IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-CA-00019

EATON CORPORATION, AEROQUIP-VICKERS, INC., EATON HYDRAULICS, INC. F/K/A VICKERS, INC., AND EATON AEROSPACE, LLC, MICHAEL S. ALLRED, MICHAEL H. SCHAALMAN **APPELLANTS**

v.

JEFFREY D. FRISBY, INDIVIDUALLY, KEVIN E. CLARK, INDIVIDUALLY, JAMES N. WARD, INDIVIDUALLY, DOUGLAS E. MURPHY, INDIVIDUALLY, MICHAEL K. FULTON, INDIVIDUALLY, RODNEY L. CASE, INDIVIDUALLY, BILLY D. GRAYSON, INDIVIDUALLY, FRISBY AEROSPACE, LLC, FRISBY AEROSPACE, INC., FOUR SEVENTEEN AEROSPACE, INC., TRIUMPH GROUP INC. AND THE TRIUMPH GROUP SINGLE BUSINESS ENTERPRISE **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY MISSISSIPPI

EATON REPLY BRIEF

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ATTORNEYS FOR EATON CORPORATION AND RELATED COMPANIES

ORAL ARGUMENT REQUESTED

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STATEMENT REQUESTING ORAL ARGUMENT

Eaton's claims against the defendants for theft of its trade secrets are backed by federal bills of particulars which run to more than 50 single-spaced pages. But the circuit court nevertheless dismissed those claims as a sanction for what it called fraud on the court.

The circuit court applied the wrong legal standards. As a result, this court's review is *de novo*. The decisive portions of the record are not lengthy, but this court should grant oral argument in light of the need for *de novo* review, the multiple misrepresentations made by Frisby, and the procedural unfairness that led to the erroneous rulings of the circuit court.

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INTRODUCTION

Despite the length of the submissions, the central point remains. After the defendants stole its trade secrets, Mississippi's oldest aerospace plant hired a former local prosecutor and two former judges to sue them. Allegations were made that the former prosecutor had lobbied the court on matters other than the merits. Then, without even the benefit of an evidentiary hearing, a successor judge dismissed the claims of trade secret theft. The successor judge, Senior Judge Swan Yerger, applied the wrong standards, used the wrong process, and as a result, made fundamental errors which this court should now correct.

The Brief of Appellant Eaton Corporation and Related Companies ("Eaton Brief") explains why the judgment against it should be reversed. Frisby's appellees' brief, styled "Joint Response of Frisby-Related Parties, Kevin J. Clark, James N. Ward, Douglas J. Murphy, Michael K. Fulton, and Billy D. Grayson to Brief[s] of Appellant Eaton Corporation and Related Companies and Michael S. Allred," ("Frisby Brief"), belabors many points, but despite its length:

- Frisby sows confusion and error by misrepresenting the agreement Eaton temporarily withheld from discovery, misquoting Eaton's interrogatory answer, and then building its case against Eaton based on these Frisby misrepresentations.
- Frisby does not dispute the legal standards which Eaton says govern the case, and also does not attempt to satisfy them, or even mention them, but instead substitutes epithets, such as "corrupt" even though there is no evidence that Judge DeLaughter was ever paid or promised even one penny.
- Frisby wholly fails to explain how either the disputed interrogatory answer or even the *ex parte* contacts have prejudiced its ability to defend itself on the merits of Eaton's claims.

The Eaton Brief rebutted each of the grounds for decision stated by the trial court in its opinions. What Frisby has done on appeal is write a novel rather than a responsive brief. The Frisby defendants remain determined to vilify the whistleblower Milan Georgeff who stepped forward and told Eaton about the thefts and received promises of indemnity. Georgeff, however, is irrelevant to the merits of the case against Frisby because in January 2004 the FBI raided the Frisby defendants and found 16,000 Eaton technical documents stolen from Eaton. That more than vindicated Georgeff, but it also made him irrelevant to this civil case and this appeal. Eaton does not need his proof. It is noteworthy that, when ruling on the *ex parte* contact sanction, Judge Yerger declared the Special Master's word-for-word adoption of Frisby's Georgeff story "clearly erroneous as to the issue before this court." ERE 224.[1] He gave it no weight in his final dismissal ruling.

The bottom line here is that Eaton hired reputable local counsel. It was entitled to believe that they knew not to commit fraud on the court, and they did not commit any such fraud. Frisby's reckless allegations have allowed it to escape liability for the theft and unlawful use of Eaton documents for more than a decade. This court should reverse the judgment dismissing Eaton's case and remand for a trial on the merits of its tort and other claims against the Frisby defendants.

COURSE OF PROCEEDINGS

After Eaton appealed and filed its principal brief on July 31, 2012, Frisby moved to vacate the Rule 54(b) judgment and terminate the appeal. It asserted that certain additional email concerning incidents already identified required further proceedings in the trial court to justify

[1] For simplicity, this brief where possible will cite only to record excerpt pages and will omit citations to the original record which are found on the record excerpt indices and pages. Eaton's *ex parte* contact record excerpts are cited as ERE and its Allred-related excerpts are cited as ARE. The record excerpts submitted by Michael S. Allred are cited as RE.

the dismissal judgment it had already obtained. After the relevant email and other material were provided to this court, the court denied the motion to vacate in late December of 2012.

The trial court has now reopened discovery and set a trial date of November 4, 2013, on Frisby's counterclaims which largely duplicate the sanctions claims before this court for review. Because prompt reversal of the circuit court's earlier rulings is necessary to allow Eaton to go forward at trial with its case on the merits, Eaton is moving to expedite the court's consideration of this appeal.

