a court must take into consideration "in mitigation, the imposition of criminal sanctions for its conduct." MISS. CODE ANN. § 11-1-65(1)(f)(ii)(4).

Even if there were some conceivable basis upon which the court could lawfully impose sanctions on appellants, there was absolutely no need or reason to impose sanctions

on appellants. In light of the punishments imposed in the criminal proceedings -- and the punishments that were and/or could have been imposed on the Scruggs Defendants alone in the lower court (civil) proceedings -- sanctions against appellants serve no purpose other than to punish innocent parties. This is unwarranted, and certainly unjust when imposed on appellants, who had no involvement in, or even knowledge of, the subject criminal activities.

If the court had conducted the mandatory "lesser sanctions" analysis and recognized the need to exercise judicial restraint as described in *Chambers v. Nasco, Inc.*, it would have concluded that the punishments of the Scruggs Defendants (in the criminal proceedings and by the trial court in this case) are more than sufficient, and that the imposition of any sanctions on appellants is unnecessary and unwarranted. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991). The court was required to use – but abused its discretion in failing to use – the "least possible power adequate to the end proposed." *Spallone v. United States,* 493.U.S. 265, 280 (1990)(quoting *Anderson v. Dunn,* 19 U.S. (6 Wheat) 204, 231 (1821)).

E. Sanctions against Don Barrett, Barrett Law Office, P.A. and Lovelace Law Firm constitute a violation of their Constitutional rights.

Appellants have a constitutional right to defend the Jones Firm's claims on the merits, possess constitutionally-protected contractual rights of arbitration, and have engaged in no wrongful conduct -- yet the court entered an order striking their answer, depriving them of their contractual rights, entering a default against them, and ordering

them to pay attorneys' fees and expenses to the Jones Firm. The court's sanctioning and punishment of these innocent parties constitutes a deprivation of appellants' property and property interests in violation of their due process and other rights under the United States and Mississippi constitutions. *See* U. S. CONST. amend. XIV, §1 (due process); MISS. CONST., art. 3 §14 (due process), §16 (impairment of contracts prohibited), and §24 (right to redress, remedy and justice).

"The conceptual essence of 'substantive' due process is the notion that the Due Process Clause ... bars outright 'certain government actions regardless of the fairness of the procedures used to implement them." *Hall v. Board of Trustees of State Institutions of Higher Learning*, 712 So. 2d 312, 318 (Miss. 1998) (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988)). One form of substantive due process is the ban on actions by government officials that "shock the conscience" and are outside the bounds of legitimate governmental activity. *Id.* at 319 (quoting *Brennan*, 834 F.2d at 1255-56)). States may only act through means appropriately related to legitimate ends, and government power has both rationality and normative limitations. *Id.* The normative limitations require a tight "fit" between means and ends requiring a "compelling" state interest reflected in actions "narrowly drawn to express only the legitimate state interests at stake." *Id.* Substantive due process limitations boil down to the fact that "every action by government must be rationally related to its end, and ends that 'shock the conscience' or otherwise violate the norms 'implicit in the concept of ordered liberty' are illegitimate." *Id.* The deprivation of a property or liberty interest that is arbitrary or not reasonably

related to a legitimate governmental interest is a substantive due process violation. *Id.* (quoting *Williams v. Texas Tech Univ. Health Sciences Ctr.*, 6 F. 3d 290, 294 (5th Cir. 1993)).

Property interests are created and defined by existing rules or understandings that stem from independent sources such as state laws or rules. *Hall*, 712 So. 2d at 319. They are created by rules or understandings that secure certain benefits and support claims of entitlement to those benefits. *Id.* Litigants in Mississippi courts are entitled to defend claims against them on the merits. *See, e.g.* Miss. R. Civ. P. 7, 8, and 12 (providing mechanisms for asserting answers and defenses in civil actions). Appellants also possess a property interest in their contractual right to arbitration. The Federal Arbitration Act and Mississippi law recognize appellants' entitlement to arbitration. 9 U.S.C. §§ 3 - 4; *IP Timberlands Operating Co. v. Denmiss Corp.* 726 So. 2d 96, 104, 107 (Miss. 1998).

The ends sought to be achieved by the trial court included the punishment of the Scruggs Defendants and the deterrence of others from engaging in the same conduct of the Scruggs Defendants. The trial court could have -- and should have -- achieved punishment and deterrence by sanctioning the Scruggs Defendants alone. Instead, the trial court deprived appellants -- innocent parties -- of their constitutionally-protected property and property interests by striking their answer, denying arbitration, entering a default against them, and ordering them to pay attorneys' fees and expenses to the Jones Firm. Such sanctioning of innocent parties certainly "shocks the conscience," and was not narrowly tailored to fit the goal of punishment and deterrence.

In addition, though the exact amount has not yet been determined, the monetary value of the sanctions imposed on appellants will be substantial and grossly excessive, and will violate appellants' rights of due process (both procedural and substantive). The United States Supreme Court's discussion of the due process limitations on punitive damages is instructive. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, the Court held: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). *See also Hall v. Board of Trustees of State Institutions of Higher Learning,* 712 So. 2d 312, 318-19 (Miss. 1998) ("substantive" due process imposes both "rationality" and "normative" limitations on government power; "Every action by government must be rationally related to its end, and ends that 'shock the conscience' or otherwise violate the norms 'implicit in the concept of ordered liberty' are illegitimate.")

Here, appellants engaged in no wrongful conduct and the Jones Firm suffered no damages as a result of any conduct by appellants, but the court, nevertheless, imposed sanctions against appellants in an amount that will be many multiples of the actual damages (none) caused by appellants. Such a grossly excessive ratio between the monetary value of the sanctions and the harm actually suffered by the Jones Firm as a result of appellants' actions (none) violates appellants' due process rights and should be rejected on

constitutional grounds.

The sanctions also, in effect, constitute a "fine" that is unconstitutionally excessive. See U.S. CONST. amend. VIII; MISS. CONST. art. 3 §28. Appellants acknowledge that the United States Supreme Court has recognized that the excessive fines clause of the Eighth Amendment only applies to criminal cases where fines have been paid to the government. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). However, a non-compensatory judicially imposed monetary sanction is, in reality, a fine, and such sanctions should be subject to the excessive fines clause of the Eighth Amendment. As Justice O'Conner argued in her *Browning-Ferris* dissent: "The recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty. From the standpoint of the defendant who has been forced to pay an excessive monetary sanction, it hardly matters what disposition is made of the award." *Browning-Ferris*, 492 U.S. at 299 (J. O'Conner, dissenting)(*citing Missouri-Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885)). Justice O'Conner argued that the excessive fines clause should apply to punitive damages stating, "This court's cases leave no doubt that punitive damages serve the same purpose – punishment and deterrence – as the criminal law, and that excessive punitive damages present precisely the evil of exorbitant monetary penalties that the clause was designed to prevent." *Id.* at 287. Likewise, the sanctions imposed in this case are non-compensatory sanctions issued solely for the purpose of punishment and deterrence, and are unconstitutionally excessive.

The imposition of sanctions against Don Barrett, individually, is unconstitutional for an additional reason. Mr. Barrett engaged in no wrongful conduct. He is not a member of SKG and cannot be personally liable for the obligations of SKG. The actions of the Scruggs Defendants cannot, therefore, be attributed to him under any partnership (or other) principles of vicarious liability. As a result, and based upon the authorities cited above, the imposition of sanctions against Mr. Barrett constitutes an egregious deprivation of Mr. Barrett's property, property interests, and rights in violation of the United States and Mississippi constitutions.

F. Pursuant to the Federal Arbitration Act, the trial court could not deny arbitration after finding that the arbitration agreement is valid and enforceable.

Once a motion to compel arbitration has been filed, a trial court's jurisdiction regarding the underlying dispute is limited to consideration of whether the parties' disputes are subject to arbitration pursuant to an agreement by the parties to arbitrate. Where, as here, the trial court answers this question in the affirmative, the only remaining jurisdiction of the trial court over matters affecting the merits of the underlying action is to compel arbitration in accordance with the agreement of the parties.

Appellants have no quarrel with the proposition that the trial court in this case could retain jurisdiction for the limited purpose of imposing sanctions on the Scruggs Defendants, but the sanctions available to the trial court cannot extend to the deprivation of appellants' arbitration rights or otherwise affect the merits of the action. In other words, the trial court should have separated the arbitration issue from the sanctions issue,

granted the appellants' motion to compel arbitration, and imposed appropriate monetary or other sanctions on the Scruggs Defendants alone.

Congress has issued a mandate through the Federal Arbitration Act ("FAA"), which provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court in which such suit is pending,** upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall** on application of one of the parties **stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,** providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added)].

> [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, **the court shall make an order directing the parties to proceed to arbitration** in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added).