STATEMENT OF FACTS

The theft for which the Frisby defendants should be held liable. The Frisby defendants' thefts are well-documented. Federal bills of particulars which total more than 50 single-spaced pages in length describe them in detail. *See* Response to Motion of Frisby Related Parties for Leave to Reply, November 2, 2012, Exs. 1, 2; S.104:27702 to S.105:27730; S.143:34269 to 34327. When in May 2012 a new U.S. attorney dismissed the indictments, he did not give lack of merit as his reason. Nor does Frisby deny that when the FBI executed a search warrant and seized the 16,000 documents, Jeff Frisby and corporate counsel met with the engineers who then destroyed material both on the Frisby premises and at their homes. *See* Eaton Brief at 4. Against this proof, Frisby offers nothing but one page of unsworn self-contradictory assertion in its appellate brief. Frisby Brief at 2. If the Eaton information had been "well known in the industry," the engineers would not have had to steal it.

As a back-up defense Frisby wrongly says the thefts are "wholly irrelevant." *See* Frisby Brief at 2 n.5. Nothing could be further from the truth. Certainly a factor to be taken into account in dismissing a complaint with prejudice is the strength of claims in that complaint. It is literally true that, unless the circuit court judgment is reversed, Frisby and the engineers will escape all liability for the theft, from one of Mississippi's oldest aerospace industries, of valuable

trade secrets and other commercial information taken after they promised, in writing, that they were doing no such thing.

Not a fact case. Faced with obvious civil liability, the Frisby defendants have labored for years to make this case about something, anything, other than their thefts. In that process, they have built an enormous record of pleadings and a mountain of accusations of mischief. But the facts relevant to this appeal other than undisputed court proceedings are relatively few.

- With respect to the discovery issue, it is enough to look at the only Milan Georgeff agreement at issue in discovery, *the entire* 2005 interrogatory answer, and the Frisby letters challenging the assertion of privilege and demanding that it and the related communications be produced. *See* ARE 29-36, 46-48; S.27:8304; RE-0003 to RE-0014.
- With respect to the fraud on the court issue, it is enough to take into account the failure of the case built up by the circuit court: Frisby's failure to dispute that Ed Peters did legitimate work, its admission now that it knew Ed Peters had been retained, the emails both parties have provided concerning *ex parte* contact, and the decisions Judge DeLaughter rendered in 2007, together with what Reuben Anderson and Fred Banks said about them. *See* pp.13-19, *infra*.

And the decisions on review are found in Special Master Jack Dunbar's 2007 Report and Recommendation, ARE 69, Judge DeLaughter's Order reviewing it, ARE 119, and Judge Swan Yerger's Opinion ordering dismissal, ERE 215. Those are the critical documents to which all else is but prologue.

ARGUMENT

I. It was error to sanction Eaton $1.5 million for a statement in an interrogatory answer which caused Frisby no prejudice.

A. The circuit court applied the wrong legal standards and so review is *de novo.*

The standard of review is not abuse of discretion where the trial court failed to apply the correct legal standard. The sole basis for finding liability on behalf of Eaton, as opposed to its Wisconsin lawyers who have not appealed, was the Special Master's finding of "willful neglect." ARE 107. As discussed in the Eaton Brief at 21-23, Eaton should not have been sanctioned absent proof that it was "grossly indifferent to discovery obligations" and its obligation with respect to the Georgeff agreement was to give Frisby sufficient information to contest the claim of privilege. *See City of Jackson v. Rahly*, 95 So.3d 602, 608 (Miss. 2012); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213 (Miss. 2005); Eaton Brief at 22, 24. The standard of review is *de novo*.

B. Eaton was not grossly indifferent to its discovery obligations.

What the Special Master's criticism of Eaton officials came down to was the assertion that in-house counsel, Sharon O'Flaherty, in October 2005 should have either seen to it that the Georgeff agreement was produced or had it and related communications identified in a privilege log. ARE 105-107. These contentions are easily answered.

Reliance on counsel. To begin with, O'Flaherty was entitled to rely on outside counsel to decide whether and when to assert privilege and produce the documents. She said she thought they were going to be produced. ARE 141. But even if she was mistaken there was nothing to cause her to countermand her counsel.

Agreement and communications were identified. The interrogatory identified both the agreement and the related "communications" which it said was done "for the purposes of a

privilege log" although no precise list was provided. So the question was not whether the documents were identified, but merely the precision with which they were identified.

The agreement. The interrogatory answer, quoted in full in Eaton Brief at 13-14, does in fact reveal the existence of the Georgeff agreement and specifies its general nature, which was as an "indemnity" agreement. Eaton Brief at 13. *See* ARE 29. It indemnified Georgeff if he lost money because of his cooperation with Eaton. The error, if any, was the use of the word "limited," which might be read to imply an agreement to indemnify Georgeff only in a joint defense situation.[2]

The Frisby Brief engages in serial misstatement in its treatment of this issue.

Frisby wrongly says there was more than one agreement whose production was in issue. *See e.g.* p. 24 (multiple uses of "**also**"), p. 25 ("more than one"; "multiple agreements"). There was not.[3] The indemnity agreement identified in the interrogatory answer, dated January 28, 2003, calls itself a "consulting agreement with indemnity terms." ARE 29. It has various terms. Frisby misleadingly calls those terms by a different name, *e.g.*, "Consulting Agreement." It then sows confusion and error by suggesting the existence of another document that had not been identified or produced. *See e.g.* ARE 114 ("false denial of the existence of a document"); Frisby

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[2] Frisby's cases are distinguishable because here the agreement was identified sufficiently for Frisby to know it wanted the document and the document had not been produced. In the Frisby cases there was no identification at all and even a denial of the existence of the evidence. *See City of Jackson v. Rahly*, 95 So.3d 602, 604 (Miss. 2012) (answers denied existence of written procedure and prior suit); *Allen v. AMTRAK*, 934 So.2d 1006, 1013 (Miss. 2006) (denial of prior workers compensation claim prejudiced opponent); *Pierce v. Heritage Properties*, 688 So.2d 1385, 1387 (Miss. 1997) (witness repeatedly denied over five years that there was any other witness to accident); *Mississippi Bar v. Land*, 653 So.2d 899, 903 (Miss. 1994) (counsel denied existence of report and photo he knew existed); *Orkin Exterminating Co. v. McIntosh*, 452 S.E.2d 159, 164 (Ga. Ct. App. 1994) (false denial of existence of investigative report); *Mississippi Bar v. Mathis*, 620 So.2d 1213 (Miss. 1993) (concealment of autopsy).