"The word 'shall' connotes a mandatory directive." *Lowery v. Lowery*, 657 So. 2d 817, 819 - 20 (Miss. 1995) (*citing Ivy v. Harrington*, 644 so. 2d 1218, 1221 (Miss. 1994)). The FAA is applicable to state courts as well as federal courts. *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 107 (Miss. 1998) (quoting *Moses H. Cone Mem'l Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

When Congress enacted the FAA, it "mandated the enforcement of arbitration agreements" and this mandate is applicable to state courts as well. *IP Timberlands*, 726 So. 2d at 107. The FAA also limits the role of the court to a single function – determining

whether the issue is arbitrable. *Id.* at 108. Once the court is satisfied that the issue involved in the suit is referable to arbitration under the arbitration agreement, it "shall ... stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 4.

For a number of years, two lines of cases regarding arbitration developed in Mississippi. *IP Timberlands*, 726 So. 2d at 103 - 04. One line of cases "jealously guarded the court's jurisdiction" and held that "private persons cannot, by a contract to arbitrate, oust the jurisdiction of the legally constituted courts." *Id.* at 103 (quoting *Machine Prods. Co. v. Prairie Local Lodge No. 1538 of Int'l Ass'n of Machinists, AFL-CIO*, 94 So. 2d 344, 348 (Miss 1957)). The other line of case law provides that parties should be required to arbitrate their differences as a matter of public policy when they have agreed to do so, *id.* (*citing Scottish Union & Nat'l Ins. Co. v. Skaggs*, 75 So. 437, 438 (Miss. 1917), and that courts should "be loathe to disturb" an arbitration award between private contracting parties regarding their respective pocket books, like the fee dispute in the present case. *Id.* at 104 (quoting *Craig v. Barber*, 524 So. 2d 974, 977 (Miss. 1988)). In *IP Timberlands,* the Mississippi Supreme Court resolved this conflicting case law by expressly overturning the line of cases that "jealously guarded the court's jurisdiction." *IP Timberlands,* 726 So. 2d at 103. Mississippi courts are now unequivocally obligated to honor and enforce the parties' agreement to arbitrate. *Id.* at 104. This should be especially so where, as here, the parties to the agreement are attorneys who certainly understood the arbitration provisions they put into their contract.

Courts have specifically acknowledged limits on sanctions when an arbitration agreement is involved. For example, in *Britton v. Co-op Banking Group*, the Ninth Circuit held that while lesser sanctions may not be affected, a default judgment should be set aside if the parties had entered into an otherwise valid arbitration agreement. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1410, 1411, 1415 (9th Cir. 1990).

In *Britton,* Liebling and other defendants engaged in a securities fraud scheme by selling a fraudulent tax shelter investment. *Id.* at 1407. The plaintiffs purchased the securities through a contract including an arbitration provision. *Id.* Almost one year after plaintiffs filed suit, Liebling wrote plaintiffs demanding arbitration. *Id.* at 1407-08. Four months later, he filed a motion seeking to compel arbitration. *Id.* at 1408. The trial court denied his motion to compel arbitration, and Liebling appealed. *Id.* While the case was pending on appeal, plaintiffs continued to push for discovery, but Liebling refused to respond. *Id.* After an order compelling production of documents, numerous hearings, and additional requests from the court, Liebling continued to resist discovery, and a default judgment was entered against him. *Id.* at 1409. The Ninth Circuit reversed the trial court's decision to deny arbitration, and remanded for a determination of Liebling's standing to assert arbitration. *Id.* at 1414. The court specifically noted that if arbitration was otherwise proper, then the default judgment must be vacated, although lesser sanctions may not be affected. *Id.* at 1410, 1411, 1414.

Congress clearly provided that jurisdiction normally proper in a particular case is stripped from the court when the parties have agreed to arbitrate their dispute. The FAA

limits the role of courts to the sole determination of whether an issue is arbitrable. *IP Timberlands*, 726 So. 2d at 108. "Once that determination is made, the court may not delve further into the dispute." *Id.* The trial court in this case held that (1) the parties are sophisticated trial attorneys who agreed to resolve their fee dispute through arbitration; (2) defendants did not waive their right to arbitration prior to filing to enforce their right to arbitrate; (3) the arbitrator(s) shall determine the scope of the arbitration, and (4) defendants' motion to compel arbitration is well taken and should be granted. (R.E. 3; R. 578-580). Where, as here, the trial court has found the dispute arbitrable under the FAA, the only remaining jurisdiction of the trial court over matters affecting the merits of the underlying dispute is to compel arbitration of the underlying dispute. Therefore, this Court should reverse the denial of arbitration that was imposed via the sanctions order.

G. The Jones Firm's settlement with the Scruggs Defendants has released the appellants from the court-imposed sanctions as a matter of law.