[3] As Frisby admits, Eaton produced a joint defense agreement and witness statement in June 2005 and Frisby knew those were not the "indemnity agreement" identified in the interrogatory answer. ARE 128, Frisby Brief at 29-30.

Brief at 25 ("swore there was only one agreement"), 66 ("denying the existence of any such agreement"). There was none. This is vitally important. Eaton did not deny that the "document" existed. If Frisby had filed a motion to compel production of the document and successfully challenged Eaton's claim of privilege, it would have obtained all of the remaining "agreements" because "they" were all part of one document.

The communications. And contrary to what is said in the Frisby Brief, the interrogatory answer does reveal the existence of other related "communications" and claims privilege. The Frisby Brief at 23 quotes the interrogatory answer without any indication that anything has been left out. But in fact Frisby leaves out the last paragraph, which says:

> Except to *identify this agreement for purposes of a privilege log*, Plaintiffs do not waive their … common litigation and other privileges with respect to the written memorandum of agreement identified herein and *any communications among principals with respect hereto.*

ARE 47-48 (emphasis added). Neither the "agreement," nor the "communications," nor the assertion of privilege, were concealed. So again the court findings to the contrary and the Frisby Brief's description of the interrogatory answer are manifestly wrong. *See* Frisby Brief at 28 ("communications" not revealed); 60 (not reveal documents reflecting "communications"); 68 n. 46 ("did not file an answer invoking the privilege"); 73 ("false denial of the existence of a document"); 76 (conceal the agreement and the communications).

If the court wants to know how Frisby sowed error and confusion in the trial court, it need look no further than Frisby's ability to write 43 pages of an appellate brief, Frisby Brief at 15-36, 56-78, pretending that one document was really multiple documents and criticizing a failure to state what was in fact stated in the critical interrogatory answer.

No sanction. Eaton identified the agreement specifically and the communications generally. It gave Frisby enough information to know that the documents had not been produced

and that privilege was claimed. Frisby disputes the legal standard and claims that what Frisby knew is irrelevant, but that is not the law where a disclosure has been made.[4]

C. Judge DeLaughter's ruling was favorable to Frisby.

In this context it is obvious that Judge Bobby DeLaughter's ruling setting aside Special Master Dunbar's recommendation but ordering Eaton to pay the cost of a motion to compel was, if anything, favorable to Frisby. ARE 119. Judge DeLaughter was correct in saying that anyone who read the answer would know that "some kind of indemnity agreement" existed and privilege was being claimed. ARE 138-139. It was within his discretion to take into account the recent decision that made it relevant that Frisby did not have to file a motion to compel to get the document. *See Ford Motor Co. v. Tennin*, 960 So.2d 379, 393 (Miss. 2007). And to the extent Frisby had to file a motion before it got 50 documents, Judge DeLaughter's sanction of the cost of a motion to compel was the proper remedy.

Frisby does not now dispute that Judge DeLaughter wrongly accepted Frisby's contention that the Georgeff agreement violated Miss. Code Ann. § 25-7-47. It did not. As Miss. Ethics Op. 145 (March 11, 1988) states, the witness fee statute does not prevent a party from compensating a witness for expenses. In this appeal, Frisby makes no attempt to claim that the agreement violated any state law, and its footnote assertion that federal law was violated is just wrong.[5]

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[4] The duty is to provide the party with sufficient information to contest the privilege. Eaton Brief at 24. Under this standard, the opposing party's knowledge is critical. *Pierce* quotes *Medina v. Foundation Reserve Ins. Co.*, 870 P.2d 125 (N.M. 1994) for the proposition that knowledge does not prevent sanctions, but in *Pierce* the opposing party had no knowledge whatsoever, and in *Medina* knowledge was less important because the misconduct was simple obstruction, i.e., disobedience to three court orders and refusal to acknowledge the truth with respect to five different matters in a deposition. 870 P.2d at 128.

[5] The FBI raid proved that what Georgeff said was true. Because it was true, there can be no showing that he was "corruptly" influenced in his testimony as required by 18 U.S.C. § 201(b)(3) (2006), and, in addition, the statute in §201(d) expressly approves payment of "the reasonable cost of travel and

That Judge DeLaughter's ruling was favorable to Frisby is important because Frisby's claim in this appeal is that it should have been obvious to Eaton that Ed Peters had influenced the April 6, 2007 decision and then correctly predicted that sanctions would be postponed. *See* Eaton Brief at 21-26, 36; Frisby Brief at 44-45. What is "obvious," however, is that Judge DeLaughter got it mostly right, and the error he made was in Frisby's favor. And Frisby never collected the relatively modest sanction because Frisby never objected to Eaton's argument that assessment should wait until final judgment. S.37:9875-76. *See also* Eaton Brief at 17, 35.

D. Frisby suffered no prejudice to its case on the merits.

Special Master Dunbar found that the dispute about Georgeff discovery did not harm Frisby's ability to defend itself on the merits. ARE 116. Frisby argues prejudice, but none of the four finders of fact in the trial court found prejudice. Dunbar said O'Flaherty's fault was inaction in October 2005. With Mike Allred's consent, Georgeff's attorney turned the agreement over to Frisby on November 2. ARE 129.