The lower court erred in imposing sanctions upon appellants for the reasons set forth above. In addition, the Jones Firm has now settled with the Scruggs Defendants and dismissed the Scruggs Defendants from the lower court proceeding with prejudice.[2] The Jones Firm's settlement with the Scruggs Defendants has -- as a matter of law -- extinguished any vicarious liability (if any) appellants could possibly have for the wrongful

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[2] *See* Order entered on Joint Motion to Partially Lift Stay and to Dismiss Certain Parties to Appeal, Motion #2008-2417 in No. 2008-IA-00421-SCT; and Order entered on Joint Motion to Partially Lift Stay and to Dismiss Certain Parties to Appeal, Motion #2008-2416 in No. 2008-IA-00788-SCT.

conduct of the Scruggs Defendants, released appellants from any such vicarious liability (if any), and released appellants from the sanctions imposed on them by the lower court's April 16, 2008, order.

Vicarious liability is a derivative remedy arising solely out of the conduct of an active wrongdoer. Once the underlying claim against the active wrongdoer is disposed of, all vicarious liability is extinguished and a claim premised on vicarious liability cannot be maintained. *J & J Timber Co. v. Broome*, 932 So. 2d 1, 6 (Miss. 2006). In *Broome*, the Mississippi Supreme Court made it clear that the release of an active wrongdoer also releases, as a matter of law, those persons who are allegedly vicariously liable for the wrongdoer's conduct. *Id.* at 6. As a matter of law, any vicarious liability appellants could possibly have (if any) for the wrongful actions of the Scruggs Defendants has been extinguished through the Jones Firm's settlement with the Scruggs Defendants, and appellants have been released from such liability and released from the court's order imposing sanctions as a matter of law.

The lower court found that the subject Agreement's arbitration provision was valid and enforceable, found that defendants had not waived their right to arbitration, and found that defendants' Motion to Compel Arbitration "is well taken and should be granted," but withheld the entry of an order granting defendants' Motion to Compel Arbitration pending the courts' resolution of plaintiff's Motion for Sanctions. (R.E. 3, 4; R. 578-582) There simply is no legal or equitable basis for continuing to deny arbitration to appellants (innocent parties) or continuing to otherwise burden these appellants with sanctions which

were imposed by the lower court vicariously based on the active wrongdoing of other parties who have now been released by plaintiff and dismissed from the litigation. This Court should reverse the April 16, 2008, order imposing sanctions and remand this action, instructing the lower court to enter an order granting appellants' Motion to Compel Arbitration.

V. CONCLUSION

Don Barrett, Barrett Law Office, P.A., and Lovelace Law Firm, P.A. had no knowledge of, did not participate in, did not authorize, and did not ratify the wrongful conduct of the Scruggs Defendants. This is undisputed and was the finding of the trial court. Despite this, the trial court, through its inherent powers, imposed sanctions on Mr. Barrett, the Barrett Firm, and the Lovelace Firm, punishing them by holding these innocent parties vicariously liable for the extraordinary and criminal conduct of the Scruggs Defendants. This was a clear error and abuse of discretion.

One cannot, of course, overstate the seriousness of the wrongful conduct of Mr. Scruggs and the other defendants convicted in the subject criminal proceeding. The investigations, convictions, and punishments of Mr. Scruggs and others in the criminal proceedings were designed and necessary to, among other things, preserve and protect our system of justice. It is ironic, then, that this appeal seeks the reversal of punishments imposed on parties who have done absolutely nothing wrong. "Justice" is not only about the punishment of the guilty, it is also about the protection of the innocent. Thus, while a system of justice should appropriately punish the guilty, it should never suffer, condone,

or allow the punishment of innocent parties -- and in its zeal to protect and preserve our system of justice, a court should not sacrifice justice, itself, through the punishment of innocent parties.

The sanctions imposed on appellants are unjust and unwarranted. This Court should reverse the lower court's February 26, 2008, and April 16, 2008, orders; remand this action; and direct the lower court to enter an order which grants appellants' Motion to Compel Arbitration and compels the Jones Firm to submit its disputes with appellants to arbitration in accordance with the parties' Agreement.

Respectfully submitted,

DON BARRETT, INDIVIDUALLY; BARRETT LAW OFFICE, P.A.; AND LOVELACE LAW FIRM, P.A.

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CERTIFICATE OF SERVICE

I, Larry D. Moffett, of counsel for Don Barrett, individually; Barrett Law Office, P.A.; and Lovelace Law Firm, P.A., do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

Honorable William F. Coleman
Senior Status Judge
1843 Springridge Drive
Jackson, MS 39211

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THIS, the 9th day of December, 2008.

Larry D. Moffett
LARRY D. MOFFETT