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subsistence incurred and the reasonable value of time lost" in preparing as expert to testify and testifying. The Georgeff agreement indemnified Georgeff for losses that resulted from his cooperation with Eaton. Federal courts have repeatedly held that a non-party fact witness may properly receive payment related to actual expenses and also reimbursement for time lost while testifying or providing relevant information during the litigation. *See, e.g., Prasad v. MML Investors Servs.*, 2004 U.S. Dist. LEXIS 9289, at *18 (S.D.N.Y. May 24, 2004) (non-party fact witness may properly receive payment related to actual expenses, including reimbursement for time lost while providing relevant information or testimony); *Centennial Mgmt. Servs. v. Axa Re Vie*, 193 F.R.D. 671 (D. Kan. 2000) (payments to fact witness for reasonable compensation for time spent on legitimate, non-testifying activities such as reviewing documents and preparing for depositions held not to violate anti-gratuity statute). Eaton has repeatedly cited *Prasad*, yet Frisby does not mention it.

Furthermore, federal judge William H. Barbour held that the payment terms in the Georgeff agreement would have been a basis for impeaching Georgeff but would not prevent his statement from providing probable cause for a search warrant. *United States v. Case*, No. 3:06-cr-210-WHB-JCS, Opinion and Order, 2008 U.S. Dist. LEXIS 36805 at *13 (S.D. Miss. May 6, 2008) ("The Court finds that while the omitted financial information may have bearing on the credibility of the CW, and thus may have affected the probable cause determination, there has been no showing that it would have precluded a finding of probable cause by the magistrate judge."). Ironically, Frisby complains about modest payments to Georgeff, but Frisby paid its witnesses, the indicted engineers, full salary for no work during the six years the indictment was pending.

The truth is that Frisby did not spend $1.5 million and take multiple depositions of Eaton lawyers and others because it was upset about an interrogatory answer. It wanted to get Eaton's case dismissed and failed, a factor Judge Yerger did not take into account when he reversed Special Master Dogan and awarded Frisby all of its fees. ARE 160.17 to 160.18, ARE 182.

But, even more than that, Frisby saw civil discovery into what Georgeff told Eaton was the key to its defense of the criminal case. There it sought to invalidate the FBI search warrant it believed was based in part on what Georgeff had said, and so derail the federal prosecution. *See* n. 5, *supra*. It is ironic that, in this fashion, the sanctions the state court imposed forced Eaton to pay for a tactic essential to the engineers' criminal defense.

This court should end that irony by reversing and rendering judgment here in favor of Eaton on the discovery sanction issue.

II. Eaton did not commit fraud on the court by hiring Ed Peters.

The charge on which the trial court wrongly convicted Eaton – without an evidentiary hearing – was fraud on the court. That charge requires proof of egregious conduct, such as bribery of a judge or fabrication of evidence. Eaton Brief at 28.[6] The only basis for breaching Eaton's attorney-client privilege was the accusation of fraud.

Frisby cannot prove fraud, and so it resorts to epithets. It says Eaton "corrupted" the court even though there is no evidence that any money ever changed hands or was going to change hands. It says Peters "fixed" the proceedings even though there is no direct admissible evidence he ever asked Judge DeLaughter to do anything and many of Judge DeLaughter's few rulings, if anything, favored Frisby.

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[6] The additional fraud on the court cases cited by Frisby confirm that standard. *See Young v. Office of the United States Sergeant at Arms*, 217 F.R.D. 61 (D.D.C. 2003) (offer of $50,000 bribe to witness if case successful); *Derzack v. County of Allegheny*, 173 F.R.D. 400 (W.D. Pa. 1996) (fabrication of false tax returns and perjury about business address).

The truth is that the "red flags" the trial court said should have alerted Eaton did not exist, and none of Frisby's name-calling can change that simple fact. The focus should be on what the trial court said and why it is wrong, not on how a fiction writer might characterize it.

A. Again the standard of review is *de novo* because the wrong legal standards were applied.

The Eaton Brief at 21-22, 26 establishes that the trial court applied the wrong legal standards. Fraud must be proven by clear and convincing evidence, i.e., the "any hypothetical reasonable juror" standard. The Special Master did not apply that standard. Judge Yerger, who heard no witnesses, said he saw clear and convincing evidence, but he said it was evidence of "misconduct by Peters on behalf of Eaton and Eaton's knowledge and/or negligence and inaction in investigation regarding same." Frisby Brief at 80, quoting FRE B-40 p. 18.

This trial court legal standard contains multiple errors:

- The issue is not negligence, it is fraud.
- The legal standard is not "misconduct" or "improper" contacts but whether Eaton knew of illegal contacts that prejudiced Frisby on the merits.[7]
- And Eaton's knowledge must be proven by evidence so clear that no "hypothetical reasonable juror" could disagree.

Because the circuit court applied none of those standards, and for the other reasons stated in Eaton Brief at 21-22, 26, the standard of review on this issue – where the trial court in effect granted summary judgment against Eaton – is *de novo*. Frisby claims the standard is abuse of discretion but wholly fails to defend the law the circuit court in fact applied.

[7] Frisby repeatedly says that Eaton says the legal standard is whether contacts were "improper." Frisby Brief at 80-81. Once again it just seeks to sow confusion. The standard is not impropriety. It is whether contacts were so clearly illegal and prejudiced Frisby on the merits that they constituted a fraud on the court. *See* Eaton Brief at 29-31.

B. In order to justify dismissal as a sanction, there must be proof of illegal *ex parte* contacts about the merits of the case which caused prejudice to the opposing party's ability to defend itself.

The Eaton Brief at 29-31 establishes that not all *ex parte* contacts are unlawful, and, before any sanction touching on the merits is awarded, it must be shown that Eaton knew of both an intent to influence the judge on the merits and prejudice on the merits to Frisby. Courts have generally found no fault with *ex parte* contacts about matters other than the merits of a case, and when the contact is for administrative purposes, other parties are frequently not notified. The notice requirement is "far more honored in the breach than in the observance in the case of the truly innocuous inquiry such as a question about the judge's trial calendar." Jack M. Weiss, *It Depends on the Meaning of "Ex Parte,"* 29 Litig. 27, 30 (Winter 2003).

In Frisby's litany of contacts about which it complains, five relate to Ed Peters contacts about hearings or trial dates. Frisby Brief at 42, 45-48. It pretends ignorance of these contacts and says they violate Rule 1.10 of the Uniform Rules of Circuit and County Court, which it quotes as forbidding "attempt in any manner . . . to influence the decision of the judge in any such case or matter." Frisby Brief at 41-42, 54, 78.

These claims are odd, in that the parties in 2007 were discussing trial dates, and Frisby itself was contacting the court *ex parte* about trial dates. *See* S.131:32306 ("Phillip Sykes called Mary Gaines on Monday, April 23, 2007 and inquired whether the December 3 date was actually available for a trial setting"). The parties discussed these contacts and there was no reason for Eaton to think otherwise.

More importantly, Frisby skips over the fact that the words "any such matter" refer to the "law or facts of the case," i.e., the merits, and not administrative matters such as trial dates. The rule in full reads as follows:

> No person shall undertake to discuss with or in the presence or hearing of the judge the *law 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 arguments or briefs connected therewith; nor attempt in any manner, except as stated above, to influence the decision of the judge *in any such matter*.

U.R.C.C.C. 1.10, as quoted in *Patton v. State*, 2012 Miss. LEXIS 612 (Dec. 13, 2012) (first emphasis the court's). In *Patton*, this court expressly exempted administrative matters, i.e., a judge's investigation into whether he should recuse himself, from this rule:

> Rule 1.10 does not prohibit all communication regarding a case in the presence of a judge; rather, the rule expressly prohibits communications related to the law or alleged facts of a case. Likewise, the Code of Judicial Conduct requires recusal only when a judge had personal knowledge of *disputed evidentiary* facts related to a case, not personal knowledge of all case-related facts.

Id. at *24 (emphasis the court's). The court went on to find that communication between the court and a party's former lawyer "was for administrative purposes only, and he was not discussing the merits of the case" and so Rule 1.10 was not violated. *Id.* at *25. Frisby's contention that *ex parte* contacts about trial dates violate that rule is mistaken.

C. Judge Yerger's dismissal ruling, even as embellished by Frisby, does not demonstrate fraud on the court by clear and convincing evidence.

Judge Yerger erroneously rested his conclusions on several "red flags." Further examination shows that two of his factual conclusions were manifestly erroneous, another rests on the wrong legal standard, i.e., the standard for analyzing *ex parte* contacts, and, with respect to the fourth, he failed to properly analyze the opinions Judge DeLaughter issued. Because of these multiple defects, his decision dismissing Eaton's complaint with prejudice should be reversed and rendered.

1. Ed Peters was retained for legitimate purposes and did legitimate work.

Eaton Brief at 31-32 establishes eight witnesses testified to the legal work Ed Peters did and intended to do in the case which included obtaining a trial setting, advice concerning

briefing, coordination with the U.S. attorney and helping try the case. Frisby disputes none of this. It was manifest error for Judge Yerger to say that no one could explain the role he was to play. ERE 131, ERE 232.

2. Frisby knew that Peters was working for Eaton.

The Eaton Brief at 33 lists all of the evidence that shows Frisby knew that Peters was working for Eaton almost as soon as Peters was hired, i.e., in January 2007. The Frisby Brief at 36-41 makes little effort to dispute this evidence and admits it knew of Peters' involvement. And it evades the truth when it claims Tom Royals' January 2007 employment had nothing to do with Peters. It was immediately after Frisby learned of Peters' involvement in January that Frisby shifted Royals from the criminal to the civil side of its case. S.133:32551. Frisby also relies on an email which states that a law firm secretary in Wisconsin thought in June 2007 that Peters' participation was not known to Frisby, but she was wrong because Peters had already told Frisby he was in the case. *See* Eaton Brief at 33.

So again, it was manifest error for the circuit court to conclude that Eaton "secretly retained Ed Peters." *See* Eaton Brief at 9-10 (citing nine references in circuit court opinion to "secret" retention of Peters).

On appeal, Frisby admits this evidence but for the first time argues it did not know enough to require DeLaughter to recuse himself. But there is no proof that Eaton had any such knowledge either. In fact, Eaton asked Fred Banks to consider the matter and Peters told Banks that he had participated before in trials before DeLaughter without objection and provided no basis for recusal. FRE F-98 at 29387. And if Frisby had thought that something was wrong with Peters working with Eaton without formally appearing, all it had to do was ask Ed Peters or Judge DeLaughter about his role. There is no evidence that it did either. Nor has it ever proffered a single basis for a motion to recuse.

3. Eaton did not know of *ex parte* contacts it knew to be illegal.

Administrative contacts. In its litany, Frisby includes five hearing or trial date examples which are discussed above. Eaton had no reason to believe there was anything illegal about those contacts, and in fact there is no evidence that Eaton knew Frisby was not made aware of them when local counsel discussed settings.

Predictions. The Eaton Brief at 34-35 addresses three other examples on which Frisby relies. Two are Ed Peters' predictions. One is that Eaton would be VERY PLEASED with Judge DeLaughter's March 2007 ruling on the discovery sanction and the other was a "100%" prediction that sanctions would be postponed. His predictions were not entirely correct. Eaton was certainly happy to have the sanction reduced, but it continues to believe that there was nothing illegal about the Georgeff agreement and Judge DeLaughter's statement to the contrary was error. And, contrary to Peters' prediction, Judge DeLaughter ordered Frisby to submit estimates of the cost of a motion to compel. After it did that, Frisby dropped the matter. So Judge DeLaughter's actions do not support an inference of *ex parte* influence.

Relationship with Judge Lee. The third example discussed in the Eaton Brief at 35 is a report in October 2007 that Peters had "taken his temperature" about a proposed meeting with federal judge Tom Lee and counsel for the parties after Lee interfered with the state case. This too did not alert Eaton that an illegal conversation had taken place. It did not deal with the law or facts of the state case nor does it suggest an intent to influence Judge DeLaughter one way or the other.

To this list Frisby adds two additional matters:

Copy of order supplied. Frisby wrongly finds it sinister that Ed Peters got from the court administrator a copy of a Judge DeLaughter ruling about discovery from the engineers who were

defendants in the federal criminal case. Frisby Brief at 48. But part of Ed Peters' job for Eaton was dealing with the U.S. attorney in the federal criminal case. Eaton Brief at 32. That the court administrator extended a courtesy to him shows nothing illegal and is evidence that Peters was performing legitimate work for Eaton.

Comment to Wisconsin counsel. Finally, Frisby jumps to the conclusion that Ed Peters influenced Judge DeLaughter's removal of Special Master Dunbar in October 2007 because when Peters was told that Dunbar was in bad health, he replied to Wisconsin outside counsel "I will use it well." Frisby Brief at 52. When he discharged Dunbar, DeLaughter faulted Dunbar for being paid $273,551 while countermanding DeLaughter's orders to move the three-year-old case forward. ERE 63. When his replacement, Larry Latham, resigned, Judge Yerger did not reinstate Dunbar but instead replaced him with David Dogan.

Because there were valid reasons to replace Dunbar, there can be no clear and convincing evidence either that Peters had anything to do with it or if he did, that Eaton knew it. The "use it well" email went to Wisconsin counsel, not Eaton. And, in any event, Frisby did not suffer any prejudice because Latham stepped aside and the circuit court afforded, without any Eaton objection, an independent review of all of Judge DeLaughter's rulings. In other words, Frisby got without asking for it the very remedy that illegal *ex parte* contact would normally require, and there was no basis for going further and dismissing Eaton's case on the merits.

4. Judge DeLaughter's rulings did not reveal improper influence.

The Eaton Brief at 5-7, 36-37, establishes that Judge DeLaughter's four rulings during 2007 – his first substantive rulings in the case – did not provide Eaton with any reason to believe that he had been improperly influenced:

- The discovery ruling, discussed at pp. 8-9, *supra*, was correct in some respects but erred in its characterization of the Georgeff agreement as a violation of state law.

- The refusal to default engineer Billy Grayson, who destroyed evidence after being served with a search warrant and then lied about doing so in discovery, favored Frisby and Frisby does not criticize it here.
- The requirement that the engineers assert their Fifth Amendment privilege on a question-by-question basis was legally correct and Frisby again does not criticize it here.
- The ruling that Eaton should not be sanctioned for failing to identify how Frisby had used its trade secrets before Eaton had an opportunity to conduct discovery was legally correct and Frisby does not criticize it here.

For these reasons, Judge Yerger's belief that these rulings showed a bias toward Eaton was wrong as a matter of law. Judge Yerger put in boldface Special Master Dogan's finding that it was "incredible that no one on the Eaton team was aware of the impact Peters was having on the rulings that Eaton was receiving." ERE 231-32. To the contrary, the rulings made perfect sense, and because there were no earlier rulings, there was nothing pre-Peters with which to compare them.

5. Fred Banks and Reuben Anderson were knowledgeable and yet saw no "red flags."

Frisby wrongly claims that local counsel Fred Banks and Reuben Anderson were kept in the dark about these red flags and offers that as proof of the nefarious nature of the evidence. They were deposed, however, and they saw nothing illegal about Peters' relationship with Eaton:

- Peters was hired to help try the case. S.114:29579. Yet Banks knew he had not entered an appearance. S.113:29387-88, S.113:29393.
- Banks knew that Peters had provided information about trial dates. He did not know whether the information came from available dockets or conversations with the court

administrator, yet neither caused any suspicion of improper communication. S.113:29405-08, S.113:29413-14, S.113:29418. Indeed, they knew the court administrator had been spoken to about trial dates. S.137:33244 (evidence trial court refused to consider because it shows proper, not improper, conduct S.140:33752).

- Banks knew that Frisby was aware that Peters was working for Eaton. FRE F-98; S.113:29393-94, S.113:29427.
- Banks did not believe that Judge DeLaughter would have to recuse himself if Peters entered the case. S.113:29388, S.113:29392-93.
- Banks knew that Peters was advising Eaton as to his opinion concerning what Judge DeLaughter might do in response to motions. ERE 5; S.113:29406-07.
- They saw nothing wrong with local counsel predicting how a local judge would rule. ERE 5; S.68:18828. Anderson said a 100% prediction would concern him, S.114:29588, but he was not asked if it would be a concern if the prediction turned out not to be true.
- Like Peters, they too were representing Eaton before a fee agreement was finalized. ERE 25.
- They were aware of Judge DeLaughter's rulings in the case.

Banks testified as follows:

> A number of things had happened at the time that Ed Peters got into the case, and one of them was that the engineer defendants had gotten indicted. I don't know whether that affected Judge DeLaughter or not in terms of his view of the case. But basically what – what happened is that he had issued a judgment with regard to the – Jack Dunbar's Report and Recommendation, accepting some things and – and not others. He had followed the law, as I viewed it, with regard to the depositions and ultimately, I guess, as the Supreme Court viewed it because it had denied the interlocutory appeal.
>
> He had established a trial date in the summer of 2008 rather than December 2007 that we requested. So it's your [Frisby's counsel's] view that things had gone remarkably well for Eaton since Ed Peters had been in the case,

> but other things had happened since Ed Peters had been in the case as well, and I don't know that it was all that remarkably well that things had gone for Eaton.

S.113:29418. Banks and Anderson were not only former Mississippi Supreme Court justices but they also were former Hinds County circuit judges who had presided over trials in which Ed Peters had prosecuted as district attorney. It is true that Peters was not required to copy them on every communication he had with Eaton. But the fact that they knew as much as they did and still did not see "red" is powerful evidence that a hypothetical reasonable juror could agree with them, i.e., that the evidence to the contrary is not clear and convincing.

D. Ed Peters' statements to the FBI are not admissible and, in any event, do not implicate Eaton.

The Eaton Brief at 38-41 shows that Ed Peters' self-serving statements to the FBI are not admissible against Eaton, and cites legal authority to that effect. Peters had every incentive to exaggerate because he was getting immunity based on what he said to the FBI. Frisby only addresses one of Eaton's legal authorities yet offers none of its own. Frisby Brief at 87-89. At the same time, however, Frisby liberally salts its brief with the inadmissible evidence. Frisby Brief at 37-41, 43, 45, 51. This is perhaps a tacit confession that Frisby's case falls without it.

The FBI 302 reports are classic hearsay. *See United States v. Whitfield*, 590 F.3d 325, 363 (5th Cir. 2009); *Minnick v. State*, 551 So.2d 77, 88 (Miss. 1988), *rev'd on other grounds*, 498 U.S. 146 (1990). *Minnick* refused to find trustworthiness in a statement just because it was made to the FBI and that is true here as well. Nor is there any circumstantial guarantee of trustworthiness sufficient to invoke the exception this court has said is "rarely" to be granted. *In Interest of C.B.*, 574 So.2d 1369, 1373 (Miss. 1990). Such circumstances are lacking where a statement is made in anticipation of litigation. *Jones v. Hatchett*, 504 So.2d 198, 203 (Miss. 1987). *See also* Eaton Brief at 39 (citing cases). Here Peters, whom Frisby accuses of masterminding a fraud, was motivated by a desire to curry favor with those who were granting

him immunity. There is no reason to trust anything he said.[8] It was not a statement against interest because the more he "confessed" the more immunity he got. *See Garrison v. State*, 726 So.2d 1144, 1148-49 (Miss. 1998) (mere hope of more lenient punishment supported determination that statement lacked trustworthiness despite being under oath during guilty plea proceeding); *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (quoting Advisory Committee note).

The bottom line, however, is that Frisby's case cannot stand even with the FBI evidence. Peters had every incentive to implicate Eaton, and did not. He did not say that Eaton was aware of either his conversation with Judge DeLaughter about the discovery sanction or his conversation with Judge DeLaughter about who should replace Jack Dunbar. A party should not be defaulted for lawyer conduct outside the ordinary scope of the legal business. *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, L.L.C.*, 27 So.3d 363 (Miss. 2009). And the report quotes him as saying it was "[a]fter DELAUGHTER released DUNBAR" that Peters was asked about who should replace Dunbar. He did not say he lobbied for that to happen. Eaton Brief at 40. In none of this is there any suggestion that Judge DeLaughter was ever offered anything of value in exchange for his rulings. There is no justification for Frisby's repeated use of the word "corrupt," an epithet this trial court never applied to Eaton.

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[8] *United States v. Bailey*, 581 F.2d 341, 345 (3d Cir. 1978) (FBI statement inadmissible where offer of less stringent punishment communicated to witness making it reasonable to infer the witness statement implicating himself was motivated by a desire toward helping himself); *United States v. Rogers*, 549 F.2d 490, 498 n.8 (8th Cir. 1976) (declarant's interest in obtaining a lesser sentence for his cooperation could have affected the reliability of the statement); *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995) (uncorroborated "post-arrest hearsay statements of an accomplice" made in the context of plea negotiations where he "may very well have been hoping to curry favor with law enforcement officials by implicating his accomplice" too unreliable to use at sentencing).

E. A suspicion or inference is not clear and convincing evidence.

In order to justify dismissal of Eaton's case, Frisby's burden was to prove by clear and convincing evidence that Eaton and not just its lawyers had knowledge of illegal *ex parte* contacts that were intended to and did prejudice Frisby in its defense on the merits. The Eaton Brief at 41-43 explains and applies the clear and convincing evidence standard. The Frisby Brief makes no effort to distinguish the authorities Eaton cites and barely mentions that standard. The standard presents a question of law for this court to decide.

Nothing here shows egregious conduct by Eaton – equivalent to bribery or fabrication of evidence – by evidence so clear no hypothetical juror could think otherwise. This court has found as a matter of law that evidence far stronger than this lacked "clear and convincing" status:

- A lawyer did not "know" another lawyer had committed an ethical violation even though he had drafted a complaint describing that violation. *Attorney U. v. Mississippi Bar*, 678 So.2d 963, 972 (Miss. 1996).
- A lawyer who took money to which a partner was contractually entitled did not commit "fraud" because the client characterized the fee as a "gift." *Levi v. Mississippi State Bar*, 436 So.2d 781, 787 (Miss. 1983).
- Drug addiction was not shown by two diluted urine samples and a refusal to submit to a hair screen. *A.B. v. Lauderdale County Dep't of Human Services*, 13 So.3d 1263, 1268 (Miss. 2009).

Frisby makes no attempt to distinguish these cases. Instead it invokes a "willful blindness doctrine" from criminal law. But in order for that to apply, there must have been red flags for Eaton to avoid seeing. There were not. Eaton cannot have been "willfully blind" to red flags that did not exist. And the "willful blindness" doctrine does not eliminate the need for clear and convincing evidence of both the red flags and Eaton's failure to heed them. Neither is present

here. *See Gen. Med. P.C. v. Horizon/CMS Health Care Corp.*, 475 Fed. Appx. 65 (6th Cir. 2012) (failure to show fraud on court by clear and convincing evidence).[9]

III. If reached, Eaton is entitled to an evidentiary hearing before a judge not from Hinds County.

As set out in the Eaton Brief at 10-11, 43-47, the circuit court allowed Frisby to turn the sanctions motion into a procedural monster so ugly that the judge refused to look at it. Against all fairness, he put Frisby in charge of an ill-defined "investigation" initiated by the court. Frisby then conducted what were supposed to be "discovery" depositions at which there was no direct examination. The special master made privilege rulings which the circuit judge declared "binding." ERE 221. *See also* FRE F-98 at 29386 (disobedience would be contempt and unsuccessful appeal would be sanctioned).

Then Frisby filed a motion to dismiss. The circuit judge refused to ask for an outside judge to decide the motion. He then sent the matter to the special master who not only provided a report but secretly provided him with descriptions of the one-sided depositions without giving Eaton a chance to challenge the descriptions. The circuit court then denied Eaton a hearing by unilaterally and retroactively declaring that the depositions Frisby had taken were hearing enough. Such a hearing, the court said, was "unnecessary and not in the interest of judicial economy." ERE 221. It is not a question, as Frisby puts it of an "additional evidentiary hearing." Frisby Brief at 6. There was NO evidentiary hearing before anyone.

If the court does not reverse and render the dismissal sanction, it should remand for trial before a judge appointed by this Court and not from Hinds County with Frisby being given only

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[9] The willful blindness cases Frisby cites do not help it here. *See In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (willful blindness applied where only use of internet downloading service was to infringe copyrights); *Parcel of Real Prop. v. City of Jackson*, 664 So.2d 194 (Miss. 1995) (willful blindness resulting in property forfeiture where cocaine was in plain view, paraphernalia was strewn throughout house, and owner's children had been repeatedly arrested for drug dealing).

a limited role. The multiple errors in fact-finding identified in this brief are directly traceable to the failure to provide such a trial:

- Frisby should not be allowed to prosecute. Frisby says the matter was not one of criminal contempt, but similar proceedings have been so characterized, *Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003), and the same rules apply to inquiries into fraud on the court. *See Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580-581 (1946) (those "selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interest in the outcome"). Frisby invokes *Barrett, supra*, but in that case the circuit court held an evidentiary hearing over which it presided and did not anoint one party to serve as an Inspector Javert and take 20 depositions.
- In a case in involving a former Hinds County prosecutor, a Hinds County judge, and a Hinds County court administrator, all of whom have taken the Fifth Amendment, a judge from outside Hinds County should have been appointed. *See In re DaimlerChrysler Corp.*, 294 F.3d 697, 700 (5th Cir. 2002) (remand required appointment of new judge in light of prior erroneous rulings). If a Special Master is used at all, his rulings should be freely reviewable by the presiding judge. Judge Yerger erred by delegating matters to Special Master Dogan and then threatening Eaton with sanctions if it appealed unsuccessfully. Frisby denies this, but that is what the record shows. *See* p. 22, *supra*. He also erred by secretly communicating *ex parte* with the Special Master in writing and so frustrating the right of appellate review. S.151:35436 (admitting "summaries" secretly furnished but asserting that special master's time records were false when they indicated substantive matters were discussed).

- There should be an evidentiary hearing. Judge Yerger erred by delegating the decision on the merits to Special Master Dogan to decide based on one-sided discovery depositions and then denying Eaton an evidentiary hearing. *See* Eaton Brief at 46-47 (citing authority).

This court should act now to make sure that this never happens again. If a three-day trial before a specially-appointed circuit judge was adequate to resolve a bribery charge in *Barrett*, then it should have been adequate to resolve this case.[10] If this court should not resolve the issue itself in Eaton's favor, and believes further fact finding is warranted, then the issue as to whether the dozen or so *ex parte* contacts in this case merit dismissal of one of the strongest plaintiff's cases ever presented to the Mississippi courts is an issue that should be made by a duly-elected judge who actually hears evidence.

CONCLUSION

This court should reverse the sanctions against Eaton and remand so that Eaton can have a trial on the merits of its trade secret claims against Frisby and the engineers. They are guilty of one of the most audacious thefts in the history of our state. They have inflicted serious damages on a Mississippi aerospace business. That damage is verified by pleadings filed and successfully defended by the United States in the criminal case. Their thefts should not go unpunished.

Eaton expects this court to endorse and uphold the highest ethical standards. It does not expect for this court to approve what Ed Peters told the FBI he did or what it might be hypothesized that he did, or may have intended to do in the future.

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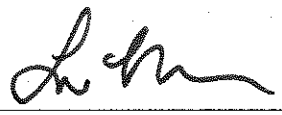
[10] Frisby cites three cases for the proposition that no hearing was required, but none of them is comparable. *See Aoude v. Mobil Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989) (hearing not requested in trial court and material facts admitted); *In re Rimstat, Ltd.*, 212 F.3d 1039 (7th Cir. 2000) (no request for hearing in trial court); *Godlove v. Bamberger, Foreman, Oswald & Hahn*, 903 F.2d 1145, 1149 (7th Cir. 1990) (plaintiff was her own lawyer and disobeyed court orders for 18 months; no further hearing required).

But at the same time Eaton asks this court to uphold the principle that litigation should be about the merits of the claims between the parties, not the conduct of the lawyers. Absent conduct that prejudiced Frisby's ability to defend itself on the trade secret claims, there is no basis for a sanction that keeps Eaton from pursuing those claims. There has been a sanction. Ed Peters and Judge DeLaughter have been disbarred and now suffer disgrace. In hindsight, Eaton made a mistake hiring Peters and believing that, as a former law enforcement official, he knew the difference between right and wrong and that the presiding judge, also a former law enforcement official, would know right from wrong. Any mistake in that regard should not keep Eaton from receiving in this case what cases are supposed to be about – compensation for the victim of theft and punishment for the perpetrators.

THIS the 8th day of April, 2013.

Respectfully submitted,

BY: 

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